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**MANAGEMENT OF EXTERNAL BORDERS:  
FRONTEX'S ROLE IN THE PROTECTION OF  
HUMAN RIGHTS AND THE LACK OF  
ACCOUNTABILITY**

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Anno Accademico 2022/2023



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## **Introduction**

The management of external borders is a contentious issue in Europe. The body entrusted with this task is the European Border and Coast Guard Agency, commonly known as Frontex.

Since the Schengen Agreement, Member States sensed the need to adopt fortified and harmonized strategies to secure their borders against the influx of migrants. After long debates and hesitations to cede their sovereignty, Frontex was created with Regulation 2007/2004.

It has now been two decades since its establishment. During these years, Frontex has undergone a remarkable evolution, witnessing a steady expansion of its mandate. While Member States retain the primary responsibility for their respective segments of the border, the Agency has become one of the major players in external border management. As a result of several amendments of its founding Regulation, Frontex has acquired more tasks, better access to human and technical resources, and more financial means than ever. Has this expansion also reflected in the Agency's commitment to the protection of fundamental rights? This thesis aims to analyze the need for compatibility between these two dimensions.

In the intricate dance between safeguarding external borders and protecting human rights, Frontex occupies a complex and at times, a potentially misleading role. While the current Frontex Regulation mandates the monitoring of compliance with fundamental rights in the context of all its operations, the practical application of Regulation 2019/1896, particularly concerning the adherence to the principle of non-refoulement, has been extensively controversial.

The recent Frontex scandal has intensified debates, particularly following the release of the OLAF report. The accountability gap accentuates the urgent need for comprehensive reforms and increased transparency within the Agency.

This thesis is structured into four distinct chapters. The first chapter adopts a primarily historical perspective, delving into the foundational elements that led to the establishment of Frontex. The second chapter focuses on a detailed examination of each Regulation that

has shaped the agency's regulatory framework from 2004 to 2019. The third chapter explores the protection of fundamental rights embedded within Frontex's regulatory journey and the Charter. Finally, the fourth chapter transitions into a more practical dimension, offering a comprehensive analysis of the Frontex scandal, alongside an in-depth study of Case WS and Others v Frontex on the Action for damages by the Court of Justice of the European Union.

## **Chapter I. The Institutionalization of the European Union External Borders: The Genesis of Frontex**

It has often been pointed out that the European refugee crisis is also a crisis of European integration.<sup>1</sup> The security of the external borders of the European Union is an essential subject for European citizens. Rightly or wrongly the external borders of the European Union are still sometimes seen as a weak link that can affect the internal security of the Member States, in particular in an area without internal borders.

Initially established as a response to the challenges posed by illegal immigration and security threats at external borders, the European Border and Coast Guard Agency's mandate has expanded over the years. It now encompasses a broader spectrum of activities, including joint operations, information sharing, and capacity-building initiatives among Member States. This evolution reflects the growing recognition that addressing migration complexities demand a cohesive, EU-wide strategy.

The opening chapter of this thesis delves into the foundational elements that contributed to the establishment of Frontex. To comprehend the genesis of Frontex, we first navigate through the broader context of the European integration process and the significance of the Schengen Acquis. We will then explore how the establishment of Frontex was a response to the growing need for enhanced cooperation among EU Member States in managing external border controls, and the different factors behind its creation. In particular, we will analyze how 9/11 served as a critical juncture that made the EU prioritize security, which eventually led to the establishment of Frontex. The aim of this chapter is, therefore, to analyze the precursors of Frontex, notably the road towards a European Corps of Border Guards, and the step-by-step process that led to its creation in the form of an Agency in 2004.

This comprehensive exploration lays the groundwork for a deeper understanding of the institutionalization of Frontex and its role in shaping the borders of the European Union.

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<sup>1</sup> Refugee Protection and Burden-Sharing in the European Union. *Journal of common market studies*. 56.1, 2018, 141–156.

## 1. The European Integration Process and the Schengen Acquis

The European Border and Coast Guard Agency, commonly known as Frontex<sup>2</sup>, remains one of the European Union's most pivotal agencies today. We will delve into how its mandate has evolved over time, paralleled by substantial growth in its budget. However, this wasn't always the scenario. During the early phases of European integration, Member States were hesitant to form a joint agency to tackle migration challenges, as border controls have historically been an important expression of sovereign control over a nation's boundaries. The original establishment of a European common market aimed primarily at bolstering economic cooperation among states.

The Treaty establishing the European Economic Community in 1957 aimed to nurture peace among nations by fostering interdependencies through dismantling economic barriers and achieving a unified market.<sup>3</sup> The four freedoms of movement—goods, services, capital, and people—were crafted to eliminate state hindrances to trade, investment, and business establishment.<sup>4</sup> However, this economic collaboration fell short of the aspirations of some federalists. In sectors like defense and political-military collaboration, nations were, and to some extent still are, reluctant to cede their sovereignty. This hesitancy resulted in a slow and cautious approach towards developing a common migration policy. The establishment of Frontex and its evolution over time reflects this cautious progression.

One of the most significant steps towards a more unified Europe was achieved through the Schengen Agreement, initially signed in 1985 by five countries. This agreement laid the groundwork for what we now identify as the Schengen Area—a region characterized by free movement and the absence of internal borders among Member States. The *Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their*

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<sup>2</sup> From “frontières extérieures”, i.e. ‘external borders’ in French.

<sup>3</sup> Treaty establishing the European Economic Community, March 25, 1957, Article 2.

<sup>4</sup> Eleanor M. Fox/ Damien Gerard, *EU Competition Law – Cases, Text and Context*, Edward Elgar Publishing Limited, 1st ed., 2017, Introduction.



*common borders*<sup>5</sup> envisioned the creation of a common space through a gradual elimination of common border controls between the five states involved, both of goods and people. The Agreement distinguished between short-term and long-term objectives. The first category included measures to coordinate visa policies and intensify cooperation in the fight against crime, focusing on combating drug and weapon smuggling as well as irregular entry of individuals. In the long term, States were urged to gradually abolish border controls at the common borders and transfer them to their respective external borders. In order to achieve this objective, Article 17 called on governments to harmonize, on a provisional basis, "*the laws, regulations and administrative provisions concerning the prohibitions and restrictions on which the checks are based and to take complementary measures to safeguard internal security and prevent illegal immigration by nationals of States that are not members of the European Communities.*"<sup>6</sup> However, the 1985 Agreement was purely programmatic in nature: it identified the areas in which it was necessary to harmonize their respective policies, but did not make any provisions in this regard. Five years later, the Agreement was supplemented by the Convention implementing the Schengen Agreement<sup>7</sup>, which can be considered as a true international treaty, since it outlined the necessary harmonization measures to permanently eliminate border controls.

In fact, the Schengen Convention, which entered into force in 1995, established the complete abolition of systematic internal border controls and a common visa policy. The Agreement and the Convention, together with related agreements and rules, form the "Schengen acquis".<sup>8</sup> This so-called Schengen acquis was finally incorporated into the EU institutional framework with the entry into force of the Amsterdam Treaty in 1999.<sup>9</sup> The Schengen agreements and the rules adopted under them originally operated independently from the European Union. Under the Treaty of Amsterdam, EU Member States agreed to transfer

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<sup>5</sup> Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany, and the French Republic on the Gradual Abolition of Checks at Their Common Borders." Schengen Agreement, 14 June 1985.

<sup>6</sup> Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany, and the French Republic on the Gradual Abolition of Checks at Their Common Borders." Schengen Agreement, 14 June 1985, Article 17.

<sup>7</sup> Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany, and the French Republic on the Gradual Abolition of Checks at Their Common Borders, 19 June 1990.

<sup>8</sup> European Union, "Schengen Agreement and Convention," EUR-Lex, Accessed 1 November 2023, <https://eur-lex.europa.eu/EN/legal-content/glossary/schengen-agreement-and-convention.html>.

<sup>9</sup> Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities, and certain related acts, 2 October 1997, Protocol integrating the Schengen acquis into the framework of the European Union, Article 2.

certain powers from national governments to the European institutions in a number of areas. Notably, these included legislation on immigration, the establishment of civil and criminal law, and the adoption of the Common Foreign and Security Policy (CFSP), as well as the implementation of institutional adjustments for enlargement to accommodate new members joining the EU. It created a new model for the Community based around three pillars which, broadly speaking, covered economic relations, foreign affairs and home affairs. It also officially created the European Union (EU), which became the title to cover all the functions of the much-expanded European governmental structure. In addition, it began the process of the Economic and Monetary Union (EMU), which would lead to the creation of the Euro. Through Title IV, entitled "*Visas, Asylum, Immigration, and Other Policies Related to the Free Movement of Persons*," all competencies related to free movement of persons<sup>10</sup> were successfully communitized in the first pillar. Conversely, competencies related to criminal, police, and judicial cooperation in criminal matters were reserved in the third pillar under the redesigned Title VI EU. The first-pillar security measures, such as the strengthening of common external border checks, and the third-pillar measures, such as police and judicial co-operation in the area of freedom of movement, are complementary and must progress together. This is the very purpose of the Area of Freedom, Security and Justice established by the Amsterdam Treaty.

### **1.1 The notion of internal and external borders**

The Schengen Convention introduced the notion of internal and external borders. Article 1 reads as follows: "*For the purposes of this Convention: internal borders: shall mean the common land borders of the Contracting Parties, their airports for internal flights and their sea ports for regular ferry connections exclusively from or to other ports within the territories of the Contracting Parties and not calling at any ports outside those territories; external borders: shall mean the Contracting Parties' land and sea borders and their*

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<sup>10</sup> Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities, and certain related acts, 2 October 1997, Title IV, Article 61: "*In order to establish progressively an area of freedom, security and justice, the Council shall adopt: (a) within a period of five years after the entry into force of the Treaty of Amsterdam, measures aimed at ensuring the free movement of persons in accordance with Article 14, in conjunction with directly related flanking measures with respect to external border controls, asylum and immigration, (...); (b) other measures in the fields of asylum, immigration and safeguarding the rights of nationals of third countries (...)*".

*airports and sea ports, provided that they are not internal borders; (...)*<sup>11</sup> This fundamental distinction provides a clear demarcation, essential for the management of the movement of persons inside and outside the Schengen area. Internal borders refer to specific borders, such as common land borders, internal airports and sea ports exclusively serving ferry connections within the territories of the Contracting Parties. These connections remain strictly within the defined territories, emphasizing a closed system that avoids any ports outside these areas. External borders, on the other hand, have a broader scope, including land and sea borders, airports and seaports, but excluding areas designated as internal borders. This distinction provides the framework for border control strategies and shapes the way in which security measures, immigration checks and regulatory protocols are implemented. By clearly defining these borders, the Convention facilitates tailored approaches to the management of movements, ensuring efficient transit within the Schengen area while maintaining security at its external borders. This division allows for a nuanced application of border policies, promoting smoother travel within the Schengen area while protecting its external frontiers.

In other words, “internal” were the borders separating the Contracting States from each other, while “external” were any borders between one of these States and a non-contracting State. The concept of external borders needs to be analyzed in more detail, as it marked the perimeter of a new area encompassing the territory of all the Contracting States and constituting a distinct entity belonging to all the States in the Schengen area. On the basis of this new concept, each State was therefore obliged to take account of the interests of all the Contracting Parties when controlling the external borders. Member States became conscious of the fact that the external borders were not merely a delineation between individual states and non-member nations; rather, they defined a shared perimeter of the entire Schengen area, forming a collective entity representing all Member States. And the absence of controls at the internal borders reinforced the need for increased protection measures at the external borders. This led to the reshaping of discussions about migration policies and border management, as national governments felt the need to compensate with more comprehensive

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<sup>11</sup> Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany, and the French Republic on the Gradual Abolition of Checks at Their Common Borders, 19 June 1990, Article 1.

strategies at the external borders. It compelled Member States to implement more robust and harmonized measures at the external borders.

Moreover, it spurred discussions on collaborative approaches, shared resources, and cooperative efforts to ensure the security and integrity of the entire Schengen area, transcending individual national interests for the collective security of the union.

## **1.2 The Tampere Programme in 1999**

In October of 1999, the European Council held a special meeting in Tampere on the creation of an area of freedom, security and justice (AFSJ) in the European Union. The area was created to ensure the absence of border control at internal borders while offering a high level of protection to citizens. The Tampere programme was a five-year work programme to implement the principle of mutual recognition, and the development of internal security policies in the EU. It called for the EU to “*develop common policies on asylum and immigration, while taking into account the need for a consistent control of external borders to stop illegal immigration and to combat those who organize it and commit related international crimes*”.<sup>12</sup> By 1999, the European Union had already established a fundamental framework. It consisted of a single market and an economic and monetary union, where citizens lived in an area of prosperity and peace. The Tampere programme aimed to ensure that freedom of movement within the Union could be enjoyed in conditions of security and justice accessible to all. It specified that the freedom of movement inside the EU is enjoyed not only by European citizens, but also by third-country nationals. For this reason, the EU committed itself to develop common policies on asylum and immigration. At the time, however, Member States had no idea of the institutional model needed to develop such cooperation. In fact, paragraph 24 of the Tampere Programme offered suggestive propositions, primarily illustrative in nature, such as the establishment of exchange programs and technology transfer, especially at maritime borders, and the rapid inclusion of the candidate countries in this cooperation.<sup>13</sup>

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<sup>12</sup> Tampere European Council (15 and 16 October 1999) Presidency Conclusions, Paragraph 3.

<sup>13</sup> Tampere European Council (15 and 16 October 1999) Presidency Conclusions, Paragraph 24.

From this point of view, we can say that the creation of Frontex in 2004 was a simple consequence of the European integration process that was being implemented more and more every year, or an extension of the principle of free movement established by the Treaty of Rome. In simpler terms, it was a natural result of the ongoing process of European integration. Nevertheless, it is crucial to consider other contributing factors.

## **2. The factors behind Frontex's creation**

To understand how Frontex works and how it has evolved, it's useful to remember why the Agency was created in the first place. What strategies were put in place to allow such an organization to emerge and participate in European border policies? The context in which the Agency was born, between free movement across internal borders on the one hand and a heightened sense of threat from international terrorism and illegal immigration on the other, necessarily plays a role.

Several European Economic and Social Committee (EESC) opinions<sup>14</sup> have pointed out that one of the main causes of illegal immigration is the lack of a common policy on the management of migration through legal, flexible and transparent channels. The growing awareness of the inadequacy of individual states in dealing with such an inherently complex phenomenon as the management of migratory flows led to the creation of Frontex, and its growth over the years. This concept hasn't stopped being relevant, topical and concrete today.

In her press statement with the Italian Prime Minister Meloni in Lampedusa, in September 2023, President Ursula von der Leyen stated: *“Migration is a European challenge that requires a European solution. It is concrete actions that will bring change on the ground. It is only through solidarity and unity that we can achieve this. L'Italia può contare sull'Unione Europea.”*<sup>15</sup> This statement reflects the purpose behind the creation of Frontex- the need for

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<sup>14</sup> European Economic and Social Committee. "Opinion on the Proposal for a Council Regulation establishing a European Agency for the Management of Operational Cooperation at the External Borders." COM (2003) 687 final - 2003/0273(CNS) (2004/C 108/20), 29 January 2004.

<sup>15</sup> European Commission, Press statement by President von der Leyen with Italian Prime Minister Meloni in Lampedusa, 17 September 2023, [https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT\\_23\\_4502](https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_23_4502)

a coherent and synchronized strategy that transcends national borders to effectively address the multifaceted nature of migration.

And it is exactly from this idea that Professor Sarah Léonard, renowned for her expertise in International Security, identified and analyzed the three primary factors that led to the creation of The European Border and Coast Guard Agency (EBCGA). Firstly, as illustrated by Professor Léonard<sup>16</sup>, since the 1990s migration had gradually become an issue. And that led European countries to reevaluate and fortify their border controls to restrict migrant and asylum-seeker access to their territories. Secondly, with the enlargement of the EU to include ten new Member States in 2004, apprehensions arose regarding these new members' capacity to effectively manage the expanded external borders of the EU. Thirdly, the aftermath of the terrorist attacks on September 11, 2001, triggered a profound reevaluation of security measures, including a substantial emphasis on reinforcing external border controls. Therefore, the tightening up of external border controls was also seen as an important contribution to the fight against terrorism. We will proceed to examine each of these factors individually.

First of all, the 1990s marked a turning point where migration began to be perceived as a significant societal concern in Europe. Factors such as increasing globalization, political changes, and conflicts in neighboring regions brought about a noticeable surge in migration flows, leading to a shift in public perception and political discourse.<sup>17</sup> Throughout the 1990s, the EU was confronted with an increase of illegal border crossings of migrants and therefore renewed its attention to finding a solution. Member States looked for new ways to increase their border control and to stop irregular migration into their territory. The growing numbers of migrants and the influx of diverse cultures and identities fueled an intensifying debate around migration. As a matter of fact, far-right parties in numerous European countries began to adopt a strict stance regarding asylum-seekers and refugees, in order to gain electoral support. European countries and the European Union as a whole were prompted to reconsider and reformulate their immigration laws, asylum policies, and border control measures.

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<sup>16</sup> Léonard, S., 2009. The creation of FRONTEX and the politics of institutionalisation in the EU external borders policy. *Journal of contemporary European research*, 5 (3), 371-388.

<sup>17</sup> Favell, A., 2008. Migration and the Making of Europe. *Journal of Ethnic and Migration Studies*, 34(4), 491–511.

Additionally, the 2004 expansion of the European Union had similar implications. Since 1957, the number of EU Member States has gradually increased, culminating in the largest round of enlargement in EU history in 2004 when ten countries joined at the same time<sup>18</sup>. This marked a historical milestone, as only one to three states were previously admitted at once. Eastward enlargement helped reconcile the ideological division that characterized Europe during the Cold War and paved the way for stability and common welfare in the continent. However, this did not imply that the integration process was easy or less impactful. In particular, after the enlargement the frontiers of the EU changed drastically, as well as the potential migration routes that asylum seekers could embark on. Not only the ways in which migrants could enter multiplied, but there were also concerns on the new members' capacity at keeping them out. As a result of this operation, a large part of the external borders would be entrusted to the management of the new Member States, whose technical capabilities many doubted. In fact, Member States encountered numerous operational difficulties within the Schengen regime itself. Cooperation between the various border police forces was characterized by a mutual lack of trust, primarily due to the fact that the differences between the various national legal systems were ignored. The different attitudes, for historical reasons, towards the police force and the fear that practices such as corruption were present in other states were also relevant. The lack of a common operational language and the complexity of the cooperation agreements also undermined the transparency of joint work. The economic difficulties encountered by some states, since most of the costs fell on national budgets, compromised the security and efficiency of border controls. The concomitance of these problems gave the definitive impetus towards a progression in border control. The need for an operational Coast Guard Agency was tightened by the prospect of ten new members soon joining the EU and their difficulties in meeting the Schengen border control standards. The formation of Frontex therefore came at a time in which the EU was pressured to reassure that the future Member States had sufficiently organized border management systems in place.

Lastly, the Twin Towers attacks in the United States are seen as a pivotal moment that delineated a shift in global security priorities and challenges. These tragic events, coupled with subsequent bombings in Madrid and London, prompted reevaluation of Western notions of security and contemporary threats. Moreover, these terrorist attacks alerted

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<sup>18</sup> The ten countries that joined in 2004 were Poland, Hungary, Slovenia, the Czech Republic, Slovakia, Latvia, Estonia, Lithuania, Cyprus, and Malta.

European institutions<sup>19</sup>, and established clear links between terrorism and immigration: terrorists were allegedly taking advantage of reception policies to enter European territory, and for that reason more drastic control measures were necessary. Consequently, scholars began highlighting potential adverse consequences the attacks might impose on immigration and the linkage between migration and security.<sup>20</sup> The Laeken European Council of December 14 and 15, 2001, reiterated this link in its conclusions: “*Better management of the Union's external border controls will help in the fight against terrorism, illegal immigration networks and the traffic in human beings. The European Council asks the Council and the Commission to work out arrangements for cooperation between services responsible for external border control and to examine the conditions in which a mechanism or common services to control external borders could be created.*”<sup>21</sup> This conclusion reminds us that coherent, effective common management of the external borders of the Member States of the Union will boost security and the citizen’s sense of belonging to a shared area and destiny. It also serves to secure continuity in the action undertaken to combat terrorism, illegal immigration and trafficking in human beings. The connection between migration and security, and more generally the concept of securitization, is reinforced by the assumption that sources of insecurity must come from “outside”, and that immigrants to the EU are a major source of insecurity<sup>22</sup>. Accordingly, migration control, security and counter-terrorism were pushed to the top of the agenda of the EU in the early 2000s, and the 9/11 terrorist attacks served as a catalyst for this periodization. It was sort of a wakeup call for Member States that created an environment in which far reaching proposals were adapted rather

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<sup>19</sup> “*The European Union will have no credibility if it does not establish a common policy on combating terrorism. (...) Since the Tampere European Council, some tentative progress has, admittedly, been made with regard to the European area of freedom, security and justice, but this falls considerably short of what is needed. We must go further. Although the European Union has made its presence felt on the international stage, in the Middle East, at Durban and even in the Former Yugoslav Republic of Macedonia, yesterday's events are proof, if proof were needed, of the imperative need to establish a Europe of defense and a genuinely common foreign and security policy as quickly as possible.*” Nicole Fontaine, former President of the European Parliament, European Parliament, Debates: 1. Acts of terrorism in the United States, (Brussels, 12 September 2001), Accessed 24 November 2023, [https://www.europarl.europa.eu/doceo/document/CRE-5-2001-09-12-ITM-001\\_EN.html](https://www.europarl.europa.eu/doceo/document/CRE-5-2001-09-12-ITM-001_EN.html)

<sup>20</sup> Bermejo, Rut. Democracy and Security, vol. 6, no. 3, 2010, pp. 278–85. JSTOR, Accessed 24 November 2023, <https://www.jstor.org/stable/48602674>.

<sup>21</sup> Presidency Conclusions, European Council Meeting in Laeken, (42), 14 and 15 December 2001.

<sup>22</sup> NEAL, A.W. (2009), Securitization and Risk at the EU Border: The Origins of FRONTEX. JCMS: Journal of Common Market Studies, 47: 333-356. <https://doi.org/10.1111/j.1468-5965.2009.00807.x>



easily. Measures that seemed drastic and received opposition from Member States before 9/11, now became possible.<sup>23</sup>

It is in this specific context of high politicization, if not securitization<sup>24</sup>, of asylum and migration that the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union was created in 2004. All these factors, notably the ones analyzed in this section, explain the identification of the need for enhanced cooperation between EU Member States in the area of external border controls. However, such cooperation could have taken other institutional forms than that of an agency. How and why was it decided to create an agency? To answer this question, it is necessary to examine the political debates and the political process that led to the creation of Frontex.

### **3. Towards a European Corps of Border Guards? (2001-2003)**

The convergence of the aforementioned factors ultimately spurred cooperation among Member States for external border control. As enlargement approached and in light of rising security concerns, it was crucial for the Community to allocate resources to its external borders in order to ensure the safety and security of its citizens. This endeavor had to be carried out in the context of a comprehensive and integrated framework for managing external borders, which necessitated not only the implementation of new organizational structures, but also the development of mechanisms for close cooperation and coordination among the relevant authorities. For this strategy to succeed, the Commission had to serve as a catalyst for change and a dynamic coordinating force. Any action taken could only be

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<sup>23</sup> Some academics drew attention towards the fact that European institutions used the terrorist attacks as an opportunity to promote far-reaching harmonization. They show that crisis situations can lead to decisions with unintended consequences and can be used by political actors to expand their power and authority. Perkowski, N., Stierl, M., & Burrige, A. (2023). The evolution of European border governance through crisis: Frontex and the interplay of protracted and acute crisis narratives. *Environment and Planning D: Society and Space*, 41(1), 110-129. <https://doi.org/10.1177/02637758231152478>.

<sup>24</sup> “*the securitisation of migration*’, that is, the extreme politicization of migration and its presentation as a security threat. (...) In other words, it is generally believed that asylum and migration have been securitised in the EU and that this evolution has had a negative impact on the status of asylum-seekers and migrants, including the protection of their human rights” (Sarah Léonard (2010) EU border security and migration into the European Union: FRONTEX and securitisation through practices, *European Security*, 19:2, 231-254, DOI: 10.1080/09662839.2010.526937). For an opposing thesis see: Christina Boswell, ‘Migration control in Europe after 9/11: Explaining the absence of securitization’, *Journal of Common Market Studies* 45 (2007) 3, 589-610, page 596.

effective if it was implemented throughout the community, requiring financial commitments at the community level.

Having said that, we will see how the political process from 2001 to 2003 was lost in a long bureaucratic process, and discussions on the creation of a new European police force dried up. European countries were afraid at the time of going too far and giving up too much control over their borders. What unfolded during that period was a series of discussions and arrangements involving negotiation between the Commission and the Council. Simultaneously, within the Council, Member States engaged in a parallel process of negotiation and compromise. The primary disagreement revolved around establishing a European Corps of Border Guards. This idea would lay the groundwork for what would later evolve into Frontex and eventually form the embryonic basis of Frontex. However, it's important to note that Frontex was not the pursued outcome between 2001 and 2003.

### **3.1 The Italian Feasibility study**

Back in October 2001, a coalition of states led by Italy—namely Belgium, France, Germany, and Spain—conducted a feasibility study<sup>25</sup> to explore the possible creation of a European Border Guard. This study proposed an organizational model to strengthen Europe's external borders. The final objective of the study was: "*the formulation of hypothesis for a control of the external borders that could be more effective, optimizing the collaboration through the use of common resources, the identification of compatible common procedures, the implementation of joint services, and, last but not least, a body of European Border Police*".<sup>26</sup> These countries supported the creation of such a body in order to share the burden of external border controls and to increase the efficiency of such controls, in particular by developing technical expertise in this field. The United Kingdom, however, while agreeing on the need to strengthen cooperation in the management of the common borders, expressed reservations regarding the creation of a centralized body<sup>27</sup>. These reservations were reflected

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<sup>25</sup> Feasibility study for the setting up of a European Border Police, Final Report, Rome, May 30, 2002.

<sup>26</sup> Feasibility study for the setting up of a European Border Police, Final Report, Rome, May 30, 2002, p.8.

<sup>27</sup> HOUSE OF LORDS SESSION 2002–03, 29th REPORT SELECT COMMITTEE ON THE EUROPEAN UNION, PROPOSALS FOR A EUROPEAN BORDER GUARD, 1 July 2003, p.21.

in the Laeken European Council Conclusions' cautious use of terms, where the term "European Border Guard" no longer appeared.<sup>28</sup>

### **3.2 Towards an Integrated Management of External Borders: the Communication from the Commission**

In accordance with the request made in Laeken, the Commission presented at the beginning of May 2002 the "*Communication from the Commission to the Council and the European Parliament Towards integrated management of the external borders of the Member States of the European Union*", with the ambition to propose a common policy of integrated management of external borders. In particular, according to this Communication, the common policy should have included at least five mutually interdependent components: (a) A common corpus of legislation; (b) A common co-ordination and operational co-operation mechanism; (c) Common integrated risk analysis; (d) Staff trained in the European dimension and inter-operational equipment; (e) Burden-sharing between Member States in the run-up to a European Corps of Border Guards.<sup>29</sup> To set up point (b), the Commission recommended two instruments: an External borders practitioners common unit<sup>30</sup> in the short term, and a permanent process of exchange and processing of data and information between the Member States' authorities (so-called Prosecur) in the medium term.

The Communication states that the External borders practitioners common unit should have played a "*full multidisciplinary and horizontal role*"<sup>31</sup>. The term "*multidisciplinary*" indicates that the common unit was expected to encompass diverse disciplines and areas of expertise. It wasn't limited to a single specialized field but rather involved professionals from

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<sup>28</sup> Presidency Conclusions, European Council Meeting in Laeken, (42), 14 and 15 December 2001.

<sup>29</sup> Communication from the Commission to the Council and the European Parliament Towards integrated management of the external borders of the Member States of the European Union, Brussels, May 7, 2002, Paragraph 20.

<sup>30</sup> Communication from the Commission to the Council and the European Parliament Towards integrated management of the external borders of the Member States of the European Union, Paragraph 27, 28 and 29. More specifically, the External borders practitioners common unity is set up to be responsible for: "*acting as a "head" of the common policy on management of external borders to carry out common integrated risk analysis; – acting as "leader" coordinating and controlling operational projects on the ground, in particular in crisis situations; – acting as manager and strategist to ensure greater convergence between the national policies in the field of personnel and equipment; – exercising a form of power of inspection, in particular in the event of crisis or if risk analysis demands it.*"

<sup>31</sup> Communication from the Commission to the Council and the European Parliament Towards integrated management of the external borders of the Member States of the European Union, Paragraph 29.

various sectors related to external border security. This might include individuals with expertise in border control, surveillance, risk analysis, visa issuance, law enforcement, customs, and possibly intelligence and security operations. The term “*horizontal*” signifies that this unit would have promoted collaboration and coordination across various levels and departments involved in securing the external borders. Instead of a hierarchical approach where one specific sector dominates, the unit would have encouraged equal participation and cooperation among different departments, ensuring a well-integrated approach. Furthermore, the unit aimed to bring together not only senior officials and decision-makers (managers), but also frontline operational staff (practitioners) involved in the day-to-day management of border security. By involving both managerial personnel responsible for strategic decisions and operational practitioners actively engaged in border control activities, the unit would have ensured a comprehensive understanding of the challenges and practical insights necessary for effective decision-making and implementation. In essence, the Communication emphasizes the unit's holistic approach, aiming to incorporate various expertise, encourage collaboration across different departments, and involve both decision-makers and implementers to ensure a comprehensive, efficient, and well-coordinated management of security measures at the EU's external borders.

The intention was to build upon or expand the existing Strategic Committee on Immigration, Frontiers and Asylum (SCIFA)<sup>32</sup> structure to create a new unit specifically dedicated to managing external borders. SCIFA is an existing working group within the EU that deals with immigration, border issues, and asylum. The Communication suggests that the envisioned External borders practitioners common unit could emerge or evolve from this existing committee. It implies utilizing the knowledge, structure, or expertise present within SCIFA as a foundational framework or starting point for establishing the new unit focused on external border management. This approach may leverage existing resources, expertise, and networks from SCIFA to facilitate the creation and functioning of the proposed unit. At the same time, the Commission recognized that for genuine multidisciplinary collaboration

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<sup>32</sup> Strategic Committee on Immigration, Frontiers and Asylum (SCIFA), Definition: “*A forum for the exchange of information amongst the EU Member States, consisting of senior officials in the fields of asylum, immigration and frontiers, which aims to implement a European Union strategic approach to matters related to asylum, immigration and frontiers.*” European Migration Network. "Glossary: Strategic Committee on Immigration, Frontiers, and Asylum (SCIFA)." Retrieved from: [https://home-affairs.ec.europa.eu/networks/european-migration-network-emn/emn-asylum-and-migration-glossary/glossary/strategic-committee-immigration-frontiers-and-asylum-scifa\\_en](https://home-affairs.ec.europa.eu/networks/european-migration-network-emn/emn-asylum-and-migration-glossary/glossary/strategic-committee-immigration-frontiers-and-asylum-scifa_en). Last Accessed: January 2, 2024.

to be possible, the External borders practitioners common unit's range of activities would have to be expanded in the future. This expansion would have been crucial to foster robust cooperation and holistic management of security measures at the EU's external borders.

As we have said before, the controversy over the creation of a European Border Police/Guard continued with the Commission's Communication. In fact, with regards to point (e), one of the most controversial aspects of the Communication is the hypothesis of the creation, in the medium term, of a European Corps of Border Guards to reach a balanced and genuine sharing of the financial burden. The concept of burden-sharing, or responsibility-sharing, emerged in the 1950s as a principle for promoting international solidarity among states receiving refugees. The word "burden" appears in the Preamble of the 1951 Refugee Convention in reference to the imposition of "*unduly heavy burdens*"<sup>33</sup> on specific host countries, and compels the international community to intervene in such circumstances, especially when the burden is inequitably distributed among Member States, often due to their geographic location.<sup>34</sup> Indeed, some Member States bear a heavier burden of conducting checks and surveillance on extensive and vulnerable external maritime or land borders. In contrast, other Member States might only have external borders at airports or none at all due to their specific geographical position within the EU. Despite that, those Member States still have a vested interest in contributing to the collective effort to safeguard all external borders. This shared responsibility is crucial because the security and integrity of the entire area without internal borders depend on the effective protection of these external borders. In substance, security concerns across the EU are interconnected, regardless of individual Member States' specific border situations. Therefore, the Commission called for collective action that would strengthen the protection for refugees by reducing inequities among recipient states. It proposed to do so by still relying on national budgets, but by also using the EU's budget to redistribute funds among Member States and finance common equipment.

As reported by the Communication<sup>35</sup>, the European Corps of Border Guards would at first exercise surveillance functions, such as observing and monitoring the borders, and then

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<sup>33</sup> United Nations. (1951). Convention Relating to the Status of Refugees, Preamble.

<sup>34</sup> According to the concept of tyranny of geography, it is easier for asylum-seekers to reach the borders of some States than of others.

<sup>35</sup> Communication from the Commission to the Council and the European Parliament Towards integrated management of the external borders of the Member States of the European Union, Paragraph 48.

actively conduct formal checks and controls at designated border crossing points. Moreover, it is specified that the Corps will not be able to replace the national authorities to maintain law and order and safeguard internal security in the host country.

Despite this fact and the emphasis on the need to pursue a step-by-step approach advocated by the Commission, demonstrated by the progressive role conferred to the Corps, many States were concerned that this development would ultimately result in the establishing a supranational structure. They likely resisted the idea of a centralized authority or entity superseding national sovereignty in border management, preferring a more decentralized approach or maintaining national control over border-related matters. The States' doubts were also reflected in the results of the above-mentioned feasibility study, presented at a ministerial conference held in Rome at the end of May of 2002.

### **3.3 The “tertium genus” proposed by the Italian Feasibility Study**

The central challenge within the feasibility study revolved around determining the most suitable organizational structure that could effectively adapt to the complexities of border security management. During the First Meeting of the Assessment Phase, the discussion mainly revolved around identifying key elements ("What") and determining the entities or structures ("Who") responsible for achieving the outlined objectives<sup>36</sup>. However, the meeting concluded without finalizing decisions on specific responsible bodies. Ultimately, the feasibility study did not express a clear position on whether or not to create a European Corps of Border Guards, but rather proposed an intermediate solution, a compromise between a “traditional” model and a “network” model.

The “traditional” model is characterized by a unitary structure, relying on hierarchies and established procedures. It thrives in stable environments but struggles to cope with rapid, unpredictable changes, often resulting in slow or inadequate responses. Conversely, the “network” model is adaptable and flexible. It excels in unstable environments, allowing for quicker decision-making and adaptation to changing circumstances. However, its decentralized nature can lead to increased autonomy among individual components. This

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<sup>36</sup> Feasibility study for the setting up of a European Border Police, Final Report, Rome, May 30, 2002, p.27

autonomy may cause duplication of internal services across different units within the network. Each unit might develop its own support functions, leading to redundancy and higher operational costs.

Balancing the benefits of unity and variety led to the creation of an intermediate model—a modified network structure with centralized coordinating body. This hybrid model combines elements of both unitary and network structures to harness their respective strengths: it allows for adaptation to diverse contexts while incorporating a centralized body for coordination. It represents a "tertium genus"<sup>37</sup> that envisions the creation of a complex network of national border police units, sharing specialized centers, common task forces, risk analysis mechanisms, and a standardized curriculum across states. Financially, it advocates for a fair distribution of responsibilities. Essentially, the feasibility Study proposes a model built as a polycentric network, co-ordinated by an appropriate body, which can be immediately and concretely set up, and then gradually progress, but that doesn't coincide with a European Corps of Border Guards.

### **3.4 The Action Plan**

Despite some reservations<sup>38</sup>, the majority of Member States preferred the model proposed by the Italian study over the more traditional communitarian option advanced by the Commission. The Commission's proposals and the feasibility study served as the basis for the Council's presentation of the Action Plan<sup>39</sup> in June 2002, which outlines how to manage the European Union's external borders. This document, considered as a "pragmatic guide"<sup>40</sup>, highlights the importance of operational cooperation and a shared mechanism in order to achieve an adequate level of security at the external borders. It focuses on finding a diagnosis of the needs of the EU, to then propose a consolidated policy on controlling external borders. On that account, the Council advocates for the same recommendations put forth in the Commission's Communication: it distinguishes between measures to be undertaken in the

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<sup>37</sup> Feasibility study for the setting up of a European Border Police, Final Report, Rome, May 30, 2002, p.30.

<sup>38</sup> The UK and Finland preferred a more informal type of cooperation.

<sup>39</sup> Council of the European Union, Plan for the management of the external borders of the Member States of the European Union, 14 June 2002, 9834/1/02 FRONT 55 COMIX 392 REV 1.

<sup>40</sup> Council of the European Union, Plan for the management of the external borders of the Member States of the European Union, 14 June 2002, 9834/1/02 FRONT 55 COMIX 392 REV 1, Paragraph 10, p. 4.

short term and in the medium term<sup>41</sup>; identifies the same five mutually interdependent components; approves the establishment of the External borders practitioners common unit; and supports the idea of setting up a European Corps of Border Guards, even if only roughly addressing the topic. Thus, the main difference with the Communication is the fact that the Action Plan merely mentioned, in much vaguer terms<sup>42</sup>, the issues related to the distribution of financial burdens and the creation of a Corps. It left the Member States with a wide margin to maneuver in its implementation and it remained unclear whether the long-term aim was to establish an operational force or a less ambitious arrangement.

A week after publishing the Action Plan, in an atmosphere of intense politicization of asylum and migration matters, the European Council met in Seville, where the heads of state and government expressed their approval of the Plan<sup>43</sup>. They called for the prompt establishment of the External borders practitioners common unit, so as to coordinate the measures contained in the Plan. Additionally, it outlines specific actions to be implemented within set timeframes: joint operations at external borders, pilot projects open to interested member states, creation of a network of immigration liaison officers by the end of 2002, and by June 2003, the development of a common risk analysis model, establishment of a uniform border guard training curriculum, and a Commission study addressing burden-sharing among member states and the Union for managing external borders. These directives aim to foster collaboration, improve risk assessment, standardize training, and address shared responsibilities in managing the Union's external borders. We will analyze each directive individually.

The directive for joint operations at external borders underscores the significance of collaborative efforts among member states to collectively address border challenges. This

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<sup>41</sup> "Short term" means within a period of one year while "medium term" means between three and five years depending on the nature of the specific measure.

<sup>42</sup> "further institutional steps could be considered, if appropriate, following an in-depth legal study addressing the question of the legal basis and identifying the instruments which would be necessary. Such steps could include a possible decision on the setting up of a European Corps of Border Guards, composed of joint teams, which would have the function of supporting the national services of the Member States, but not replacing them." Council of the European Union, Plan for the management of the external borders of the Member States of the European Union, 14 June 2002, 9834/1/02 FRONT 55 COMIX 392 REV 1. Paragraph 120, Page 27.

<sup>43</sup> Council of the European Union, Seville European Council (21 and 22 June 2002) Presidency Conclusions, 24 October 2002, Paragraph 32. "The European Council applauds the recent approval of the plan for the management of the external borders of the Member States, based on those three initiatives, which should, inter alia, help bring greater control of migration flows. It urges the introduction without delay, within the framework of the Council, of the common unit for external-border practitioners, composed of Member States' heads of border control, to coordinate the measures contained in the plan."



involves unified, coordinated actions to enhance surveillance, control illegal migration, and ensure security at shared external borders. The initiation of pilot projects, open to all interested Member States, seeks to test innovative approaches and best practices in border management.

These experimental endeavors aim to identify effective strategies that could be scaled up for broader implementation, fostering a dynamic exchange of ideas and methods among participating nations. The creation of a network of immigration liaison officers represents a concerted effort to facilitate communication and information sharing among Member States.

These officers will serve as crucial links, fostering cooperation, and streamlining the exchange of intelligence and expertise in managing migration-related matters.

Furthermore, the development of a common risk analysis model by June 2003 underscores the commitment to establishing a unified approach in assessing and addressing potential risks at external borders. This model aims to harmonize risk evaluation methods, enabling a more comprehensive understanding and response to emerging challenges. The establishment of a common core curriculum for border guard training and consolidation of European provisions concerning borders aims to standardize and enhance the expertise of border control personnel.

By setting a uniform training framework, Member States aim to ensure a consistent and high level of competence among border guards across the Union.

Lastly, the Commission's study on burden-sharing between Member States and the Union for managing external borders signifies a commitment to fair and equitable distribution of responsibilities and resources. This study aims to assess and propose mechanisms to allocate the collective burden of managing external borders, promoting solidarity and cooperation among member states and the Union in this critical area. However, in this list of measures to be adopted within one year, the European Council Conclusions did not include the creation of a European Corps of Border Guards, nor did the term appear in the document.

### 3.5 The establishment of the External Borders Practitioners Common Unit and its Challenges

Based on the directions of the Action Plan and the Seville European Council, the External Borders Practitioners Common Unit was created by the union of the aforementioned CSIFA Committee with the National Border Guard Directors, in the so-called CSIFA+. Since its creation in June 2002, this body had lavished its efforts on various activities, such as the development of a common risk analysis model, a single curriculum for border guard training, and the coordination of ad hoc specialized centers. As a matter of fact, the Common Unit took the lead in coordinating various operations and pilot projects relating to border controls, which aimed to improve operational standards and coordination.<sup>44</sup>

Despite diversified efforts on several fronts, however, the effectiveness of the Common Unit's work was soon enough questioned by the European institutions, as well as by Member States<sup>45</sup>. The problem of the External Borders Practitioners Common Unit (CSIFA+) was that it met approximately once a month, and it was highly politicized, not really looking at what they needed to do at the European level, but only at promoting individual Member States' projects.<sup>46</sup>

In other words, any sense of urgency had translated into bureaucracy and a lack of concrete operational progress.

The challenges faced by the Common Unit are also outlined in a Report on the implementation of programmes, ad hoc centers, pilot projects and joint operations<sup>47</sup>, published by the Council of the European Union in March 2003. The Report found that joint operations faced serious problems, such as the lack of suitable planning and preparation; the

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<sup>44</sup> Amongst them, the "International Airports Plan" led by Italy, and joint operations at the maritime borders such as "Operation Ulysses" under Spanish leadership and "Operation Triton" led by Greece. Ad hoc centers were also created, including the Centre for Land Borders (Germany), the Risk Analysis Centre (Finland) and the Centre of Excellence at Dover for developing new surveillance and border control technologies (United Kingdom).

<sup>45</sup> In its report to the Council on the implementation of programmes, ad hoc centers, pilot projects and joint operations from 11 June 2003, the Greek Presidency concluded that with regard to the pilot projects and joint operations, the absence of a monitoring mechanism and of a method for independent and thorough evaluation as well as for the processing and utilization of results was particularly evident. (Doc. 10058/1/03 REV 1 FRONT 70 COMIX 354).

<sup>46</sup> NEAL, A.W. (2009), *Securitization and Risk at the EU Border: The Origins of FRONTEX*. *JCMS: Journal of Common Market Studies*, 47: 333-356. <https://doi.org/10.1111/j.1468-5965.2009.00807.x>

<sup>47</sup> Council of the European union, « Report on the implementation of programmes, ad hoc centers, pilot projects and joint operations », *Cultures & Conflicts*, 50 | March 15, 2003, 169-193.

lack of central operational coordination; the lack of adequate in depth treatment of difficulties which arose during the implementation period; the lack of legal basis for carrying out common operations; the fact that participating countries did not fully meet their obligations under the programmes. The Report concludes with the constation that “*the upgrading of the coordination and operational role of SCIFA+ is a precondition for the successful development of similar programmes in the future*”. This means that the SCIFA+ needed significant enhancement in its coordination and operational capacities to pave the way for successful future programs of a similar nature; it considers it as a prerequisite for the efficacy of forthcoming initiatives. The same conclusion is reached in the Communication from the Commission to the European Parliament and the Council in view of the European Council of Thessaloniki “*on the development of a common policy on illegal immigration, smuggling and trafficking of human beings, external borders and the return of illegal residents*”<sup>48</sup> from June 3, 2003. The Commission pointed out that the Common Unit has shown structural limits with regard to the co-ordination of the operational cooperation at the external borders. The Commission therefore proposed that certain more strategic co-ordination tasks could remain with the Common Unit, whereas the more operational tasks could be entrusted to a new permanent Community structure able to exercise day-to-day management and co-ordination tasks and to respond in time to emergency situations.

The European Council returned to the issue at Thessaloniki in June 2003<sup>49</sup>, where it also examined the possibility of a Draft Constitutional Treaty. While in its Conclusions the European Council reiterated its appreciation for the work of the individual national centers, it also pointed out that the polycentric structure was not conducive to the development of a coherent and balanced policy, since the activities carried out by the individual centers ended up reflecting the patterns and policy agendas of the state in which they were based. It therefore argued how the need for operational coordination of all the centers, required the substitution, or rather, the complementation of CSIFA+ with a new permanent community structure, a much more operational body, capable of managing operational activities on a daily basis and, at the same time, reacting in an immediate manner to crisis situations. It called upon the Commission to assess, based on the Common Unit's activities, the potential necessity of instituting new institutional mechanisms, potentially including a Community

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<sup>48</sup> Communication from the Commission to the European Parliament and the Council in view of the European Council of Thessaloniki on the development of a common policy on illegal immigration, smuggling and trafficking of human beings, external borders and the return of illegal residents, June 2003, p 7-8.

<sup>49</sup> Presidency Conclusions – Thessaloniki, 19 and 20 June 2003, Paragraph 14.

operational structure, aimed at enhancing operational cooperation for external border management. "*New institutional mechanisms*" refer to novel structures or frameworks that could be established within the European Union to address specific needs or challenges. This implies the potential creation of organizational setups or entities specifically dedicated to enhancing operational cooperation for managing external borders. This appears to be a reference to the possibility of an operational European Border Guard without actually using the term.

### **3.6 The Negotiations for Establishing Frontex and the Exclusion of the European Parliament**

Shortly after, seizing the chance, the Commission, known for its favor toward establishing community structures, took action. In November 2003, just a few months later, it introduced a proposal for a Regulation titled "*establishing a European Agency for the Management of Operational Cooperation at the External Borders.*"<sup>50</sup> The Commission recognized that the mere application of common rules by states, due to integrated border management, wasn't sufficient; there was a need for harmonized adherence to these rules. Hence, the proposal aimed to enhance the coordination of operational cooperation among Member States by establishing an Agency. The Commission also reasserted that the Agency's tasks were intended only as complementary to those of the national services in charge of external border surveillance and control. Moreover, its main activities mirrored, almost entirely, those of the Common Unit.<sup>51</sup>

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<sup>50</sup> Proposal for a Council Regulation establishing a European Agency for the Management of Operational Co-operation at the External Borders (presented by the Commission), Brussels, 20.11.2003 COM (2003) 687 final/2.

<sup>51</sup> In particular "*The main tasks of the Agency are: – Co-ordination of the operational co-operation between Member States in the field of control and surveillance of the external borders. – Rendering assistance to Member States on training of their national border guards by providing training at European level for national instructors of border guards, as well as holding seminars and offering additional training to officers of national border guards. – Carrying out of general and tailored risk assessments. – Follow-up on developments in research relevant for the control and surveillance of the external borders. – Rendering assistance to Member States confronted with circumstances requiring increased operational and technical assistance at the external borders. – Co-ordination of operational co-operation between Member States on removal of third-country nationals illegally residing in Member States*". Proposal for a Council Regulation establishing a European Agency for the Management of Operational Co-operation at the External Borders (presented by the Commission), Brussels, 20.11.2003 COM (2003) 687 final/2, p. 4-5.

More broadly, the choice to establish an Agency was justified by the observation that the Agency would be in an even better position than the Commission itself to bring together all the highly technical knowledge of external border control and surveillance. Such a choice would also have resulted in greater transparency of external border management for the public, as well as resource savings. However, the Commission refrained from presenting a controversial proposal, opting instead for an institutional structure that would have fallen under both intergovernmental and supranational control. For example, with regard to the composition of the board, twelve representatives of the member states and only two members of the Commission were foreseen.

The negotiations for establishing Frontex lasted less than a year, since the Agency was proposed on 20 November 2003 and established on 26 October 2004.<sup>52</sup> Although unanimity was required, the Council promptly reached a political consensus on the draft Regulation. The Council agreed on the tasks assigned to Frontex as proposed by the Commission. It considered the creation of an Agency the most appropriate way to organize and develop the indispensable coordination of operational cooperation at the external borders. However, a significant disagreement emerged between the Commission and the Council regarding the composition of the Agency's Management Board. This discord led to an amendment of this particular provision in the Regulation's final text, as will be later explained.

The European Parliament was officially consulted both during the proposal phase in December 2003 and in the subsequent voting process in March 2004. Members of the European Parliament had the chance to debate the proposal extensively. They could propose amendments, suggestions, and modifications to the text of the proposal during parliamentary sessions. These amendments could address various aspects of the proposed agency, such as its mandate, structure, scope of operations, and accountability mechanisms. Relevant parliamentary committees, such as the Committee on Civil Liberties, Justice and Home Affairs (LIBE)<sup>53</sup>, could scrutinize the proposal, hold hearings with experts, and draft reports

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<sup>52</sup> EU Migration Agencies: The Operation and Cooperation of FRONTEX, EASO and EUROPOL, David Fernández-Rojo, 2021, p.35.

<sup>53</sup> The Committee on Civil Liberties, Justice and Home Affairs (LIBE) is responsible for legislation and oversight in the EU. It aims to ensure an area of freedom, security, and justice for citizens, while upholding the Charter of Fundamental Rights and the European Convention on Human Rights. The committee consists of 68 members. It collaborates closely with the European Commission, Council, national parliaments, judiciary, law enforcement, and civil society. LIBE focuses on common interests such as combating crime and terrorism, protecting rights, and managing migration. The committee emphasizes mutual trust, active participation, and dialogue to achieve Treaty objectives and implement the Charter of Fundamental Rights.

outlining their recommendations and opinions. These committee reports often included proposed amendments and suggestions for refining the legislation. Following discussions and amendments in committees, the proposal was presented to the entire Parliament for a plenary vote. Members of the European Parliament had the opportunity to express their support or opposition to the proposal as a whole, along with any amendments proposed during the debate.

The Parliament's position, reflected in the amendments and votes, served as a basis for negotiations with the Council and the Commission to reach a consensus on the final text of the legislation. These negotiations often involved reconciling differences between the Parliament's position and the positions of other EU institutions.

In the context of the Frontex Regulation, in December 2003 the European Parliament adopted a resolution drafted by Christian Von Boetticher, making some significant amendments to the Commission's proposal. In particular, the Parliament opposed the coordination of expulsions as part of the mandate of the Agency and deleted references to this.<sup>54</sup> Parliament also stated that the Agency should not be set up until a decision is taken on its permanent seat and that this should be agreed by 31 December 2004.<sup>55</sup> Moreover, it pointed out the fact that the management of national borders should remain a sovereign Member State responsibility, while the Agency must cooperate with the Member States without usurping their national role. And that the support of the Agency should be provided only in exceptional and particularly serious circumstances, such as a mass influx of people fleeing a war. The Parliament also opposed the creation of agency branches, justifying such

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(European Parliament, LIBE Committee, Welcome Words, Juan Fernando LÓPEZ AGUILAR, <https://www.europarl.europa.eu/committees/it/libe/about>, Last Accessed: January 5, 2024).

<sup>54</sup> Deleted: "*co-ordinate operational co-operation between Member States in the field of removal of third-country nationals illegally residing in the Member States.*" The European Parliament does not wish to entrust this task to an independent agency at European level. There would be a clear risk that the Agency gets the character of an "expulsion agency". Next to the general position as outlined in the explanatory statement in this specific case there would also be a danger of insufficient direct democratic control of such kind of operational activities. European Parliament (2003). "Draft European Parliament Legislative Resolution on the proposal for a Council regulation establishing a European Agency for the Management of Operational Co-operation at the External Borders (COM (2003) 687 – C5-0613/2003 – 2003/0273(CNS))." Consultation procedure.

<sup>55</sup> The Regulation shall enter into force once a definitive seat for the agency has been established. The situation in which several new agencies have to start their activities in provisional locations and in uncertainty about their future place of work should be avoided. European Parliament (2003). "Draft European Parliament Legislative Resolution on the proposal for a Council regulation establishing a European Agency for the Management of Operational Co-operation at the External Borders (COM (2003) 687 – C5-0613/2003 – 2003/0273(CNS))." Consultation procedure.

a choice for reasons of control, efficiency and cost effectiveness.<sup>56</sup> It passed amendments to enhance the powers of the European Commission, stating that it should have six seats on the management board instead of two. The Commission rather than the Management Board should appoint the Executive Director and have the power to dismiss him. Finally, certain amendments give the Parliament itself greater scrutiny powers and increased oversight authority, including the requirement for the Executive Director to appear before it. Additionally, any decision to expand the Agency's mandate and activities should follow the ordinary legislative procedure, entailing consultation with the European Parliament.

Essentially, the European Parliament considered that the proposal of the Commission was drafted with a "rather intergovernmental" structure in mind, since it provided for an excessively limited involvement of European institutions. Under those circumstances, it proposed several amendments aiming to strengthen its "communitarian" character, but those were ignored by the Council. Two primary factors precipitated the expedited enactment of the regulation and the disregarding of the Parliament's amendments.<sup>57</sup>

First of all, the imminent "big bang" enlargement of the EU set for May 1, 2004, sparked concerns about potential unregulated migration from Eastern countries, particularly highlighted in the media. Consequently, there existed public expectations for EU Member States to showcase initiatives reinforcing border controls within the EU's external borders, and there was a call for support to aid future Member States in establishing their border control systems.

The second factor had an institutional nature, since it regarded a transitional period of five years during which exceptional decision-making rules applied, in accordance with Article 67 of the Treaty on European Community<sup>58</sup>. While the European Commission held the power of initiative alongside Member States, the European Parliament had a limited role,

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<sup>56</sup> It does not make sense to set up an independent agency in one Member State having in addition specialized branches in other Member States. The existing centers specialized in the different aspects of control and surveillance of land, air and maritime borders, which have been set up by Member States, should therefore become integral part of the agency at one single location. European Parliament (2003). "Draft European Parliament Legislative Resolution on the proposal for a Council regulation establishing a European Agency for the Management of Operational Co-operation at the External Borders (COM (2003) 687 – C5-0613/2003 – 2003/0273(CNS))." Consultation procedure.

<sup>57</sup> Léonard, S., 2009. The creation of FRONTEX and the politics of institutionalisation in the EU external borders policy. *Journal of contemporary European research*, 5 (3), 371-388.

<sup>58</sup> Article 67 of the Treaty on European Community: *1. During a transitional period of five years following the entry into force of the Treaty of Amsterdam, the Council shall act unanimously on a proposal from the Commission or on the initiative of a Member State and after consulting the European Parliament. (...)*

being solely consulted on legislative proposals. Furthermore, decisions by the Council were required to follow the unanimity rule. Measures regarding the crossing of external borders of Member States could only be adopted through the co-decision procedure, which grants the Parliament equal decision-making power with the Council, starting from January 1, 2005. Therefore, the Council had to promptly adopt the Commission's proposal to avoid the active involvement of the European Parliament in the Regulation's adoption. As previously noted, during the drafting of the Regulation, the European Parliament was only involved in the decision-making process through the consultation procedure. And that is precisely what happened.

Hence, the creation of an agency to enhance operational collaboration for managing external borders stood as just one of several potential choices. Both the European Commission and Member States extensively pondered diverse models for fostering heightened cooperation, including propositions such as a European Corps of Border Guards. The forthcoming paragraph will delve into this inquiry: Why did Member States opt to establish a European agency over the array of models available for fostering cooperation in managing external borders?

#### **4. Rationales for setting up agencies**

The inception of Frontex in 2004 embodied a balanced approach, facilitating enhanced operational collaboration among Member States while upholding their sovereignty and primary responsibility for external border management. “Agency” is an omnibus label to describe a variety of organizations which perform functions of a governmental nature, and which generally exist outside of the normal departmental framework of government.<sup>59</sup> They are specialized entities staffed with expert personnel, often handling scientific or technical matters.

Within the EU, an increasing number of agencies have been created over the last few decades. At least three waves of agency formation at the EU level can be distinguished – the

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<sup>59</sup> Majone, G. (2006). “Managing Europeanisation: The European Agencies” in Peterson, J. and M. Shackleton (eds), *The Institutions of the European Union*, 2nd edition. Oxford: Oxford University Press, p.191.



initial one in 1975, a second one from 1990 to 1999, and the third from 2000 to present.<sup>60</sup> Presently, over 30 decentralized agencies operate within the EU framework. These agencies possess their own legal personality, are distinct from the EU institutions and are set up for an indefinite period of time. Their primary role involves contributing to the implementation of EU policies, fostering collaboration between the EU and national governments. By amalgamating technical expertise from both EU institutions and national authorities, decentralized agencies facilitate this cooperative effort. Geographically spread across Europe, these agencies address various aspects of daily life for the approximately 450 million people residing in the EU. Their domains encompass areas such as food, medicine, justice, transport safety, drug addiction, and environmental concerns.<sup>61</sup> An initial fundamental categorization distinguishes between Community agencies and those operating under the Council's authority in the areas previously known as second and third pillars. Within the scope of Community agencies, a subdivision exists comprising regulatory agencies and executive agencies. Regulatory agencies encompass a broad spectrum of responsibilities specified in their legal framework, whereas executive agencies undertake more specialized tasks to aid in managing Community programs. Applying this classification, Frontex can be classified as a community Agency falling under the “regulatory” category.

The creation of an agency, as the entity to be entrusted with the management of external borders, following the failure of the project to establish an European Border Guard, and after the difficulties encountered by the Common Unit, can traditionally be analyzed through the principal-agent model.<sup>62</sup> In light of this theoretical construct, the “principal”, i.e., the Member States, with the ultimate goal of reducing transaction costs, delegate to the European Union, i.e., “the agent”, the authority needed to put in place certain policies at the EU level. In this context, the term "principal" refers to institutions utilizing their authority to create non-majority institutions via a formal delegation process; and "agents" are entities that govern by exerting the powers delegated to them.

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<sup>60</sup> Egeberg, M., and Trondal, J. (2017) Researching European Union Agencies: What Have We Learnt (and Where Do We Go from Here)? *JCMS: Journal of Common Market Studies*, 55: 675–690.

<sup>61</sup> European Union. Types of institutions and bodies. [https://european-union.europa.eu/institutions-law-budget/institutions-and-bodies/types-institutions-and-bodies\\_en](https://european-union.europa.eu/institutions-law-budget/institutions-and-bodies/types-institutions-and-bodies_en). Last Accessed: January 1, 2024

<sup>62</sup> Initially developed in the United States to account for the delegation of executive functions to federal agencies.

According to Professor Leonard<sup>63</sup>, an author we have previously mentioned, scholars have identified six main rationales for setting up agencies. Namely, reasons why delegating some functions to a given agency may be seen as advantageous by policy-makers.

First, because they are staffed by highly skilled professionals, agencies are able to provide policy expertise to policymakers. These professionals within the agency possess a depth of understanding and proficiency in the specific areas or fields they operate in, allowing them to provide informed and detailed guidance to policymakers on complex policy matters. This support assists policymakers in making more informed decisions based on expert advice and insights.

Second, it's believed that agencies aid in improving decision-making efficiency by handling technical and scientific matters, enabling principals to concentrate on less technical responsibilities. Leveraging experts for the technical and scientific aspects of decision-making allows the "principals" to address equally significant but less intricate issues. This division of labor optimizes the efficiency of the decision-making process, since policymakers can channel their efforts towards strategic, less specialized matters, fostering a more efficient and effective policy implementation process.

Third, agencies, shielded from direct political influences, are perceived as better equipped to pursue long-term policy objectives compared to governments. National governments often prioritize responsiveness to political pressures and public opinion, potentially impacting their ability to focus on long-term goals. In contrast, agencies, being insulated from these immediate political influences, provide a more stable environment for pursuing long-term goals, avoiding disruptions caused by potential shifts in parliamentary majorities that typically influence national governments.<sup>64</sup>

Fourth, agencies are often presented as bodies capable of enhancing the visibility of European policies, thus, at the same time, increasing the legitimacy of the Union's overall action. When policymakers delegate certain functions or decision-making processes to

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<sup>63</sup> Léonard, S., 2009. The creation of FRONTEX and the politics of institutionalisation in the EU external borders policy. *Journal of contemporary European research*, 5 (3), 371-388.

<sup>64</sup> According to Professor Leonard, *"This claim is based on the following assumptions. Firstly, policy continuity is necessary to ensure policy credibility. Secondly, policy continuity is best ensured by the delegation of powers to agencies, as those are best able to preserve policy continuity despite possible changes in parliamentary majorities."* Léonard, S., 2009. The creation of FRONTEX and the politics of institutionalisation in the EU external borders policy. *Journal of contemporary European research*, 5 (3), p. 374.

agencies, it carries a strong symbolic significance. It symbolizes a clear demonstration of the EU's proactive approach, and commitment to transparent, efficient, and accountable governance.

Fifth, agencies can stimulate cooperation amongst Member States through information sharing and coordination activities. By serving as hubs for expertise and knowledge exchange, agencies facilitate the pooling of information and best practices among Member States. This exchange allows for a more comprehensive understanding of common challenges, enabling the development of unified strategies and approaches. Through coordinated activities, such as joint operations and collaborative projects, agencies promote harmonization and alignment of efforts among Member States.

Sixth, agencies are often regarded as instrumental in facilitating increased engagement of stakeholders, including representatives from industries or consumer groups, within the EU policy-making framework. One way this involvement materializes is through representation within the Management Boards of these agencies. Their participation creates a platform for meaningful dialogue and collaboration, leading to more comprehensive and well-informed policymaking.

Nonetheless, it has been pointed out by academia<sup>65</sup> that these reasons are not solely sufficient to explain the phenomenon in the polycentric institutional context of the European Union. One can look at the phenomenon from a sociological perspective: the birth of Frontex is coeval with the creation of a large number of European agencies, in what is commonly recognized as the process of "agencification" of the European Union. At the same time, the rapid creation of Frontex can be explained taking into consideration the historical context of the time, linking the birth of the Agency to certain events concomitant to it. Foremost, among these events is the aforementioned enlargement of the European Union. This unprecedented expansion had also incorporated the borders of two Mediterranean islands, Cyprus and Malta, which had always been considered as vulnerable. As if that weren't enough, the fear that this enlargement would further weaken the Union's external borders, producing an unprecedented wave of migration, prompted Member States to encourage the strengthening of common integrated management and, therefore, the creation of a supranational body. The

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<sup>65</sup> Renaud Dehousse (2008) Delegation of powers in the European union: The need for a multi-principals model, *West European Politics*, 31:4, 789-805.

rush with which the agency was created can find justification, finally, by referring to the institutional set-up of the time. This refers to the 5-year transactional period, during which the Commission played a pivotal role and failed to meet the expectations of the Parliament.

In conclusion, the six rationales for setting up agencies that follow the principal-agent model must be considered in addition to, and in light of, the factors that accelerated the creation of Frontex that we discussed previously in this Chapter<sup>66</sup>. Only by collectively considering all these factors, we can develop a comprehensive approach to understanding this dynamic and multifaceted phenomenon, thereby gaining insight into Frontex's formation and evolution.

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<sup>66</sup> Refer to p.14 and p.34 of this Thesis.

## **Chapter II. The Evolving Role of Frontex in the Management of the European Union's external borders**

We have witnessed the intricacies of the negotiations surrounding the establishment of Frontex and analyzed the Commission's Regulation Proposal. Chapter 2 begins by analytically examining Frontex's founding Regulation and subsequently delves into the dynamic evolution of Frontex's role in managing the European Union's external borders. Over the years, the Agency has witnessed numerous modifications, reflecting the fluid nature of border management within the EU. This chapter seeks to uncover the overarching themes and reasons behind these modifications, providing a comprehensive understanding of Frontex's adaptability.

The frequency and extent of these changes are striking, spanning from Regulation 2007/2004 to the latest in 2019 (Regulation (EU) 2019/1896). This temporal spectrum showcases the continuous efforts to refine Frontex's mandate over the years.

The regulatory changes observed in Frontex's journey are not arbitrary but rather a response to the complex landscape of migration challenges. The agency's adaptability is notably influenced by the nature of migration patterns, the imperative to address emerging and shifting challenges, and the necessity to enhance operational effectiveness. Moreover, regulatory modifications are driven by the agency's expanding mandate, shaped by lessons learned from past experiences, and aligned with broader EU policies and goals. The influence of technological advancements, responses to crisis situations, and compliance with evolving legal standards further underscore the multifaceted reasons behind the continuous evolution of Frontex's regulatory framework.

This chapter therefore aims to shed light on the interconnected factors that have driven Frontex's regulatory journey, emphasizing the agency's resilience and responsiveness in navigating the ever-changing landscape of border management challenges within the EU.

## 1. Council Regulation (EC) No. 2007/2004<sup>67</sup>

### 1.1 Legal Basis and Main Tasks

Frontex is the 19th decentralized agency created by the European Union. The founding document of Frontex, known as Council Regulation (EC) 2007/2004, was signed in 2004. Frontex is headquartered in Warsaw, Poland. It is a community body with legal personality and technical independence. Member States must accord it the widest capacity accorded to legal persons under national law.<sup>68</sup>

Frontex's legal basis was established in Article 62.2(a) of the EC Treaty<sup>69</sup>, which pertains to common standards and procedures regarding external border controls, and in Article 66 of the same Treaty<sup>70</sup>, which pertains to cooperation on asylum, immigration, and other policies related to the movement of persons. Frontex was created as an instrument under the first pillar, known as the European Communities pillar. However, despite its legal basis, it was initially perceived as a cross-pillar Agency. It was called upon to perform functions that were typically seen as complementary to the police cooperation policies taking place in the shadow of the then third pillar.

As reiterated in Article 1 of the Regulation<sup>71</sup>, Frontex acknowledges that the primary responsibility for controlling and monitoring external borders rests with the individual Member States. However, the Agency's role is to support and enhance the implementation of both current and forthcoming European Union measures concerning the management of these external borders. The Agency has an obligation to offer technical support and specialized knowledge to both the European Commission and the individual Member States

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<sup>67</sup> COUNCIL REGULATION (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

<sup>68</sup> Article 15, COUNCIL REGULATION (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

<sup>69</sup> Article 62.2(a), Treaty establishing the European Community (Consolidated version 2002). Now Article 77, Treaty on the Functioning of the European Union, 2009.

<sup>70</sup> Article 66, Treaty establishing the European Community (Consolidated version 2002). Now Article 74, Treaty on the Functioning of the European Union, 2009.

<sup>71</sup> Article 1, COUNCIL REGULATION (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

in managing their external borders, and also to promote solidarity between the Member States.

Chapter II of Regulation 2007/2004 presents the six main tasks of Frontex. Article 2<sup>72</sup> reads as follows: “*Main tasks: 1. The Agency shall perform the following tasks: (a) coordinate operational cooperation between Member States in the field of management of external borders; (b) assist Member States on training of national border guards, including the establishment of common training standards; (c) carry out risk analyses; (d) follow up on the development of research relevant for the control and surveillance of external borders; (e) assist Member States in circumstances requiring increased technical and operational assistance at external borders; (f) provide Member States with the necessary support in organizing joint return operations.*”

The first task concerns the coordination of operational cooperation between Member States in the field of management of external borders. According to Article 3<sup>73</sup>, Frontex is responsible for coordinating joint operations and pilot projects, which can be proposed by the Member States, but also initiated by the Agency itself, in agreement with the States concerned. Joint operations can be described as operational activities carried out by two or more Member States, and possibly in co-operation with the Agency, with a view to strengthen surveillance and control at a section of the external borders. Pilot projects, on the other hand, are operational activities related to surveillance and control of the external borders with a view to examining the feasibility of applying a certain operational methodology and/or certain technical equipment.<sup>74</sup> Decisions regarding the necessity of launching specific operations are typically based on the results of risk analysis. Frontex may provide its own equipment and co-finance such projects.

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<sup>72</sup> Article 2, COUNCIL REGULATION (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

<sup>73</sup> Article 3, COUNCIL REGULATION (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

<sup>74</sup> Proposal for a Council Regulation establishing a European Agency for the Management of Operational Co-operation at the External Borders (presented by the Commission), Brussels, 20.11.2003 COM (2003) 687 final/2, p.11.

Risk analysis, regulated by Article 4<sup>75</sup>, is considered the starting point for all operational activities, since the Agency has repeatedly described itself as an intelligence driven organization. Thanks to the exchange of information with Europol, Eurojust and other EU bodies, the Agency is able to prepare risk analysis of both a general and targeted nature, to be used also for the development of a common basis for the training of border guards. To this end, and in close cooperation with Member States, the Agency has developed its own Common Integrated Risk Analysis Model (CIRAM).<sup>76</sup> Risk analyses are presented to the European Commission and the Council, but not to the European Parliament. Moreover, they are not open to the public. This denotes a regrettable lack of transparency since risk assessments provide for the basis of all Frontex's activities.<sup>77</sup>

Article 5 of the Regulation<sup>78</sup> mentions, what is considered to be the most important horizontal task of the Agency, which is the development of a common basis for the training of border guards. Frontex took over the responsibility for this task from the Austrian Ad-hoc Centre for Border Guard Training (ACT).<sup>79</sup> The common core curriculum for border guard officers provides structured guidelines covering a range of essential duties, including enforcement measures, control and investigation activities, administrative tasks, operations equipment utilization, and personal development aspects, ensuring comprehensive training and standardized expertise across their roles.

Research and development are a crucial element of integrated management since the study of operational methods and techniques is necessary to plan joint operations and pilot projects. According to Article 6 of the founding Regulation<sup>80</sup>, Frontex is competent to follow

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<sup>75</sup> Article 4, COUNCIL REGULATION (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

<sup>76</sup> Frontex, CIRAM: Common Integrated Risk Analysis Model. <https://www.frontex.europa.eu/what-we-do/monitoring-and-risk-analysis/ciram/>. Last Accessed: January 2, 2024.

<sup>77</sup> Jorry, Hélène. (2007) Construction of a European Institutional Model for Managing Operational Cooperation at the EU's External Borders: Is the FRONTEX Agency a decisive step forward? CEPS CHALLENGE Paper, No. 6, 22 March 2007, p.15.

<sup>78</sup> Article 5, COUNCIL REGULATION (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

<sup>79</sup> Proposal for a Council Regulation establishing a European Agency for the Management of Operational Cooperation at the External Borders (presented by the Commission), Brussels, 20.11.2003 COM (2003) 687 final/2, p.11.

<sup>80</sup> Article 6, COUNCIL REGULATION (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.



up developments in the field of research relevant to the control and surveillance of external borders, transmitting such information to the Commission and the Member States.

Article 8 is titled “*Support to Member States in circumstances requiring increased technical and operational assistance at external borders*”<sup>81</sup>, it is designed to provide assistance to States facing particular situations, such as encountering problems at external borders. The nature of such situations was the subject of debate during the negotiations of the Regulation: the European Parliament unsuccessfully proposed to specify the exceptional character of such circumstances<sup>82</sup>. The Council, however, dismisses this amendment in drafting the final version of the text. In such circumstances, Frontex can, alternatively, provide coordination aid with other Member States, or send experts equipped with its own technical equipment, albeit without law enforcement-related expertise in the state to which they are sent.

Article 9<sup>83</sup> pertains to the provision of assistance to Member States in organizing joint return operations. As previously analyzed in this chapter, the European Parliament expressed concern regarding the premature nature of such a provision, given the lack of a common asylum and immigration policy within the Union. The Regulation's final version refers to this competence as “necessary assistance”, precisising that the Agency shall identify best practices on the acquisition of travel documents and the removal of illegally present third-country nationals.

## **1.2 Institutional Structure and Budget**

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<sup>81</sup> Article 8, COUNCIL REGULATION (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

<sup>82</sup> Justification: Given the scale of the resources to be employed in such situations, support should be provided only in particularly serious circumstances, such as a mass influx of people fleeing a war. European Parliament (2003). "Draft European Parliament Legislative Resolution on the proposal for a Council regulation establishing a European Agency for the Management of Operational Co-operation at the External Borders (COM (2003) 687 – C5-0613/2003 – 2003/0273(CNS))." Consultation procedure.

<sup>83</sup> Article 9, COUNCIL REGULATION (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

The Agency's organizational structure and its budget serve as the backbone for its operational efficacy. After dissecting the main tasks of the Agency, Chapter III of Regulation 2007/2004 deals with Frontex's institutional structure.

The first body of the Agency to be listed is the Management Board, which, according to Article 21<sup>84</sup>, is composed of one representative from each Member State and two representatives of the Commission. This composition has a strong intergovernmental character, with the consequence that the control of the Agency's work is placed largely in the hands of the Member States, as a wide range of powers are vested in their representatives. These include the exercise of budgetary functions, the definition of Frontex's organizational structure, and the policy regarding the Agency's personnel. The Board is also responsible for appointing the Executive Director from among the candidates proposed by the Commission. It elects a Chairperson and a Deputy Chairperson from among its members<sup>85</sup>, meets at least twice a year<sup>86</sup> and makes decisions by an absolute majority of the members entitled to vote.<sup>87</sup>

With respect to the Executive Director, this is the person responsible for the day-to-day management of the Agency and is, in this sense, completely independent in the exercise of his duties<sup>88</sup>. The functions and powers of the Executive Director are included in Article 25<sup>89</sup>. These primarily focus on the execution and implementation of decisions, programs, and activities sanctioned by the Management Board. They encompass a broad spectrum, including the drafting and submission of annual working programs and activity reports, as well as overseeing the financial aspects by preparing estimates of revenues and expenditure

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<sup>84</sup> Article 21, COUNCIL REGULATION (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

<sup>85</sup> Article 22, COUNCIL REGULATION (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

<sup>86</sup> Article 23, COUNCIL REGULATION (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

<sup>87</sup> Article 24, COUNCIL REGULATION (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

<sup>88</sup> "The Executive Director shall neither seek nor take instructions from any government or from any other body." Article 25.1, COUNCIL REGULATION (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

<sup>89</sup> Article 25, COUNCIL REGULATION (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

and managing the budget. Furthermore, the Director exercises authority over internal administrative measures, staff-related matters, and holds the prerogative to delegate powers to the Agency's staff under prescribed guidelines. The pivotal role of the Executive Director serves as the linchpin in ensuring the effective operation and compliance of Frontex within the parameters stipulated by its regulatory framework. The control of its work is subject to review by both Parliament and the Council, who may request a report on the exercise of its functions. The Executive Director is held accountable for his activities to the Management Board. He is appointed, on the proposal of the Commission, by the Management Board, on the basis of merit and proven competence in administrative and managerial matters, as well as relevant experience in external border management. He is assisted in the performance of his duties by a Deputy Executive Director, appointed in the same manner.<sup>90</sup>

Chapter IV deals with Frontex's financial requirements. Article 29 of the Council Regulation stipulates that the Agency's revenue shall consist of four components: “— *a subsidy from the Community entered in the general budget of the European Union (Commission section), — a contribution from the countries associated with the implementation, application and development of the Schengen acquis, — fees for services provided, — any voluntary contribution from the Member States.*”<sup>91</sup> In practice, the Community's contribution is the main item of the Agency's budget, giving the European Parliament significant control over Frontex. The European Parliament, which was excluded from the negotiations of the Draft Regulation establishing Frontex, relies on budgetary control as its main instrument to oversee Frontex activities.

Shortly after its implementation, the 2004 Regulation received criticism for not adequately addressing the complex mechanisms of migration. In particular, it did not significantly improve transparency regarding activities at the European Union's common borders, and the budget was insufficient<sup>92</sup> to promote solidarity among Member States.

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<sup>90</sup> Article 26, COUNCIL REGULATION (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

<sup>91</sup> Article 29, COUNCIL REGULATION (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

<sup>92</sup> In 2005 the annual budget for Frontex consisted of 6 million €, compared with 845 million € in 2023. Statista (2023) Annual budget of Frontex (EU) from 2005 to 2023. Retrieved from: <https://www.statista.com/statistics/973052/annual-budget-frontex-eu/>. Last Accessed: January 5, 2024.

## 2. The Principle of Solidarity and Regulation (EC) 863/2007

Defining solidarity is a complex task because this concept proves to be extremely complex and elusive. From a philosophical perspective, it defines the relationship of interdependence between the community and the individual, according to which the individual's actions are motivated less by his own needs than by the prerogatives of the group to which he belongs. On the other hand, from a constitutional point of view, solidarity is an obligation stemming from a social contract that is fulfilled, for example, through recourse to general taxation. Article 67(2) TFEU<sup>93</sup> introduced a significant innovation by stating that the EU's asylum, immigration and border control policies must be based on solidarity between Member States and fair treatment of third-country nationals.

The concept of burden sharing, already discussed in the context of the establishment of the External Borders Practitioners Common Unit<sup>94</sup>, has a crucial implication. The burden on individual Member States is uneven, with some bearing a disproportionate share of responsibilities that benefit the Community as a whole, and uneven application would jeopardize the project of creating a level playing field. In particular, although the budget allocated to Frontex had increased considerably in the time between 2005 and 2007, it was still considered insufficient to support the large number of tasks related to border management attributed to the Agency and to provide adequate technical assistance to Member States.<sup>95</sup>

Based on these observations, in April 2005 the Commission presented its Communication to the Council and the European Parliament “*establishing a framework programme on Solidarity and the Management of Migration Flows for the period 2007-2013*”<sup>96</sup> This

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<sup>93</sup> Article 67(2) Treaty on the Functioning of the European Union.

<sup>94</sup> Refer to p.26 of this Thesis.

<sup>95</sup> Jorry, Hélène. (2007) Construction of a European Institutional Model for Managing Operational Cooperation at the EU's External Borders: Is the FRONTEX Agency a decisive step forward? CEPS CHALLENGE Paper, No. 6, 22 March 2007, p. 20.

<sup>96</sup> Communication from the Commission to the Council and the European Parliament establishing a framework programme on Solidarity and the Management of Migration Flows for the period 2007-2013, Brussels, 6.4.2005. “*The Communication establishing a Framework programme on “Solidarity and the management of migration flows” is part of a coherent set of proposals aiming at providing an adequate support to an area of freedom, security and justice under the financial perspectives 2007-2013. Indeed, the three key objectives of freedom, security and justice are to be developed in parallel and to the same degree of intensity, thus allowing*

programme proposed the creation of four different financial solidarity mechanisms: the European Refugee Fund; the External Borders Fund; the European Fund for the Integration of Third-country nationals; the European Return Fund. The External Borders Fund was created in 2007 by Decision No 574/2007/EC of the European Parliament and of the Council.<sup>97</sup> It aims to address challenges and promote cooperation among EU member states in managing and safeguarding the external borders of the Union. A total budget of 1,820 million euros was allocated to cover the costs associated with its execution.<sup>98</sup>

Frontex's founding Regulation was amended three years after its establishment, by Regulation (EC) No 863/2007<sup>99</sup> on the creation of Rapid Border Intervention Teams (RABITs). According to the website of the European Commission, RABITs are a *“mechanism providing rapid operational assistance for a limited period to a requesting EU Member State facing a situation of urgent and exceptional pressure at points of the external EU borders from large numbers of third-country nationals trying to enter the territory of the EU Member State illegally”*<sup>100</sup> The amendment was necessary because of the fact that at the time the possibilities for providing efficient practical assistance with regard to checking persons at the external borders and the surveillance of the external borders at European level were not considered sufficient.<sup>101</sup>

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*for a balanced approach, based on the principles of democracy, respect for fundamental rights and freedoms, and the rule of law. Each of these objectives is supported by a Framework programme, providing for the necessary coherence between relevant interventions in each policy area, and clearly linking political objectives and the resources available to support them. Furthermore, this structure represents a major simplification and rationalization of existing financial support in the area of freedom, justice and security, thus allowing for greater flexibility in the allocation of priorities and increasing overall transparency.”* p. 3.

<sup>97</sup> Decision No 574/2007/EC of the European Parliament and of the Council of 23 May 2007 establishing the External Borders Fund for the period 2007 to 2013 as part of the General programme ‘Solidarity and Management of Migration Flows’.

<sup>98</sup> Article 13.1, Communication from the Commission to the Council and the European Parliament establishing a framework programme on Solidarity and the Management of Migration Flows for the period 2007-2013, Brussels, 6.4.2005.

<sup>99</sup> Regulation (EC) No 863/2007 of the European Parliament and of the Council of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers.

<sup>100</sup> European Migration Network. (n.d.). Rapid Border Intervention Team (RABIT). Retrieved from [https://home-affairs.ec.europa.eu/networks/european-migration-network-emn/emn-asylum-and-migration-glossary/glossary/rapid-border-intervention-team-rabit\\_en#:~:text=Definition\(s\),the%20EU%20Member%20State%20illegally](https://home-affairs.ec.europa.eu/networks/european-migration-network-emn/emn-asylum-and-migration-glossary/glossary/rapid-border-intervention-team-rabit_en#:~:text=Definition(s),the%20EU%20Member%20State%20illegally), Last Accessed, January 2, 2024.

<sup>101</sup> Paragraph 5, Regulation (EC) No 863/2007 of the European Parliament and of the Council of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers.

While Article 8 of Regulation 2007/2004<sup>102</sup> provided for the possibility for Member States to call upon the Agency in circumstances requiring increased technical and operational assistance, the new Regulation provided for the creation of Rapid Border Intervention Teams to be deployed for a limited period of time to the Member State facing situations of an urgent and exceptional nature.<sup>103</sup> Regulation 863/2007 introduced the principle of compulsory solidarity, according to which Member States are obliged to make the border guards available for deployment at the request of the Agency, unless they are faced with an exceptional situation substantially affecting the discharge of national tasks.<sup>104</sup>

### **3. From the Need to Strengthen Frontex's Mandate to Regulation (EU) No. 1186/2011**

While Frontex had been very useful in providing a framework for Member States to work together, until then, operational cooperation had been inefficient and insufficient. Moreover, according to the European Commission, Frontex had not been able to maximize its potential due to unclear or inadequate existing legislation. In particular, expectations were not met due to: insufficient technical equipment; insufficient human resources; lack of uniform standards; inefficient coordination and follow-up of joint operations; insufficient and ineffective cooperation with third countries; collection, storage and processing of personal data; inefficient coordination and follow-up of return operations; failure to use the Agency's expertise to evaluate Member States' performance in the area of border management.<sup>105</sup> Therefore, the Commission redacted a Proposal with the objective to adapt the 2007/2004

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<sup>102</sup> Refer to p.41 of this Thesis.

<sup>103</sup> Article 1, Regulation (EC) No 863/2007 of the European Parliament and of the Council of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers.

<sup>104</sup> Article 4.3, Regulation (EC) No 863/2007 of the European Parliament and of the Council of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers.

<sup>105</sup> Commission Staff Working Document, Executive Summary of the Impact Assessment accompanying the Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX), Brussels, 24.2.2010.

Regulation, in the light of the evaluations carried out and practical experiences, to clarify the mandate of the Agency and to address identified shortcomings.<sup>106</sup>

Among the most relevant innovations, the Commission envisaged a revised mechanism with compulsory contributions of human resources from Member States combined with a pool of border guards on semi-permanent detachment from Member States to Frontex, with the status of national experts.<sup>107</sup> Moreover, the Commission suggested the introduction of a reporting mechanism to the Management Board regarding the operational activities of Member States with third countries.<sup>108</sup> Doing so would allow Frontex to actively participate in the evaluation of Member States' performance in the management of border control. The proposal also had a profound effect on the discipline of joint operations, awarding the Agency a co-leading role for the implementation of joint operations, with detailed rules for the operational plan, evaluation, and incident reporting, to be enforced by Frontex. In particular, it provided the possibility for the Agency itself to initiate joint operations and pilot projects in cooperation with Member States.<sup>109</sup>

As a result of the Commission's Proposal, in 2011 Regulation (EU) No 1168/2011 amending Council Regulation (EC) No 2007/2004 entered into force.<sup>110</sup> All of the Commission's suggestions were accepted, including the creation of a pool of border guards called European Border Guard Teams.<sup>111</sup> Furthermore, Article 3.1 of the Regulation provides that "*the Agency shall evaluate, approve and coordinate proposals for joint operations and pilot*

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<sup>106</sup> Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX), Brussels, 24.2.2010.

<sup>107</sup> Article 3.2 and 7.3 of the Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX), Brussels, 24.2.2010.

<sup>108</sup> Article 2.2 of the Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX), Brussels, 24.2.2010.

<sup>109</sup> Article 3.1 of the Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX), Brussels, 24.2.2010.

<sup>110</sup> Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

<sup>111</sup> Article 3.1b of the Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

*projects made by Member States, including the requests of Member States related to circumstances requiring increased technical and operational assistance, especially in cases of specific and disproportionate pressures.*<sup>112</sup>

Therefore, under this Regulation, we witness a shift in Frontex's role: it is no longer confined to a mere supportive function but, to a certain extent, plays a role in directing the operations themselves. However, the rules introduced by the new regulation do not go so far as to provide for a centralized system of border guards. Instead, it sanctions the compulsory contribution of Member States only after their decision to participate in a joint operation. In fact, in adherence to existing agreements between the Agency and Member States, the latter are obliged to make both their technical equipment and border guards available for deployment at the request of the Agency, except in cases where they are confronted with exceptional situations significantly impacting the fulfillment of national tasks.<sup>113</sup> This mechanism in part still subordinates Frontex's capacity and effective contribution to the management of the EU's external borders to the will and strategic interests of the Member States.

As we will observe in the next Chapter, regulation (EU) No 1168/2011 also had a massive impact on the protection of human rights in Europe. Article 1 states that *“the Agency shall fulfill its tasks in full compliance with the relevant Union law, including the Charter of Fundamental Rights of the European Union; the relevant international law, including the Convention Relating to the Status of Refugees done at Geneva on 28 July 1951; obligations related to access to international protection, in particular the principle of non-refoulement; and fundamental rights, and taking into account the reports of the Consultative Forum referred to in Article 26a of this Regulation.”*<sup>114</sup> Moreover, the Agency is tasked with creating a Code of Conduct that establishes the procedures to ensure adherence to the principles of the rule of law and the protection of fundamental rights, especially for

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<sup>112</sup> Article 3.1 of the Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

<sup>113</sup> Article 3b.2 and Article 7.3 of the Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

<sup>114</sup> Article 1.2 of the Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.



vulnerable individuals such as unaccompanied minors and those seeking international protection.<sup>115</sup>

Finally, the new Regulation has also extended the application of Regulation (EC) No 45/2001 on the protection of individuals with regard to the processing of personal data by Community bodies<sup>116</sup> to the activity of the Agency<sup>117</sup>. In light of this, Frontex is required to develop an information system that enables swift and reliable exchanges of information on emerging risks at the external borders. The use of such information systems will be discussed in the next section.

#### **4. Eurosur (Regulation (EU) 1052/2013)**

In 2013, Regulation (EU) 1052/2013 establishing the European Border Surveillance System (Eurosur) was implemented. The system was created in order to strengthen the exchange of information and operational cooperation between national authorities of Member States and the Agency.<sup>118</sup> The aim of Eurosur is to reinforce the control of the Schengen external borders. It establishes a mechanism for Member States' authorities to share operational information and cooperate with each other and with Frontex in carrying out border surveillance activities. The objective is to reduce the loss of lives at sea and the number of irregular immigrants entering the EU undetected, as well as to increase internal security by preventing cross-border crimes, such as trafficking in human beings and the smuggling of drugs.<sup>119</sup>

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<sup>115</sup> Article 2a of the Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

<sup>116</sup> Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data.

<sup>117</sup> Article 11a of the Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

<sup>118</sup> Paragraph 1 of the Regulation (EU) No 1052/2013 of the European Parliament and of the Council of 22 October 2013 establishing the European Border Surveillance System (Eurosur).

<sup>119</sup> European Commission, Proposal for a Regulation of the European Parliament and of the Council Establishing the European Border Surveillance System (EUROSUR) Brussels, 12.12.2011 COM (2011) 873.

Eurosur is a mass surveillance and data exchange programme, that consists of national hubs – referred to as National Coordination Centers (NCCs)– established in each EU Member State for interagency cooperation and information exchange. These are connected through a secure communication network among themselves and with Frontex. The Agency operates the Eurosur Fusion Services which supports border surveillance in different ways, for example through satellite imagery, ship recording services, weather and environmental services. In essence, Eurosur is crucial to the daily functioning of Frontex. It covers most aspects of border management, including land maritime and air border surveillance, but also checks at border crossing points, border operations and integrated planning.<sup>120</sup>

Article 6 of the Eurosur Regulation<sup>121</sup> delineates the key tasks of the European Border and Coast Guard Agency. These include establishing and maintaining the communication network, managing the European situational picture, overseeing the common pre-frontier intelligence picture, and coordinating the application of surveillance tools. Additionally, the Agency is mandated to operate 24/7, ensuring uninterrupted readiness and response capability. As a result, Frontex plays a pivotal role in the operation of the new surveillance system. Nevertheless, significant reservations emerged regarding the effectiveness of data protection provisions. Critics<sup>122</sup> argue that the increased use of surveillance technologies and data-sharing within Eurosur raises concerns about the privacy and data protection rights of individuals. The collection and processing of sensitive information on migrants and border activities have in fact raised various ethical questions.

## **5. Regulation 2016/1624: a Missed Reform?**

### **5.1 The EU's Reaction to the Migration Crisis and the Commission's ambitious Proposal to Establish a European Border and Coast Guard**

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<sup>120</sup> European Commission, "Eurosur: European Border Surveillance System." URL: [https://home-affairs.ec.europa.eu/policies/schengen-borders-and-visa/border-crossing/eurosur\\_en](https://home-affairs.ec.europa.eu/policies/schengen-borders-and-visa/border-crossing/eurosur_en). Last Accessed: January 3, 2024.

<sup>121</sup> Article 6 of the Regulation (EU) No 1052/2013 of the European Parliament and of the Council of 22 October 2013 establishing the European Border Surveillance System (Eurosur).

<sup>122</sup> Tas, Sarah: Frontex and Data Protection: Another Rule of Law Challenge in Sight? *VerfBlog*, 2022/9/09, <https://verfassungsblog.de/frontex-and-data-protection/>, DOI: 10.17176/20220909-230639-0.

Although one of the objectives of Eurosur was to improve the visibility of the EU's external borders to reduce the number of deaths at sea, the number of people missing or dead while trying to reach the European shores of the Mediterranean had progressively increased since its establishment. According to The International Organization for Migration's Missing Migrants website,<sup>123</sup> 2015 and 2016 were considered the peak of the refugee crisis, with respectively, a total of 4,005 and 5,136 dead or missing. These events hastened the efforts of European institutions, which assert that “*the immediate imperative is the duty to protect those in need*”.<sup>124</sup>

The European agenda on migration outlines a significant increase in the budget for Frontex joint-operations Triton and Poseidon, along with a reinforcement of the Agency's capacity and functions. Once put into effect, this initiative will not only enhance the capabilities of these operations but also broaden their geographical scope. This expansion aligns with Frontex's dual mandate of coordinating operational border support to Member States facing challenges and contributing to life-saving efforts for migrants at sea.

Based on the more general assertion that there is a need, beyond immediate measures, to radically rethink the way the common external borders are managed,<sup>125</sup> the Commission presented in December 2015 a Proposal for a new Regulation on the European Border and Coast Guard<sup>126</sup>, formed by a European Coast Guard and Border Guard Agency - created from Frontex- and Member States' authorities responsible for border management, including coast guards to the extent that they carry out border control tasks<sup>127</sup>. This Proposal begins with the premise that the sheer scale of migratory flows which have crossed the external

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<sup>123</sup> International Organization for Migration (IOM). "Missing Migrants Project: Mediterranean Region." Retrieved from: <https://missingmigrants.iom.int/region/mediterranean>. Last Accessed: January 3, 2024.

<sup>124</sup> European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions a European Agenda on Migration, Brussels, 13.5.2015 COM (2015) 240 final.

<sup>125</sup> European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Commission Work Programme 2016, No time for business as usual, Strasbourg, 27.10.2015 COM(2015) 610 final, p.11: “*The crisis has shown that beyond these immediate steps, we need to fundamentally rethink the way we manage our common external border and our European asylum framework. Later this year the Commission will present proposals for a European Border and Coast Guard, building on a significant strengthening of Frontex.*”

<sup>126</sup> European Commission, Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC, Strasbourg, 15.12.2015 COM (2015) 671 final 2015/0310 (COD).

<sup>127</sup> Article 3.1 of the Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC, Strasbourg, 15.12.2015 COM (2015) 671 final 2015/0310 (COD).

borders of the EU have demonstrated that the existing Union structures are inadequate to address the challenges arising from such a large influx. Throughout the ongoing migration crisis, it became evident that the sustainability of the Schengen area, characterized by the absence of internal borders, relies heavily on the effective security and protection of external borders. The Commission reiterates the fact that the control of the Union's external borders is a common and shared interest which must be carried out in accordance with high and uniform Union standards. This function has become even more important in the light of the growing phenomenon of foreign fighters involved in terrorist attacks.<sup>128</sup> This proposal substantially expands upon the Agency's ability to effectively address existing or future threats at the external borders by proactively reinforcing, assessing, and coordinating the Member States' actions in the implementation of suitable measures.

According to the Proposal, the European Coast Guard and Border Guard Agency has to define an operational and technical strategy for integrated European border management, with respect to which national strategies have to consistently align<sup>129</sup>. Moreover, these subjects bear a general obligation to exchange information with each other<sup>130</sup> and a mutual duty to cooperate in good faith<sup>131</sup>. Another notable change from Regulation 1168/2011 is seen in the provision establishing an unconditional obligation for Member States to make their border guards available for rapid interventions (but not for joint operations). In this regard, the proposal explicitly refers to the creation of a rapid reserve pool of at least 1,500 border guards as a permanent corps at the immediate disposal of the Agency<sup>132</sup>. The same principle applies to the Member States' obligation to contribute to the technical equipment pool. Even if limited to rapid interventions, Member States are no longer allowed to invoke the presence of an exceptional situation that prevents them from making their own

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<sup>128</sup> In 2015, Paris endured a series of terrorist attacks, notably the Charlie Hebdo shooting and the coordinated Islamist terrorist attacks that occurred in November.

<sup>129</sup> Article 3.2 and 3.3 of the Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC, Strasbourg, 15.12.2015 COM (2015) 671 final 2015/0310 (COD).

<sup>130</sup> Article 9 of the Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC, Strasbourg, 15.12.2015 COM (2015) 671 final 2015/0310 (COD).

<sup>131</sup> Article 8 of the Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC, Strasbourg, 15.12.2015 COM (2015) 671 final 2015/0310 (COD).

<sup>132</sup> Article 19.4 and 19.5 of the Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC, Strasbourg, 15.12.2015 COM (2015) 671 final 2015/0310 (COD).

equipment available<sup>133</sup>. As far as return operations are concerned, the Commission foresees that the Agency shall assist Member States to ensure the coordination or the organization of return operations but may also coordinate or organize return operations on its own initiative<sup>134</sup>.

The Commission's Proposal also extended Frontex's competences in the processing of personal data collected during joint operations, pilot projects and rapid border interventions and by migration management support teams. The Agency is now allowed to use personal data not only of persons who are suspected of involvement in cross-border criminal activities but also of persons who illegally cross external borders.<sup>135</sup> This choice was heavily criticized by many, including the European Data Protection Supervisor.<sup>136</sup>

A key innovation in the Proposal is the introduction of Liaison Officers from the Agency deployed in Member States. These experts, drawn from the Agency's staff, have the responsibility of fostering cooperation and dialogue between the Agency and national authorities. Liaison Officers are mandated to regularly monitor and report to the Executive Director on the Member State's capability to effectively handle situations at the external borders<sup>137</sup>. In situations requiring urgent action, the Commission has the authority to make decisions to implement necessary measures and mandate cooperation between the Agency and the Member State concerned. The right to intervene arises in two specific scenarios: if a Member State fails to take the necessary corrective measures, or in the event of *“disproportionate migratory pressure at the external border, rendering the control of the external borders ineffective to such an extent that it risks putting in jeopardy the functioning*

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<sup>133</sup> Article 37.4 and 38.4 of the Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC, Strasbourg, 15.12.2015 COM (2015) 671 final 2015/0310 (COD).

<sup>134</sup> Article 27.1 of the Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC, Strasbourg, 15.12.2015 COM (2015) 671 final 2015/0310 (COD).

<sup>135</sup> Article 46.1 of the Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC, Strasbourg, 15.12.2015 COM (2015) 671 final 2015/0310 (COD).

<sup>136</sup> European Data Protection Supervisor, Opinion 02/2016, EDPS' recommendations on the proposed European Border and Coast Guard Regulation: *“The EDPS recognizes this need for more effective manage of migration and for reinforcing internal security, which requires processing of personal data. However, the Commission's Proposal could also create a serious intrusion into the rights of migrants and refugees, a vulnerable group of people in particular need of protection.”*

<sup>137</sup> Article 11 of the Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC, Strasbourg, 15.12.2015 COM (2015) 671 final 2015/0310 (COD).

of the Schengen area”.<sup>138</sup> This last provision was both legally and politically controversial. It raised serious concerns in most Member States, which were preoccupied that it would affect their sovereignty and give too much power to the Commission.<sup>139</sup>

## 5.2 The Setbacks of Regulation (EU) 2016/1624<sup>140</sup>

Despite the aforementioned divergences on the possibility of providing Frontex the right to intervene with a strong role of the European Commission, the Proposal did not go so far as to create a “true” European Border and Coast Guard, understood as a supranational body. In truth, the scholarship considered the new tasks assigned to the EBCG not to be sufficient to respond to the ongoing migration crisis.<sup>141</sup> However, these concerns went entirely unaddressed. The emergency and securitarian logic that had characterized the European institutions resulted in an accelerated approval of the Proposal, taking only 9 months.

This does not mean that no modifications were implemented. The markedly supranational inclination given to the Regulation Proposal, under which Frontex could not only monitor but also sanction non-compliant Member States, was significantly downsized during consultations.

With regard to the right to intervene, the European Commission was unsuccessful with its attempt to gain more competences in border management, as the decision-making powers moved to the Council.<sup>142</sup> In addition, the measures to be taken by the Agency in situations

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<sup>138</sup> Article 18.1 of the Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC, Strasbourg, 15.12.2015 COM (2015) 671 final 2015/0310 (COD).

<sup>139</sup> Hrabalek, M. and Burianová, S. (2019) “To Intervene or Not to Intervene? Positions of the Member States Towards the Article 18 of the European Border and Coast Guard Proposal”, *Slovak Journal of Political Sciences*, 19(1).

<sup>140</sup> Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC.

<sup>141</sup> Carrera, Sergio and Den Hertog, Leonhard, A European Border and Coast Guard: What's in a Name? (March 8, 2016). CEPS Paper in Liberty and Security in Europe, p. 16: “*This paper has argued that the EBCG proposal would not lead to a truly European border guard. It would strengthen the current competences of the Frontex agency, but it would still not remedy the shortcomings of Frontex.*”

<sup>142</sup> Article 19.1, Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European

at the external borders requiring urgent action could only be taken after an agreement with the State in question<sup>143</sup>. And in the event of non-cooperation with the Agency's provisions, the Commission could recommend the reintroduction of internal border controls under Article 29 of the Schengen Borders Code<sup>144</sup>. Essentially, under the new mandate, whereas the Agency is responsible for crafting operational plans for joint operations and coordinating diverse national policies, the legal authority and accountability for the operation still rest with the Member State where the operation occurs. In this framework, Member States contribute the majority of human and technical operational resources for the operation, it's like "*they made themselves co-responsible of their respective borders*"<sup>145</sup>. While progress has been made, it is equally true that this is not enough to create centralized management of the EU's external borders in a truly supranational structure.

In the matter of processing of personal data collected during joint operations, pilot projects and rapid border interventions and by migration management support teams, Regulation 2016/1624 made an ambiguous compromise. It reaffirmed the principle according to which the Agency can process personal data regarding persons who cross the external borders without authorization, adding that it "*shall only be transferred to law enforcement authorities in specific cases and when strictly necessary for the purpose of preventing, detecting, investigating or prosecuting serious crime*"<sup>146</sup>. From my perspective this represents a cosmetic amendment, which refers to a symbolic modification that may enhance the regulatory framework's appearance without substantially altering its operational dynamics.

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Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC.

<sup>143</sup> Article 19.5, Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC.

<sup>144</sup> Article 29, Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code).

<sup>145</sup> Martin Deleixhe & Denis Duez (2019) The new European border and coast guard agency: pooling sovereignty or giving it up? *Journal of European Integration*, 41:7, 921-936, p.932: "*The difference with the pre-existing situation may be subtle but it is nevertheless a clear departure from the doctrine of a unique and supreme authority concentrating all power over border controls. The exercise of sovereignty is turned partially (that is, on a specific policy issue and during emergency situations only) into a collective endeavor shared among different members of a select club.*"

<sup>146</sup> Article 47.2, Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC.

### **5.3 The EU's Hotspot Approach to Managing the Migration Crisis**

Article 2 of Regulation (EU) 2016/1624 defines the term hotspot area as an “*area in which the host Member State, the Commission, relevant Union agencies and participating Member States cooperate, with the aim of managing an existing or potential disproportionate migratory challenge characterized by a significant increase in the number of migrants arriving at the external borders*”<sup>147</sup>. This means that these designated areas serve as collaborative hubs where multiple entities work together to address and navigate situations involving a notable surge in migrant arrivals at the external borders. In particular, cooperation was requested from three agencies: EASO, Frontex and Europol - capable of assisting national authorities in the rapid implementation of operations for the identification, registration and fingerprinting of arriving migrants.

What on the surface appears to be an efficient solution to the migration crisis that has gripped in Europe since 2015, actually hides a dark truth underneath. Hotspots are constantly in the public spotlight because of the countless complaints received about the degrading living conditions and the violation of human rights<sup>148</sup>. In this context, the European Border and Coast Guard Agency became the primary entity responsible for setting up and coordinating the hotspot system. Yet, their activities over the years have revealed mixed priorities: a focus on border control and return operations often takes precedence over addressing international protection needs.

## **6. Regulation (EU) 2019/1896**

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<sup>147</sup> Article 2 (10), Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC.

<sup>148</sup> Amnesty International, Rapporto Hotspot Italia, November 3, 2016. Retrieved from: <https://www.amnesty.it/rapporto-hotspot-italia/> Last Accessed: January 5, 2024.



## 6.1 Political Background

The EBCG Regulation from 2016 proved to be particularly ambitious, but as is often the case in European decision-making, it left several issues unresolved or half-baked. These included the division of competencies between the state and European levels, the policy framework, the respect for fundamental rights, and the allocation of human and financial resources.<sup>149</sup> In response to these issues, the Commission presented a comprehensive proposal in September 2018. Before analyzing this proposal, however, it is critical to discuss the political context in which it was conceived.

The rise of populist parties in multiple Member States and the imminent European Parliament elections in May 2019 added new momentum to debates about how to strengthen EU external border controls.<sup>150</sup> In the words of German Chancellor Angela Merkel, the fate of the EU may depend on its ability to face the “*make or break*” migration challenge.<sup>151</sup> Consequently, migration was a top priority for the EU in 2018. This is evident on three separate occasions: the Multiannual Financial Framework in February, the June European Council, and the SOTEU speech in September.

Agreement on a new Multiannual Financial Framework for the period 2021 to 2027 represented a key moment for EU leaders to reaffirm their commitment to a positive agenda and to Europe itself. It was an opportunity to choose a more united, stronger, and more democratic Union, along with a budget that could deliver it. When presenting the options for the future financial framework, the Commission posed the question: How can the EU budget support better management of the EU's external borders? The EU budget plays a crucial role in ensuring effective migration management, countering terrorism, and addressing cyber threats. Additionally, it is instrumental in reinforcing the control of external borders.<sup>152</sup> During the 2021-2027 period, the Agency will require a total EU contribution of €11.27 billion to cover the upgraded tasks and functions, primarily related to the

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<sup>149</sup> Emilio De Capitani (2019), *La nuova Guardia di frontiera e costiera europea (Regolamento (UE) 2019/1896): un primo esempio di amministrazione integrata nazionale/europea?*

<sup>150</sup> European Policy Center, I. Angelescu and F. Trauner, September 2018, *10,000 border guards for Frontex: Why the EU risks conflated expectations*, p.2.

<sup>151</sup> Reuters, *Migration challenge is make-or-break for EU, says passionate Merkel*, June 28, 2018.

<sup>152</sup> Communication from the Commission to the European Parliament, the European Council and the Council, *A new, modern Multiannual Financial Framework for a European Union that delivers efficiently on its priorities post-2020*, The European Commission's contribution to the Informal Leaders' meeting on 23 February 2018, Brussels, 14.2.2018 COM (2018) 98 final.

implementation of the European Border and Coast standing corps and the acquisition of the Agency's own equipment.

In June 2018, the European Council expressed its intention to step up the effective return of irregular migrants by further strengthening the role of Frontex. EU leaders confirmed the need for a more effective control of the EU's external borders by providing additional resources and expanding the Agency's mandate.<sup>153</sup>

In his SOTEU speech<sup>154</sup> in September 2018, Jean-Claude Juncker proposed to achieve this goal by providing the Agency with a “*standing corps of 10,000 operational EU staff with executive power and their own equipment*” to permit the EU to “*intervene wherever and whenever needed.*”<sup>155</sup> He goes on to say that: “*We cannot continue to squabble to find ad-hoc solutions each time a new ship arrives. Temporary solidarity is not good enough. We need lasting solidarity – today and forever more.*”<sup>156</sup>

The suggested increase in Frontex's resources was anticipated to be a crucial argument in countering criticism from populist parties and demonstrating its commitment to managing migration effectively. In effect, in order to function efficiently, the Agency requires not only additional funding and personnel but also greater cooperation from Member States in sharing their sovereignty. Frontex does not take over the national responsibility to protect the Union's external borders, as this remains a Member State prerogative. However, in emergency situations, Frontex has special powers, and the Commission, rather than the Council, decides whether Frontex has the right to intervene.

Within the context of the State of the European Union, the Commission explored the concept of disembarkation centers, also referred to as controlled centers. These centers could be established to register and process the claims of individuals disembarked in the EU, in order to differentiate rapidly between those in need of protection and those who have no right to stay in the EU. The role of the European Border and Coast Guard would be to assist in

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<sup>153</sup> European Council meeting (28 June 2018) – Conclusions, Brussels, 28 June 2018 (OR. en) EUCO 9/18 CO EUR 9 CONCL 3.

<sup>154</sup> The State of the European Union or SOTEU, is the annual speech addressed by the President of the European Commission to the European Parliament plenary session in September. It was instituted by the Lisbon Treaty in order to make the political life of the Union more democratic and transparent.

<sup>155</sup> European Commission - Fact Sheet State of the Union 2018: A fully equipped European Border and Coast Guard – Questions and Answers Strasbourg, 12 September 2018

<sup>156</sup> State of the Union 2018, The hour of European Sovereignty, Authorized version of the State of the Union Address (2018).

identifying and returning irregular migrants who have no right to remain in the EU. The centers would be managed by the host Member State with full support from the EU and its agencies and could have a temporary or ad-hoc nature depending on the location. Frontex would work closely with the EU Agency for Asylum, which would support the processing of asylum applications.<sup>157</sup>

## 6.2 The Commission's Proposal

The Proposal for a Regulation on the EBCG solidifies Frontex's role as a central element in the EU's efforts to address and manage undesired migration. According to the Commission, Frontex is slated to assume certain responsibilities previously carried out by national border guards. These include tasks like conducting identity checks, approving or denying entry at border crossing points, stamping travel documents, overseeing border patrols, and intercepting individuals who have irregularly crossed borders. Although the Commission specifies that these activities would take place under the authority and control of the host Member State, there is a likelihood that Frontex could gain a significant level of autonomy in these aspects, including practical procedures for returns.<sup>158</sup>

The Commission begins by explaining the context surrounding the Proposal, then proceeds to list the reasons for improving the functioning of the EBCG, and lastly its objectives.

Among the reasons is the fact that *“a continuous high level of engagement is needed to ensure a proper and long-lasting protection of the external borders”*<sup>159</sup>. According to the 2016 Regulation, the mandatory Rapid Reaction Pool of 1,500 border guards could only be activated in emergency situations for rapid border interventions. For operational support to frontline Member States under regular joint operations, the Agency continued to rely entirely

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<sup>157</sup> European Commission. (2018, September 12). Press Release: State of the Union 2018: Commission proposes measures for a more secure, resilient and sustainable EU gas network. Retrieved from: [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_18\\_4629](https://ec.europa.eu/commission/presscorner/detail/en/IP_18_4629). Last Accessed: January 8, 2024.

<sup>158</sup> European Policy Center, I. Angelescu and F. Trauner, September 2018, 10,000 border guards for Frontex: Why the EU risks conflated expectations, p.3.

<sup>159</sup> Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Council Joint Action n°98/700/JHA, Regulation (EU) n° 1052/2013 of the European Parliament and of the Council and Regulation (EU) n° 2016/1624 of the European Parliament and of the Council, A contribution from the European Commission to the Leaders' meeting in Salzburg on 19-20 September 2018, Brussels, 12.9.2018 COM(2018) 631 final 2018/0330 (COD), p.4.

on the voluntary pooling of Member States' human and technical resources, which often failed to meet the established needs. There is a clear need for the Agency to have a permanent, fully trained staff that can be deployed anywhere at any time. Therefore, the objective of this Proposal is to address the identified shortcomings, meet the then-present needs, and ensure the EU's strategic readiness to respond to future challenges.<sup>160</sup>

The Commission's major change is to establish a European Border and Coast Guard standing corps of 10,000 operational staff with executive powers. This would provide the Agency with its own operational arm. The Commission considers this “*game changer*” a reliable solution and a “*blueprint*” for EU border management implementation.<sup>161</sup>

The European Border and Coast Guard standing corps should be composed of three categories of operational staff: those employed directly by the Agency; those seconded to the Agency by the Member States for longer durations; and those mandatorily provided by Member States for short-term deployment.<sup>162</sup> This modular composition provides flexibility to adapt the Agency's engagement based on operational needs.

The Agency's statutory staff would have executive powers for border control and return tasks. The legal basis to confer these powers of law enforcement to the agents acting on behalf of the Union is Article 77.2 (d) TFEU<sup>163</sup>. However, it is important to clearly define these powers and tasks to align with the objective of establishing an integrated management system for external borders.

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<sup>160</sup> Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Council Joint Action n°98/700/JHA, Regulation (EU) n° 1052/2013 of the European Parliament and of the Council and Regulation (EU) n° 2016/1624 of the European Parliament and of the Council, A contribution from the European Commission to the Leaders' meeting in Salzburg on 19-20 September 2018, Brussels, 12.9.2018 COM(2018) 631 final 2018/0330 (COD), p.6.

<sup>161</sup> Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Council Joint Action n°98/700/JHA, Regulation (EU) n° 1052/2013 of the European Parliament and of the Council and Regulation (EU) n° 2016/1624 of the European Parliament and of the Council, A contribution from the European Commission to the Leaders' meeting in Salzburg on 19-20 September 2018, Brussels, 12.9.2018 COM(2018) 631 final 2018/0330 (COD), p.2.

<sup>162</sup> Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Council Joint Action n°98/700/JHA, Regulation (EU) n° 1052/2013 of the European Parliament and of the Council and Regulation (EU) n° 2016/1624 of the European Parliament and of the Council, A contribution from the European Commission to the Leaders' meeting in Salzburg on 19-20 September 2018, Brussels, 12.9.2018 COM(2018) 631 final 2018/0330 (COD), p.7.

<sup>163</sup> Article 77.2 (d) TFEU: the Union shall adopt “*any measure necessary for the gradual establishment of an integrated management system for external borders*”.

The Proposal emphasizes the mandatory nature of Member States' contributions, both short and long term. This is the only way to ensure that the Agency has the necessary contributions for its activities and to guarantee the functionality of the Schengen area with solidarity and responsibility.

Another significant change made by the Proposal is represented by the merging of the 2016 EBCG Regulation and the Eurosur Regulation adopted in 2013. The incorporation of Eurosur into the European Border and Coast Guard Proposal not only enhances the functionality of Eurosur but also expands its scope to encompass most aspects of Integrated Border Management. This integration results in the further improvement of Eurosur's capabilities, by increasing the quality of the data exchanged, the security and the reactivity of the systems.<sup>164</sup>

All things considered, the proposal for 10,000 new border guards for Frontex sparked intense discussions regarding the desired approach to border management within the EU and its member states. Nevertheless, it is crucial not to assume that allocating more resources to Frontex will inherently lead to a decrease in the number of asylum seekers and irregular migrants.<sup>165</sup>

### **6.3 Innovations**

Examining the novelties introduced by Regulation (EU) 2019/1896 is essential as it currently constitutes the regulatory framework in effect today. The European Parliament and the Council dealt with the Proposal in record time and approved it on 17 April 2019, at the end of the parliamentary term. The 124 Articles of the new Regulation entered into force on 4 December 2019. They represent an organic framework of the first form of integrated administration of the protection of the Union's external borders at supranational and national

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<sup>164</sup> Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Council Joint Action n°98/700/JHA, Regulation (EU) n° 1052/2013 of the European Parliament and of the Council and Regulation (EU) n° 2016/1624 of the European Parliament and of the Council, A contribution from the European Commission to the Leaders' meeting in Salzburg on 19-20 September 2018, Brussels, 12.9.2018 COM(2018) 631 final 2018/0330 (COD), p.9.

<sup>165</sup> "A more powerful Frontex agency will not be the catch-all solution to reduce migratory pressures". European Policy Center, I. Angelescu and F. Trauner, September 2018, 10,000 border guards for Frontex: Why the EU risks conflated expectations, p.4.

levels responding for the first time in an all-too-consistent manner to the criticisms that had been presented to the previous legislative texts and to the requests of Frontex itself.<sup>166</sup>

Article 3<sup>167</sup> outlines the holistic components of European integrated border management (IBM), covering aspects such as border control, search and rescue operations, risk analysis, information exchange, inter-agency collaboration, cooperation with third countries, technical measures, and return mechanisms. It underscores the importance of fundamental rights, education, and research. The integration of state-of-the-art technology, quality control mechanisms, and the provision of solidarity measures supported by Union funding are underscored as pivotal elements for ensuring successful implementation. The notion of European integrated border management<sup>168</sup> took shape in its essential components in the 2016 reform but was confirmed and made more coherent by the 2019 Regulation.

As delineated in Article 4<sup>169</sup>, the European Border and Coast Guard emerges as a collaborative entity comprising both the supranational Agency and national authorities charged with border management, including coast guards involved in border control tasks, and national authorities responsible for return. This integration signifies that IBM is a shared responsibility<sup>170</sup> between the Agency and the national authorities. While Member States retain primary responsibility for their borders, the guidelines for national actions are now set at the European level. In addition, it is foreseen that the Agency is accountable "*for its actions to the European Parliament and the Council*"<sup>171</sup>, i.e. to the institutions that created it and not to the Commission alone, like most other European Agencies.

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<sup>166</sup> Emilio De Capitani (2019), *La nuova Guardia di frontiera e costiera europea (Regolamento (UE) 2019/1896): un primo esempio di amministrazione integrata nazionale/europea?*

<sup>167</sup> Article 3, Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624.

<sup>168</sup> Defined as: "*National and international coordination and cooperation among all relevant authorities and agencies involved in border security and trade facilitation to establish effective, efficient and coordinated border management at the external EU borders, in order to reach the objective of open, but well controlled and secure borders.*" European Migration Network. "European Integrated Border Management." EMN Asylum and Migration Glossary. Retrieved from: [https://home-affairs.ec.europa.eu/networks/european-migration-network-emn/emn-asylum-and-migration-glossary/glossary/european-integrated-border-management\\_en](https://home-affairs.ec.europa.eu/networks/european-migration-network-emn/emn-asylum-and-migration-glossary/glossary/european-integrated-border-management_en). Last Accessed January 10, 2024.

<sup>169</sup> Article 4, Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624.

<sup>170</sup> Article 7, Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624.

<sup>171</sup> Article 6, Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624.

The Commission and the EBCG ensure the effectiveness of European integrated border management by means of a multiannual strategic policy cycle. This policy provides strategic guidelines for a period of five years, and sets out how to address challenges in a coherent and systematic manner.<sup>172</sup> On the basis of the multiannual strategic policy cycle, the Agency establishes an integrated planning process for border management and return, including operational planning, contingency planning and capability development planning processes.<sup>173</sup> The 2019 Regulation confirmed the general obligation to exchange information and the duty to cooperate in good faith<sup>174</sup>, which were already foreseen in the 2016 Regulation.

Section 3 of Regulation (EU) 2019/1896 is dedicated entirely to Eurosur.<sup>175</sup> With this Regulation, the integration of Eurosur into the European Border and Coast Guard Agency, as envisaged by the Commission, has finally become a reality. The exchange and processing of information between the national and supranational levels is therefore facilitated by the Eurosur information system, which became the reference hub for the Agency. This consolidation ensures a more unified and responsive approach to safeguarding the EU's external borders.

The vocation of the new European Border Guard to become the first integrated border police and intelligence system at European level is confirmed by the “situational awareness” of the EU's border management framework. This concept emphasizes a thorough understanding of events and operational activities related to border security. It establishes three types of situational pictures—national, European, and specific—generated through the collection, evaluation, and analysis of information. These situational pictures encompass layers focusing on events (e.g., unauthorized border crossings), operations (e.g., deployment plans), and analysis (e.g., imagery and key developments).<sup>176</sup> The objective is to grasp

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<sup>172</sup> Article 8, Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624.

<sup>173</sup> Article 9, Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624.

<sup>174</sup> Articles 11 and 12, Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624.

<sup>175</sup> Articles 11-23, Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624.

<sup>176</sup> Article 24, Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624.

migratory trends, volume, and routes, ultimately aiding in the identification and tracking of events and operations, particularly those involving risks to human lives.

With this new Regulation, the European Border and Coast Guard Agency implements a comprehensive risk analysis and vulnerability assessment framework. On one side, risk analysis involves monitoring migratory flows, assessing trends, and identifying challenges at external borders<sup>177</sup>. The Agency establishes a common integrated risk analysis model to systematically evaluate and address risks collaboratively with Member States, ensuring a coordinated and proactive approach to border management. On the other side, the aim of the vulnerability assessment is for the Agency to assess, in qualitative and quantitative terms, the capacity and readiness of Member States to face present and upcoming challenges at the external borders, including their capacity to deal with the potential arrival of large numbers of persons on their territory<sup>178</sup>.

The 2019 Regulation also determines the measures to be taken once the risks in the different sections of the EU external border have been identified, which each country must keep under control in its own interest and that of other EU countries (as well as neighboring third countries). To that end, each Member State divides its external borders into sections that may consist of land, sea and air, and notifies such external border sections to the Agency.<sup>179</sup>

On the basis of the Agency's risk analysis and vulnerability assessment and in agreement with the Member State concerned, the Agency attributes the following impact levels to each external border section: (a) low impact level; (b) medium impact level; (c) high impact level; (d) critical impact level.<sup>180</sup> Each border section is classified according to the level of vulnerability and the possible risk it represents and the measures to be taken to deal with it.

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<sup>177</sup> Article 29, Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624.

<sup>178</sup> Article 32, Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624.

<sup>179</sup> Article 30, Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624.

<sup>180</sup> Article 34, Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624.



The critical impact level is only temporarily attributed in cases where incidents have a decisive impact on border security to such an extent that they risk jeopardizing the functioning of the Schengen area. In such circumstances, the Executive Director issues a recommendation to the Member State concerned, to request that the Agency initiate, carry out or adjust joint operations, rapid border interventions or any other relevant actions. If the recommendation is rejected, the Member State must provide reasons for doing so.<sup>181</sup> In urgent situations requiring immediate action, the Council<sup>182</sup> may adopt a decision identifying measures for implementation by the Agency and requiring the Member State concerned to cooperate with the Agency.

Regulation (EU) 2019/1896 dedicates a section to "Actions of the Agency at the external borders" and another to "Actions of the Agency in the area of return".

As per the actions at the external border, it is stipulated that Member States may request the Agency's assistance in fulfilling their obligations for external border control. This assistance may consist in, inter alia, the coordination of joint operations, the organization of rapid border interventions, and the support in search and rescue operations.

When analyzing joint operations, it is crucial to consider Article 38 on operational plans<sup>183</sup>.

These plans are comprehensive documents that outline the organizational and procedural details of joint operations at the external borders of the European Union. The plan is a meticulously crafted and binding document, developed collaboratively by the executive director of the European Border and Coast Guard Agency, in cooperation with the host Member State and in consultation with participating Member States. The document outlines all necessary aspects for conducting a joint operation, such as duration, geographical area, tasks, responsibilities, command structure, technical equipment, reporting mechanisms, and safeguards for fundamental rights. It is important to note the level of detail in these "rules of

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<sup>181</sup> Article 41, Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624.

<sup>182</sup> The Council may adopt such a decision on the basis of a proposal from the Commission, which consults the Agency before making its proposal. Article 42, Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624.

<sup>183</sup> Article 38, Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624.

engagement”<sup>184</sup>, which appear to be dictated by experience in the field and Frontex's desire to overcome possible bottlenecks and misunderstandings about their respective roles. The Member States involved must agree on the content of these rules before each operation. Beyond their operational significance, these rules play a pivotal role in delineating the legislative framework, particularly in the context of operations conducted in international waters. The topic of operational plans will be further discussed in relation to Frontex's accountability.

As per the actions in the area of return, “*without entering into the merits of return decisions, which remain the sole responsibility of the Member States, and in accordance with the respect for fundamental rights, general principles of Union law and international law, including international protection, the respect for the principle of non-refoulement and children's rights, with regard to return, the Agency shall provide technical and operational assistance to Member States in the area of return.*”<sup>185</sup> With the agreement of the Member State concerned Frontex may also coordinate or organize return operations on its own initiative.<sup>186</sup> The repeated references in the Regulation to the sole responsibility of Member States and the imperative to respect fundamental rights evoke a critical consideration. In a context where certain EU member countries do not consistently uphold fundamental rights, Frontex faces the challenge of navigating a landscape where an absolute presumption of the legitimacy of national return decisions may be untenable.

Article 54<sup>187</sup>, which defines the volume and characteristics of the standing corps, is one of the main innovations of the new Regulation. As previously addressed in the Proposal, the Agency included the European Border and Coast Guard standing corps with a capacity of up to 10 000 operational staff by 2027.<sup>188</sup> This Article specifies the four categories of personnel that make up this permanent corps, namely: statutory personnel of the Agency,

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<sup>184</sup> Operational plan.

<sup>185</sup> Article 48, Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624.

<sup>186</sup> Article 50, Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624.

<sup>187</sup> Article 54, Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624.

<sup>188</sup> The significant rise in numbers, especially when compared to the initially planned 170 Frontex officials in 2004, shows that the operational structure has become much larger than originally envisioned.

personnel seconded to the Agency by Member States on a long-term basis, personnel from Member States put at the disposal of Frontex for short-term deployments and, finally, the rapid reaction reserve, composed of personnel from Member States ready to be deployed in rapid interventions. The Proposal did not include category 4 staff, which has been added as an additional guarantee. Category 4 staff should be activated only after the operational staff in categories 1, 2, and 3 have been fully deployed for rapid border intervention.<sup>189</sup>

The statutory staff of Frontex deployed in teams are authorized to perform tasks requiring executive powers, in accordance with the conditions set out by Article 82<sup>190</sup>. This authorization is contingent upon the approval of the host Member State and compliance with “*applicable Union, national, or international law, in particular Regulation (EU) No 656/2014, as described in the operational plan referred to in Article 38*”<sup>191</sup>. Moreover, both team members and Agency staff may, with the host Member State's authorization, use force, “*including the carrying and use of service weapons, ammunition and equipment*”<sup>192</sup>. This authorization is subject to the consent of their respective Member State or, in the case of statutory personnel, the Agency. The use of force must align with the national law of the host Member State and must occur in the presence of border guards from that state. The host Member State, with the consent of the home Member State or the Agency, when appropriate, may grant authorization for team members to use force on its territory even in the absence of border guards from the host Member State.

In conclusion, Regulation (EU) 2019/1896 is certainly the most ambitious and complex intervention approved in the field of border control in recent years. However, it is important to consider whether it is sufficient to guarantee the protection of fundamental rights at external borders and at sea.

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<sup>189</sup> Article 58, Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624.

<sup>190</sup> Article 55.7, Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624.

<sup>191</sup> Article 82.2, Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624.

<sup>192</sup> Article 82.8, Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624.

### **Chapter III. The Protection of Fundamental Rights within the Framework of Frontex**

We have tracked the evolution of Frontex in terms of its institutionalization, observing how it was created and how its functions have expanded over the years. Specifically, the previous chapter analyzed how the mandate of the Agency was implemented, Regulation after Regulation. However, it is crucial for this thesis to consider whether this expansion has been accompanied by a respect for the fundamental rights of migrants.

It is a well-known fact that the plight of migrants dying at sea and the actions of Frontex have been under intense scrutiny concerning the protection of human rights. Vulnerable individuals, such as migrants, receive inadequate protection due to various reasons, including a lack of legal status and the discrimination and stereotyping they may face. Often without proper documentation, they may encounter significant challenges leaving them vulnerable to exploitation and limited legal safeguards.

According to preliminary calculations by Frontex, the number of irregular border crossings at the EU's external border in 2023 reached a total of approximately 380 000, driven by a rise in arrivals via the Mediterranean region. Hans Leijten, the current Executive Director, stated: *“The numbers presented today show the evolving challenges we face in managing the EU's external borders. We remain committed to ensuring the security and integrity of the EU's borders. It's equally crucial to address the humanitarian aspects of migration. These figures represent not just statistics but real people”*.<sup>193</sup>

This chapter analyzes the protection offered to migrants on paper and how it has evolved over the years. It starts with Regulation (EC) 2007/2004 and walks through each reform that has intervened to manage the Agency. The objective is to assess the EU's attempt to reconcile its practices of extraterritorial border control coordinated by Frontex in the Mediterranean with international human rights law, notably the principle of non-refoulement.

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<sup>193</sup> Frontex, Significant Rise in Irregular Border Crossings in 2023: Highest Since 2016. Retrieved from: <https://www.frontex.europa.eu/media-centre/news/news-release/significant-rise-in-irregular-border-crossings-in-2023-highest-since-2016-C0gGpm#:~:text=The%20number%20of%20irregular%20border,to%20preliminary%20calculations%20by%20Frontex,> Last Accessed: February 10, 2024.

## **1. The total absence of References to the Protection of Fundamental Rights in Regulation (EC) 2007/2004**

Although the creation of Frontex entailed a considerable increase in the level of centralisation and institutionalization of European policies on the control of the external borders of the European Union, Regulation (EC) 2007/2004 limited itself to only provide a generic respect of fundamental rights and of the "*principles recognized by Article 6(2) of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union*"<sup>194</sup>.

Otherwise stated, while the founding Regulation referred to the organizational capacity and procedural details aiming to facilitate the collaborative effort of border control, it remained silent regarding human rights obligations. According to a well-established line of doctrine<sup>195</sup>, this silence can be explained in two ways. First, Member States felt the need to tackle irregular migration as soon as possible. Second, this insufficient guarantee was justified by the provision<sup>196</sup> under which the Agency was limited to coordinating the actions undertaken by the border guards of the Member States, thus leaving them the responsibility for the correct application of the relevant standards, including those relating to the protection of human rights.

The reaction of human rights groups, academics, and inter and supranational organizations towards Frontex operations was underestimated by this framework. The absence of legal precision was criticized for creating a legal vacuum that promotes practices that violate international human rights law.

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<sup>194</sup> Paragraph 22, COUNCIL REGULATION (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

<sup>195</sup> Slominski, P. (2013), The Power of Legal Norms in the EU's External Border Control. *Int Migr*, 51: 41-53. <https://doi.org/10.1111/imig.12089>, p. 44-45.

<sup>196</sup> Article 1.2, COUNCIL REGULATION (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

## 1.1 The Charter of Fundamental Rights of the EU

The Charter of Fundamental Rights of the European Union<sup>197</sup> brings together the most important personal freedoms and rights enjoyed by citizens of the EU<sup>198</sup>. The Charter was solemnly proclaimed at the Nice summit on 18 December 2000 and became legally binding with the entry into force of the Lisbon Treaty in December 2009<sup>199</sup>.

The protection offered by the Charter is rooted in the collective international obligations shared by Member States<sup>200</sup>. It required harmonization with the protection provided by the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)<sup>201</sup>.

Various provisions of the Charter are relevant in the context of the activities carried out by Frontex. Of primary importance is the protection granted by Article 18 and 19 of the Charter, respectively on the right to asylum and protection in the event of removal, expulsion or extradition.

Article 18 accords protection to individuals fleeing persecution or serious threats in their home country. The right to asylum is guaranteed “*with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community*”<sup>202</sup>.

Article 19 begins by asserting the prohibition of collective expulsions. It then states that “*no one may be removed, expelled or extradited to a State where there is a serious risk that he*

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<sup>197</sup> European Union. (2000). Charter of Fundamental Rights of the European Union. (2000/C 364/01).

<sup>198</sup> Such as human dignity, the right to life, the right to liberty and security, freedom of thought and expression.

<sup>199</sup> Article 6.1, Consolidated Version of the Treaty on European Union (2012): “*The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.*”

<sup>200</sup> Preamble, Charter of Fundamental Rights of the European Union. (2000/C 364/01)

<sup>201</sup> Article 52.3, Charter of Fundamental Rights of the European Union. (2000/C 364/01). The Charter aligns its rights with those guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, ensuring that the interpretation and scope of these rights mirror the standards set by the Convention.

<sup>202</sup> Article 18, Charter of Fundamental Rights of the European Union. (2000/C 364/01). This indicates a commitment to internationally recognized standards for the treatment of refugees and a unified approach to asylum protection within the EU.

*or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment*”<sup>203</sup>.

Frontex’s work was also conditioned, at the level of secondary law, by the respect of the Schengen Borders Code (SBC), which enshrines respect for fundamental rights and principles recognised by the Charter of Fundamental Rights of the European Union, as well as “*Member States’ obligations as regards international protection and non-refoulement*”<sup>204</sup>.

## **1.2 The Principle of non-refoulement**

The most important implication of Articles 18 and 19 of the Charter is the principle of non-refoulement, protected directly by Article 33 of the UN Convention relating to the Status of Refugees, and indirectly, by the ECHR and the Covenant on Civil and Political Rights.

The principle of non-refoulement is a fundamental principle of international law: under Article 33 of the 1951 Geneva Convention, no contracting State shall expel or return (“refoule”) a refugee to the frontiers of territories where their life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion.<sup>205</sup>

Refoulement consists, in essence, of any form of forced removal to an unsafe country. This establishes the obligation for states to not forcibly return individuals or a certain group of persons present in their territory to a country where they may face persecution. The principle of non-refoulement is the cornerstone of asylum-seekers' protection because it is the only guarantee that refugees will not be subjected again to the persecution that caused their departure. It responds to the refugee’s need to enter the asylum country. However, it does

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<sup>203</sup> Article 19, Charter of Fundamental Rights of the European Union. (2000/C 364/01).

<sup>204</sup> Paragraph 20, Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code).

<sup>205</sup> Article 33, Convention relating to the Status of Refugees, United Nations. (1951).

not explicitly guarantee access to the territory of the destination state or admission to the procedures granting refugee status.<sup>206</sup>

As a result of the jurisprudence of the European Court of Human Rights<sup>207</sup>, the prohibition of refoulement applies to all individuals, regardless of their refugee status or whether they have applied for recognition as a refugee. Additionally, the principle of non-refoulement is recognized as a corollary to the prohibition of torture and inhuman and degrading treatment, regulated by Article 3 of the Convention<sup>208</sup>. Since the European Court of Human Rights (ECHR) declared the prohibition of torture as jus cogens<sup>209</sup>, this connection could give the prohibition of refoulement an absolute status and make it a non-derogable right. However, the jus cogens nature of the non-refoulement principle is still a topic of debate.<sup>210</sup>

### 1.3 A Closer Look at Criticisms

Despite the existence of these guarantees in primary and secondary EU law, Frontex's work has faced strong reservations, first and foremost by NGOs and associations protecting the rights of migrants and refugees.<sup>211</sup>

Criticism has also been received from the European Council on Refugees and Exiles (ECRE)<sup>212</sup> and the United Nations High Commissioner for Refugees (UNHCR). The latter

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<sup>206</sup> Seline Trevisanut, The principle of non refoulement at sea and the effectiveness of asylum protection, Max Planck Yearbook of United Nations Law, Volume 12, p.205-246 (2008), p.208.

<sup>207</sup> Hirsi Jamaa and Others v. Italy, Application No. 27765/09, European Court of Human Rights, 2012.

<sup>208</sup> Article 3, Convention relating to the Status of Refugees, United Nations. (1951).

<sup>209</sup> Saadi v. Italy, Application No. 37201/06, European Court of Human Rights, 2008.

<sup>210</sup> Giulia Baj, Il Principio di non-refoulement: Criticità applicative, Il Politico (Univ. Pavia, Italy) 2019, anno LXXXIV, n. 1, pp. 25-46, p.36.

<sup>211</sup> Sarah Léonard, FRONTEX and the Securitization of Migrants through Practices, 2011, p. 3. “*Its activities have generated much controversy and have been heavily criticized especially by human rights activists and pro-migrant groups. Several blogs and websites that are critical of the actions of European states and the EU towards migrants and asylum-seekers specifically focus on FRONTEX, such the blog entitled Frontexwatch and the website of the Noborder network. Several pro-migrant associations have rallied around a ‘Shut down FRONTEX!’ slogan, whilst demonstrations have taken place not only in front of the seat of the Agency in Warsaw, but also in other towns and cities where FRONTEX training sessions took place, such as in Lübeck in August 2008.*”<sup>5</sup> The German nongovernmental organization (NGO) PRO ASYL handed in a petition to the European Parliament in December 2008 that demanded notably the following: ‘*Stop the deathtrap at the EU borders! FRONTEX activities which violate human rights must cease!*’ (PRO ASYL 2008)”.

<sup>212</sup> “*Frontex fails to demonstrate adequate consideration of International and European asylum and human rights law including the 1951 Convention relating to the Status of Refugees and European Community (EC law) in respect of access to asylum and the prohibition of refoulement*” House of Lords, European Union



suggested incorporating a reference to international obligations, particularly the principle of non-refoulement, into the Frontex Regulation and clarifying that it applies to all Frontex operations, including those involving third countries. It also recommended including training on international human rights and refugee law in the revised Common Core Curriculum for border guards<sup>213</sup>.

In fact, the Agency's most discussed activities are the organization of joint and return operations. These operations involve the interception of a large number of individuals classified as irregular migrants even before they enter European territory. Consequently, the EU's practice of exerting control over its external borders fails to consider the potential presence of asylum seekers among the migrants to be returned. This oversight undermines the full respect for human rights, particularly access to a case-by-case refugee status determination procedure as provided for by the Geneva Convention.

Initially, the European Commission appeared indifferent to the numerous criticisms of Frontex's work, emphasizing that it was the responsibility of the Member States, not the Agency, to specify the relevant human rights legislation<sup>214</sup>. However, the Commission also recognized the need to study the possibility of a more structured contribution of the UNHCR to the activities and operations coordinated by Frontex<sup>215</sup>. This could be achieved through the drafting of practical guidelines, which would provide greater clarity and predictability regarding the fulfillment of Member States' obligations under international law.

## **2. First Acknowledgments of the Need to Implement the System for the Protection of Fundamental Rights: the Intricate Journey of Decision 2010/252/EU**

Following the numerous criticisms received and in the wake of the Commission's wishes, Frontex intensified relations with UNHCR. In early 2007, Frontex appointed a UNHCR

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Committee 9th Report of Session 2007–08, FRONTEX: the EU external borders agency, Report with Evidence, 2008, p.113.

<sup>213</sup> UN High Commissioner for Refugees (UNHCR), UNHCR's Response to the European Commission's Green Paper on the Future Common European Asylum System, September 2007, Retrieved from: <https://www.refworld.org/docid/46e159f82.html>, Last Accessed: February 2, 2024.

<sup>214</sup> Slominski, P. (2013), The Power of Legal Norms in the EU's External Border Control. *Int Migr*, 51: 41-53. <https://doi.org/10.1111/imig.12089>, p. 45.

<sup>215</sup> European Commission, Communication from the Commission to the Council, Brussels, Reinforcing the management of the European Union's Southern Maritime Borders 30.11.2006 COM (2006) 733 final.

liaison officer to ensure that border management complies with the international obligations of EU Member States<sup>216</sup>. In June 2008, through an exchange of letters to strengthen their partnership, UNHCR and Frontex sealed an agreement considered to be a “*positive step*” in the direction of fair and effective asylum procedures<sup>217</sup>.

The tension was also perceived by the European Parliament, who in December 2008 called for a consistent human rights policy at EU level. The Parliament addressed Frontex’s “*responsibility to protect*”<sup>218</sup> and urged for its mandate to explicitly include “*an obligation to meet international human rights and a duty towards asylum seekers in rescue operations on the high seas*”<sup>219</sup>.

In 2010, the agency also signed a Cooperation Agreement with the European Agency for Human Rights (FRA), “*with the overall objective of strengthening the respect of fundamental rights in the field of border management and in particular in Frontex activities*”<sup>220</sup>.

In the Stockholm Programme for 2010-2014<sup>221</sup>, the European Council requested the Commission to strengthen and clarify the role of Frontex, specifically by providing for “*clear common operational procedures containing clear rules of engagement for joint operations at sea, with due regard to ensuring protection for those in need who travel in mixed flows in accordance with international law*” and by establishing “*a mechanism for reporting and recording incidents*”<sup>222</sup>.

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<sup>216</sup> Council of the European Union, Frontex General Report 2007, Brussels: General Secretariat, December 18, 2008, p.11.

<sup>217</sup> UNHCR, UNHCR and Frontex strengthen cooperation to address refugee and migrant needs, 17 June 2008. Retrieved from: <https://www.unhcr.org/news/briefing-notes/unhcr-agreement-frontex>, Last Accessed: February 3, 2024.

<sup>218</sup> Paragraph 23, Evaluation and future development of Frontex and Eurosur, European Parliament resolution of 18 December 2008 on the evaluation and future development of the Frontex Agency and of the European Border Surveillance System (Eurosur) (2008/2157(INI)).

<sup>219</sup> Paragraph 18, Evaluation and future development of Frontex and Eurosur, European Parliament resolution of 18 December 2008 on the evaluation and future development of the Frontex Agency and of the European Border Surveillance System (Eurosur) (2008/2157(INI)).

<sup>220</sup> Article 1, Cooperation Arrangement between the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union and the European Union Agency for Fundamental Rights, May 26, 2010.

<sup>221</sup> The Stockholm Programme is a five-year plan with guidelines for justice and home affairs of the member states of the European Union for the years 2010 through 2014.

<sup>222</sup> European Council, The Stockholm Programme — An Open and Secure Europe Serving and Protecting Citizens, (2010/C 115/01), Paragraph 5.1 on Integrated management of the external borders.

On the basis of these remarks, the Commission put forward a Proposal for a Decision to supplement the Schengen Borders Code<sup>223</sup>, with the aim of making the duty to respect fundamental rights and the rights of refugees explicit in Frontex Agency surveillance operations, and introducing a prohibition on refoulement of those in danger of persecution or other forms of inhuman or degrading treatment, that would apply regardless of the status of the waters the people were in. The Commission also pointed out the necessity to provide an appropriate legal framework to clarify the responsibilities of the different authorities involved in Search and Rescue operations (SAR).

The legal basis of the Proposal is Article 12(5) of Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), which authorizes the Commission to adopt additional rules governing surveillance in accordance with the regulatory procedure with the European Parliament exercising the right of scrutiny<sup>224</sup>. It was adopted by the Council of the European Union, with Decision No. 2010/252/EU<sup>225</sup>.

The Decision consisted of two articles, which referred to the Annex, structured in two parts: Part I provided binding rules for sea border operations coordinated by the Agency, while Part II specified non-binding guidelines for search and rescue situations and for disembarkation in the context of sea border operations coordinated by the Agency. Both rules and guidelines shall form part of the operational plan drawn up for each operation coordinated by the Agency<sup>226</sup>.

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<sup>223</sup> European Commission, Proposal for a Council Decision supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of the operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders, Brussels, 27.11.2009 COM(2009)658 final.

<sup>224</sup> Article 12.5, Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code).

<sup>225</sup> Council Decision of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, (2010/252/EU).

<sup>226</sup> Article 1, Council Decision of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, (2010/252/EU).

It was argued that the Decision was unsatisfactory from the point of view of the protection of fundamental rights, given the non-binding nature of the guidelines. Moreover, although the Decision codified the obligation of non-refoulement<sup>227</sup> vis-à-vis the extraterritorial conduct of Member States for the first time in EU law, the formulation of the principle itself reflected the internal division in the Council and allowed for non-univocal interpretations.

The Decision lacked clarity on several important points. It did not specify how to implement the material and procedural requirements that arise from the prohibition of refoulement during operations coordinated by the Agency. Additionally, it did not provide clear guidance on how to conduct refugee screening procedures or whether intercepted persons have the right to apply for asylum. The Decision also failed to address whether respect for human rights by third states is a necessary condition for cooperation with those countries. Finally, the Decision did not indicate where applicants for international protection should be disembarked.

Regardless, in September 2012, the EU Court of Justice annulled<sup>228</sup> Council Decision No. 2010/252/EU based on procedural grounds, following a petition from the European Parliament.

The Parliament argued that the Decision was adopted on an incorrect legal basis and that it encroached upon its legislative prerogatives. More precisely, the Parliament objected that the Decision went beyond the scope outlined in Article 12(5) of the Schengen Borders Code. This is because it was not just an additional measure for border surveillance, but it also modified essential legislative elements.

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<sup>227</sup> ANNEX, PART I, 1.2. “No person shall be disembarked in, or otherwise handed over to the authorities of, a country in contravention of the principle of non-refoulement, or from which there is a risk of expulsion or return to another country in contravention of that principle.” Council Decision of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, (2010/252/EU).

<sup>228</sup> Case C-355/10, European Parliament v Council of the European Union, Judgment of the Court (Grand Chamber), 5 September 2012, regarding the annulment under Article 263 TFEU of Decision 2010/252/EU on the surveillance of sea external borders and the introduction of additional rules governing border surveillance under the Schengen Borders Code.

The purpose of surveillance was defined by the SBC<sup>229</sup>, but clear guidelines on authorized measures that border guards could apply during apprehension were lacking<sup>230</sup>. Additionally, specific provisions in the annulled Decision empowered border guards to stop, inspect, and seize ships, as well as detain and transport individuals to a third state<sup>231</sup>.

The Court of Justice of the EU ruled that these measures involved political choices that extended beyond the Code's scope and were the responsibility of the EU legislator. Therefore, the CJEU annulled the Decision<sup>232</sup> underscoring that decisions impacting fundamental migrant rights should be made by the EU legislature, including the Parliament, rather than through a comitology procedure with limited parliamentary involvement.

The annulment addressed the issue of opacity in Frontex's sea operations by emphasizing the need for direct parliamentary involvement in decisions that affect fundamental rights. The Court aimed to ensure transparency and parliamentary oversight in matters concerning migrant rights by setting limits on decisions beyond the Code's boundaries.

In a real-world context, after the entry into force of Regulation (EC) 863/2007<sup>233</sup>, in 2010 Frontex launched its first Rabit Operation, as evidence of effective “*European solidarity*”<sup>234</sup>.

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<sup>229</sup> Article 12.4, Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code).

<sup>230</sup> Paragraph 73, Case C-355/10, European Parliament v Council of the European Union, Judgment of the Court (Grand Chamber), 5 September 2012, regarding the annulment under Article 263 TFEU of Decision 2010/252/EU on the surveillance of sea external borders and the introduction of additional rules governing border surveillance under the Schengen Borders Code.

<sup>231</sup> ANNEX, PART I, 2.4. Council Decision of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, (2010/252/EU).

<sup>232</sup> The CJEU also ruled to “*maintain the effects of Decision 2010/252 until the entry into force of new rules within a reasonable time*”. Case C-355/10, European Parliament v Council of the European Union, Judgment of the Court (Grand Chamber), 5 September 2012, regarding the annulment under Article 263 TFEU of Decision 2010/252/EU on the surveillance of sea external borders and the introduction of additional rules governing border surveillance under the Schengen Borders Code.

<sup>233</sup> Regulation (EC) No 863/2007 of the European Parliament and of the Council of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers.

<sup>234</sup> Carrera, S., & Guild, E. (November 2010). Joint Operation RABIT 2010’ – FRONTEX: Assistance to Greece’s Border with Turkey: Revealing the Deficiencies of Europe’s Dublin Asylum System. “*The operation consists of 175 ‘border control-experts’ from the 26 member states and Schengen-associated countries. They include “experts in false documents, clandestine entry, first and second-line border checks and stolen vehicles as well as dog handlers and specialist interviewers, debriefers and interpreters”*. The assets made available from member states’ commitments to Frontex’s Centralised Record of Available Technical Equipment (CRATE), 19 include: - 1 Helicopter (Romania) - 1 Bus (Romania) - 5 Minibusses (1 Romania, 2 Austria, 1 Bulgaria, 1 Hungary) - 19 Patrol cars (4WD) (7 Romania, 3 Austria, 2 Slovakia, 7 Germany) - 9 ThermoVision

Following the Greek government's request for help, Frontex deployed 175 border control experts in the Greek-Turkish border to bring the situation under control. All this without neglecting “*the rights of refugees and persons requesting international protection, in particular as regards non-refoulement*”<sup>235</sup>.

However, the Agency's coordinating role during the operation produced numerous perplexities. It was heavily criticized by the public and NGO's. Human Rights Watch, for instance, published a detailed Report on Frontex's action during the Rapid Border Intervention. Their reproach was that “*border guards participating in Frontex patrols apprehended migrants that they knew would be held in facilities where the conditions were inhuman and degrading*”<sup>236</sup>.

In parallel, scholars criticized the disparity between Frontex's legal mandate as “*coordinator*”, as laid down in the Regulations, and its more active role on the ground<sup>237</sup> e.g. by conducting interviews to establish the nationality of migrants without the presence of Greek authorities.

Therefore, while the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union had an increasing role in sea interception, there were concerns about the lack of guarantees for human rights and compliance with international and EU laws in the joint operations it coordinates.<sup>238</sup>

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*Vans (2 Austria, 2 Bulgaria, 4 Germany, 1 Hungary) - 3 Schengen buses (1 Austria, 2 Hungary) - 3 office units from Denmark.*”

<sup>235</sup> Article 2, Regulation (EC) No 863/2007 of the European Parliament and of the Council of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers.

<sup>236</sup> Human Rights Watch, *The EU's Dirty Hands Frontex Involvement in Ill-Treatment of Migrant Detainees in Greece*, 2011, p.48.

<sup>237</sup> This “*has been made possible by the ambiguities fixed into these Regulations. This has led to this discussion of the resultant difficulty of knowing who is liable for the human rights violations to third country nationals that have occurred during border control operations carried out by both Frontex and the host Member State*”. Shabbir, Anjum, *The Accountability of FRONTEX for Human Rights Violations at Europe's Borders* (October 1, 2012), p. 25. Available at: <http://dx.doi.org/10.2139/ssrn.2280707>.

<sup>238</sup> Parliamentary Assembly, Resolution 1821 (2011), *The interception and rescue at sea of asylum seekers, refugees and irregular migrants*, Paragraph 5.4.

### 3. Regulation 1168/2011: A Step Forward with Recognized Limits

#### 3.1 The Code of Conduct and the Fundamental Rights Strategy as non-binding guidelines

An important step forward regarding the compliance of fundamental rights is the adoption, in March 2011, of the Code of Conduct for all persons participating in Frontex activities<sup>239</sup>. Resulting from a preliminary study, the Code establishes the ethical behavior standards and obligations for all officials participating in Frontex operations.<sup>240</sup>

Considering its substance, the Code of Conduct prescribes that all Frontex participants shall, in full respect of the principle of non-refoulement, recognize the right of applicants for international protection to receive assistance, be informed about their rights, and be referred to the competent national authorities for asylum requests<sup>241</sup>.

In the words of the then Director of Frontex, Ilkka Laitinen, the Code of Conduct “*fills an important gap*”<sup>242</sup>. However, the Code is a purely exhortatory document that does not provide an independent complaint mechanism, nor does it allow individuals to report a breach of the Code<sup>243</sup>.

Also in May 2011, Frontex adopted a Fundamental Rights Strategy to prevent possible violations of fundamental rights within the Agency’s activities. According to this document “*respect and promotion of fundamental rights are unconditional and integral components of effective integrated border management*”<sup>244</sup>. The FRS reaffirms the provisions of the Lisbon Treaty on human rights<sup>245</sup> and stipulates that Frontex should take into account the relevant case law developed by the European Court of Human Rights<sup>246</sup>.

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<sup>239</sup> Frontex, Code of Conduct for all persons participating in Frontex activities, 2011.

<sup>240</sup> Article 1.1 Code of Conduct for all persons participating in Frontex activities, 2011.

<sup>241</sup> Article 5.a Code of Conduct for all persons participating in Frontex activities, 2011.

<sup>242</sup> Ilkka Laitinen, Code of Conduct for all persons participating in Frontex activities, 2011, p.3.

<sup>243</sup> Article 22, Code of Conduct for all persons participating in Frontex activities, 2011: “*Participants in Frontex activities who have reason to believe that a violation of the present Code has occurred or is about to occur, are obliged to report the matter to Frontex via the appropriate channels.*”

<sup>244</sup> Frontex, Frontex Fundamental Rights Strategy, 2011, Preamble.

<sup>245</sup> Frontex, Frontex Fundamental Rights Strategy, 2011, Paragraph 4.

<sup>246</sup> Frontex, Frontex Fundamental Rights Strategy, 2011, Paragraph 6.

The Fundamental Rights Strategy also requires Frontex to draft an Operational Plan that “shall provide guidance on how to address identified fundamental rights challenges with a view to preventing breaches or other negative effects”<sup>247</sup>. In contrast to the Code of Conduct, the Strategy not only allows for the consideration of reports of human rights violations from third parties such as human rights groups or international organizations<sup>248</sup>, but also establishes a continuous exchange of information with the Fundamental Rights Agency, the European Asylum Support Office, the United Nations High Commissioner for Refugees, and the International Organization for Migration<sup>249</sup>.

Although there have been significant advancements in upholding the rule of law, it is important to note that both the Code of Conduct and the FRS are non-binding instruments. Non-binding rules, despite lacking legal force, are crucial legal instruments. They can interact with binding laws, yielding both political and indirect legal effects. These rules, often more precise than binding counterparts, create “legitimate expectations” among stakeholders. The production of non-binding guidelines aims to enhance legal certainty, contributing to the refinement of rules and improving the thin notion of the rule of law<sup>250</sup>. However, this strategic choice is viewed as a rational approach by EU member states and Frontex to circumvent the limitations associated with more stringent “hard” supranational integration. By opting for non-binding texts, there is an intentional effort to maintain flexibility and navigate challenges in border management without committing to the more rigid, legally binding aspects of supranational frameworks<sup>251</sup>.

### **3.2 Progress and constraints of Regulation 1168/2011**

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<sup>247</sup> Frontex, Frontex Fundamental Rights Strategy, 2011, Paragraph 15.

<sup>248</sup> Frontex, Frontex Fundamental Rights Strategy, 2011, Paragraph 19.

<sup>249</sup> Frontex, Frontex Fundamental Rights Strategy, 2011, Paragraph 21.

<sup>250</sup> Slominski, P. (2013), The Power of Legal Norms in the EU's External Border Control. *Int Migr*, 51: 41-53. <https://doi.org/10.1111/imig.12089>, p. 43: “This by no means implies that the controversies which prevented a precise and binding agreement in the first place have ceased to exist. But expectations are raised which may in turn improve the level of precision of the rule, thus enhancing the thin notion of the rule of law. Although these new texts may continue to be subject to various interpretations themselves, they are important contributions to the legal discourse insofar as they provide all members of the interpretive community with further focal points and options of issue linkages”.

<sup>251</sup> Slominski, P. (2013), The Power of Legal Norms in the EU's External Border Control. *Int Migr*, 51: 41-53. <https://doi.org/10.1111/imig.12089>, p. 48.



In the wake of the criticism received and thanks to the direct involvement of the European Parliament, Regulation no.1168/2011 expressly provided that “*the Agency shall fulfill its tasks in full compliance with the relevant Union law, including the Charter of Fundamental Rights; the relevant international law, including the Geneva Convention; obligations related to access to international protection, in particular the principle of non-refoulement*”<sup>252</sup>. Article 2 explicitly articulated the principle of non-refoulement<sup>253</sup>, making this Regulation a considerable improvement in the human rights discourse.

The Regulation also required the Agency to establish and further develop a Code of Conduct<sup>254</sup> and to implement its Fundamental Rights Strategy<sup>255</sup>. As a result, a supplementary Code of Conduct was adopted in October 2013. It was complementary to the first one and applied in particular to all joint return operations coordinated by the Agency. This second compilation included procedures aimed at ensuring that returns were carried out “*in a humane manner and with full respect for fundamental rights*”<sup>256</sup>. However, it limited the possibility of reporting human rights violations exclusively to participants in the operations, thereby excluding the possibility for persons directly affected by such violations not only to lodge a complaint, but also to have access to any remedy of a compensatory nature.

As regards the termination of joint operations and pilot projects, the 2011 Regulation provided that the Agency could, on its own initiative or at the request of the participating Member States, terminate joint operations and pilot projects if the conditions for their implementation were no longer met. However, the obligation to terminate arose only if the

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<sup>252</sup> Article 1.2, Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

<sup>253</sup> Article 2.1(a), Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union: “*In accordance with Union and international law, no person shall be disembarked in, or otherwise handed over to the authorities of, a country in contravention of the principle of non-refoulement, or from which there is a risk of expulsion or return to another country in contravention of that principle. The special needs of children, victims of trafficking, persons in need of medical assistance, persons in need of international protection and other vulnerable persons shall be addressed in accordance with Union and international law*”.

<sup>254</sup> Article 2 (a), Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

<sup>255</sup> Article 26 (a), Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

<sup>256</sup> Frontex, Code of Conduct for joint return operations coordinated by Frontex, 7 October 2013, Article 4

Executive Director considered that such non-compliance was of a serious nature or was likely to persist<sup>257</sup>.

Moreover, while the Preamble of Regulation No. 1168/2011 provided for the creation of an incident reporting scheme for credible allegations of breaches<sup>258</sup>, this provision was not included in the main text of the Regulation.

The main innovations of the 2011 Regulation were the creation of two new bodies with complementary competences to monitor the Agency's respect for human rights: the Consultative Forum (CF) and the Fundamental Rights Officer (FRO).

On the one hand, the Consultative Forum, which became operational in January 2013, was set up by the Agency “*to assist the Executive Director and the Management Board on fundamental rights issues*”<sup>259</sup>. This body was also consulted on the further development and implementation of the Fundamental Rights Strategy, the Code of Conduct and the common core curricula.

These consultations took the form of opinions or recommendations and were usually included in the annual report on the activities of the Consultative Forum. The European Asylum Support Office, the European Agency for Fundamental Rights and the United Nations High Commissioner for Refugees are compulsory members of the Consultative Forum. For the other components, the Regulation only provided that the Management Board should decide upon a proposal from the Executive Director. It was therefore unclear how this selection process would work in practice.

The Consultative Forum can be seen as a major contribution to the operationalization of the concept of fundamental rights at the borders of the EU. However, it is not an external, independent body with extensive powers, such as the power to terminate operations in case of human rights violations and access to all information concerning Frontex operations. In

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<sup>257</sup> Article 3.1a, Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

<sup>258</sup> Paragraph 16, Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

<sup>259</sup> Article 26(a).2, Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

particular, this body was prevented from dealing with individual complaints and, given the scarcity of resources at its disposal, from assessing the respect for fundamental rights in each of the operations coordinated by the Agency. Finally, the Consultative Forum's effective contribution to the cause of fundamental rights was undermined by the fact that it could only monitor joint operations with the agreement of the Agency and the Member States concerned.

On the other hand, the appointment of a Fundamental Rights Officer was foreseen to further strengthen the monitoring of fundamental rights in Frontex's activities<sup>260</sup>. This body should be the interface between the Consultative Forum, the Management Board and the Executive Director.<sup>261</sup> In practical terms, the FRO should be entrusted with a number of prerogatives, such as: keeping and managing a register of possible violations of fundamental rights in operations and pilot projects; supervising the Agency's operational activities; monitoring compliance with and implementation of the Fundamental Rights Strategy; being able to participate in internal meetings of the Agency and having access to all relevant documents, as well as to individual complaints.

He/she shall be independent in the performance of his/her duties and shall report regularly, thus contributing to the fundamental rights monitoring mechanism. However, the independence of this body has been questioned because it was required to report only to the Board and the Consultative Forum. This made this mechanism for the protection of fundamental rights purely internal and therefore excluded the possibility of imposing legally binding obligations on Frontex's top management. Moreover, this body was not given any investigative powers, let alone the right to participate in operations coordinated by the Agency. Finally, the monitoring capacity of the Fundamental Rights Officer was also undermined by the scarcity of financial and human resources allocated by the Agency to carry out its tasks.

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<sup>260</sup> Article 26(a).3, Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

<sup>261</sup> Luisa Marin, Protecting the EU's borders from ... fundamental rights? Squaring the circle between Frontex's border surveillance and human rights, 2013, p.18

### 3.3 The European Ombudsman's enquiry

The above-mentioned doubts about the effectiveness of the Consultative Forum and the Fundamental Rights Officer as accountability mechanisms, as well as the questions left open by Regulation 1168/2011<sup>262</sup>, led the European Ombudsman to open an inquiry on his own initiative.

In a letter dated March 6, 2012, addressed to the Executive Director of Frontex, the European Ombudsman requested clarifications on several provisions introduced by the Agency<sup>263</sup>. The Agency's opinion, sent in response to the European Ombudsman on May 17, 2012<sup>264</sup>, provided some clarity, but did not fully resolve the confusion surrounding the issue.

In particular, with regard to the request to clarify the precise attribution of responsibilities for any violations committed, Frontex limited itself to replying that the personnel made available by the Agency on a temporary basis was not qualified to carry out border control functions, but only to enhance cooperation and coordination between the host State and the participating States. Therefore, in the event of a violation of fundamental rights, the matter could alternatively be examined by the authorities of the Member State hosting the operation, by those of the State of origin of the border guard concerned or by the Agency itself<sup>265</sup>. Although the European Ombudsman was inclined to accept the purely coordinating nature of the activities carried out by the Agency, it stressed that *“this cannot tantamount to*

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<sup>262</sup> Regulation (EU) No 1168/2011 does *“not address fully questions of the legal responsibility of Frontex in joint operations, especially when these operations have an impact on the fundamental rights of migrants.”* Valsamis Mitsilegas, *The Criminalization of Migration in Europe Challenges for Human Rights and the Rule of Law*, 2015, p.18.

<sup>263</sup> European Ombudsman, Letter from the European Ombudsman opening its own-initiative inquiry OI/5/2012/BEH-MHZ concerning implementation by Frontex of its fundamental rights obligations, 6 March 2012. Retrieved from: <https://www.ombudsman.europa.eu/en/doc/correspondence/en/11316>, Last Accessed: February 5, 2024.

<sup>264</sup> European Ombudsman, Opinion from Frontex on the European Ombudsman's inquiry into the implementation by Frontex of its fundamental rights obligations, 17 May 2012. Retrieved from: <https://www.ombudsman.europa.eu/it/doc/correspondence/en/11758>, Last Accessed: February 5, 2024.

<sup>265</sup> *“Since Frontex' task is only to coordinate the cooperation of the EU Member States and Schengen Associated Countries, activities that can affect a person's rights can only be performed by the competent authorities from the Member States hosting or participating in the operation. Frontex' staff members do not have executive powers in the fields of border control; all such powers are only in the hands of the Member States authorities. Hence, any person claiming that his/her fundamental rights were violated by an action from that authority may use both national and EU mechanisms to file a complaint.”* European Ombudsman, Opinion from Frontex on the European Ombudsman's inquiry into the implementation by Frontex of its fundamental rights obligations, 17 May 2012, Annex 1, p.2.

*shielding Frontex from responsibility for acts performed by its staff in exercising their coordination tasks*”<sup>266</sup>.

Another element of doubt was the information provided by the Agency concerning the mechanism for suspending and terminating operations. Indeed, in response to the Ombudsman's question as to what procedures and criteria the Agency used to identify possible violations of fundamental rights and protection obligations, the Agency replied that it had not established any specific criteria “*since violations of fundamental rights cannot be predicted before they actually occur and cannot be systematized*”<sup>267</sup> and that a Standard Operating Procedure (SOP), which was still under development, would be published once adopted. While welcoming this initiative, the Ombudsman nevertheless invited Frontex to adopt practical guidelines in order to clarify the meaning of those terms<sup>268</sup>.

Finally, as regards the possibility, as requested by the European Ombudsman, to provide for an individual complaint mechanism within the framework of the activities of the Fundamental Rights Officer, Frontex replied that it had already prepared the creation of an internal mechanism, still under development, which would allow stakeholders “*to inform about possible infringements*”<sup>269</sup>. The European Ombudsman highlighted the inadequacy of the monitoring mechanism alone and recommended that the Agency develop a system for dealing with complaints from individuals directly affected by its activities<sup>270</sup>. However, Frontex did not follow this recommendation and instead argued in a subsequent reply that the competences of the FRO did not include the possibility to deal with individual complaints. Instead, other institutions, such as national and European courts, were

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<sup>266</sup> European Ombudsman, Draft Recommendation of the European Ombudsman in his own-initiative inquiry OI/5/2012/BEH-MHZ concerning the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, 9 April 2013, Paragraph 82. Retrieved from: <https://www.ombudsman.europa.eu/it/recommendation/en/49794>, Last Accessed: February 5, 2024.

<sup>267</sup> European Ombudsman, Opinion from Frontex on the European Ombudsman's inquiry into the implementation by Frontex of its fundamental rights obligations, 17 May 2012, Annex 1, p.9.

<sup>268</sup> European Ombudsman, Draft Recommendation of the European Ombudsman in his own-initiative inquiry OI/5/2012/BEH-MHZ concerning the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, Paragraph 76.

<sup>269</sup> European Ombudsman, Opinion from Frontex on the European Ombudsman's inquiry into the implementation by Frontex of its fundamental rights obligations, 17 May 2012, Annex 1, p.2.

<sup>270</sup> “*The Ombudsman did not share Frontex's view that putting in place a system of reporting and/or informing about fundamental rights breaches is sufficient to ensure full compliance with its fundamental rights obligations. On the contrary, reporting obligations and complaints mechanisms are not alternatives. Rather, they constitute complementary means to guarantee the effective protection of fundamental rights.*” European Ombudsman, Special Report of the European Ombudsman in its own-initiative inquiry OI/5/2012/BEH-MHZ concerning Frontex, Paragraph 23. Retrieved from: <https://www.ombudsman.europa.eu/it/special-report/en/52465>, Last Accessed: February 5, 2024.

competent to do so<sup>271</sup>. In the final decision of the inquiry, the European Ombudsman replied to the Agency, pointing out that the Agency could have given the Fundamental Rights Officer the competence to receive and deal with individual complaints<sup>272</sup>. The Ombudsman also pointed out that the status of the persons affected by the Agency's activities, who were often intercepted at sea, made it difficult for them to bring the matter before the national or European courts, given the time, legal representation and costs involved<sup>273</sup>. The great precariousness and vulnerability that characterized the situation of these individuals also made it difficult to investigate the complex system of responsibilities that characterized the operations coordinated by the Agency. Instead, it would have been easier for them to turn to Frontex as the "*first resort*" for complaints about violations of their fundamental rights<sup>274</sup>. The above considerations therefore led the Ombudsman to reiterate its prediction that an individual complaints mechanism should be institutionalized within the framework of the Agency.

#### **4. Regulation No. 656/2014 and the Guarantees to Protect Fundamental Rights in the Context of Maritime Operations Coordinated by the Agency**

In April 2013, the Parliamentary Assembly of the Council of Europe reached the same conclusions. It emphasized the lack of clarity regarding Frontex's accountability and made several recommendations. Specifically, it demanded that Frontex's activities should not be restricted to the mere control of the EU's external borders but should also encompass search and rescue operations at sea<sup>275</sup>.

Part of these recommendations were then codified in Regulation No. 656/2014, containing rules for the surveillance of the EU's external maritime borders, within the framework of

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<sup>271</sup> European Ombudsman, Frontex answer on draft recommendations of the European Ombudsman in his own-initiative inquiry OI/5/2012/BEH-MHZ concerning the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex), p. 13. Retrieved from: <https://www.ombudsman.europa.eu/it/correspondence/en/51139>, Last Accessed: February 5, 2024.

<sup>272</sup> European Ombudsman, Special Report of the European Ombudsman in its own-initiative inquiry OI/5/2012/BEH-MHZ concerning Frontex, Paragraph 47.

<sup>273</sup> European Ombudsman, Special Report of the European Ombudsman in its own-initiative inquiry OI/5/2012/BEH-MHZ concerning Frontex, Paragraph 41.

<sup>274</sup> European Ombudsman, Special Report of the European Ombudsman in its own-initiative inquiry OI/5/2012/BEH-MHZ concerning Frontex, Paragraph 37.

<sup>275</sup> Council of Europe, Parliamentary Assembly, Resolution n. 1932, 2013, Paragraph 9.5.

operational cooperation coordinated by the Agency<sup>276</sup>. The Regulation replaces Council Decision 2010/252/EU which, as we have observed in the previous paragraph<sup>277</sup>, was annulled by the Court of Justice of the European Union<sup>278</sup>.

This Regulation includes a series of detailed and legally binding rules on detection<sup>279</sup>, interception in the territorial sea<sup>280</sup>, on the high seas<sup>281</sup> and in the contiguous zone<sup>282</sup>, search and rescue situations<sup>283</sup> and disembarkation<sup>284</sup>. Unlike the previous Regulation, this one also contained numerous references to the protection of fundamental rights and the rule of law in the context of activities coordinated by the Agency. In fact, we can even say that the protection of human rights is an eminent protagonist of this Regulation. For the first time, it was stated that the objective of European policy in the area of external borders was not only to ensure effective control, but also to protect and save lives<sup>285</sup>. Moreover, the Regulation made explicit reference to compliance with obligations under international law, in particular, “*the United Nations Convention on the Law of the Sea, the International Convention for the Safety of Life at Sea, the International Convention on Maritime Search and Rescue...*”<sup>286</sup> Most importantly, the text contains measures to ensure safety at sea<sup>287</sup> and specifically defines the principle of non-refoulement.<sup>288</sup> Whereas Decision 2010/252/EU exclusively

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<sup>276</sup> Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

<sup>277</sup> Refer to p. 77 of this thesis.

<sup>278</sup> Paragraph 7, Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

<sup>279</sup> Article 5, Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders.

<sup>280</sup> Article 6, Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders.

<sup>281</sup> Article 7, Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders.

<sup>282</sup> Article 8, Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders.

<sup>283</sup> Article 9, Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders.

<sup>284</sup> Article 10, Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders.

<sup>285</sup> Paragraph 1, Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders.

<sup>286</sup> Paragraph 8, Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders.

<sup>287</sup> Article 3, Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders.

<sup>288</sup> Article 4.1, Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders: “*No person shall, in contravention of the*

referred to the principle of non-refoulement without further clarification, and the Commission's Proposal only mentioned the serious risk of being subjected to “*death penalty, torture or other inhuman or degrading treatment or punishment*” in the country of destination<sup>289</sup>, the broad wording adopted by Regulation 656/2014 was the result of a strengthening requested by the European Parliament.<sup>290</sup>

Regulation No. 656/2014 also included strict introductory provisions regarding the respect of fundamental rights when third states are involved. Notably, it mandated the adherence to “*standards at least equivalent to those set by Union law*”<sup>291</sup> when collaborating within the territories or waters of such countries. Even in the presence of agreements with third countries, Member States are unequivocally obligated to uphold the principle of non-refoulement. This obligation persists when Member States are aware or should be aware of systemic deficiencies in the asylum procedure or reception conditions within the third country, giving rise to substantial concerns about the risk of asylum seekers facing inhuman or degrading treatment. Similarly, the principle of non-refoulement remains in force when Member States are aware or should reasonably be aware that the third country engages in practices contravening the essential tenets of non-refoulement<sup>292</sup>.

This ultimately codifies the landmark judgment *Hirsi Jamaa and others v. Italy*<sup>293</sup>, in which the Strasbourg Court unanimously condemned Italy for the manner in which it had rejected a considerable number of African refugees from Libya. The judgment not only sanctioned Italy’s deportation conduct and extraterritorial application of the principle of non-

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*principle of non-refoulement, be disembarked in, forced to enter, conducted to or otherwise handed over to the authorities of a country where, inter alia, there is a serious risk that he or she would be subjected to the death penalty, torture, persecution or other inhuman or degrading treatment or punishment, or where his or her life or freedom would be threatened on account of his or her race, religion, nationality, sexual orientation, membership of a particular social group or political opinion, or from which there is a serious risk of an expulsion, removal or extradition to another country in contravention of the principle of non-refoulement.”*

<sup>289</sup> Article 4, Proposal for a Regulation of the European Parliament and of the Council establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

<sup>290</sup> Steve Peers, *New EU rules on maritime surveillance: will they stop the deaths and push-backs in the Mediterranean?*, 2014, p.2: “*Compared to the 2010 Decision, the Commission proposal, and the Council position, the EP successfully insisted on adding the words ‘forced to enter’ and ‘conducted to’, which clearly covers push-backs.*”

<sup>291</sup> Paragraph 5, Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders.

<sup>292</sup> Paragraph 13, Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders.

<sup>293</sup> *Hirsi Jamaa and Others v. Italy*, European Court of Human Rights, Application No. 27765/09, Judgment of 23 February 2012.



refoulement but also aimed to clarify Frontex’s role in surveillance activities and the relationship between Italy’s refoulements and the operations coordinated by the Agency.

In the context of maritime border surveillance, the 2014 Regulation imposes an obligation to provide assistance to any ship that encounters individuals in distress at sea. Such assistance should be provided without delay and regardless of the nationality or status of the persons to be assisted or of the circumstances in which they are found<sup>294</sup>. This principle underscores the international commitment to prioritizing humanitarian concerns in maritime operations.

In terms of procedural guarantees, the Regulation stipulated that, before disembarkation, participating units should employ all available means to identify individuals intercepted or rescued. Moreover, they are required to “*give them an opportunity to express any reasons for believing that disembarkation in the proposed place would be in violation of the principle of non-refoulement*”<sup>295</sup>. To facilitate this process, the presence of medical staff, interpreters, legal advisers, and other relevant experts is mandated. However, concerns about the effectiveness of these safeguards have been raised, particularly by the Parliamentary Assembly of the Council of Europe. The Assembly questioned the efficacy of such measures, noting that “*if important safeguards such as legal aid are not in place, let alone an effective remedy against a negative decision*”<sup>296</sup>, the overall adequacy of the protection mechanisms may be compromised.

With regard to the place of disembarkation, Regulation No. 656/2014 assumed that Member States participating in external border control operations, were “safe countries”<sup>297</sup> within the

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<sup>294</sup> Paragraph 14, Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders.

<sup>295</sup> Article 4.3, Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders.

<sup>296</sup> Parliamentary Assembly of the Council of Europe, Report: Lives Lost in the Mediterranean Sea: Who is Responsible?, C. Explanatory memorandum by Ms Strik, rapporteur, Paragraph 6.a. Retrieved from: <http://www.assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=20940&lang=en>, Last Accessed: February 6, 2024.

<sup>297</sup> European Migration Network, Safe Country of Origin: “A country where, on the basis of the legal situation, the application of the law within a democratic system and the general political circumstances, it can be shown that there is generally and consistently no persecution as defined in Art. 9 of Directive 2011/95/EU (Recast Qualification Directive), no torture or inhuman or degrading treatment or punishment and no threat by reason of indiscriminate violence in situations of international or internal armed conflict.” Retrieved from: [https://home-affairs.ec.europa.eu/networks/european-migration-network-emn/emn-asylum-and-migration-glossary/glossary/safe-country-origin\\_en#:~:text=A%20country%20where%2C%20on%20the,persecution%20as%20defined%20in%20Art](https://home-affairs.ec.europa.eu/networks/european-migration-network-emn/emn-asylum-and-migration-glossary/glossary/safe-country-origin_en#:~:text=A%20country%20where%2C%20on%20the,persecution%20as%20defined%20in%20Art), Last Accessed: February 7, 2024.

meaning of international law. However, the Strasbourg Court had long since abandoned the presumption that states within the Dublin System were to be considered automatically safe, and instead adopted an orientation requiring more penetrating scrutiny measures to verify the existence of effective guarantees for asylum seekers in that Member State<sup>298</sup>. Furthermore, it is a well-established principle that the mere existence of an agreement with a third country is not sufficient to demonstrate its safety<sup>299</sup>.

Notwithstanding these critical remarks, the 2014 Regulation not only filled the legal gap that characterized the European legislation, but also contributed to increasing Frontex's accountability and transparency. In this regard, Article 13 required Frontex to produce an annual report on the practical application of this Regulation, containing, in particular, “*detailed information on compliance with fundamental rights and the impact on those rights, and any incidents which may have taken place*”.<sup>300</sup>

## **5. Regulation 2016/1624 and the Introduction of an Individual Complaint Mechanism within Frontex: Two Steps Forward, One Step Back**

Regulation 2016/1624 is a significant innovation compared to other norms governing Frontex, as it introduces the long-awaited and much-anticipated individual complaint mechanism. The migratory crisis in 2015 brought increased scrutiny to the Agency, which can be seen as an incentive to intensify its commitment to the respect of fundamental rights.

The previous sections of this thesis analyzed how the European Ombudsman and the Parliamentary Assembly of the Council of Europe put forward the need for the EU to establish a system to promote Frontex's “*bottom-up*” accountability.<sup>301</sup> Subsequently, this principle was also reiterated in a resolution of the European Parliament in 2015. These institutions have identified the right to good administration and effective remedy as the foundations for designing an individual complaint mechanism. In other words, the basis for

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<sup>298</sup> M.S.S. v. Belgium and Greece, Application No. 30696/09, European Court of Human Rights, 2011, Paragraph 342.

<sup>299</sup> Saadi v. Italy, Application No. 37201/06, European Court of Human Rights, 2008, Paragraphs 147 and 148.

<sup>300</sup> Article 13, Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders.

<sup>301</sup> Fernandez-Rojo, David. (2016). The Introduction of an Individual Complaint Mechanism within Frontex: Two Steps Forward, One Step Back. *Tijdschrift voor Bestuurswetenschappen en Publiek Recht*, p.231.

the creation of the individual complaint mechanisms is the right to good administration and effective remedy. These are fundamental rights enshrined respectively in articles 41 and 47 of the Charter.

In accordance with the principle of good administration, “*every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the (...) agencies of the Union*” and to be compensated for any damages caused by the EU’s institutions in the performance of their duties<sup>302</sup>. Moreover, in order for the right to good administration to be effectively implemented, the institutions should design specific instruments, since the principle itself does not confer rights upon individuals. The Court of Justice of the European Union has established three conditions that must be met in order to grant individuals the right to reparation: the right to good administration infringed must confer rights on the individuals, the damage must be sufficiently serious, and there must be a causal link between the breach of the obligation resting on the EU and the damage sustained by the complainants<sup>303</sup>.

Regarding the right to an effective remedy, the Charter states that: “*everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal*”. This principle encompasses the right to a fair and public hearing, as well as the right to a judgment by an independent and impartial tribunal, within a reasonable time.<sup>304</sup>

In the aforementioned 2015 European Parliament resolution, the following question was posed: “*Why Frontex should set up an individual complaints mechanism*”?<sup>305</sup> The EP supports the recommendation by the European Ombudsman and calls on Frontex to set up an appropriate complaint mechanism in the forthcoming Regulation. The introduction of such a mechanism would increase transparency and respect for fundamental rights in the context of Frontex’s operations. Most importantly, it would clarify the division of responsibilities between Member States and Frontex<sup>306</sup> and enhance the latter’s

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<sup>302</sup> Article 41, Charter of Fundamental Rights of the European Union. (2000/C 364/01).

<sup>303</sup> *Area Cova and Others v Council and Commission*, Judgment of the Court of Justice of the European Union (CJEU), Case T-196/99, 6 December 2001.

<sup>304</sup> Article 47, Charter of Fundamental Rights of the European Union. (2000/C 364/01).

<sup>305</sup> European Parliament resolution of 2 December 2015 on the Special Report of the European Ombudsman in own-initiative inquiry OI/5/2012/BEH-MHZ concerning Frontex, 2014/2215(INI), p.4.

<sup>306</sup> The EP “*stresses that the legal relations and the distinct yet shared responsibilities existing between Frontex and the Member States should not undermine the safeguarding of fundamental rights and respect for those*

accountability<sup>307</sup>. The Parliament notes that there appear to be no legal obstacles to the introduction of an individual complaint mechanism. In particular, such a mechanism would be compliant with EU law and the principle of good administration and would reinforce the effective implementation of the Agency's Fundamental Rights Strategy<sup>308</sup>. Furthermore, it stresses that Frontex should ensure that the mechanism meets the criteria of “*accessibility, independence, effectiveness and transparency*”<sup>309</sup>. For this reason, it recommends that the office of the Frontex Fundamental Rights Officer should play a crucial role in handling complaints.

On the basis of these considerations Regulation No. 2016/1624 provided for the establishment, in cooperation with the Fundamental Rights Officer, of a complaint mechanism, of an administrative nature, designed to “*monitor and ensure respect for fundamental rights in all the activities of the Agency*”<sup>310</sup>. In this respect, Article 72 of Regulation 2016/1624 stipulates that individuals are now guaranteed the right to address the Agency directly. More precisely, any individual who is directly affected by the actions of the members of the European Coast Guard and Border Guard Teams, and who considers that his or her fundamental rights have been violated as a result of those actions, is allowed to submit a complaint in writing to the Agency<sup>311</sup>.

However, the above-mentioned Article excludes the possibility for the FRO to act *motu proprio* to investigate alleged violations committed by its own staff and does not even mention the possibility for NGOs or other international organizations to submit complaints in the public interest, despite the fact that they often have relevant information on systematic violations of fundamental rights. This contradicts the recommendation to make the Frontex

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*rights in joint operations*”: European Parliament resolution of 2 December 2015 on the Special Report of the European Ombudsman in own-initiative inquiry OI/5/2012/BEH-MHZ concerning Frontex, 2014/2215(INI), Paragraph 8.

<sup>307</sup> The EP “*takes the view that it is a legitimate expectation to believe that the actions of those involved in Frontex operations are attributable to Frontex and more generally to the EU*”: European Parliament resolution of 2 December 2015 on the Special Report of the European Ombudsman in own-initiative inquiry OI/5/2012/BEH-MHZ concerning Frontex, 2014/2215(INI), Paragraph 8.

<sup>308</sup> European Parliament resolution of 2 December 2015 on the Special Report of the European Ombudsman in own-initiative inquiry OI/5/2012/BEH-MHZ concerning Frontex, 2014/2215(INI), Paragraph 6.

<sup>309</sup> European Parliament resolution of 2 December 2015 on the Special Report of the European Ombudsman in own-initiative inquiry OI/5/2012/BEH-MHZ concerning Frontex, 2014/2215(INI), Paragraph 10.

<sup>310</sup> Article 72.1, Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC.

<sup>311</sup> Article 72.2, Regulation (EU) 2016/1624 on the European Border and Coast Guard.

complaint mechanism available to all stakeholders with a legitimate interest in activating a procedure aimed at assessing responsibility for human rights violations.<sup>312</sup>

The obligation to submit the complaint in writing was also restrictive, as it prevented those directly affected from activating the procedure at the very moment the abuse occurred.

The inadmissibility of anonymous complaints was established in recognition of the need for safeguards to prevent abuse of the complaint mechanism. While this was justifiable, it risked undermining the objective of encouraging potential victims to come forward and activate the procedure in question. Indeed, some scholars pointed out that “*it is striking to note that while cases of human rights violations involving border and coast guards participating in Frontex activities are constantly recorded through the Frontex Serious Incident reporting system, only 2 complaints were received by the agency in 2016, and 13 in 2017*”<sup>313</sup>.

The decision on the admissibility of the complaint rested with the FRO, which, if satisfied that the complaint was well-founded, would forward it to the Executive Director or to the authorities responsible for the violation of fundamental rights in the Member States.<sup>314</sup> If the violation was attributed to a staff member of the Agency, the Executive Director would ensure “*appropriate follow-up in consultation with the FRO, including disciplinary measures if necessary*”.<sup>315</sup> If, on the other hand, the complaint concerned the conduct of a border guard of a Member State or a member of the teams, it was the authorities of the Member State of their nationality that had to ensure appropriate follow-up in accordance with national law.<sup>316</sup>

Yet, Article 72 of the 2016 Regulation did not specify what was meant by appropriate follow-up, i.e. what kind of remedial action would be taken in the case of well-founded complaints, nor did it define a precise time frame. The possible sanctions in the event of inadequate follow-up by the host Member State were also not defined, nor was the

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<sup>312</sup> Sergio Carrera and Marco Stefan, *Complaint Mechanisms in Border Management and Expulsion Operations in Europe: Effective Remedies for Victims of Human Rights Violations?*, Centre for European Policy Studies (CEPS), 2018, p. 25.

<sup>313</sup> Sergio Carrera and Marco Stefan, *Complaint Mechanisms in Border Management and Expulsion Operations in Europe: Effective Remedies for Victims of Human Rights Violations?*, Centre for European Policy Studies (CEPS), 2018, p. 25.

<sup>314</sup> Article 72.4, Regulation (EU) 2016/1624 on the European Border and Coast Guard.

<sup>315</sup> Article 72.6, Regulation (EU) 2016/1624 on the European Border and Coast Guard.

<sup>316</sup> Article 72.7, Regulation (EU) 2016/1624 on the European Border and Coast Guard.

relationship with judicial remedies. There was no reference to a possible appeal procedure before an independent body.

Instead, there is only the possibility for the Agency to request the Member State to remove the border guard concerned<sup>317</sup> or, as an *extrema ratio*, for the Executive Director to withdraw the financing of an operation or to suspend or terminate all or part of such activities.<sup>318</sup>

Finally, the independence of the Fundamental Rights Officer, despite being maintained during the execution of duties, is compromised by the fact that the officer is appointed by the Management Board. This compromise undermines the effectiveness of the mechanism, rendering it unable to serve as a substitute for the right to a remedy before an independent court of law. It's worth noting that even though the Fundamental Rights Officer, employed by the Agency, does not have the ultimate decision-making authority—this authority rests with the Executive Director or the authorities of Member States—the mechanism itself is not designed to be judicial or fully independent.<sup>319</sup>

Overall, the terminology deployed in the actual decision on the complaint is notably vague, raising questions about its legal implications. Does the decision carry legal weight, or is it part of a self-contained system aimed at internally addressing deficiencies that impact human rights? A more progressive interpretation suggests that these decisions should be subject to review by other EU organs<sup>320</sup>.

In conclusion, the individual complaint mechanism, while a step forward, seems to be accompanied by setbacks. Its internal nature and insufficient independence fall short of meeting the standards of good administration and effective remedy as outlined in the Charter of Fundamental Rights.

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<sup>317</sup> Article 72.8, Regulation (EU) 2016/1624 on the European Border and Coast Guard.

<sup>318</sup> Article 25, Regulation (EU) 2016/1624 on the European Border and Coast Guard.

<sup>319</sup> Gkliati, Mariana, and Rosenfeldt, Herbert, Accountability of the European Border and Coast Guard Agency: Recent Developments, Legal Standards and Existing Mechanisms. RLI Working Paper No. 30, 2017, p.6.

<sup>320</sup> Gkliati, Mariana, and Rosenfeldt, Herbert, Accountability of the European Border and Coast Guard Agency: Recent Developments, Legal Standards and Existing Mechanisms. RLI Working Paper No. 30, 2017, p.5.

## 6. Regulation 2019/1896: Unresolved Issues and Lingering Questions

The protection of fundamental rights in the context of Frontex's activities has become even more prominent following the entry into force of Regulation 2019/1896, which is now in force.

As a matter of fact, scholars reported how this increased relevance is concretely visible: “*in the 2016 Regulation the term ‘fundamental rights’ is used over 100 times and in the Regulation (EU) 2019/1896 the term features over 230 times.*”<sup>321</sup> This development indicates a heightened awareness and emphasis on protecting fundamental rights but also hints to the fact that this protection remains an unsolved issue within Frontex's operational framework. The question that we would like to address in this paragraph therefore is: Does great power come with great responsibility?

In light of the persisting human rights protection deficiencies, the European Union legislator saw the need to stress underlying legal obligations that are rooted inter alia in International Law and EU law including but not limited to the Charter of Fundamental Rights. Consequently, the 2019 Regulation states that “*the extended tasks and competence of the Agency should be balanced with strengthened fundamental rights safeguards and increased accountability and liability, in particular in terms of the exercise of executive powers by the statutory staff.*” Unlike its predecessors, the Regulation in question has added a specific reference to compliance with Regulation No. 656/2014 on the surveillance of the EU's external sea borders<sup>322</sup>. It has also specified the need for “*a continuous and uniform application of Union law*” including the Charter<sup>323</sup>.

In addition to having provided that “*fundamental rights (...) are general elements of the implementation of integrated border management*”<sup>324</sup> the Regulation currently in force has

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<sup>321</sup> Hruschka, Constantin: Frontex and the Duty to Respect and Protect Human Rights, VerfBlog, 2020/2/07. Retrieved from: <https://verfassungsblog.de/frontex-and-the-duty-to-respect-and-protect-human-rights/>, Last Accessed: February 8, 2024.

<sup>322</sup> Paragraph 21, Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624.

<sup>323</sup> Article 5.4, Regulation (EU) 2019/1896 of 13 November 2019 on the European Border and Coast Guard.

<sup>324</sup> Article 3.2, Regulation (EU) 2019/1896 of 13 November 2019 on the European Border and Coast Guard.

also introduced, within the Agency's tasks, the monitoring of compliance with fundamental rights in the context of all its activities at the external borders and return operations<sup>325</sup>.

Regulation 2019/1896 also contributed to strengthening the accountability of the Agency, thanks to a greater interparliamentary cooperation in the scrutiny of the activities carried out at the external borders of the European Union. In particular, Article 112 aims to facilitate coordinated oversight of Frontex by the European and national parliaments. This entails active collaboration, the mandatory attendance of Frontex's Executive Director and Management Board Chairperson in parliamentary meetings, and the obligation for Frontex to disclose its annual activity reports to ensure transparency<sup>326</sup>.

The role of the Fundamental Rights Officer is equally strengthened. In addition to its pre-existing tasks, the FRO will now be able to give advice on its own initiative<sup>327</sup>, issue opinions on operational plans and working arrangements<sup>328</sup>, and conduct investigations into the activities of the Agency<sup>329</sup>. The independence of the FRO and their staff is reiterated, and the Regulation stipulates for rules to be developed by the Management Board so as to guarantee the FRO's independence<sup>330</sup>. Even more relevant for the purpose of strengthening Frontex's accountability is the provision according to which “*the Fundamental Rights Officer shall publish annual reports on his or her activities and on the extent to which the activities of the Agency respect fundamental rights*”<sup>331</sup>.

To carry out these new tasks, the Fundamental Rights Officer is granted the authority to appoint Fundamental Rights Monitors<sup>332</sup>, who will operate under its hierarchical

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<sup>325</sup> Article 10.1, letter (e), Regulation (EU) 2019/1896 of 13 November 2019 on the European Border and Coast Guard.

<sup>326</sup> Article 112, Regulation (EU) 2019/1896 of 13 November 2019 on the European Border and Coast Guard.

<sup>327</sup> Article 109.2, letter (d), Regulation (EU) 2019/1896 of 13 November 2019 on the European Border and Coast Guard.

<sup>328</sup> Article 109.2, letters (e) and (f), Regulation (EU) 2019/1896 of 13 November 2019 on the European Border and Coast Guard.

<sup>329</sup> Article 109.2, letter (b), Regulation (EU) 2019/1896 of 13 November 2019 on the European Border and Coast Guard.

<sup>330</sup> “*The management board shall ensure that action is taken with regard to recommendations of the fundamental rights officer*”: Article 109.4, Regulation (EU) 2019/1896 of 13 November 2019 on the European Border and Coast Guard.

<sup>331</sup> Article 109.4, Regulation (EU) 2019/1896 of 13 November 2019 on the European Border and Coast Guard.

<sup>332</sup> For detailed information on the topic, it is highly recommended to consult the official Frontex website and watch the related video on Fundamental Rights Monitors. Retrieved from: <https://www.frontex.europa.eu/fundamental-rights/fundamental-rights-at-frontex/fundamental-rights-monitors/#:~:text=Deployed%20to%20the%20operational%20areas,rights%20as%20part%20of%20Europea>n, Last Accessed: February 9, 2024.



supervision<sup>333</sup>. These monitors, employed as statutory staff, are charged with constantly assessing the compliance of operational activities with fundamental rights and providing advice and assistance in this regard<sup>334</sup>. Additionally, they may also act as forced-return monitors in the context of return operations<sup>335</sup>. The tasks assigned to Fundamental Rights Monitors encompass conducting visits, contributing to activity evaluations, and participating in the development of operational plans<sup>336</sup>. Crucially, they are mandated to maintain independence in the execution of their duties<sup>337</sup>. While they can contribute to the Agency's training activities on fundamental rights<sup>338</sup>, they are also obligated to undergo enhanced fundamental rights training themselves and carry out their responsibilities in accordance with the “highest standards”<sup>339</sup>. As of its most recent update in November 2023, Frontex reported having 46 Fundamental Rights Monitors<sup>340</sup>. Some scholars<sup>341</sup> argue that this number is inadequate, especially when compared to the 10,000 border guards at the Agency's disposal, particularly given the significant workload expected of the Fundamental Rights Officer.

Regulation 2019/1896 brought about revisions to the complaint mechanism established in the previous Regulation. Notably, it introduced a new category, namely “*failure to act*” by staff, alongside their actions, as valid grounds for individuals to file complaints with the Agency. Moreover, the current Regulation expands the scope of the complaints mechanism by incorporating the Agency's operational actions in a third country, thus covering a comprehensive range of interventions<sup>342</sup>. Under the present system, individuals can submit complaints directly to Frontex or through a standardized online complaint form. This form

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<sup>333</sup> Article 110.5, Regulation (EU) 2019/1896 of 13 November 2019 on the European Border and Coast Guard.

<sup>334</sup> Article 110.1, Regulation (EU) 2019/1896 of 13 November 2019 on the European Border and Coast Guard.

<sup>335</sup> Article 110.4, Regulation (EU) 2019/1896 of 13 November 2019 on the European Border and Coast Guard.

<sup>336</sup> Article 110.2.2, letters (b), (e), and (a), Regulation (EU) 2019/1896 of 13 November 2019 on the European Border and Coast Guard.

<sup>337</sup> Article 110.5, Regulation (EU) 2019/1896 of 13 November 2019 on the European Border and Coast Guard.

<sup>338</sup> Article 110.2, letter (c), Regulation (EU) 2019/1896 of 13 November 2019 on the European Border and Coast Guard.

<sup>339</sup> Article 110.7, Regulation (EU) 2019/1896 of 13 November 2019 on the European Border and Coast Guard.

<sup>340</sup> Frontex, Fundamental Rights in Border Management: Explained, LinkedIn. Retrieved from: [https://www.linkedin.com/posts/frontex\\_frontex-frontexexplained-fundamentalrights-activity-7128726178764324864-\\_xBu/](https://www.linkedin.com/posts/frontex_frontex-frontexexplained-fundamentalrights-activity-7128726178764324864-_xBu/). Last Accessed: February 9, 2023.

<sup>341</sup> “*The regulation foresees equipping the FRO with 40 Monitors, who will be drawn from the agency's staff and receive specialized training. Given the FRO's additional competences, such promises on concrete numbers are certainly helpful. Yet, they pale in comparison with the 10,000 border guards at the agency's disposal and thus remain insufficient to remedy any operational shortcomings of the FRO.*”: Lucas Rasche, Policy Brief, Great power warrants great responsibility, Four proposals to strengthen Frontex' accountability, in Hertie School, Jacques Delors Centre Publications, 2019, p.5.

<sup>342</sup> Article 111.2, Regulation (EU) 2019/1896 of 13 November 2019 on the European Border and Coast Guard.

must be made available on the Agency's website and in hard copy during operations, presented “*in languages that third-country nationals understand or are reasonably believed to understand*”.

Additionally, Regulation 2019/1896 mandates that the form be easily accessible on mobile devices, and the Agency must provide further guidance and assistance on the complaint procedure to complainants<sup>343</sup>. Regarding complaints against Frontex staff members, the updated framework grants the Fundamental Rights Officer the authority, rather than the Executive Director in consultation with the FRO, to propose appropriate follow-up actions.

These may include disciplinary measures and, if necessary, the initiation of civil or criminal proceedings. The Executive Director is tasked with ensuring the adequacy of these measures and reporting back to the FRO on their implementation<sup>344</sup>. However, the specific procedures for follow-up actions remain unspecified, allowing the Executive Director discretionary authority in determining the appropriate measures to be taken. More importantly, as of the current framework, no remedy is made available against the admissibility decision of the FRO or the decision of the Executive Director<sup>345</sup>.

In general, it can be agreed that while these amendments represent a “*profound improvement on the rather limited accountability mechanisms previously in place*”, they do not correspond to the substantial strengthening of Frontex’s operational competencies envisaged by Regulation 2019/1896<sup>346</sup>. For instance, the Agency's responsibility for both conducting return operations and monitoring respect for fundamental rights during them may not align with the need for an effective monitoring system of forced returns. To answer the question posed in the beginning of this paragraph<sup>347</sup>, while these changes increase accountability, they do not expand the agency’s powers or competencies in any of the discussed areas. In conclusion, despite the progressive development of the protection of fundamental rights,

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<sup>343</sup> Article 111.10, Regulation (EU) 2019/1896 of 13 November 2019 on the European Border and Coast Guard.

<sup>344</sup> Article 111.6, Regulation (EU) 2019/1896 of 13 November 2019 on the European Border and Coast Guard.

<sup>345</sup> Mariana Gkliati, The new European Border and Coast Guard: Do increased powers come with enhanced accountability?, in EU Law Analysis, Expert insight into EU law developments, 2019. Retrieved from: <https://eulawanalysis.blogspot.com/2019/04/the-new-european-border-and-coast-guard.html>, Last Accessed: February 10, 2024.

<sup>346</sup> Lucas Rasche, Policy Brief, Great power warrants great responsibility, Four proposals to strengthen Frontex’ accountability, in Hertie School, Jacques Delors Centre Publications, 2019, p.5.

<sup>347</sup> Refer to p.96 of this thesis.

Frontex's accountability for its increasingly prominent role in managing the EU's external borders has not yet found a satisfactory solution<sup>348</sup>.

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<sup>348</sup> Carrera, S., Geddes, A., Curtin, D., 20 year anniversary of the Tampere programme – Europeanisation dynamics of the EU area of freedom, security and justice, European University Institute, 2020, p.77.

## **Chapter IV. The Frontex Scandal and the Agency's Lack of Accountability**

With the rise of powers entrusted to Frontex, so have risen the challenges for fundamental rights. Major progress has been made in the Regulations governing Frontex, but the biggest concern remains the real-life application of rules on fundamental rights and on the topic of the Agency's legal accountability.

What is particularly remarkable about Frontex is the considerable amount of attention that it has attracted since its operational start in 2005, especially from the media, human rights activists and pro-migrant groups. Some of these groups have even organized protests, notably in front of the seat of the Agency in Warsaw<sup>349</sup>.

Frontex has consistently been under scrutiny for alleged violations of human rights, leading to substantial controversy and criticism. As previously mentioned<sup>350</sup>, international organizations, such as Human Rights Watch, are closely monitoring the Agency, waiting for an opportunity to point their finger. Frontex has therefore often been portrayed by human rights NGOs as waging a “*war against migrants*”<sup>351</sup> in the context of the management of external borders.

Thus, while criticism of the EU's asylum and migration policies is certainly not new, it seems that Frontex has become the focus of sharp criticism in recent years. And the controversies reached their peak with the Frontex scandal.

Notably, the policies and practices at the center of these controversies encompass pushbacks—a practice deemed widespread and systematic, with potential devastating effects on refugee protection and human rights.

However, the judicial system appears to overlook violations of fundamental rights, and even when they are acknowledged, the Agency seems capable of justifying its actions before the

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<sup>349</sup> Sarah Léonard, The creation of FRONTEX and the politics of institutionalisation in the EU external borders policy. *Journal of contemporary European research*, 5 (3), 2009, p.372.

<sup>350</sup> Refer to p. 79 of this Thesis.

<sup>351</sup> Sarah Léonard, *FRONTEX and the Securitization of Migrants through Practices*, 2011, p. 3

Court. This results in a “*systematic shielding of Frontex from any responsibility for contributing to human rights harms*”<sup>352</sup>.

The final chapter aims to describe the events of the Frontex scandal and the subsequent reactions of the European community. It will then analyze Frontex’s lack of accountability from both theoretical and practical perspectives. Finally, based on the CJEU's judgment on a specific case law, possible solutions to the problem will be proposed.

## **1. The Frontex Scandal**

### **1.1 Description of the Facts**

The Frontex Scandal refers to a series of events that occurred between 2020 and 2022, involving the Agency’s violation of fundamental rights. It began with the denunciation of alleged human rights violations against migrants in the Aegean Sea (Greek-Turkish border), in the context of the Poseidon Joint Operation and the Rapid Border Intervention in Evros.

The alleged violations consisted of pushbacks and the consequent violation of the principle of non-refoulement. Following the reports from multiple NGOs and the wide coverage received through online media outlets, the European institutions were forced to conduct their own investigations. After their inquiries, notably the Olaf Report, Frontex’s former Executive Director Fabrice Leggeri resigned from its post in April 2022, somewhat putting an end to the Scandal. But in reality, the controversies surrounding Frontex's human rights violations did not end, and the people who lost their lives at sea did not really have a chance to seek justice.

The Frontex Scandal is considered the most serious crisis of confidence in the Agency’s history. The EBCG has been described as a “*silent accomplice in human rights violations*” or even worse, as an “*active perpetrator*” in pushbacks<sup>353</sup>.

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<sup>352</sup> De Coninck, Joyce: Shielding Frontex: On the EU General Court’s “WS and others v Frontex”, VerfBlog, 2023/9/09, Retrieved from: <https://verfassungsblog.de/shielding-frontex>, Last Accessed February 19, 2024.

<sup>353</sup> EuroNews. Allegations, lawsuits, and damning reports: How Frontex became the most contentious EU agency, July 29, 2021. Retrieved from: <https://www.euronews.com/my-europe/2021/07/29/allegations->

“Pushback” literally means resisting or opposing something. It is used to describe the act of pushing back against a force, pressure, or unwanted situation. In the context of Frontex’s operations, pushbacks are defined as incidents in which *“fleeing and migrating people are pushed back - usually immediately after crossing the border - without the opportunity to apply for asylum or have their legality checked by a court.”*<sup>354</sup>

In the Aegean Sea, pushback incidents typically manifest in two primary scenarios. The first involves preventing dinghies traveling from Turkey to Greece from reaching Greek soil.

This obstruction may involve physically impeding the dinghy until it exhausts its fuel or disabling its engine. Subsequently, the incapacitated dinghy may either be forcibly returned to Turkish territorial waters through the use of waves or towed if wind conditions are unfavorable. The second pushback method is employed when individuals have successfully landed on Greek soil. In such cases, they are apprehended, transferred onto a life raft devoid of propulsion means, towed to the central Aegean Sea, and then abandoned. These pushback occurrences frequently lead to standoffs between the Hellenic Coast Guard (HCG) and the Turkish Coast Guard (TCG), with both entities refraining from assisting distressed dinghies and engaging in unsafe maneuvers around them.

The Frontex Scandal erupted in October of 2020, after the publication of a Report<sup>355</sup> on illegal pushbacks of migrants from Greece to Turkey. The report was the result of a joint investigation by Bellingcat, Lighthouse Reports, Der Spiegel, ARD and TV Asahi.

The investigation identified at least six pushback incidents that occurred between April and August of 2020, in which Frontex assets were either in the vicinity or participated directly.<sup>356</sup>

Vessels of the Agency were in fact accused of being complicit in maritime pushback operations to drive away migrants attempting to enter the EU via Greek waters. The huge amount of information collected<sup>357</sup> revealed that in multiple instances Frontex was either

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lawsuits-and-damning-reports-how-frontex-became-the-most-contentious-eu-agency, Last Accessed February 10, 2024.

<sup>354</sup> European Center for Constitutional and Human Rights (ECCHR), Push-back. Retrieved from: <https://www.ecchr.eu/en/glossary/push-back/>, Last Accessed: February 10, 2024.

<sup>355</sup> Bellingcat. Frontex at Fault: European Border Force Complicit in Illegal Pushbacks, October 23, 2020. Retrieved from: <https://www.bellingcat.com/news/2020/10/23/frontex-at-fault-european-border-force-complicit-in-illegal-pushbacks/>, Last Accessed: February 11, 2024.

<sup>356</sup> The Report in question distinguished between four proximity incidents and two active incidents.

<sup>357</sup> Including dozens of videos, satellite images and comparative analyses.

present at pushbacks, or close enough to be able to understand what was taking place. In at least one incident the Report corroborated that a Frontex vessel actively participated in a pushback<sup>358</sup>.

This report sparked a political storm in Brussels and beyond. The question remains: How did the EU institutions respond? Nevertheless, the impact of the scandal continues to cast a long shadow over the Agency, which now finds itself in an apparent state of perpetual damage control, grasping at straws to salvage the remnants of its reputation.

## **1.2 Institutional Reactions and the OLAF Report**

Both Frontex and Greece have denied the allegations raised by the Frontex scandal. Frontex, in particular, claims that it operates to the “*highest standards*”<sup>359</sup> of border control.

Several European institutions<sup>360</sup> have publicly reprimanded the Agency in unusually harsh terms demanding immediate reforms. At the same time, they are actively working on plans to bolster its authority and ensure that it continues to play a crucial role in EU migration policy.

The most notable reactions to the Scandal involve the Frontex Management Board Working Group, addressing internal accountability; the European Ombudsman; the European Parliament Frontex Scrutiny Group; and, above all, the OLAF Report.

The Frontex Management Board Working Group, referred to as the Working Group on Fundamental Rights and Legal Operational Aspects of Operations in the Aegean Sea (WG FRaLO), was established in November 2020 as an ad hoc entity to serve as an internal accountability mechanism. The main issues highlighted by the MB were the need to improve the reporting and monitoring system and the lack of clarity in the whistleblowing system of

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<sup>358</sup> The Report in question identifies this incident as the one that occurred on June 8 of 2020.

<sup>359</sup> Bellingcat. Frontex at Fault: European Border Force Complicit in Illegal Pushbacks, October 23, 2020. Retrieved from: <https://www.bellingcat.com/news/2020/10/23/frontex-at-fault-european-border-force-complicit-in-illegal-pushbacks/>, Last Accessed: February 11, 2024.

<sup>360</sup> Statewatch, Frontex investigations: What changes in the EU border agency's accountability?, 2021. Retrieved from: <https://www.statewatch.org/analyses/2021/frontex-investigations-what-changes-in-the-eu-border-agency-s-accountability/>, Last Accessed: February 10, 2024.

serious professional wrongdoings. In its final Report<sup>361</sup>, the WG FRaLO stated that overall, no substantial evidence of fundamental rights infringements was found. However, it recommended combining the reporting system with a newly introduced culture that acknowledges and addresses failure to create awareness of and sensitivity towards possible misconduct.

The European Ombudsman opened an inquiry on its own initiative to look into how the Agency deals with alleged breaches of fundamental rights. In its Decision OI/5/2020/MHZ<sup>362</sup> in June 2021, the European Ombudsman found several inadequacies in the independence, effectiveness and transparency of the complaint mechanism, as well as the role of the Fundamental Rights Officer.

The Frontex Scrutiny Working Group (FSWG) of the European Parliament's LIBE Committee was constituted at the beginning of March 2021. It was tasked with the monitoring of Frontex's operations, focusing on its reinforced role and compliance with key regulations. The Working Group carried out a four-month investigation in which it gathered information on alleged fundamental rights violations involving Frontex, and whether the Agency was directly implicated or aware but failed to intervene appropriately. In its final Report<sup>363</sup>, the FSWG did not find conclusive evidence of direct performance of pushbacks and/or collective expulsions by Frontex. However, it concludes that the Agency found evidence in support of allegations of fundamental rights violations in Member States with which it had a joint operation but failed to "*address and follow-up on these violations promptly, vigilantly and effectively*"<sup>364</sup>. As a result, Frontex did not prevent these violations, nor reduced the risk of future fundamental rights violations. The FSWG therefore found deficiencies in Frontex's mechanisms to monitor, report and assess fundamental rights situations and developments, and made concrete recommendations for improvement.

Among these, the further development of a culture of cooperation between Frontex and the host Member State, the inclusion of a transparent reporting mechanism in the Operational

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<sup>361</sup> Fundamental Rights and Legal Operational Aspects of Operations in the Aegean Sea, Final Report of the Frontex Management Board Working Group, March 5, 2021.

<sup>362</sup> European Ombudsman, Decision in OI/5/2020/MHZ on the functioning of the European Border and Coast Guard Agency's (Frontex) complaints mechanism for alleged breaches of fundamental rights and the role of the Fundamental Rights Officer, 15/06/2021.

<sup>363</sup> LIBE Committee on Civil Liberties, Justice and Home Affairs, Report on the fact-finding investigation on Frontex concerning alleged fundamental rights violations, Rapporteur: Tineke Strik, 14.7.2021.

<sup>364</sup> Report on the fact-finding investigation on Frontex concerning alleged fundamental rights violations, p.5.



Plan with the objective that every incident in the operational area is reported and properly followed up. In particular the Operational Plan should include an agreement on Search and Rescue obligations, as well as on the port of disembarkation. The FSWG then recommends establishing clear criteria and procedures for the proper application of Article 46<sup>365</sup> regarding the suspension or termination of operations. Moreover, since the Agency should function as the eyes and ears on the ground, it is crucial that coastguards are not impeded or penalized for reporting any wrongful or potentially illegal actions or situations. The FSWG emphasizes the need for whistleblower guidelines to provide clear and robust protection. With regard to internal cooperation inside the Agency, the recommendations and opinions of the FRO and the CF are not sufficiently taken into account and the Executive Director fails to apply professional courtesy. Therefore, the FSWG calls upon the Executive Director to apply a due diligence procedure in the case of its activities in Greece, in a “*fully transparent, comprehensive and timely manner*”<sup>366</sup>.

In response to the Reports from the WG FRaLO, the European Ombudsman and the Frontex Scrutiny Working Group, Frontex’s Management Board released a statement<sup>367</sup> welcoming the recommendations of these institutions. However, the actual implementation of these recommendations remains a distinct and unaddressed matter.

The most significant investigation to date regarding Frontex was conducted by OLAF (European Anti-Fraud Office)<sup>368</sup> in 2021. OLAF is considered the EU’s “*watchdog*”<sup>369</sup> as it investigates fraud against the EU budget, corruption, and serious misconduct within European institutions, and develops anti-fraud policy for the European Commission<sup>370</sup>. After

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<sup>365</sup> Article 46, Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624.

<sup>366</sup> Report on the fact-finding investigation on Frontex concerning alleged fundamental rights violations, p.12.

<sup>367</sup> “*All these reports represent a very important contribution to the well-functioning of the Agency, and they represent an opportunity to reinforce the governance and internal management of the Agency by addressing a wide array of the shortcomings that have been identified.*” Frontex, Conclusions of the Management Board on the follow-up of the reports from the WG FRaLO, the Frontex Scrutiny Working Group, the European Ombudsman, ECA, and IAS. Retrieved from <https://www.frontex.europa.eu/media-centre/news/management-board-updates/conclusions-of-the-management-board-on-the-follow-up-of-the-reports-from-the-wg-fralo-the-frontex-scrutiny-working-group-the-european-ombudsman-eca-and-ias-Dqvm0w>, Last Accessed: February 12, 2024.

<sup>368</sup> Established in 1999, now regulated by Commission Decision (EU) 2015/2418 of 18 December 2015 amending Decision 1999/352/EC, ECSC, Euratom establishing the European Anti-fraud Office (OLAF).

<sup>369</sup> *InfoMigrants*, Frontex leaders concealed pushbacks, watchdog reports. Retrieved from: <https://www.infomigrants.net/en/post/38907/frontex-leaders-concealed-pushbacks-watchdog-reports>, Last Accessed: February 11, 2024.

<sup>370</sup> European Anti-Fraud Office (OLAF) Official website. Retrieved from: [https://anti-fraud.ec.europa.eu/index\\_en](https://anti-fraud.ec.europa.eu/index_en), Last Accessed: February 11, 2024.

receiving information about possible irregularities concerning Frontex, OLAF opened an investigation into alleged misbehavior and migrant pushbacks. It carried out various investigative activities, including the collection of information from open sources, the inspection of Frontex's premises and the interview of more than 20 witnesses. This resulted in a 123-page Report<sup>371</sup>, initially confidential, and later published by German journalists from FragDenStaat<sup>372</sup> to advocate for freedom of information. Based on the evidence collected, OLAF found that the allegations concerning the witnessing of illegal pushbacks by Frontex, the isolation of the FRO from the handling of Serious Incident Reports (SIRs) and the intimidation of staff are proven. The Report identifies three main categories of failure among the persons concerned (whose names have been redacted): failure to follow procedures and processes, failure in their duty of loyalty, and failure in their managerial responsibilities. These failures hindered the Agency's ability to fully comply with the protection of fundamental rights to which it is subject. The Report provides a detailed analysis of every incident that occurred between April and August 2020. During a specific incident, Hellenic Border Guard assets towed an overcrowded rubber boat with migrants into Turkish Territorial Waters in adverse sea conditions. The persons concerned decided to relocate Frontex aerial assets to a different operational area to avoid witnessing human rights violations in the Aegean Sea. In its conclusions, OLAF reported that the repeated misconduct of the individuals involved breached the Frontex Regulation and Code of Conduct, particularly with regard to the respect of fundamental rights as enshrined in the Charter.

As the focal point of this thesis, it is imperative to comprehend the significance of the Anti-Fraud Office's findings. For the first time, violations committed by Frontex have been substantiated by an independent entity. The proof of Frontex's fundamental rights violations is now irrefutable.

In the aftermath of the OLAF investigation, the most conspicuous consequence of the Report's findings to date is the resignation of former Frontex Executive Director Fabrice Leggeri<sup>373</sup>. Additionally, the European Parliament refused to approve the Agency's budget

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<sup>371</sup> OLAF, Final Report, Case No. OC/2021/0451/A1, March 2021.

<sup>372</sup> FragDenStaat, Frontex OLAF Report Leaked, October 13, 2022. Retrieved from: <https://fragdenstaat.de/en/blog/2022/10/13/frontex-olaf-report-leaked/>, Last Accessed February 12, 2024.

<sup>373</sup> Le Monde, The story behind Frontex director Fabrice Leggeri's resignation, May 1, 2022. Retrieved from: [https://www.lemonde.fr/en/international/article/2022/05/01/the-story-behind-frontex-director-fabrice-leggeri-s-resignation\\_5982123\\_4.html](https://www.lemonde.fr/en/international/article/2022/05/01/the-story-behind-frontex-director-fabrice-leggeri-s-resignation_5982123_4.html), Last Accessed: February 12, 2024. Fun fact: He is now a candidate of the

for 2020<sup>374</sup>. A climate of silence and inaction appears to have taken hold, with very little observable change, a state of affairs that is deemed insufficient. In fact, no legal proceedings were initiated.

In response to the public disclosure of the OLAF Report, Frontex issued a statement<sup>375</sup> acknowledging the identified shortcomings and pledging its commitment to addressing these matters earnestly. Affirming that “*these were practices of the past*”. The statement emphasized the importance of cooperation and structured dialogue between the Agency and Greek authorities, along with the integration of the FRO. Frontex expressed its dedication to ensuring the Agency's functionality and adherence to legal standards. However, a lingering question persists: Was the OLAF Report truly a wake-up call? In the same statement, Frontex attempted to redirect attention to its added value in activities post the outbreak of the war in Ukraine, as if this could rectify the situation.

## **2. The Recurring Issue of Frontex’s Accountability**

Now that the allegations regarding Frontex's violations of fundamental rights have been substantiated, it is imperative to delve into the discourse surrounding its legal accountability.

Enforcing legal remedies against Frontex’s actions has historically presented challenges. Holding Frontex accountable is difficult for several reasons. The first and most significant obstacle that the victim has to overcome is accessing the Court in the first place. Migrants find themselves in a vulnerable position, lacking access to legal assistance. Other contributing factors to this difficulty include the shared responsibility for external border

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French far-right Rassemblement National (RN) party for the 2024 European elections (Reuters, Former EU border agency chief joins French far-right RN party, February 18, 2024. Retrieved from: <https://www.reuters.com/world/europe/former-eu-border-agency-chief-joins-french-far-right-rn-party-2024-02-18/>, Last Accessed: February 23, 2022.

<sup>374</sup> Frontex, Frontex statement following European Parliament's vote on budget discharge, October 20, 2022. Retrieved from: <https://www.frontex.europa.eu/media-centre/news/news-release/frontex-statement-following-european-parliament-s-vote-on-budget-discharge-OaWqfl#:~:text=On%2018%20October%2C%20the%20European,recommendations%20to%20improve%20the%20agency>, Last Accessed: February 12, 2024.

<sup>375</sup> Frontex, Statement of Frontex Executive Management following publication of OLAF Report, October 14, 2024. Retrieved from: <https://www.frontex.europa.eu/media-centre/news/news-release/statement-of-frontex-executive-management-following-publication-of-olaf-report-amARYy>, Last Accessed: February 12, 2024.

management between the EU and its Member States. During joint operations, the host Member States formally hold command, and Frontex's perceived lack of executive powers has been frequently emphasized. Although the Agency acquired an increasingly prominent role, most of the personnel used in operations belong to the Member States. The Agency is primarily responsible for coordination, advisory, and supervisory roles, which sometimes makes it only indirectly involved in human rights violations. In the context of EU border management, there is a multi-actor dynamic. The plurality of actors participating in the operations provides an incentive for each actor to shift responsibility to the other.

Additionally, issues such as the absence of transparency in joint operations and joint return operations further complicate legal accountability. The notorious opacity of Frontex's decision-making processes and activities hinders the identification of responsible parties. It is frequently challenging to determine the extent of Frontex staff involvement in specific violations of fundamental rights. The precise activities of Frontex staff in specific locations and timeframes are not always clearly communicated. Fundamental rights violations may occur at various stages, each characterized by different levels of Frontex's involvement and control. Finally, due to its administrative nature, it can be challenging to demonstrate accountability within an Agency.

This analysis implies that distinguishing between the liability of Member States and Frontex is crucial. Frontex's responsibility is distinct and independent from any potential liability of the Member State receiving support. This has two implications: substantive and procedural.

The substantive implications identify the obligations that apply to each actor. In fact, each actor is accountable for its own failure to meet obligations; and neither actor bears responsibility for the failures of the other. Consequently, if a return decision or its implementation by a Member State does not comply with obligations under EU, international, or national law, that Member State is accountable. Similarly, if Frontex provides support in a manner or under conditions that contravene its obligations under EU law, Frontex is accountable. The separation of responsibilities is the object of Operational Plans between the Agency and Member States, which have often been deemed insufficiently clear.

Several cooperating actors each have their own competences and thus responsibilities. These responsibilities coexist in parallel; they are not mutually exclusive. Therefore, Frontex is

only liable for its own conduct and not for any breaches committed by Member States, and vice versa. Yet what are the actions that give rise to their responsibility?

The Francovich case<sup>376</sup>, a landmark decision by the European Court of Justice, established the principle that Member States can be held liable for damages when they fail to implement EU law, and individuals who suffer a loss as a result of this failure have the right to seek compensation from the Member States.

Within the context of Frontex accountability, it is essential to consider the legal framework governing the attribution of Member State conduct to the EU. There are no codified rules in that respect. The CJEU has established a general principle stipulating that the EU incurs liability for the actions of Member States only when it holds legal decision-making power.

This implies that Frontex is accountable for Member State conduct only to the extent that it has the authority to determine the specific actions of the Member State in a legally binding manner. Notably, mere opinions, advice, or other forms of non-binding influence exerted by the EU over a Member State's conduct, even if in violation of the law, do not render the EU liable. However, when the European Union exercises instructions and exerts other forms of legally binding influence, it becomes susceptible to liability<sup>377</sup>.

The procedural implications involve identifying the jurisdiction applicable to each actor. Member States can be held accountable before their own national courts and international courts, including the European Court of Human Rights (ECtHR). However, in the case of Frontex, being an EU body, the recourse for accountability lies in bringing it before the Court of Justice of the European Union to assess the conformity of its conduct with EU law.

As a matter of fact, Article 268 of the Treaty on the Functioning of the European Union (TFEU)<sup>378</sup> stipulates that the jurisdiction of the CJEU is exclusive when there are disputes concerning reparations for damages that involve the EU. In other words, the European Union cannot be sued before the national or international courts of the Member States.

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<sup>376</sup> CJEU, Case C-6/90, Francovich and Bonifaci v. Italy, 1991.

<sup>377</sup> Melanie Fink, The Action for Damages as a Fundamental Rights Remedy: Holding Frontex Liable. *German Law Journal*, 2020, p.538-539.

<sup>378</sup> Article 268 TFEU

The principal direct actions available to individuals against acts of EU bodies, including Frontex, are the action for annulment and the action for damages.

In light of the substantive and procedural implications, attribution of the conduct to the EU is a precondition for the EU's liability and for the CJEU jurisdiction.

## **2.1 The Action for Damages and the Conditions for Fundamental Rights Liability**

The Action for annulment, as regulated by Article 236 TFEU<sup>379</sup>, serves as a mechanism allowing individuals to contest the legality of legal acts carried out by European bodies and organs before the Court of Justice of the European Union. However, its applicability becomes significantly constrained when considering Frontex's activities at the EU's external borders. This limitation arises from three primary factors. Firstly, the action for annulment is contingent upon the legal acts being “*intended to produce legal effects vis-à-vis third parties*”. Secondly, proving that Frontex's acts directly and individually concern a specific person, especially in the context of potential fundamental rights violations, poses a formidable challenge. Thirdly, the narrow window for filing an appeal may not align with the practical realities faced by migrants affected by Frontex's actions.

An individual who has been negatively impacted by Frontex's actions could then bring a lawsuit before the Court of Justice of the European Union to seek compensation for any damage caused by the Agency or its agents while performing their duties. Indeed, Article 340 TFEU<sup>380</sup> regulates the Action for damages and establishes that in the case of non-contractual liability, the Union “*shall make good any damage caused by its institutions or by its servants in the performance of their duties*”. This last sentence has been interpreted restrictively by the CJUE, by limiting its scope to acts of servants that “*by virtue of an internal and direct relationship, are the necessary extension of the tasks entrusted to the institution*”<sup>381</sup>. Consequently, the EU is not liable for private conduct unless there is a strong legal relationship between the EU and the servant. This relationship must be dual in nature:

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<sup>379</sup> Article 236 TFEU

<sup>380</sup> Article 340 TFEU

<sup>381</sup> CJEU, *Jamal Ouariachi v Commission* (Case T-124/04), Order of the Court of First Instance (Fifth Chamber), 26 October 2005, Paragraph 18.

the servant must be an official staff member of a Union body, and the infringement must objectively occur while carrying out tasks for that Union body.

The Action for damages is notably more fitting than the Action for annulment in cases involving the violation of human rights by Frontex. This is particularly true given that the execution of border management tasks often manifests as factual conduct. This type of conduct represents actions that do not entail the adoption of legally binding acts. A pertinent example is the execution of pushbacks. Such factual conduct is often not reviewable under the action for annulment. Individuals can typically only resort to the action for damages to contest these activities.

Considering all the difficulties in enforcing the Agency's responsibilities, the question that this thesis addresses is: Can the action for damages fill Frontex's gap of accountability?<sup>382</sup>

To answer this question, we must first identify the conditions under which the EU and Frontex may be held liable.

The EU's liability conditions are guided by “*the general principles common to the laws of the Member States*”<sup>383</sup>. Thus, the CJEU is inspired by the rules on liability of public national authorities and on liability in private law. In this perspective, the Action for damages is both backward and forward looking. It is backward-looking because it seeks compensation for harm that has already been suffered. It is forward-looking because it aims to prevent any future harm.

However, if the harm involves violations of fundamental rights, it is always irreparable, in the sense that it cannot be restored by economic compensation.

First, we will examine the conditions for EU liability and then the conditions for EU fundamental rights liability.

With regard to the sphere of EU liability, it is relevant to highlight that not every violation causes damages. It is necessary to demonstrate both that the violation caused actual damages and that it was the fault of the public authority. The Court of Justice of the European Union

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<sup>382</sup> Refer to p. 118 of this Thesis.

<sup>383</sup> Article 340 TFEU.

has established three cumulative conditions for the EU's liability, which are not specific to fundamental rights. These conditions are: the unlawfulness of the conduct in question (1), the occurrence of damage to the victim (2), and a causal link between the unlawful conduct and the damage (3).

Furthermore, the unlawful conduct (1) must be qualified, meaning that the rule infringed upon should confer rights to individuals (A), and the breach must be sufficiently serious (B).

Seriousness arises when EU authorities “*manifestly and gravely disregard the limits on their discretion*”<sup>384</sup>. A breach is considered manifest (a) when the authority in question blatantly infringes its legal obligations. This means that the violation is obvious, clear-cut, or flagrant.

On the other hand, a breach is considered grave (b) when an authority, exercising ordinary care and diligence, would clearly not have committed it. This type of violation is reprehensible or inexcusable. The severity of a breach (B) is therefore determined by the level of discretion held by the authority, the clarity of the boundary between lawful and unlawful conduct, and the degree of overstepping that boundary in a particular case<sup>385</sup>.

In relation to the sphere of EU fundamental rights liability, the CJEU has not yet formulated a distinct approach tailored exclusively to fundamental rights. Liability is thereby dependent on the fulfillment of the same three cumulative conditions.

Since the CJEU acknowledges that fundamental rights confer rights on individuals<sup>386</sup> and that their violation causes at least non-material damage<sup>387</sup>, the core question is whether and under which circumstances the Court considers violations of fundamental rights to be sufficiently serious.

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<sup>384</sup> CJEU, *Laboratoires Pharmaceutiques Bergaderm SA and Jean-Jacques Goupil v. European Community* (Case C-352/98 P), JUDGMENT OF THE COURT, 4 July 2000, Paragraph 43.

<sup>385</sup> Melanie Fink, *The Action for Damages as a Fundamental Rights Remedy: Holding Frontex Liable*. *German Law Journal*, 2020, p.541-542.

<sup>386</sup> An obligation confers rights on individuals when it serves to protect them. This is true for fundamental rights obligations as well as for Frontex's monitoring obligations, which explicitly aim to protect fundamental rights.

<sup>387</sup> Non-material damages, also referred to as non-pecuniary or non-economic damages, encompass harm or loss that is intangible and not directly associated with financial or economic value. These damages often involve emotional distress, pain and suffering, loss of enjoyment of life, or other subjective and non-monetary impacts on an individual's well-being.



The Court's stance on the matter appears ambiguous, depending on the specific right at the center of the case law. In certain instances<sup>388</sup>, the CJEU has suggested that a mere breach of a fundamental right is inherently serious, rendering it intolerable and unacceptable.

Conversely, in other cases<sup>389</sup>, the Court has articulated that violations of fundamental rights are deemed sufficiently serious only when they are manifest, flagrant, or reprehensible. Even within the context of fundamental rights, limiting liability by imposing a seriousness requirement is considered necessary to provide authorities with the discretion and maneuverability essential for the effective execution of their duties.

The field of fundamental rights law exhibits distinctive features that distinguish it from traditional liability regimes, necessitating adjustments in the conditions for liability within this context. Breaches of rights commonly at risk during border control activities, such as the right to life, the prohibition of torture, and the prohibition of refoulement, inherently possess a level of severity, simply because of their nature.

In EU fundamental rights liability, the Action for damages primarily serves to redress and prevent violations of fundamental rights, with the focus on rectifying the breach of rights rather than economic loss. A restrictive approach to liability seems unnecessary in the realm of fundamental rights, where the paramount concern lies in safeguarding rights rather than mere compliance with obligations<sup>390</sup>. Limiting liability solely to cases of blameworthy or serious noncompliance might not align with the overarching goal of protecting fundamental rights.

According to Flink<sup>391</sup>, the conventional conditions of damage and causation should only be relevant when the victim seeks compensation for material damage in addition to the inherent damage resulting from any breach of a fundamental right. Consequently, a comprehensive approach to liability, akin to the European Court of Human Rights' perspective<sup>392</sup>, would

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<sup>388</sup> CJEU, *Chart v. EEAS* (Case T-138/14), JUDGMENT OF THE COURT, 16 December 2015, Paragraph 114.

<sup>389</sup> CJEU, *Sison v. Council* (Case T-341/07), JUDGMENT OF THE COURT, 23 November 2011, Paragraphs 73-74.

<sup>390</sup> "It should be noted, however, that in balancing the various interests at stake, the Court may give priority to the fight against irregular migration and deny liability." Melanie Fink, p.546.

<sup>391</sup> Melanie Fink, *The Action for Damages as a Fundamental Rights Remedy: Holding Frontex Liable*. *German Law Journal*, 2020, p.543.

<sup>392</sup> ECHR, *Keegan v. The United Kingdom* (Application No. 28867/03), JUDGEMENT, 18 July 2006, Paragraph 34.

imply that any infringement automatically triggers liability. Following this logic, all breaches of fundamental rights should automatically qualify as sufficiently serious and incur Frontex's liability. Ergo, seriousness should not be a determining factor for liability within the context of Frontex operations so as to ensure the protection of fundamental rights.

## **2.2 Frontex's Breaches of Positive Obligations**

Fundamental rights are commonly recognized as involving both negative and positive obligations. Negative obligations compel public authorities to abstain from conduct that infringes upon fundamental rights. On the other hand, positive obligations necessitate active efforts from public authorities to ensure the protection of these rights. This duty to act may involve activities such as enacting laws, responding to and penalizing interference by others, or taking practical measures to safeguard individuals.

Frontex may violate fundamental rights either through action, constituting a breach of its negative obligations (e.g., a pushback conducted by Frontex's own border guard with executive powers), or through omission, signifying a breach of its positive obligations (e.g., a pushback carried out by a Member State in the context of a joint operation). Given Frontex's coordinating role in joint operations, infringements through action are less probable than infringements through omission.

As extensively explored in Chapter 3<sup>393</sup>, Frontex is obligated by EU fundamental rights law, which includes positive obligations to implement all reasonable measures for safeguarding individuals from known or foreseeable fundamental rights risks.

Frontex's intervention is circumscribed by the competences delegated to it, precluding its authority to modify or annul the original return decision or issue binding directives to Member State personnel. Despite these limitations, Frontex possesses a repertoire of measures to ensure the protection of individuals in border management activities. This includes a prior assessment of fundamental rights risks, detailed guidance in the Operational Plan, and the facilitation of communication channels for forced-return monitors to swiftly

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<sup>393</sup> Refer to p. 69 of this Thesis.

signal potential violations. Moreover, Frontex’s on-ground personnel are empowered to convey Agency views to the host Member State on personnel instructions, with these views mandatorily considered by the host Member State. Any deviation from the Operational Plan, particularly regarding fundamental rights compliance, requires immediate reporting to the Executive Director. In cases of serious or persistent fundamental rights violations, the Executive Director is obligated to withdraw financial support or suspend/terminate joint operations<sup>394</sup>. Frontex is not only competent but obligated to employ this array of measures, indicating a limited degree of discretion in its response to violations. The failure to implement these measures would render Frontex liable.

In alignment with Frontex’s competences, the duty to intervene arises when authorities “*knew or ought to have known*” of a “*real and immediate risk*”<sup>395</sup> to the rights of specific individuals. Essentially, the duty to act is founded on the foreseeability of the risk of harm.

In such instances, public authorities are mandated to employ all reasonable measures within their capacity to safeguard the rights of the individuals involved. The European Court of Human Rights considers the projected effect of the measures that could have been taken.

Measures are deemed reasonable if they were expected to avert the risk or had a real prospect of altering the outcome or mitigating harm. At the same time, authorities are only expected to undertake measures that do not impose an impossible or disproportionate burden, considering factors such as the unpredictability of human conduct, limited resource availability, and the necessity to prioritize in policing modern societies.

After considering these factors, the analysis will now turn to the conditions for EU liability in the context of positive obligations.

In examining the manifestness of a breach (a), the CJEU considers the foreseeability for the public authority regarding the illegality of its conduct. The evaluation of the gravity of the breach (b) involves assessing the reprehensibility or excusability of the mistakes made.

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<sup>394</sup> Article 46, Regulation 1896/2019.

<sup>395</sup> ECHR, CASE OF OSMAN v. THE UNITED KINGDOM (87/1997/871/1083) JUDGMENT, 28 October 1998, Paragraph 116.

Therefore, liability only arises to the extent that a diligent authority could reasonably have been expected to do more, considering the possibilities and limitations faced by public authorities.

The presence of a causal link (3) is established when the violation of EU law is a necessary and sufficiently direct condition for the damage to occur<sup>396</sup>. The crucial consideration revolves around the potential impact of the measures that the EU was obligated to undertake.

In the case of Frontex's omission, the inquiry centers on what would have transpired if it had acted. A causal link exists if the EU authority's omission, failure to act, or supervise is both a necessary and sufficient condition for the unlawful conduct of a Member State.

In summary, the factors that determine the existence and breach of a positive obligation, leading to potential EU liability under Article 340 TFEU, include: the foreseeability of the illegality, considering the possibilities and limitations faced by the relevant authority, and evaluating the anticipated impact of measures that could have been implemented by them.

For Frontex to be held liable, it must possess knowledge of an interference (or the risk of an interference) with fundamental rights, be aware of the available possibilities to prevent it in the specific situation and comprehend the projected effect of measures it could have taken<sup>397</sup>. While the assessment of these aspects is ultimately contingent on the specific circumstances of each case, two general observations can be articulated:

First, Frontex is obligated to monitor joint operations and establish structures to acquire knowledge of any irregularities, including violations of fundamental rights. Frontex may not always possess knowledge of such violations, but it should certainly be aware of them. This is sufficient to trigger a positive obligation. In fact, Frontex's awareness of a specific violation holds limited importance in determining a breach of fundamental rights obligations. The Agency is legally required to establish effective mechanisms for monitoring fundamental rights compliance in all its activities. This necessitates the establishment of structures, such as the presence of its staff on the ground, to be informed of relevant risks and irregularities. Therefore, Frontex must have knowledge of any fundamental rights

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<sup>396</sup> CJEU, *Trubowest Handel and Makarov v. Council and Commission*, (Case C-419/08 P) JUDGMENT OF THE COURT (Fourth Chamber), 18 March 2010, Paragraph 53.

<sup>397</sup> Melanie Fink, *The Action for Damages as a Fundamental Rights Remedy: Holding Frontex Liable*. *German Law Journal*, 2020, p.544.

violations that occur, and the failure to establish structures to acquire such knowledge cannot be used to diminish its accountability in this regard.

Second, liability is contingent on the extent to which the Agency had the opportunity and took measures to address a specific fundamental rights risk. Generally, the more apparent and persistent a fundamental rights violation, the greater the expectation that Frontex will actively intervene to prevent or halt it. Failure to take any measures would likely constitute a serious breach of its monitoring obligations, rendering Frontex liable alongside the Member State who directly committed the violation. When Frontex does take measures, it becomes essential to evaluate whether these actions align with what a reasonably acting authority would consider appropriate and sufficient to address the violations at hand.

### **2.3 The Action for Damages as a Remedy to hold Frontex Liable**

Currently there are evidenced human rights violations and a lack of mechanisms for individuals affected to hold the Agency accountable. Some efforts have been made in this respect with the setting up of an individual complaint mechanism with Regulation 2016/1624. Still, our previous analysis<sup>398</sup> has demonstrated how it does not qualify as an effective remedy because of its non-judicial and internal nature. This section analyzes the potential of the Action for damages to fill the accountability gap that Frontex is subject to.

The Action for damages was not initially designed as a mechanism for safeguarding fundamental rights, leading to inherent limitations. The Court of Justice of the EU adopts a stringent interpretation of the conditions for liability<sup>399</sup>. Given Frontex's coordinating role, distinguishing between Frontex's liability and that of Member States becomes a complex task. Consequently, the Court encounters significant challenges in determining the demarcation point between Frontex's liability and that of the Member States.

Simultaneously, the Action for damages emerges as a powerful accountability mechanism for safeguarding fundamental rights by providing a procedural remedy that enforces compliance. In situations where there may be a lack of political will to ensure adherence to

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<sup>398</sup> Refer to p. 95 of this Thesis.

<sup>399</sup> “*the Court has been reluctant to relax the conditions for liability*”: Melanie Fink, *The Action for Damages as a Fundamental Rights Remedy: Holding Frontex Liable*. *German Law Journal*, 2020, p.547.

legal obligations, individuals can utilize this avenue to compel public authorities. This process not only empowers individuals to demand justifications and answers but also places the decision on their claims in the hands of an independent and impartial body, with legally binding and enforceable awards of damages.

Considering both its shortcomings and potentials, the question arises: Can the Action for damages effectively ensure the right to good administration and the right to an effective remedy? This paper contends that the answer is affirmative, contingent upon the Court of Justice of the EU adopting a fundamental rights-friendly approach. Specifically, the Court should broaden Frontex's liability scope, adopt a more flexible stance on the seriousness requirement, and carefully consider the conditions under which positive obligations incur liability.

Nevertheless, in the current landscape, the Action for damages stands as the only recourse for individuals. Consequently, the CJEU must facilitate a simplified process for individuals to establish the Agency's legal responsibility. A more accessible path to legal remedies should be established by requiring a less intense level of proof.

In conclusion, as long as viable alternatives remain lacking, the Action for damages serves as a crucial gap-filler, especially in addressing factual conduct. To delve deeper into the practical application of these conditions and assess the suitability of the Action for damages in ensuring the respect of fundamental rights within Frontex operations, the following section of this Thesis will analyze a recent case law before the Court of Justice of the European Union.

### **3. Judicial Scrutiny of Frontex: Analyzing Case Law**

#### **3.1 Case T-600/21 WS and Others v Frontex**

WS and Others v Frontex<sup>400</sup> is about the contested return operation orchestrated by Frontex and the Hellenic Republic, involving Syrian nationals who arrived on the island of Milos in

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<sup>400</sup> CJEU, Case T-600/21, WS and Others v European Border and Coast Guard Agency (Frontex), Judgment of the General Court (Sixth Chamber), 6 September 2023.

Greece on October 9, 2016<sup>401</sup>. This case centers on the applicants' quest for international protection, their subsequent transfer to a temporary reception center in Turkey, and the issuance of temporary protection documents by Turkish authorities. The dispute deepens as the applicants, dissatisfied with their return process, filed complaints with the Frontex Fundamental Rights Officer, alleging Frontex's involvement. The unfolding events, including the handling of complaints, internal investigations by the Hellenic Police, and the Fundamental Rights Officer's final report, underscore the pivotal issues of accountability, procedural fairness, and the applicants' persistent contention regarding Frontex's role in the return operation.

The applicants claim that the Agency engaged in an unlawful conduct before, during and after the return operation. This caused them actual and certain damage of material<sup>402</sup> and non-material<sup>403</sup> nature. Specifically, they request for compensation that amounted to more than 136,000€<sup>404</sup>. Their argument hinges on the premise that had Frontex not breached its obligations, particularly those related to non-refoulement and the right to asylum, they would not have undergone an unlawful return to Turkey. According to the applicants, this breach deprived them of the international protection to which they were entitled. In contrast, Frontex opposes the application, urging the court to dismiss it and suggesting that the applicants bear the associated costs.

Before analyzing the substantive aspects of the case, the General Court examines its admissibility<sup>405</sup>. Frontex disputes the admissibility of the Action for damages by asserting that the applicants should have first brought an Action for annulment. Moreover, Frontex contends that the first and second head of claims are inadmissible, arguing that the Court lacks jurisdiction to issue statements of principle. Following a thorough examination, the General Court dismisses these disputes. It maintains that the claim for damages constitutes an independent form of action, serving different purposes than the Action for annulment. Furthermore, the Court asserts its jurisdiction over the first and second heads of claims, emphasizing the EU's obligation to remedy any damages suffered by individuals due to

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<sup>401</sup> At the time of the events Frontex was governed by Regulation 2016/1624, which is now replaced by Regulation 2019/1896. The following is based on Regulation 2016/1624 as the relevant legal framework.

<sup>402</sup> CJEU, Case T-600/21, *WS and Others v European Border and Coast Guard Agency*, Paragraph 58.

<sup>403</sup> CJEU, Case T-600/21, *WS and Others v European Border and Coast Guard Agency*, Paragraph 59.

<sup>404</sup> CJEU, Case T-600/21, *WS and Others v European Border and Coast Guard Agency*, Paragraph 17.

<sup>405</sup> CJEU, Case T-600/21, *WS and Others v European Border and Coast Guard Agency*, Paragraphs 19-51.

alleged infringements by Frontex. This pivotal decision sets the stage for the court to delve into the substantive examination of the case.

Having reiterated the three indispensable conditions for EU agencies to incur non-contractual liability—qualified unlawful conduct, actual damage, and a causal link—the General Court opts to bypass the first two conditions and focuses directly on analyzing the existence of a causal link<sup>406</sup>. The Court emphasizes that the damage claimed by the applicants must be a sufficiently direct consequence of the conduct complained of, with such conduct being “*the determining cause of the damage*”<sup>407</sup>. The applicants contend that all three conditions are met, but the Court challenges this assertion, arguing that the applicants’ argument is based on an incorrect premise<sup>408</sup>. They contend that, had it not been for Frontex’s alleged shortcomings in fulfilling its obligations related to the protection of fundamental rights within the scope of the repatriation operation, they would not have been unlawfully returned to Turkey, and the invoked material and moral damages would have been averted. This assertion is rooted in the belief that, given their Syrian nationality and the prevailing conditions in Syria at the time, they would have rightfully received the international protection entitled to them. Consequently, they posit that they would have secured accommodation, basic support, and a residency permit in Greece, thus avoiding the purported psychological distress and circumventing a challenging journey to Iraq. The General Court, however, challenges this premise, indicating that the applicants’ interpretation is flawed, negating Frontex’s alleged responsibility for the subsequent material and moral damages. This nuanced analysis forms a critical part of the court’s deliberation on the causal link in the context of the applicants’ claims.

Even if the EBCG Agency is bound by the principle of non-refoulement, it has no competence on the assessment of the merits of the return decisions and on the applications for international protection. These are considered to be the sole responsibility of the host

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<sup>406</sup> CJEU, Case T-600/21, *WS and Others v European Border and Coast Guard Agency*, Paragraph 55.

<sup>407</sup> CJEU, Case T-600/21, *WS and Others v European Border and Coast Guard Agency*, Paragraph 56.

<sup>408</sup> CJEU, Case T-600/21, *WS and Others v European Border and Coast Guard Agency*, Paragraph 62.



Member State. In fact, the applicants also filed a lawsuit against Greece in the European Court of Human Rights and won a friendly settlement<sup>409</sup>.

Furthermore, the damage invoked must result directly from the alleged illegality and not from the applicant's choice as how to react to the allegedly unlawful act. The mere fact that the damage was a necessary condition for the damage to arise, in the sense that the damage would not have arisen in the absence of such conduct is not sufficient to establish a causal link<sup>410</sup>.

Therefore, the General Court declares the inexistence of a causal link, stating that in Case T-600/21, material and non-material damage are the result of the choice the applicants made, not of Frontex's direct conduct. In its final decision on September 2023, the CJEU dismisses the Action for damages in its entirety, without being necessary to examine the other conditions for liability. Since the applicants have been unsuccessful, they bear their own costs and those incurred by the Agency.

### **3.2 Legal and Operational Repercussions**

The verdict in the *WS and Others v Frontex* case, has generated mixed sentiments. At first glance, this judgment may seem, both worrying and discouraging. It appears that Frontex got away, once again, with human rights violations<sup>411</sup>. While on the surface, it may appear as a setback for human rights activists, with Frontex seemingly avoiding accountability, some scholars argue that within this judgment lies a hidden success. This section aims to develop on the critiques as well as the legal and operational ramifications of Case T-600/21.

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<sup>409</sup>Bakir, Hemin, Syrian Family Loses EU Lawsuit Against Frontex Deportation. BNN Breaking, 26 Sep 2023. Retrieved from: <https://bnnbreaking.com/politics/syrian-family-loses-eu-lawsuit-against-frontex-deportation/>, Last Accessed: February 20, 2024.

<sup>410</sup> CJEU, Case T-600/21, *WS and Others v European Border and Coast Guard Agency*, Paragraph 57.

<sup>411</sup> Peers, S. The EU General Court's Judgment in Case T-600/21 *WS and Others v Frontex*: A Step Forward or a Missed Opportunity?, *EU Law Analysis*, September 2023. Retrieved from: <https://eulawanalysis.blogspot.com/2023/09/the-eu-general-courts-judgment-in-case.html>, Last Accessed: February 20, 2024.

This particular case holds significant weight as the first of its kind, marking a crucial milestone after years of discourse on holding Frontex accountable for fundamental rights violations. The de facto application of the Action for damages by the CJEU in this context suggests that judicial protection against EU bodies can be achieved through this mechanism. Essentially, by declaring the admissibility of the case, the judgment establishes the Action for damages as an ad-hoc remedy for fundamental rights, laying the groundwork for future similar proceedings. In other words, the judgment confirms that the Action for damages functions as a makeshift fundamental rights remedy and the main success of this case is that it has paved the way for further proceedings of its kind<sup>412</sup>.

While criticism is warranted, especially regarding the General Court's argument on causation, viewing the judgment from this perspective reveals it as a pivotal step in adapting the EU legal protection system to the complex realities at the EU's external borders. The Action for damages is gradually evolving into a form of declaratory relief, utilizing the flexibility of Art. 340 TFEU to allow for judicial review of factual conduct.

From a practical standpoint, the core benefit of the CJEU's judgment is its facilitation of future complaints against Frontex. From now on, complainants can reference Art. 340 TFEU without engaging in lengthy discussions on admissibility, streamlining the process for potential judicial review. This nuanced approach positions the *WS and Others v Frontex* case as a catalyst for reshaping the landscape of accountability in EU border operations.

When discussing future cases, it is crucial to highlight that *WS and Others v Frontex* specifically addressed issues related to return operations and deportations, distinct from instances of pushbacks. Notably, while pushbacks are inherently deemed unlawful, the legality of deportations hinges on various factors, particularly the safety of the destination country for the individual being deported. In this context, the pivotal question in the *WS and Others* case revolved around whether Turkey qualified as a safe third country, a determination beyond the scope of the General Court's competence. Contrarily, in cases of pushbacks, the General Court might face fewer challenges in identifying such actions as inherently unlawful.

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<sup>412</sup> Catharina Ziebritzki, *A Hidden Success?* Verfassungsblog, October 13, 2023. Retrieved from: <https://verfassungsblog.de/a-hidden-success/>, Last Accessed: February 20, 2024.

Furthermore, establishing the existence of both material and non-material damage may be more straightforward in cases diverging from *WS and Others v Frontex*. In this instance, the applicants sought compensation for damage resulting from their onward flight from Turkey to Iraq, introducing a complex chain of causation. Cases where the invoked damage is a more direct outcome of the deportation process could potentially bypass this obstacle.

The outcome of a potential appeal to the Court of Justice in Case T-600/21 remains uncertain, prompting anticipation regarding the Court's decision. However, certain doctrinal weaknesses in the General Court's reasoning have been identified, raising the likelihood that the Court of Justice will need to provide more precision in its assessment.

According to Ziebritzki<sup>413</sup>, the General Court's reasoning present at least two fundamental mistakes. First, it failed to define Frontex's misconduct, jumping directly to evaluating the causal link without first identifying the specific wrongful actions of Frontex. This oversight is problematic as a comprehensive evaluation of causation necessitates a prior understanding of the conduct in question. Frontex's failures, including a failure to object to an unlawful deportation, a failure to insist on EU law compliance and a failure to withdraw its administrative support, should have been precisely defined before assessing the causal link. The second critical mistake pertains to the question of causation, where the General Court "*started with the wrong question*"<sup>414</sup>. Instead of focusing on whether Frontex's conduct was causal for the resulting damage, the Court implicitly asked which conduct was causal for the damage. This led to the conclusion that the Greek decision to reject asylum claims and issue deportation orders was the sole cause. However, this oversimplification ignores the possibility of multiple causes for a single result, where both national decisions and EU support contribute causally.

Complicating the matter in this case is the fact that the monitoring and protection obligations Frontex is accused of breaching are inherently tied to potentially unlawful Member State conduct. The Agency's coordinating nature cannot exclude accountability for any breach of its positive obligations. While Frontex's competences are limited, it cannot be exempt from

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<sup>413</sup> Catharina Ziebritzki, *A Hidden Success?* Verfassungsblog, October 13, 2023. Retrieved from: <https://verfassungsblog.de/a-hidden-success/>, Last Accessed: February 20, 2024.

<sup>414</sup> Catharina Ziebritzki, *A Hidden Success?* Verfassungsblog, October 13, 2023. Retrieved from: <https://verfassungsblog.de/a-hidden-success/>, Last Accessed: February 20, 2024.

accountability simply because another party acted wrongfully. Preventing violations of human rights is Frontex's very *raison d'être*.

In this light, Frontex's failure to meet obligations to monitor these operations and safeguard individuals from fundamental rights violations should be viewed as a contributing factor to the damage suffered by the injured party. This is particularly relevant since if the Agency had acted through the lawful execution of its duties, it could have prevented the unlawful conduct by the Member State entirely or mitigate the victim's harm.

#### **4. Potential Reforms: Strengthening Frontex Accountability**

Frontex's unmistakable breach of monitoring obligations has implicated it in fundamental rights violations. Yet, to this day, Frontex was never condemned for violations of human rights. The lack of accountability in Frontex's operations is thus evident. The only judicial mechanism offered to individuals is the Action for damages, which was acknowledged as admissible for potential Frontex illegality only last year. While we've explored the circumstances under which this action can hold Frontex accountable, it remains insufficient. Considering the vast expanse of the Agency's responsibilities, managing 42,000 km of coastline and 500 million border crossings annually<sup>415</sup>, alternative measures must be introduced to address the accountability gap effectively.

A reinforced accountability mechanism is necessary to ensure robust oversight and address the shortcomings identified in the current framework. This entails implementing proactive measures that enhance transparency, clarify Frontex's responsibilities, and establish clear lines of accountability. Key aspects of reform should include the establishment of an independent oversight body with the authority to investigate alleged violations, an enhanced role for the European Parliament in scrutinizing Frontex activities, and the development of comprehensive guidelines for Frontex's engagement in joint operations. Additionally, mechanisms for effective collaboration with relevant human rights organizations and

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<sup>415</sup> Frontex, Operations. Retrieved from: <https://www.frontex.europa.eu/what-we-do/operations/operations/>, Last Accessed: January 2, 2024.

agencies should be integrated to foster external scrutiny. By bolstering accountability through these reforms, Frontex can better align with fundamental rights principles and contribute to a more trustworthy and responsible management of EU external borders.

Lastly, holding Frontex liable for its own actions would undoubtedly elevate its accountability. The prospect of facing responsibility and consequences for human rights violations should be a clear and unavoidable outcome in the event of such transgressions. Since the inherent wrongfulness of an act alone do not suffice as a preventive measure, creating a direct link between its actions and accountability serves as a powerful deterrent, reinforcing the notion that any violation will not go unnoticed or without repercussions.

Ideally, there should be a comprehensive reform of the system, beginning with a reassessment of the Agency's founding regulation. This reform should strive to identify effective means of legal recourse available to the individuals affected, eliminate uncertainties about the appropriate course of action, clarify the applicable jurisdiction, and ensure not only political but, crucially, legal accountability.

## Conclusion

The Frontex founding Regulation has been amended four times: in 2007, 2011, 2016 and 2019, each of which has progressively expanded the agency's mandate, functions and budget (from 19 million € in 2006 to 330 million € in 2019).

The creation of Frontex was a deliberate and gradual process that explored various options for its precursor before ultimately selecting the form of an Agency. With entrance into force of Regulation 2019/1896, the European and Border Coast Agency is now closer than ever to its original conception as a fully-fledged European Corps of Border Guards.

At the outset, Frontex was reluctant to implement an individual complaint mechanism. Currently, although not yet fully refined, an operational system exists to handle such complaints. This is evidence of the Agency's strengthened functions over the years.

In February 2024, the Commission released its evaluation of Regulation 2019/1896<sup>416</sup>. While the report arguably acknowledges the Agency's effective adherence to the fundamental rights framework within Frontex, it also highlights a notable deficiency in accountability for its operations.

There is a conspicuous tension between a control-oriented logic and a human rights-based approach to European migration policy. This tension has become particularly apparent in the context of Frontex operations in the Aegean Sea. The Frontex scandal is an example of how the conflict between these two approaches has resulted in greater scrutiny of the Agency's practices. This underscores the need for a more unified and rights-oriented framework in external borders of the European Union.

Throughout our analysis, practical scenarios involving pushbacks in joint operations and violations within return joint operations have been evident. In these instances, Frontex did not demonstrate an "exemplary attitude" in handling its coordinating role in managing external borders. If substantiated violations persist, the safeguards within Frontex's regulatory framework may not be sufficient to ensure the consistent respect for human rights.

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<sup>416</sup> REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL on the evaluation of Regulation (EU) 2019/1896 on the European Border and Coast Guard, including a review of the Standing Corps, COM/2024/75 final, 2.2.2024.

In *WS and Others v Frontex*, the Court of Justice of the European Union ruled the absence of a causal link and the dismissal of the Action for damages against the Agency. Navigating Frontex's path to accountability may pose challenges in the future. Eventual solutions to this issue could consist in the CJEU's nuanced interpretation of Frontex's responsibilities, ensuring a more comprehensive and rights-centric approach.

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