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Frontex and human rights : responsibility in 'multi-actor situations' under the ECHR and EU public liability law

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The aim of this chapter is to examine the role and powers of Frontex, the host state, and participating states during joint operations. The extent to which each of them is involved in decision-making processes and exercises authority over the resources deployed during joint operations determines the existence and degree of their legal responsibility. For this reason, this chapter focusses on decision-making and chains of command during Frontex-coordinated joint operations. As such, it not only forms the basis for the subsequent chapters, but also provides an important clarification of the tasks, responsibilities, and precise powers of Frontex and the states involved in joint operations.⁶⁹

Section 2.1 opens with a closer look at the agency. It introduces the origins, evolution, and tasks of Frontex (Section 2.1.1). In both EU law and international law, only 'subjects' thereof can be held responsible for breaches of their obligations. Section 2.1.2 thus discusses Frontex' legal personality within EU law and international law respectively, in order to clarify its capacity to bear legal responsibility under each of these legal systems. Section 2.1.3 provides an overview of the internal organisation of Frontex, highlighting the bodies set up with a mandate to monitor fundamental rights compliance of the activities of the agency.

The remaining part of the chapter elaborates on the organisation and coordination of joint operations. The analysis relies on the EBCG Regulation, Frontex' revised legal basis that entered into force on 6 October 2016. However, the EBCG Regulation leaves open numerous questions that are of interest here, especially the practical decision-making processes and detailed chains of command. Thus, the analysis also relies on an examination of documents requested from the agency under the right to public access to documents and qualitative empirical research. The latter consists of semi-structured interviews conducted at Frontex' headquarters in Warsaw and a field visit to the Military Airbase Pratica di Mare where the International Coordination Centre for Joint Operation Triton is located.⁷⁰ It should be noted that these documents, interviews, and visits relate to Frontex' legal basis in force prior to 6 October 2016. However, the legal framework for joint operations did not undergo substantial modifications.⁷¹ It may thus be assumed that the conclusions drawn on that basis still remain valid in light of the EBCG

69 See in particular the references cited in n 51.

70 For more detail see above 1.3.1.

71 Compare in particular EBCG Regulation (n 18) arts 15-42 with Council Regulation (EC) No 2007/2004 (n 16) [as amended] arts 3-3c, 7-10c.

Regulation. Where this is otherwise, it will be specifically pointed out in the course of this chapter.

Section 2.2 introduces joint operations. It discusses the typical activities during, and different types of, border control and return operations.

Section 2.3 focusses on the operational resources used to conduct joint operations. These include financial, human, and technical resources. Section 2.3.1 provides an overview of Frontex' financial resources. Section 2.3.2 discusses the different 'pools' of human and technical resources the agency has established in order to plan activities more efficiently and make swift reaction possible. Finally, Section 2.3.3 elaborates on the deployment of human and technical resources, focussing on the tasks and powers conferred on deployed officers and experts in the context of joint operations.

Section 2.4 zooms in on the implementation of joint operations. Section 2.4.1 sets out the applicable rules during joint operations, focussing on the Operational Plan that forms the basis according to which operations are implemented. Section 2.4.2 outlines the various instruments in place to ensure the coordination of the operations. Section 2.4.3 provides a detailed discussion of the authority the actors involved exercise over the deployed resources. It analyses the command and control arrangements according to the EBCG Regulation and the Operational Plans as well as the rules regarding criminal jurisdiction and civil liability. Finally, Section 2.4.4 looks into the structures in place to deal with fundamental rights-related incidents that may occur during joint operations and the possibilities for withdrawing financial support, or suspending or terminating operations on that basis.

Section 2.5 concludes that the state hosting a joint operation assumes the leading role, whereas the participating states act in support of the host state. Frontex, in turn, supports, reinforces, coordinates, and monitors the actions of member states before, during, and after joint operations.

2.1 FRONTEx: AN OVERVIEW

2.1.1 Origin, establishment, and tasks

2.1.1.1 *The 'Schengen area': common rules governing external border control*

A state's power to regulate and control entry to and presence on its territory has often been associated with the core of state sovereignty.⁷² Yet, the development of the free movement of persons within the EU and the abolition of

72 Gerassimos Fournalanos, *Sovereignty and the Ingress of Aliens* (Almqvist and Wiksell International 1986) 55–58; for detail see Malcom Anderson and others, *Policing the European Union* (Clarendon Press 1995) 121–155.

internal border controls, in particular, have triggered a gradual transfer of limited powers in the area of external border management to the EU.⁷³

Cooperation in the area of external border management was initiated inter-governmentally, both inside and outside the EU context. Most notably, in 1985, five states (Belgium, France, Germany, Luxembourg, and the Netherlands) concluded the Schengen Agreement, aimed at abolishing checks at internal borders.⁷⁴ The Schengen Convention, signed in 1990 in order to implement the Schengen Agreement, further specified that common rules would govern controls at the external borders.⁷⁵

This 'Schengen system' came into effect in 1995 and was incorporated into the EU legal system in 1999.⁷⁶ The competences of the EU in the area of border management are now found in Article 77 TFEU, which sets out in particular that the EU shall adopt measures concerning checks at the external borders and the absence thereof at internal borders. The centre-piece of the EU's Schengen *acquis* is the 'Schengen Borders Code', a Regulation that provides the legal framework for controls at the external borders of the Schengen area.⁷⁷

The Schengen area currently encompasses 26 states. Of the 28 EU member states, two, the United Kingdom and Ireland, are excluded from the application of the Schengen *acquis* with the possibility to opt in at a later stage to all or some Schengen provisions. This is because when the Schengen system was incorporated into the Union legal framework, they were not parties to the Schengen agreements.⁷⁸ In addition, Denmark negotiated a separate position, but continued to be part of the Schengen area as a matter of international law.⁷⁹ 26 EU member states are therefore in principle members of the Schengen area. However, the lifting of internal borders with four states (Bul-

73 Ferruccio Pastore, 'Visas, Borders, Immigration: Formation, Structure, and Current Evolution of the EU Entry Control System' in Neil Walker (ed), *Europe's Area of Freedom, Security and Justice* (Oxford University Press 2004) 94–98.

74 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, 14 June 1985; for more detail on the simultaneous developments within the EU, see Jorrit J Rijpma, 'The Third Pillar of the Maastricht Treaty: The Coming Out of Justice and Home Affairs' in Maartje de Visser and Anne P van der Mei (eds), *The Treaty on European Union 1993-2013: Reflections from Maastricht* (Intersentia 2013).

75 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.

76 Treaty of Amsterdam, Protocol integrating the Schengen *acquis* into the framework of the European Union, 2 October 1997.

77 Schengen Borders Code (n 3).

78 Schengen Protocol (n 76) art 4; for a more detailed discussion see Rijpma, 'Building Borders' (n 62) 66–68.

79 Schengen Protocol (n 76) art 3; Treaty of Amsterdam, Protocol on the position of Denmark, 2 October 1997, art 1.

garia, Croatia, Cyprus, and Romania) has been postponed until the Council decides that the conditions for abolishing internal border controls have been met. This brings the number of EU states where no internal border checks are carried out to 22.⁸⁰ In addition, the Schengen *acquis* is applicable to four non-EU countries (the 'Schengen Associated Countries', i.e. Iceland, Liechtenstein, Norway, and Switzerland), who concluded Association Agreements with the EU member states covering not only the then existing *acquis* but also all measures that build on it.⁸¹ In this chapter, the terms 'Schengen states' and 'member states' will be used interchangeably.

2.1.1.2 Operational implementation of the common rules

Despite the transfer of important powers in the area of external border management to the EU, the external borders continue to be borders of the member states rather than of the EU. In this light, in principle, it is the task of the respective national border guards to control the external borders.⁸²

It soon became clear that this approach brought a number of challenges. The diversity of the national authorities present at the external borders made a homogenous application of the Schengen rules difficult. In addition, the financial burden of external border control is unequally distributed, largely depending on the geographical position of the respective state and the geographical features of their border. Consequently, in 2002, the Commission identified a need to raise awareness among the national authorities that their activities also serve the interests of the other member states, to increase coordination and cooperation between them, and to share the financial burden more equally. On that basis, the Commission proposed *inter alia* the establishment of an external borders practitioners' common unit that would develop from the existing Strategic Committee on Immigration Frontiers and Asylum (SCIFA) and also brought up the possible creation of a 'European corps of border guards'.⁸³ The idea of an external borders practitioners' common unit was endorsed by the Council and soon after by the Seville European Council.⁸⁴

80 This is set out in the respective Acts of Accession: OJ 2003 L236/33, art 3 and Council Decision of 6 December 2007, 2007/801/EC, OJ 2007 L323/34 (Cyprus); OJ 2005 L157/203, art 4 (Bulgaria and Romania); OJ 2012 L112/21, art 4 (Croatia).

81 Schengen Protocol (n 76) art 6; OJ 1999, L176/36 (Iceland and Norway); OJ 2008, L53/1 (Switzerland); Council Decision 2011/350/EU of 7 March 2011, OJ 2011 L160/19 (Liechtenstein).

82 Schengen Borders Code (n 3) arts 1, 16; Rijpma, 'Frontex and the European system of border guards' (n 15) 218.

83 European Commission, 'Communication: Towards integrated management of the external borders of the member states of the European Union' (COM(2002) 233 final, 7 May 2002), in particular paras 12-19, 27-32, 47-51.

84 Council of the European Union, 'Plan for the management of the external borders of the Member States of the European Union' (10019/02 FRONT 58 COMIX 398, 14 June 2002); European Council (Seville), 'Presidency Conclusions' (21 and 22 June 2002), paras 31-32.

The new 'External Border Practitioners Common Unit', composed of the heads of the national services in charge of border control, met for the first time in July 2002 as a new formation of SCIFA (SCIFA plus the heads of national border guard services, therefore SCIFA+). Its major task was to manage the operational cooperation of external border management practitioners. This involved the approval of plans for joint operations and pilot projects submitted by the member states, the monitoring of their implementation, and the establishment of *ad hoc* centres.⁸⁵ Between July 2002 and March 2003, the Common Unit approved the initiation of a total of 17 projects, operations and *ad hoc* centres and set up a network of national contact points for the management of external borders. Major projects included a 'Common Integrated Risk Analysis Model' aimed at producing risk analyses that could be used by the Practitioners Common Unit and a 'Common Core Curriculum for Border Guard Training'. Joint operations were implemented *inter alia* at the coasts of the northern Mediterranean and the Canary Islands and in the South-eastern Mediterranean.⁸⁶

2.1.1.3 Establishment and development of Frontex

Less than a year after the Common Unit first met, the Commission identified structural limits related to the Common Unit's capability to effectively coordinate operational cooperation, noting that it was better equipped for more strategic tasks. The Commission found there was a 'need of alternative institutional solutions' and called for a 'much more operational body'. This new permanent structure should exercise day-to-day management and coordination tasks and be able to respond in time to emergency situations.⁸⁷

85 Valsamis Mitsilegas, 'Border Security in the European Union: Towards Centralised Controls and Maximum Surveillance' in Anneliese Baldaccini, Elspeth Guild and Helen Toner (eds), *Whose freedom, security and justice? EU immigration and asylum law and policy* (Hart 2007) 363–365; Daphné Gogou, 'Towards a European Approach on Border Management: Aspects Related to the Movement of Persons' in Marina Caparini and Otwin Marenin (eds), *Borders and Security Governance: Managing Borders in a Globalised World* (Transaction Publishers 2006) 112; Peers, Guild and Tomkin (n 51) 121.

86 Greek Presidency, 'Progress Report for the Implementation of the Plan for the management of external borders of the Member States of the European Union and the comprehensive Plan for combating illegal immigration' (17 March 2003); for a detailed analysis of the activities, House of Lords, 'Proposals for a European Border Guard' (Session 2002–03, 29th Report, London 2003), paras 33–39.

87 European Commission, 'Communication: Development of a common policy on illegal immigration, smuggling and trafficking of human beings, external borders and the return of illegal residents' (COM(2003) 323 final, 3 June 2003), 7–8; Rijpma, 'Hybrid agencification in the Area of Freedom, Security and Justice and its inherent tensions' (n 46) 87–88.

This issue was taken up shortly after by the Justice and Home Affairs Council, as well as the Thessaloniki and Brussels European Councils.⁸⁸

In November 2003 the Commission tabled a draft Regulation establishing a 'European Agency for the Management of Operational Co-operation at the External Borders' to take over the tasks from the Common Unit.⁸⁹ The Regulation was adopted by the Council in October 2004, setting up the new agency as of 1 May 2005 with a mandate to improve the management of the external borders of the Schengen area by coordinating the Schengen states' actions in the application of the Schengen Borders Code.⁹⁰ The new agency Frontex started its operational work in the headquarters in Warsaw on 3 October 2005.⁹¹

Frontex' founding Regulation was subject to two major revisions. In 2007 a Rapid Border Intervention Team ('RABIT') mechanism was set up, designed to provide swift operational assistance for a limited period of time to a member state facing a situation of urgent and exceptional pressure.⁹² The RABIT Regulation is particularly notable for having introduced a range of executive powers for officers deployed in support of the requesting state that were later extended to officers participating in 'standard' joint operations. In 2011, a second amendment further strengthened the agency's powers.⁹³ Unlike the original founding Regulation, this amendment required the

88 Council of the European Union, 'Preparation of the Thessaloniki European Council' (5 June 2003); European Council (Thessaloniki), 'Presidency Conclusions' (19 and 20 June 2003), 13–14; European Council (Brussels), 'Presidency Conclusions' (16 and 17 October 2003).

89 European Commission, Proposal for a Council Regulation establishing a European Agency for the Management of Operational Co-operation at the External Borders, 20 November 2003, COM/2003/0687 final.

90 Council Regulation (EC) No 2007/2004 (n 16); for detail on the origins and specific characteristics of Frontex see also Andrew W Neal, 'Securitization and Risk at the EU Border: The Origins of FRONTEX' 47 *Journal of Common Market Studies* 333; Rijpma, 'Hybrid agencification in the Area of Freedom, Security and Justice and its inherent tensions' (n 46); Jorrit J Rijpma, 'Institutions and Agencies: Government and Governance after Lisbon' in Diego Acosta Arcarazo and Cian C Murphy (eds), *EU Security and Justice Law: After Lisbon and Stockholm* (Hart Publishing 2014).

91 Frontex, 'Annual Report 2006' (Warsaw, 2006), 2; Council of the European Union, Decision designating the seat of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, 26 April 2005, 2005/358/EC.

92 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, [2007] OJ L199/30.

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

approval of the European Parliament, who included significant improvements regarding fundamental rights protection.⁹⁴

In 2016, in the wake of the migration or refugee ‘crisis’, a completely revised European Border and Coast Guard Regulation (‘EBCG Regulation’) was adopted, replacing Frontex’ original founding Regulation.⁹⁵ The new Regulation significantly increased the agency’s powers, human resources, and financial means. It in particular afforded the agency a more comprehensive monitoring role, further improved its access to resources to be used in border control and return operations, increased the powers of deployed human resources, and expanded Frontex’ role in relation to the return of persons with no right to stay.⁹⁶ Reflecting these changes, the new Regulation officially renamed Frontex the ‘European Border and Coast Guard Agency’, although it continues to be referred to as ‘Frontex’, and remains the same legal person with full continuity in all activities.⁹⁷ It is no coincidence that the reinforcement of Frontex occurred in the midst of a migration or refugee ‘crisis’. Channelling resources to and otherwise strengthening external border control more generally forms the EU’s main response strategy in such situations.⁹⁸

2.1.1.4 Tasks of Frontex

Together, Frontex and the national border management authorities form the ‘European Border and Coast Guard’ (EBCG).⁹⁹ Their joint responsibility lies in implementing European integrated border management, including border control, measures relating to the prevention and detection of cross-border crime, search and rescue in the context of border surveillance operations, return of persons with no right to stay, and cooperation with relevant stake-holders.¹⁰⁰

Frontex and the member states assume different roles within the EBCG. The member states retain the primary responsibility for the management of their respective segments of the external borders.¹⁰¹ The agency’s duty is to ensure coherence in European integrated border management. For that purpose, it supports member states in the implementation of Union measures relating to border management, in particular the Schengen Borders Code, by reinforcing, assessing and coordinating the actions of member

94 For more detail on the development of Frontex’ approach to fundamental rights see Rijpma, ‘Frontex and the European system of border guards’ (n 15) 230–233; see also below 2.1.3.3.

95 EBCG Regulation (n 18); see also above 1.1.

96 For more detail see Rijpma, ‘The Proposal for a European Border and Coast Guard’ (n 23).

97 EBCG Regulation (n 18) recital (11).

98 See in particular above 1.1.1 and below 2.3.1.

99 EBCG Regulation (n 18) art 3(1).

100 Ibid arts 1, 4, 5(1).

101 Ibid art 5(1), recital (6).

states.¹⁰² This does not prevent member states from continuing to engage in operational cooperation amongst themselves or with the authorities of third states, where this complements the work of Frontex. However, such activities must be notified to the agency and may not jeopardise its functioning or the attainment of its objectives.¹⁰³

Frontex' tasks more specifically include the monitoring of migratory flows and trends or challenges at the external borders. For that purpose, it gathers and analyses data on the threats at and vulnerabilities of Europe's external borders, using a 'Common Integrated Risk Analysis Model' (CIRAM). On that basis, the agency may recognise threats early on and identify appropriate responses, including for example joint border control or return operations.¹⁰⁴

Frontex also supervises the member state's management of the external borders. It can in particular deploy liaison officers in member states and has to carry out vulnerability assessments. In the context of vulnerability assessments, the agency evaluates the capacity and readiness of member states to face present and future challenges at the external borders and the potential consequences for the member state and the functioning of the whole Schengen area.¹⁰⁵ If necessary, the Executive Director recommends measures to be taken by member states to eliminate vulnerabilities identified and the time limit within which these are to be implemented. Where the member state concerned fails to comply, the Management Board may issue a binding decision in that respect.¹⁰⁶ Eventually, in the event of a continued failure of the member state to comply, the Council may decide on appropriate measures to be taken, including joint border control or return operations.¹⁰⁷

Frontex also supports member states in the area of capacity building, contributing to developments in research relevant for European integrated border management and to training of border guards.¹⁰⁸ In particular, in relation to personnel that participate in joint operations, it has to provide advanced training relevant to their tasks and powers, conduct regular exercises, and ensure that they are sufficiently trained in relevant Union and international law, including fundamental rights and refugee law.¹⁰⁹

The largest part of Frontex' budget is spent on supporting member states

102 Ibid arts 5(3), 6(2).

103 Ibid art 8(2).

104 Ibid art 11, see also art 15(3).

105 Ibid arts 12-13; pointing out the potential overlap and need for coordination between the Vulnerability Assessment and the Schengen Evaluation Mechanism, see Rijpma, 'The Proposal for a European Border and Coast Guard' (n 23) 14-15.

106 EBCG Regulation (n 18) art 13(6-8).

107 Ibid arts 13(8), 19; see also below 2.2.1.2.

108 Ibid arts 36-37.

109 Ibid art 36(2, 4)

directly at the external borders or in the area of return cooperation, in particular through the organisation and coordination of joint operations.¹¹⁰ This forms the focus of this study and is elaborated on in detail in Sections 2.2–2.4.

2.1.2 Legal personality

Frontex was established as an agency under EU law. It is based on Articles 77(2)(b) and (d) and 79(2)(c) TFEU, the legal basis for the EU's common policy on border management.

EU agencies are permanent EU bodies created by secondary legislation in order to perform tasks specified in their constituent acts.¹¹¹ The powers afforded to agencies vary significantly, depending on the functional needs and the political nature of the specific agency.¹¹² Despite their broad variety, EU agencies have two major things in common. First, they enjoy a certain degree of organisational and financial autonomy, which has triggered concerns in particular regarding their democratic accountability.¹¹³ Second,

110 Ibid arts 14, 27, 28, 33.

111 For detail see Merijn Chamon, *EU Agencies: Legal and Political Limits to the Transformation of EU Administration* (Oxford University Press 2016) 5–15; see also European Commission, 'Communication: The operating framework for the European Regulatory Agencies' (COM(2002) 718 final, 11 December 2012), 3; Stefan Grillier and Andreas Orator, 'Everything under control?: The "way forward" for European agencies in the footsteps of the Meroni doctrine' (2010) 35 *European Law Review* 3, 7; R. D Kelemen, 'European Union Agencies' in Erik Jones, Anand Menon and Stephen Weatherill (eds), *The Oxford Handbook of the European Union* (Oxford University Press 2012) 393.

112 There are, however, constitutional limits to the delegation of powers to agencies, see in particular CJEU, Case 9/56 *Meroni v High Authority*, 13 June 1958, ECLI:EU:C:1958:7, limited more recently by CJEU, Case C-270/12 *United Kingdom v Parliament and Council (ESMA)*, 22 January 2014, ECLI:EU:C:2014:18; these limits have been extensively analysed recently by Chamon (n 111) 134–298, he in particular discussed the (ir)relevance of the much relied on *Meroni* case (CJEU, Case 9/56 *Meroni* (n 112)), see 175–248; see also : Renaud Dehousse, 'Delegation of powers in the European union: The need for a multi-principals model' (2008) 31 *West European Politics* 789; more generally see Giandomenico Majone, 'Delegation of Regulatory Powers in a Mixed Polity' (2002) 8 *European Law Journal* 319; Grillier and Orator (n 111) 15–31.

113 For a detailed discussion of autonomy in the context of EU agencies see Martijn Groenleer, *The Autonomy of European Union Agencies: A Comparative Study of Institutional Development* (Uitgeverij Eburon 2009); Deirdre Curtin, 'Holding (Quasi-)Autonomous EU Administrative Actors to Public Account' (2007) 13 *European Law Journal* 523; Madalina Busuioc, 'Accountability, Control and Independence: The Case of European Agencies' (2009) 15 *European Law Journal* 599; Madalina Busuioc, *The Accountability of European Agencies: Legal Provisions and Ongoing Practices* (Eburon 2010); Tobias Bach and Julia Fleischer, 'The parliamentary accountability of European Union and national agencies' in Madalina Busuioc, Martijn Groenleer and Jarle Trondal (eds), *The agency phenomenon in the European Union* (Manchester University Press 2012); broader on the problems of independent agencies see Martin Shapiro, 'The problems of independent agencies in the United States and the European Union' (1997) 4 *Journal of European Public Policy* 276.

agencies enjoy legal personality, which enables them to fulfil their tasks independently from the EU institutions.¹¹⁴

In this vein, Article 56(1) EBCG Regulation states that Frontex 'shall have legal personality'. Thus, Frontex has the legal capacity to bear rights and duties under EU law. Consequently, as discussed in more detail in Chapter 4, it can be held liable under EU law for breaches thereof independently from the EU itself and the member states.¹¹⁵

This does not automatically endow Frontex with international legal personality, necessary to enjoy rights, have duties, and bear responsibility on the international plane.¹¹⁶

The international legal personality of EU agencies is indeed controversial.¹¹⁷ Some authors detect certain indications of agencies' international legal personality where member states have concluded headquarters agreements with the agencies residing in their territory, resembling classic headquarters agreements with international organisations. It is argued that member states have treated the agencies like subjects of international law, since they would have invoked Article 218 TFEU and concluded the agreement with the EU, had they not at least acknowledged a restricted international legal personality.¹¹⁸ Most authors, however, deny international legal personality of agencies.¹¹⁹

International legal personality of bodies other than states can be explicitly conferred or implied.¹²⁰ The prevailing view is that international legal personality of bodies other than states is implied when the body was intended to and in fact exercises functions and rights on the international plane which can only be explained on the basis of the possession of international legal person-

114 Ronald van Ooik, 'The Growing Importance of Agencies in the EU: Shifting Governance and the Institutional Governance' in Deirdre Curtin and Ramses A Wessel (eds), *Good governance and the European Union* (Intersentia 2005) 132.

115 Similarly see Chamon (n 111) 357; for more detail see below 4.1.2.

116 Provisions such as Article 56(1) EBCG Regulation are commonly understood as only conferring 'domestic' legal personality, see also Gregor Schusterschitz, 'European Agencies as Subjects of International Law' (2004) 1 *International Organizations Law Review* 163, 163; Andrea Ott, 'EU Regulatory Agencies in EU External Relations: Trapped in a Legal Minefield Between European and International Law' (2008) 13 *European Foreign Affairs Review* 515, 526–528.

117 Blokker, 'The Macro Level: The Structural Impact of General International Law on EU Law' (n 25) 479–482.

118 Schusterschitz (n 116), he concludes that agencies have acquired restricted international legal personality as far as their headquarters are concerned.

119 Florin Coman-Kund, 'EU agencies as global actors: a legal assessment of Europol's international dimension' (Maastricht Working Papers, 2014-6); Griller and Orator (n 111) 7; distinguishing between different agencies see Ott (n 116).

120 James Crawford, *Brownlie's principles of public international law* (8th edn, Oxford University Press 2012) 167–168.

ality.¹²¹ Simply put, if Frontex is endowed with tasks and powers it can only exercise with international legal personality, it can be assumed that it was, to the extent necessary, implicitly conferred international legal personality.¹²²

Frontex' international cooperation mandate is set out in Articles 52-55 EBCG Regulation according to which the agency may, in particular, conclude working arrangements with international organisations competent in the area of border management, and with authorities of third countries in matters 'related to the management of operational cooperation'.¹²³ At the end of 2016, Frontex had concluded working arrangements with several international organisations, including UNHCR, IOM, Interpol and DCAF, and with the authorities of 18 third states. The most recent agreement was signed in May 2016 with the relevant authorities of Kosovo.¹²⁴ The objectives of working arrangements are, *inter alia*, to counter irregular migration and related cross-border crime by means of border control, to strengthen security at the border, to develop good relations and mutual trust among the relevant authorities, and sometimes include capacity building. Most working arrangements foresee cooperation relating to risk analysis, training, research, and technical development. Furthermore, they contain provisions on the coordination of joint operational measures and pilot projects, including cooperation in the field of return operations, and allow for the participation of representatives of the competent authorities of the third state in joint operations as observers.¹²⁵ The conclusion of working arrangements is subject to prior approval of the Commission and has to be notified to the European Parliament.¹²⁶

The legal nature of working arrangements is not entirely clear. The decisive criterion under international law distinguishing a non-binding agreement

121 ICJ, *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)*, 11 April 1949, ICJ Reports 1949, 174, 179.

122 With respect to Europol see Coman-Kund (n 119) 19.

123 See in particular EBCG Regulation (n 18) arts 52(2), 54(2); for a more detailed discussion see Melanie Fink, 'Frontex Working Arrangements: Legitimacy and Human Rights Concerns Regarding "Technical Relationships"' (2012) 28 *Utrecht Journal of International and European Law* 20.

124 Working arrangements have been signed with the respective authorities of the following states: the Russian Federation, Ukraine, Moldova, Georgia, the former Yugoslav Republic of Macedonia, Serbia, Albania, Bosnia and Herzegovina, the United States, Montenegro, Belarus, Canada, Cape Verde, Nigeria, Armenia, Turkey, Azerbaijan, and Kosovo.

125 The working arrangements concluded so far with authorities of third states are similar in their objectives and content, see for example the working arrangement with the authorities of Armenia, 'Working Arrangement establishing operational cooperation between the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex) and the National Security Council of the Republic of Armenia', 22 February 2012.

126 EBCG Regulation (n 18) arts 52(2), 54(2).

from a treaty is the intention of the parties.¹²⁷ All working arrangements concluded with the authorities of third states contain a provision establishing that it shall not be considered a treaty under international law and its implementation shall not be regarded as fulfilment of obligations by the EU. This seems to contradict some of the clear and precise language ('the parties shall ...', 'the parties will ...') used in the agreements. Be that as it may, even if Frontex was to conclude legally binding agreements (with international organisations and/or third states) this would not automatically require that Frontex itself possess international legal personality. Similarly to the working arrangements concluded by the Commission in the framework of its cooperation with international organisations under Article 220 TFEU, Frontex could act under the umbrella of the international legal personality of the EU.

In sum, as the law currently stands, it cannot be assumed that the agency enjoys implicit international legal personality because its international cooperation mandate does not require it.¹²⁸ For the purposes of international responsibility, it may thus be assumed that the EU bears international responsibility for internationally wrongful acts resulting from the agency's activities.¹²⁹

2.1.3 Internal organisation

2.1.3.1 *Governing bodies*

Frontex is managed by an Executive Director, who is assisted by a Deputy Executive Director. The positions are currently held by Fabrice Leggeri (since 16 January 2015) and Berndt Körner (since January 2016) respectively. The Executive Director is independent in the performance of his duties and therefore not subject to the instructions of any government or EU body.¹³⁰ His tasks include the proposal, preparation, and implementation of the strategic decisions, programmes, and activities adopted by the agency's governing body, the Management Board, in particular the preparation of the annual work programme, activity report, and budget as well as the appointment of staff.¹³¹ The Executive Director is appointed by the Management Board on

127 Oscar Schachter, 'The Twilight Existence of Nonbinding International Agreements' (1977) 71 *The American Journal of International Law* 296, 296–297.

128 The same conclusion is reached by Coman-Kund with respect to Europol, Coman-Kund (n 119) 36–37; This is relevant because it has been argued that Europol enjoys particularly wide powers in the area of external relations and that Frontex' external relations powers may be closest to the powers enjoyed by Europol, see Steve Peers, 'Governance and the Third Pillar: The Accountability of Europol' in Deirdre Curtin and Ramses A Wessel (eds), *Good governance and the European Union* (Intersentia 2005) 264.

129 See also 3.1.2.1.1.

130 EBCG Regulation (n 18) art 68(1).

131 *Ibid* art 68(3).

the basis of proposals by the Commission for a (once renewable) term of five years.¹³² He is accountable for his activities to a Management Board.¹³³

The Management Board is responsible for taking the strategic decisions of the agency.¹³⁴ Its tasks include the adoption of the annual work programme, activity report, and budget, the establishment of the agency's organisational structure and staff policy, the development of multiannual planning and a long term strategy regarding the activities of the agency, decisions on a number of matters concerning the operational tasks of the agency, and the appointment of the Executive Director and exercise of disciplinary authority over him.¹³⁵ The Management Board is composed of a representative of each Schengen member state and two representatives of the Commission. The representatives are appointed for a (once renewable) term of four years by the respective member state or the Commission and shall have experience and expertise in the field of operational cooperation on border management.¹³⁶ In practice they are often the operational heads of the national services in charge of border control, making the composition of the Management Board similar to that of the Practitioners Common Unit.¹³⁷ States that are members of the EU but not signatories of the Schengen *acquis*, i.e. the United Kingdom and Ireland, are invited to participate in the meetings of the Management Board.¹³⁸

2.1.3.2 Staff

Frontex' human resources consist of its own staff and national experts seconded to the agency, the so-called SNEs.¹³⁹ Seconded national experts receive their salaries from the state seconding them, which also continues to be responsible for their social security and pension, but are required to carry out their duties 'solely in the interests of Frontex' and may neither seek nor take 'any instructions from any government, authority, organisation or person outside Frontex.'¹⁴⁰ The agency's human resources have been steadily growing since its establishment (see Figure 9). It is envisaged that by 2020 the agency may employ up to 1,000 persons.¹⁴¹ It is noteworthy that

132 Ibid art 69.

133 Ibid art 68(4).

134 Ibid art 62(1).

135 Ibid art 62.

136 Ibid art 63; states that are associated with the implementation, application and development of the Schengen *acquis* but are not member states of the EU (Iceland, Liechtenstein, Norway, Switzerland) have representatives on the Management Board but limited voting rights, see para 3.

137 Rijpma, 'Building Borders' (n 62) 264; see also above 2.1.1.2.

138 EBCG Regulation (n 18) art 66(4).

139 Ibid art 58(4).

140 Frontex Management Board, Decision No 22/2009 regarding the rules on the secondment of national experts (SNE) to Frontex, 25 June 2009, recital (4), art 1(1), art 7(1)(a).

141 See <http://frontex.europa.eu/pressroom/faq/european-border-and-coast-guard/>.

the growth has taken place almost entirely in the area of the agency's own staff, whilst the number of seconded national experts remained relatively stable (see Figure 9). This makes the agency less dependent on secondments by member states.

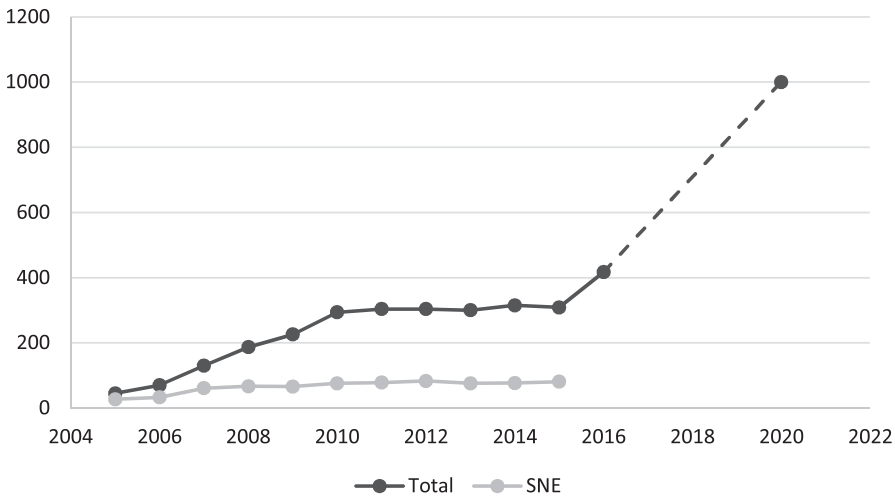


Figure 9: Staff development 2005-2020¹⁴²

The agency's human resources work in three divisions, the Operations Division (further divided into Risk Analysis, Frontex Situation Centre, Joint Operations, and Return Support), the Capacity Building Division (further divided into Training, Research and Development, Pooled Resources, and Third Countries and EU Cooperation) and Corporate Governance (further divided into Financial and Corporate Services, Human Resources and Security, Information and Communication Technology, and Legal Affairs).¹⁴³

2.1.3.3 Fundamental rights bodies

Frontex has made significant progress in relation to human rights awareness throughout its over ten years of existence. In particular, in 2011 two fundamental rights bodies were introduced within Frontex' organisational structure. First, relevant organisations in the field of human rights protection form part of a 'Consultative Forum' which assists the Executive Director and the Management Board in fundamental rights matters. The Consultative Forum advises on the development and implementation of a Frontex Fundamental Rights Strategy, Code of Conduct, and Common Core Curriculum, and on the establishment of a fundamental rights complaints

¹⁴² The data for the years 2005-2015 is retrieved from Frontex' Annual General Reports. The data for 2016 and 2020 is from Frontex' homepage, see the link in n 141.

¹⁴³ See <http://frontex.europa.eu/about-frontex/organisation/structure/>.

mechanism. It also informs the public through annual reports that are made publicly available.¹⁴⁴ The composition of the Consultative Forum is decided by the Management Board on a proposal of the Executive Director and currently encompasses a total of 15 EU agencies, international organisations, and civil society organisations.¹⁴⁵

Second, Frontex has a Fundamental Rights Officer who contributes to the agency's Fundamental Rights Strategy, monitors compliance with fundamental rights, and promotes the respect thereof. The position is currently held by Inmaculada Arnaez Fernandez. The Fundamental Rights Officer is independent in the performance of her duties, reports directly to the Management Board, and cooperates with the Consultative Forum.¹⁴⁶ She is consulted *inter alia* on Operational Plans that form the basis of joint operations, on the necessity of early suspension or termination of operations due to fundamental rights violations, and on evaluations after the conclusion of operations.¹⁴⁷ In addition, she is involved in setting up a pool of forced return monitors and receives their reports in relation to return operations they have monitored.¹⁴⁸ Importantly, the Fundamental Rights Officer enjoys a central role in the fundamental rights complaints mechanism open to individuals that was introduced with the EBCG Regulation.¹⁴⁹

2.2 JOINT OPERATIONS

Joint operations organised and coordinated by Frontex are launched in order to support one or more member states in external border management. Assistance may be rendered for purposes of border control (joint border control operations) or the return of third country nationals that have no right to stay (joint return operations). Both types of operation are characterised by the deployment of additional operational resources that are made available

144 EBCG Regulation (n 18) art 70; Frontex had already cooperated with many of these organisations before the establishment of the Consultative Forum, cooperation existed in particular with UNHCR, who assigned a liaison officer to Frontex in 2007 in order to 'help ensure that border management complies with the international obligations of EU member states', see UNHCR, 'Q&A: Working for refugees on Europe's outer borders', News Stories 18 May 2010, <http://www.unhcr.org/4bf29c8b6.html>, they concluded a working arrangement with the agency in 2008. The working arrangement includes regular consultations, the exchange of information, expertise, and experiences as well as UNHCR's assistance in human rights training, see Frontex, 'Frontex – UNHCR: Reinforced Cooperation' News Release of 18 June 2010. In addition, Frontex signed a cooperation arrangement with the European Union Agency for Fundamental Rights on 26 May 2010.

145 Frontex Management Board, Decision No 29/2015 on the composition of the Frontex Consultative Forum on Fundamental Rights, 9 September 2015; the mandate of these members lasts until 31 December 2018.

146 EBCG Regulation (n 18) art 71(1-2).

147 Ibid arts 71(3), 25(4), 26, 28(8).

148 Ibid arts 28(6), 29(1).

149 Ibid art 72; for more detail see 2.4.4.2.

primarily by other member states and operate under a specific ‘command regime’. The state that receives the support is commonly referred to as the ‘host state’, those that contribute operational resources as ‘participating states’.¹⁵⁰

It should be noted that Frontex may also deploy operational resources as a contribution to ‘Migration Management Support Teams’ (MMST). Migration Management Support Teams are teams of experts that assist member states facing ‘disproportionate migratory challenges at particular hotspot areas of its external borders characterised by large inward mixed migratory flows’.¹⁵¹ The experts are contributed by Frontex, the European Asylum Support Office (EASO), Europol, or other relevant EU agencies and allow these agencies to respond rapidly and in an integrated manner to ‘crises’ at specific points of the external border.¹⁵² However, the deployment of Migration Management Support Teams is not coordinated by Frontex, but by the Commission and therefore falls outside the scope of this study.¹⁵³

2.2.1 Joint border control operations

2.2.1.1 *Activities during operations*

In the framework of joint border control operations, Frontex supports one or more member states in the control of their segments of the external border. This support consists of deploying additional technical and human resources (‘European Border and Coast Guard Teams’) primarily made available by other member states, financing the operations, and coordinating the activities of the various actors involved.¹⁵⁴

The main objective of a joint border control operation is border control, i.e. detecting, preventing, and responding to irregular migration flows.¹⁵⁵ Whilst operations are commonly launched specifically for this purpose, they may also be part of multipurpose operations that can for example involve coast guard functions, or fighting migrant smuggling.¹⁵⁶

150 Ibid art 2(5, 7).

151 Ibid arts 14(2d), 18(1).

152 Ibid art 2(9); for more detail see Statewatch, ‘Explanatory note on the “Hotspot” approach’ (<http://www.statewatch.org/news/2015/jul/eu-com-hotspots.pdf>), 2.

153 EBCG Regulation (n 18) art 18(3)

154 For detail on ‘European Border and Coast Guard Teams’ see below 2.3.2.1.1 and 2.3.3.1.

155 See for example Frontex (Operations Division, Joint Operations Unit, Sea Borders Sector), Operational Plan: Joint Operation EPN Triton 2014, 22 October 2014, on file with the author, 6, Annex 2; Frontex (Operations Division, Joint Operations Unit, Sea Borders Sector), Operational Plan: Joint Operation EPN Hermes 2014, 24 September 2014, on file with the author, 5, Annex 2; Frontex (Operations Division, Joint Operations Unit, Land Borders Sector), Operational Plan: Joint Operation Poseidon Land 2013, Warsaw, 12 March 2013, on file with the author, 8-9, Annex 2; Frontex (Operations Division, Joint Operations Unit, Air Border Sector), Operational Plan: Joint Operation Pegasus 2014, undated, on file with the author, 4, Annex 2.

156 EBCG Regulation (n 18) art 15(5).

Border control consists of border checks and border surveillance.¹⁵⁷ Border checks are 'carried out at border crossing points, to ensure that persons, including their means of transport and the objects in their possession, may be authorised to enter the territory of the Member States or authorised to leave it'.¹⁵⁸ In this context, additional human and technical resources made available for joint border control operations, such as border guards and document checking equipment, are commonly relied upon to increase a member state's capacity and capability for thorough border checks, in particular verification of the conditions governing entry.¹⁵⁹ Use of additional human resources is frequently made for screening and debriefing interviews as well, after first checks have been carried out.¹⁶⁰ Screening interviews are mandatory for any irregular migrant crossing (or attempting to cross) an external border of the EU without possessing the necessary documentation. They are carried out to establish his or her presumed nationality, making them the first step in national processes following the detection of an irregular migrant.¹⁶¹ As opposed to screening interviews, debriefing interviews are voluntary. They are carried out to collect information and produce intelligence about countries of origin, and reasons for travelling, as well as routes and *modi operandi* of facilitators.¹⁶² When necessary, screening and debriefing teams can be supported by interpreters and/or cultural mediators if agreed between Frontex and the member state supported. This is considered particularly important due to their ability, based on experience, language expertise and cultural background, to evaluate credibility and reliability of the information provided by the irregular migrant interviewed.¹⁶³

157 Schengen Borders Code (n 3) art 2(10).

158 Ibid art 2(11).

159 Frontex (Operations Division, Joint Operations Unit, Land Borders Sector), Handbook to the Operational Plan: Joint Land Borders Operations, undated, on file with the author, 14; Frontex (Operations Division, Joint Operations Unit, Sea Borders Sector), Handbook to the Operational Plan: Joint Maritime Operations, 13 February 2014, on file with the author, 15; Frontex (Operations Division, Joint Operations Unit, Air Border Sector), Handbook to the Operational Plan: Air Border Joint Operations, undated, on file with the author, 14–15.

160 Screening and debriefing experts always enjoy team member status (previously 'guest officer status'), see Handbook OPlan Land Border Operations (n 159) 20, 23; Handbook OPlan Maritime Border Operations (n 159) 21, 24; Frontex (Operations Division, Joint Operations Unit, Return Operations Sector), Handbook to the Operational Plan: Operations - Return Operations Sector, undated, on file with the author, 20, 23; Handbook OPlan Air Border Operations (n 159) 20 (with respect to debriefers).

161 Handbook OPlan Land Border Operations (n 159) 21–23; Handbook OPlan Maritime Border Operations (n 159) 22–24; Handbook OPlan Return Operations (n 160) 21–23.

162 Handbook OPlan Air Border Operations (n 159) 16–20; Handbook OPlan Land Border Operations (n 159) 16–20; Handbook OPlan Maritime Border Operations (n 159) 17–21; Handbook OPlan Return Operations (n 160) 16–20.

163 Handbook OPlan Land Border Operations (n 159) 20, 22–23, 28; Handbook OPlan Maritime Border Operations (n 159) 21, 23–24, 30; Handbook OPlan Return Operations (n 160) 20, 22–23, 28; Handbook OPlan Air Border Operations (n 159) 20.

Deployed resources, such as maritime and terrestrial assets, dog teams, night vision devices or thermal cameras, are also relied upon for border surveillance. Border surveillance refers to ‘the surveillance of borders between border crossing points and the surveillance of border crossing points outside the fixed opening hours’.¹⁶⁴ Its purpose is to prevent unauthorised border crossings, to counter cross-border criminality and to take measures against persons who have crossed the border illegally.¹⁶⁵ It includes up to four stages: detection of intended unauthorised border crossings, tracking of the means of transportation, identification, and interception.¹⁶⁶ Whilst ‘interception’ may refer to any measures taken to interrupt or stop the movement of persons when there are reasonable grounds to suspect that they intend to circumvent border checks, it is frequently used in the context of sea border operations. In that respect, it is understood as stopping, boarding, searching, diverting the course of, or escorting a vessel that is engaged in the smuggling of migrants by sea before it reaches the host state.¹⁶⁷

Apart from support by providing additional human and technical resources for conducting border control, deployed personnel also facilitate the exchange of experience. In this light, their role is not only to conduct border control, but also to share their knowledge and experience with local staff and in turn learn from their host. In order to ease the exchange of knowledge and experience, the ‘guests’ are normally integrated into existing that include local staff.¹⁶⁸

¹⁶⁴ Schengen Borders Code (n 3) art 2(12).

¹⁶⁵ *Ibid* art 13(1).

¹⁶⁶ Handbook OPlan Maritime Border Operations (n 159) 12–13; see also 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 [Sea Borders Regulation], [2014] OJ L189/93, recital (1).

¹⁶⁷ For more detail on the precise measures that may be taken in the different maritime zones, see Sea Borders Regulation (n 166) arts 6–8; for a broader definition see UNHCR, ‘Interception of Asylum-Seekers and Refugees: the International Framework and Recommendations for a Comprehensive Approach’ (Doc EC/50/SC/CPR.17, 9 June 2000), para 10; see also UNHCR, ‘Protection Safeguards in Interception Measures’ (Executive Committee Conclusion No 97, 2003); for more detail on interception more generally and in the context of Frontex operations see Efthymios Papastavridis, ‘Interception of Human Beings on the High Seas: A Contemporary Analysis under International Law’ (2008–2009) 36 *Syracuse Journal of International Law and Commerce* 145; Efthymios Papastavridis, ‘“Fortress Europe” and FRONTEX: Within or Without International Law?’ (2010) 79 *Nordic Journal of International Law* 75.

¹⁶⁸ See for example Handbook OPlan Air Border Operations (n 159) 24–25; for a specific operation see for example OPlan JO Triton 2014 (n 155) 15.

It should be noted that vessels deployed during sea operations have regularly participated in rescue operations.¹⁶⁹ Since the entry into force of the EBCG Regulation, search and rescue operations for persons in distress at sea that take place in the context of sea border surveillance indeed explicitly form part of 'European integrated border management'.¹⁷⁰ Thus, provisions have been included in the EBCG Regulation according to which Frontex may provide technical and operational assistance to member states and third countries in support of search and rescue operations which may arise during border surveillance operations at sea.¹⁷¹ However, once involved in a search and rescue operation, vessels come under the coordination of the competent maritime rescue coordination centre (MRCC) for the duration of the rescue operation.¹⁷² Since the coordination structures established for joint operations are thereby inapplicable for that period, search and rescue operations are excluded from this study.

2.2.1.2 *Types of operation*

Operations can take place at air (white), land (green), or sea (blue) external borders of Schengen states. At all types of border joint operations may take the form of 'standard operations' or 'rapid interventions'. Standard operations may be implemented at any time to address challenges at the external border, such as irregular immigration or cross-border crime.¹⁷³ Rapid interventions are designed to provide swift operational assistance to a member state facing a situation of 'specific and disproportionate challenges'. Such a situation could arise in particular where a member state is confronted with the arrival of large numbers of third-country nationals trying to enter its territory without authorisation.¹⁷⁴ Many standard operations have become permanent, running throughout the whole year.¹⁷⁵ In contrast, rapid interventions may only take place for a limited period of time.¹⁷⁶

169 For example, according to Frontex' own data, between 1 January 2015 and 24 November 2015, a total of 140,380 irregular migrants were rescued during Joint Operation Triton 2015 (data retrieved from Frontex briefing 24 November 2015, 31, on file with the author). The obligation to rescue persons in distress at sea is specifically reiterated in the Operational Plans for joint sea operations (typically in the Rules of Engagement), see for example OPlan JO Triton 2014 (n 155) Annex 3; OPlan JO Hermes 2014 (n 155) Annex 3; the relevant obligations under international law are set out in particular in the following treaties: United Nations Convention on the Law of the Sea (UNCLOS), 10 December 1982, 1833 UNTS 397; International Convention on Maritime Search and Rescue (SAR), 27 April 1979, 1405 UNTS 119; International Convention for the Safety of Life at Sea (SOLAS), 1 November 1974, 1184 UNTS 1979.

170 EBCG Regulation (n 18) art 4(b).

171 Ibid arts 8(1f), 14(2e).

172 For example, Rules of Engagement for Joint Operation Triton 2014, OPlan JO Triton 2014 (n 155) Annex 3.

173 EBCG Regulation (n 18) art 15(1).

174 Ibid art 15(2).

175 For more detail see below 2.2.1.3.

176 EBCG Regulation (n 18) art 15(2).

Even though regular exercises for rapid interventions took place from 2007 onwards, the mechanism has so far only been activated twice, both times by Greece.¹⁷⁷ The first ever rapid intervention took place between 2 November 2010 and March 2011 at the Greek-Turkish border upon a request by Greece on 24 October 2010. Qualifying the situation as an ‘urgent and exceptional situation’, approximately 200 national border control experts as well as technical equipment and other logistical and administrative support were deployed to Greece.¹⁷⁸ It was activated for a second time by Greece in December 2015. As a result, the standard operation in that area (JO Poseidon Sea) was replaced by a rapid intervention in order to handle the large number of migrants landing on Greek islands. The focus of the over 700 officers deployed on the ground was on speeding up the registration and identification process.¹⁷⁹

Both standard and rapid operations are as a rule launched upon the request and with the consent of the host member state, be it on the basis of the host state’s own initiative or a recommendation by the Executive Director.¹⁸⁰ Requests are evaluated, approved, and coordinated by the Executive Director. The decision on which joint operations to launch depends on the specific situation at the respective stretches of the external border in question as well as the availability of resources.¹⁸¹ Due to the urgency of rapid interventions, the Executive Director is required to decide on a request within two working days.¹⁸²

The EBCG Regulation for the first time foresees the possibility that a rapid intervention may be implemented following a legally binding decision by the Council on the basis of a proposal from the Commission.¹⁸³ These rapid interventions may be launched where the functioning of the Schengen area is in jeopardy because the member state in question did not comply with a decision of the Management Board setting out the measures to be taken to eliminate vulnerabilities identified. In addition, also where a member state did not request sufficient support from the agency despite facing specific

177 The first RABIT exercise took place between 5 and 9 November 2007 in Porto, Portugal on the basis of a fictional scenario developed by Frontex, see Frontex, ‘Rapid Border Intervention Teams first time in action’ News Release of 6 November 2011; House of Lords, ‘Frontex: The EU External Borders Agency’ (Session 2007-08, 9th Report, London 2008), 68; Another exercise took place in April 2008 at the Slovenian-Croatian border, see Frontex, ‘Rapid Border Intervention Teams (Rabits) Exercise in Slovenia’ News Release of 10 April 2008.

178 Frontex, ‘Frontex to Deploy 175 Specialist Border Personnel to Greece’ News Release of 29 October 2010.

179 Frontex, ‘Frontex accepts Greece’s request for rapid border intervention teams’ News Release of 10 December 2015; Frontex, ‘General Report 2015’ (n 22) 28.

180 EBCG Regulation (n 18) art 15(1-2, 4).

181 Ibid art 15(3).

182 Ibid art 17(4).

183 Ibid art 19(1).

and disproportionate challenges, the Council and the Commission may take such action.¹⁸⁴ If the member state in question does not comply with the Council decision and cooperate with Frontex, the Commission may trigger the procedure provided for in the Schengen Borders Code to temporarily reinstate internal border controls.¹⁸⁵

2.2.1.3 *Examples of joint border control operations implemented by Frontex*

Notable recent air border operations include Joint Operation (JO) Pegasus, JO VEGA Children, and JO Alexis. JO Pegasus was the longest running operation with 209 operational days in 2015 and 149 operational days in 2014.¹⁸⁶ Its focus was on supporting border checks at the 13 participating airports with specific skills in interviewing irregular migrants, in particular those whose profiles matched specific pre-identified threats.¹⁸⁷ JO Alexis had the most extensive participation. In 2015, it took place at 30 EU international airports with the participation of 24 Schengen states, 8 third countries, and Interpol.¹⁸⁸ During its two phases, 73 deployed officers enhanced the capabilities of the local border guards in relation to different types of document fraud and abuses.¹⁸⁹

The largest land border operations coordinated by Frontex took place in the Western Balkans and at the South-Eastern land borders. This includes in particular JO Poseidon Land which ran on an almost permanent basis between 2010 and 2014 at the borders of Greece and Bulgaria with Turkey.¹⁹⁰ In 2015, all operational activities implemented at the land borders in the Western Balkans and at the South-Eastern land borders were brought under one joint operation, JO Flexible Operational Activities, hosted by Croatia and Hungary at their border with Serbia, and by Bulgaria and Greece at the Turkish green border. This allowed for a more flexible use of available resources, in particular a more rapid reaction potential when resources needed to be reallocated.¹⁹¹ JO Flexible Operational Activities ran for 309 days with the participation of 26 Schengen states and 3 third countries and a budget of over EUR 5 million.¹⁹²

184 See also 2.1.1.4.

185 EBCG Regulation (n 18) art 19(10).

186 Frontex, 'General Report 2015' (n 22) 48; Frontex, 'General Report 2014' (Warsaw 2015), 48.

187 Frontex, 'General Report 2015' (n 22) 26; see also OPlan JO Pegasus 2014 (n 155) 4, Annex 2.

188 Frontex, 'General Report 2015' (n 22) 48; similarly in 2014, see Frontex, 'General Report 2014' (n 186) 48.

189 Frontex, 'General Report 2015' (n 22) 25–26.

190 Frontex, 'General Report 2014' (n 186) 48–49; Frontex, 'General Report 2013' (Warsaw 2014), 58; Frontex, 'General Report 2012' (Warsaw 2013), 47; Frontex, 'General Report 2011' (Warsaw 2012), 42; Frontex, 'General Report 2010' (Warsaw 2011), 35.

191 Frontex, 'General Report 2015' (n 22) 48, 52.

192 See the Archive of Operations on Frontex' homepage, <http://frontex.europa.eu/operations/archive-of-operations/>.

The largest part of the agency's operational budget is allocated to sea border operations.¹⁹³ Joint sea border operations generally take place under the umbrella of the European Patrols Network (EPN), a communication platform for the exchange of information and best practices among the broad range of authorities involved in the area of maritime surveillance.¹⁹⁴ Sea operations take place almost exclusively at the Spanish (Western Mediterranean and North-West Atlantic), Italian (Central Mediterranean), and Greek (Eastern Mediterranean) borders. Joint operations implemented at Spain's sea borders include in particular JO Hera (North-West Atlantic), JO Indalo (Western Mediterranean), and JO Minerva (Western Mediterranean sea-ports). The first phase of JO Hera was launched in 2006, the very first year Frontex operations took place. It has been running on an almost permanent basis ever since. Having peaked in 2008 with a budget of over EUR 10 million, JO Hera has since then continuously decreased in scale, as the focus of operations increasingly shifted to the Central and Eastern Mediterranean border.¹⁹⁵

Frontex also implemented sea operations in Greece and Italy early on. In Greece, JO Poseidon Sea has been running on an almost permanent basis since 2007. In most years, its budget ranged from EUR 8 million to EUR 13 million, but rose to almost EUR 20 million in 2015.¹⁹⁶ In that year, the regular joint operation was replaced by a rapid intervention. Large operations implemented at Italy's blue border are, in particular, JO Hermes, JO Aeneas, and since 2014 JO Triton. In 2015, these operations were merged into a single joint operation, JO Triton.¹⁹⁷ As a result of the increased funding for joint maritime operations in response to the migration or refugee 'crisis', JO Triton was equipped with a budget of close to EUR 40 million in 2015.¹⁹⁸ That made it the biggest operation ever implemented by Frontex.

The permanent Focal Points Programme, designed to provide for a more permanent exchange of border guards and information at key points at the external borders, may be implemented at air, land, and sea borders. It allows member states, in cooperation with Frontex, to establish 'Focal Points', i.e. border crossing points or other points along the borders identified as particularly vulnerable. Focal Points can be located for example on road or railway connections or at various points between border crossing points at the external land border. Focal Points at the sea external border are usually

193 Frontex, 'General Report 2015' (n 22) 40; Frontex, 'General Report 2014' (n 186) 39.

194 See the Archive of Operations on Frontex' homepage, <http://frontex.europa.eu/operations/archive-of-operations/>; see also Lehnert (n 31) 165.

195 See the Archive of Operations on Frontex' homepage, <http://frontex.europa.eu/operations/archive-of-operations/>.

196 Ibid.

197 Frontex, 'General Report 2015' (n 22) 52.

198 See the Archive of Operations on Frontex' homepage, <http://frontex.europa.eu/operations/archive-of-operations/>.

sea ports, those at air borders are airports. Joint operations launched within the Focal Points Programme regularly include the participation of third states.¹⁹⁹

2.2.2 Joint return operations

In the area of return support, Frontex reinforces and coordinates member states' activities relating to the return of persons who have no right to stay.²⁰⁰ In particular, it organises, coordinates, and finances or co-finances two types of joint return operation. These are return operations in the narrow sense and return interventions.²⁰¹

During return operations in the narrow sense, Frontex in essence assists member states with carrying out returns. For this purpose, member states inform the agency on a monthly basis of the number and destination of their planned returns, so that it can draw up a rolling Operational Plan and provide the states with necessary operational assistance, for example through chartering of aircraft.²⁰² Frontex may also assist in organising 'collecting return operations', i.e. operations where the third country of return provides the means of transport.²⁰³ Each operation has to be monitored by a so-called forced-return monitor, who observes and reports on the operation as required under Article 8(6) Return Directive.²⁰⁴

Return interventions are more comprehensive than return operations in the narrow sense. They may include the organisation of the latter, but additionally also the deployment of European Return Intervention Teams (ERIT).²⁰⁵ Return interventions can be launched as standard or rapid interventions. Standard interventions may be implemented at any time where a member state faces a burden in implementing its obligation to return third-country nationals in respect of whom a return decision was issued.²⁰⁶ Rapid interventions, in contrast, require that the host member state faces a situation of 'specific and disproportionate challenges' in meeting this obligation.²⁰⁷ Like border control operations, return operations are as a rule launched upon request by a member state, but under the circumstances described in Article 19 EBCG Regulation may be launched following a legally binding decision by the Council on the basis of a proposal from the Commission.²⁰⁸

199 Frontex, 'General Report 2014' (n 186) 47; Frontex, 'General Report 2013' (n 190) 19; Frontex, 'Evaluation Report Joint Operation Focal Points 2013 Air' Warsaw 19 May 2014.

200 EBCG Regulation (n 18) art 27.

201 Ibid arts 28, 33.

202 Ibid art 28(1-2).

203 Ibid art 28(3-5).

204 Ibid art 28(6).

205 Compare ibid arts 28-33; for more detail see below 2.3.2.1.3.

206 Ibid art 33(1).

207 Ibid art 33(2).

208 Ibid arts 28(1, 3), 33(1-2), 19; see also 2.2.1.2.

Human resources that may be deployed during return operations include forced-return monitors, who observe and report on the operation, and forced-return escorts, who assist in case coercive measures have to be used in order to carry out the return of a person who resists removal.²⁰⁹ Other return specialists may also be deployed, who carry out specific tasks required to carry out return-related activities, such as identification of particular groups of third-country nationals, acquisition of travel documents from third countries, and facilitation of consular cooperation.²¹⁰ Importantly, the EBCG Regulation clarifies that Frontex may not enter into the merits of the return decisions. However, should the agency have fundamental rights concerns in respect of a return operation, it has to communicate these to the participating states and the Commission.²¹¹

The possibility of launching return interventions was newly created with the EBCG Regulation. At the time of writing, no return interventions have yet taken place. However, return operations in the narrow sense have been implemented since 2010. In that context, the number of irregular migrants returned has increased consistently over the last few years. In 2015, 3,565 persons were returned in 66 operations, which represented a 64% overall increase as compared to the previous year (in 2014, 2,271 persons were returned in 24 operations).²¹² Since the entry into force of the EBCG Regulation, Frontex avails itself of a substantially increased budget in this respect. In 2016, the budget for return support amounted to a total of over EUR 66 million, compared to just over EUR 13 million in 2015.²¹³ It may be assumed that activities in this area will intensify as a result of the strengthening of Frontex.²¹⁴

2.2.3 Joint operations hosted by third states

All joint operations discussed so far are operations hosted by and launched in (or from) Schengen states. The EBCG Regulation created the possibility of carrying out joint operations on the territory of neighbouring non-Schen-

209 Ibid arts 29(1), 30(1).

210 Ibid art 31(1).

211 Ibid art 28(1, 7).

212 Frontex, 'General Report 2015' (n 22) 50-51, 53; Frontex, 'General Report 2014' (n 186) 51-52.

213 Frontex, 'Budget 2016' (n 21); Frontex, 'Budget 2015 (amended N3)' (6 November 2015); Frontex, 'General Report 2015' (n 22) 40; It should be noted that prior to 2016, return support did not feature as a separate budget chapter. The amount for 2015 is therefore deduced from the Budget 2015 in combination with the General Report 2015.

214 In this vein see also European Commission, 'Report to the European Parliament, the European Council and the Council on the operationalisation of the European Border and Coast Guard' (COM(2017) 42 final, 25 January 2017), 7-9; European Commission, 'Second report to the European Parliament, the European Council and the Council on the operationalisation of the European Border and Coast Guard' (COM(2017) 201 final, 2 March 2017), 8-9.

gen states ('third states').²¹⁵ Already before the entry into force of the EBCG Regulation, third states were able to participate in Frontex operations, albeit to a more limited extent, for instance by sending observers.²¹⁶ The major novelty introduced by the EBCG Regulation is the possibility to deploy border management equipment and personnel of Schengen states during joint operations *hosted by* and *carried out in* third states.²¹⁷ Participation by member states in such joint operations is voluntary.²¹⁸

Third states are of course neither bound by EU law generally, nor by the EBCG Regulation more specifically. Hence, where border management personnel from member states is deployed in third states, the EU (note: not Frontex) concludes a status agreement with that third country, whenever necessary. The conclusion of such an agreement is mandatory in case the deployed personnel are to exercise executive powers in the third state.²¹⁹ In accordance with Article 54(5), the Commission has drawn up a model status agreement which shall serve as a blueprint for future agreements.²²⁰ The Commission has further selected two priority third countries (Serbia and Macedonia) with whom it is conducting 'exploratory talks'. In January 2017, it recommended to the Council to authorise the opening of formal negotiations with both countries.²²¹

The model agreement sets out the tasks, powers, privileges, and immunities of the personnel to be deployed to third states. It further determines the conditions for termination and suspension of activities, and reiterates the fundamental rights obligations of deployed personnel.²²² With respect to the powers of and authority over the personnel deployed to third states, the model agreement essentially replicates the relevant parts of the EBCG Regulation. This is remarkable. As discussed in detail below, the host state

215 EBCG Regulation (n 18) art 54(3).

216 Council Regulation (EC) No 2007/2004 (n 16) [as amended] art 14(6); for more detail see below 2.3.3.1.2.

217 In principle, this includes not just joint border control operations, but also joint return operations. For example, member state personnel may be given access to databases of third states. However, joint return operations may not be launched from third states. See European Commission, 'Communication: Model status agreement as referred to in Article 54(5) of Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard' (COM(2016) 747 final, 22 November 2016), section 2. For this reason, the following considerations only apply to joint border control operations.

218 EBCG Regulation (n 18) art 54(3).

219 Ibid art 54(4).

220 European Commission, 'Model status agreement as referred to in Article 54(5) of Regulation (EU) 2016/1624' (n 217).

221 European Commission, 'First report on the operationalisation of the European Border and Coast Guard' (n 214) 9–10; European Commission, 'Second report on the operationalisation of the European Border and Coast Guard' (n 214) 10–11.

222 European Commission, 'Model status agreement as referred to in Article 54(5) of Regulation (EU) 2016/1624' (n 217) Annex, arts 4–6, 8.

of an operation typically exercises far reaching authority over deployed personnel. This includes, in particular, the power to issue instructions.²²³ Thus, in the case of joint operations led by and carried out in third states, member states (partially) place their border guards and other experts under third state authority on the basis of an agreement concluded between the EU and the third state. This seems unique under EU law. Even though member states may contribute their personnel to be deployed abroad also in the context of CSDP operations, military command in those operations remains with EU-designated commanders, and is not transferred to third state authorities.²²⁴

The model agreement specifies that joint operations may include any ‘action aimed at tackling illegal immigration, present or future threats at the external border [of the third state concerned] or cross-border crime’.²²⁵ Thus, it appears that joint operations may cover not only the external borders of neighbouring third states with the EU, but also their external borders with other third states. However, ‘increased technical and operational assistance’ can only be provided for the control of those parts of the third state’s external borders neighbouring a member state. In other words, member states’ border guards and other experts as well as their border management equipment may be deployed to a third state, but only to control their external border with the EU. For instance, they may be active at the border between Serbia and Hungary or the Libyan Mediterranean border, but not the border between Serbia and Montenegro or Libya and Chad.

This raises a fundamental question about the nature of joint operations in third states. The notion of ‘border control’ has the same meaning in the model agreement as in the Schengen Borders Code. It refers to activities taken in response to a person’s intention to cross a border. As such, it may consist of border checks and border surveillance, both aimed at preventing unauthorised *entry* to a territory.²²⁶ However, joint operations at third states’ external borders with the EU are unlikely to focus on the control of entry of EU nationals to those third countries. Rather, they will typically be launched to control the *exit* of third country nationals from third country territory so as to avoid having to control their entry to the EU. This presents a number of human rights risks. On the one hand, every person has a right to leave a country, guaranteed for example in Article 2(2) of Protocol 4 to the ECHR or

223 See below 2.4.3.1.

224 See below 3.3.3.3.

225 European Commission, ‘Model status agreement as referred to in Article 54(5) of Regulation (EU) 2016/1624’ (n 217) Annex, art 2(2).

226 Schengen Borders Code (n 3) art 2(10-12); European Commission, ‘Model status agreement as referred to in Article 54(5) of Regulation (EU) 2016/1624’ (n 217) Annex, art 2(5), the model agreement, however, contains only a reference to, but no definition of border checks and border surveillance.

in Article 12(2) of the International Covenant on Civil and Political Rights.²²⁷ On the other hand, whilst no right to enter another country exists, the principle of *non-refoulement* guarantees that persons cannot be forced back to a place where they would suffer serious maltreatment or persecution.²²⁸ However, this fundamental protection is only triggered once they have actually left the country where they are in danger. Cooperating with third states to prevent exit from their territory not only risks participating in a breach of the right to leave but, depending on the situation in the third state in question, may also circumvent the protection against *refoulement*.

Joint operations led by and carried out in third states raise similar questions of allocation of responsibility to joint operations hosted by third states. If human rights violations occur during operations, which actor—Frontex, participating member states, the hosting third state—bears responsibility for it? Can the participation of member states or Frontex give rise to responsibility on their part for inhumane reception or detention conditions in the third state? Clarifying questions of responsibility may be particularly crucial in the context of joint operations hosted by third states because, as explained in the previous paragraphs, they give rise to human rights challenges even beyond those posed by joint operations hosted by member states.

As noted, the model agreement envisages that member state personnel enjoy the same powers and are subject to similar authority regimes when deployed to third states or Schengen states. Thus, in principle, the analysis in this study applies to operations in third states just like to those in Schengen states. However, there are some caveats with respect to both responsibility under the ECHR (Chapter 3) and liability under EU law (Chapter 4).

Whilst all Schengen states are parties to the ECHR, this is not the case for all neighbouring third states. North African states, for example, are not signatories to the Convention and cannot be held responsible for breaches thereof. Moreover, third states are not bound by EU law and cannot be held liable for breaches thereof. In this vein, when operations are hosted by third states who are not parties to the ECHR, the analysis in Chapters 3 and 4 does not apply insofar as it relates to host state responsibility. However, to the extent it deals with the responsibility of participating states and Frontex, the analysis in this study applies *mutatis mutandis* to operations hosted by third states. Where this does not seem to be the case, it will be specifically pointed out in the relevant sections.²²⁹

Other neighbouring third states, Serbia and Macedonia (the two priority states selected by the Commission) for example, are ECHR signatories.

227 International Covenant on Civil and Political Rights (ICCPR), 16 December 1966, 999 UNTS 171 and 1057 UNTS 407.

228 See above text to n 33–36.

229 See in particular below 3.4.2.3.

When operations are hosted by third states that are parties to the Convention, the analysis in Chapter 3 is fully applicable.

2.3 OPERATIONAL RESOURCES FOR JOINT OPERATIONS

To implement joint operations, Frontex needs to have financial, human, and technical resources available. Section 2.3.1 first outlines Frontex' budget and its distribution over the agency's activities. Section 2.3.2 then gives an overview of the pooling of human and technical resources, before Section 2.3.3 discusses the modalities and consequences of their deployment.

2.3.1 Financial resources

Since its establishment, the financial resources of Frontex have been steadily growing (see Figure 10). Two budget increases, namely those in 2011 and 2015/2016, will be mentioned here as particularly remarkable. At the start of 2011 Frontex' budget was just over EUR 86 million, representing a 7% decrease when compared to the previous year. During the year, the Commission provided the agency with an additional EUR 30 million, raising the total budget to EUR 118 million (this amounts to a 27% increase compared with 2010).²³⁰ The additional funding was part of an emergency response package to address the rising numbers of arrivals of irregular migrants during the first half of 2011, due to the uprisings in the North African region known as the 'Arab Spring'.²³¹

The second particularly notable growth in the funds of the agency occurred in 2015 and 2016. The budget at the start of 2015 amounted to EUR 114 million, already an increase of over 16% when compared with 2014.²³² In April, the agency received almost EUR 28 million out of emergency funds in response to the rising death toll of individuals trying to cross the Mediterranean, raising the agency's budget to EUR 143 million for 2015.²³³ Finally, in

230 Frontex, 'Budget 2011' (undated); Frontex, 'Budget 2012 (amended N3)' (1 January 2012).

231 European Commission, 'The European Commission's response to the migratory flows from North Africa' (MEMO/11/226, 8 April 2011), other measures included the extension of Frontex-coordinated Joint Operation EPN Hermes to assist the Italian authorities and a call for Frontex to speed up negotiations to conclude working arrangements with countries of origin and transit of irregular migration in the Mediterranean region (in particular Egypt, Morocco, and Tunisia); Frontex, 'General Report 2011' (n 190) 23; discussing the EU policy responses to human mobility flows from North Africa in the wake of the 'Arab Spring' in a larger context, see Sergio Carrera, Leonhard den Hertog and Joanna Parkin, 'EU Migration Policy in the wake of the Arab Spring: What prospects for EU-Southern Mediterranean Relations?' (MEDPRO Technical Report No. 15, August 2015); Jan Wouters and Sanderijn Duquet, 'The Arab Uprisings and the European Union: In search of a comprehensive strategy' (Working Paper No. 98, January 2013).

232 Frontex, 'Budget 2015 (amended N3)' (n 213).

233 European Council (n 10); Frontex, 'Budget 2015 (amended N3)' (n 213).

2016, Frontex' budget further increased to EUR 254 million, an amount that is envisaged to rise further to EUR 281 million in 2017.²³⁴

A large part of the annual budget is allocated to the organisation and implementation of joint operations. It regularly ranges between 50% and 65% of the total annual budget and in 2016 reached an all-time high of 73% (EUR 186 million in total).²³⁵

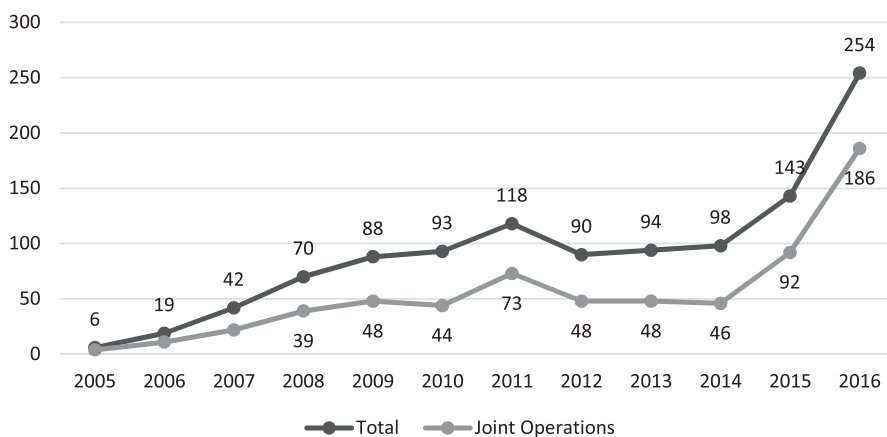


Figure 10: Budget development and distribution 2005-2016 (in Mio EUR)²³⁶

²³⁴ Frontex, 'Budget 2016' (n 21); the data for 2017 was retrieved from Frontex' homepage, <http://frontex.europa.eu/pressroom/faq/european-border-and-coast-guard/>.

²³⁵ See also the explanation on this date in n 236.

²³⁶ All data was retrieved from Frontex' annual budget reports. It should be noted that until (and including) 2015, return operations formed part of the general budget chapter 'joint operations'. From 2016 onwards, 'return support' features as a separate budget chapter. For the purposes of illustrating budget distribution in 2016, the budget chapters 'joint operations' and 'return support' have been added together. Since, however, 'return support' is broader than 'return operations', the figure for joint operations in 2016 may in reality be slightly lower than the figure illustrated here.

2.3.2 Pooling of human and technical resources

In order to plan activities more efficiently and make swift reaction possible, Frontex pools personnel and equipment that may later be deployed.

2.3.2.1 Human resources

2.3.2.1.1 The 'standard' pool of European Border and Coast Guard Teams

Frontex sets up a pool of European Border and Coast Guard Teams (EBCGT), a human resources pool where persons that may be deployed during joint operations are registered.²³⁷

The pool consists of contributions from the member states on the one hand and from the agency on the other.²³⁸ Member states make national border guards and other relevant staff available on the basis of annual bilateral negotiations with Frontex. The ensuing agreements, concluded in the form of a Frontex Letter of Agreement and a Commitment Confirmation by the respective state, are considered a state's commitment to the pool.²³⁹ Frontex' contribution consists of border guards or other relevant staff that are seconded by member states to the agency as national experts on the basis of annual bilateral negotiations and agreements between the agency and the respective state.²⁴⁰ All members of the EBCGT therefore originate from national border authorities (see also Figure 11).²⁴¹

Human resources registered in the EBCGT pool have to be made available for deployment by member states at the request of the agency, unless the member state is faced with an 'exceptional situation substantially affecting the discharge of national tasks'.²⁴² Border guards and other staff have to be made available for secondment in accordance with the agreements reached with the agency, 'unless that would seriously affect the discharge of national tasks'.²⁴³

237 Prior to the entry into force of the EBCG Regulation this was named the 'European Border Guard Teams' (EBGT), on the EBGT see also Roberta Mungianu, 'Frontex: Towards a Common Policy on External Border Control' (2013) 15 *European Journal of Migration and Law* 359, 379–381.

238 EBCG Regulation (n 18) art 20(2, 11).

239 Ibid art 20(2-3); Frontex, 'Annual Information on the Commitments of Member States to the European Border Guard Teams and the Technical Equipment Pool: Report 2015' (April 2015), 12.

240 EBCG Regulation (n 18) arts 20(11), 58(2, 4).

241 Frontex, 'EBGT and TEP Report 2015' (n 239) 6.

242 EBCG Regulation (n 18) art 20(3).

243 Ibid art 20(11).

The overall number of border guards and other staff to be made available and their profiles are decided by the Management Board on the basis of a proposal by the Executive Director.²⁴⁴ The EBCGT is currently made of 14 different profiles covering different areas of border control. These include first and second line officers, surveillance officers and specialised profiles such as screening or debriefing experts, document experts, stolen-vehicle detection officers and Frontex Support Officers.²⁴⁵ The newest addition is the profile of the European Coast Guard Functions Officer.²⁴⁶

The required number of EBCGT members was initially set at 1,850, a number that was already slightly exceeded in its first year of existence.²⁴⁷ The pool has continued to grow, reaching 2,500 at the end of 2013 and a total of 2,900 registered border guards at the end of 2014.²⁴⁸ The two most common profiles are border surveillance and first-line officers, together amounting to almost 50% of the total EBCGT members (border surveillance officers: 897 corresponding to 31%, first-line officers: 506 corresponding to 17,5%).²⁴⁹ Occasionally the agency may launch additional calls for contributions in order to respond to unforeseen needs.²⁵⁰

Currently all states applying the Schengen *acquis* and two Schengen Associated Countries (Norway and Switzerland) contribute to the pool.²⁵¹ The contributions per state mirror their respective specialisations as well as their size and the availability of personnel.²⁵² The largest contributor is Spain (286 profiles) followed by Romania (254 profiles), Portugal (243 profiles), the Netherlands (200 profiles), Germany (194 profiles), Poland (186 profiles), and Latvia (173 profiles).²⁵³ Frontex itself contributes 66 officers seconded by 19 different states.²⁵⁴

244 Ibid art 20(2); this was done with Frontex Management Board, Decision No 11/2012 establishing the profiles and the overall number of border guards to be made available to the European Border Guard Teams, 23 May 2012.

245 Frontex, 'EBGT and TEP Report 2015' (n 239) 6; for a short description of these profiles see for example Frontex, 'General Report 2012' (n 190) 41; on Frontex Support Officers see below 2.4.2.2.

246 Frontex, 'Frontex takes first step towards creating European Coast Guard' News Release of 30 November 2016.

247 Frontex Management Board, Decision No 11/2012 (n 244); Frontex, 'Annual Information on the Commitments of Member States to the European Border Guard Teams and the Technical Equipment Pool: Report 2013' (Warsaw, 2013), 7.

248 Frontex, 'Annual Information on the Commitments of Member States to the European Border Guard Teams and the Technical Equipment Pool: Report 2014' (Warsaw, 2014), 9; Frontex, 'EBGT and TEP Report 2015' (n 239) 6.

249 Frontex, 'EBGT and TEP Report 2015' (n 239) 7.

250 Ibid 12, 15; an additional call has for example been launched for Joint Operation Triton 2014, as a result of which the additional needs were successfully covered, see *ibid* 15.

251 Frontex, 'EBGT and TEP Report 2015' (n 239) 6–7.

252 Ibid 5.

253 Ibid Annex 1.

254 Ibid 8.

Frontex has to provide all border guards that are members of the EBCGT with training relevant to their tasks and powers and conduct regular exercises with them. In addition, it has to ensure that all personnel that participate in the EBCGT receive training in relevant Union and international law, including fundamental rights and access to international protection.²⁵⁵ The contributions to the EBCGT are managed through the web-based Operational Resources Management System (OPERA), where officers nominated by member states for the human resources pool are registered with their relevant personal details, including deployment history, profiles, or participation in Frontex training.²⁵⁶

2.3.2.1.2 *The rapid reaction pool of European Border and Coast Guard Teams*

In order to be able to react on short notice in the context of rapid interventions, the EBCG Regulation requires Frontex to set up, within the ‘standard’ pool of EBCGT, a rapid reaction pool consisting of at least 1,500 border guards and other relevant staff.²⁵⁷ The precise numbers to be made available by each state are set out in Annex I of the EBCG Regulation.

As opposed to the standard EBCGT, the rapid reaction pool is a standing corps placed at the immediate disposal of the agency.²⁵⁸ At the request of the agency, persons in the rapid reaction pool have to be made available within no more than five working days from when the Operational Plan is agreed upon. In this respect, member states cannot invoke the exception that they are faced with a situation affecting the discharge of national tasks, unless this has been confirmed in a risk analysis or a vulnerability assessment.²⁵⁹

On 7 December 2016, the agency announced that the rapid reaction pool had been launched and was ready for deployment in emergency situations.²⁶⁰

255 EBCG Regulation (n 18) art 36(2).

256 Handbook OPlan Air Border Operations (n 159) 56; Handbook OPlan Land Border Operations (n 159) 64; Handbook OPlan Maritime Border Operations (n 159) 65; Handbook OPlan Return Operations (n 160) 60.

257 EBCG Regulation (n 18) art 8(1g).

258 Ibid art 20(5).

259 Ibid art 20(5, 7).

260 Frontex, ‘European Border and Coast Guard Agency launches rapid intervention pool’ News Release of 7 December 2016; see also European Commission, ‘First report on the operationalisation of the European Border and Coast Guard’ (n 214) 5, where the Commission notes that the availability of all 1.500 border guards and other officer was confirmed by the member states.

2.3.2.1.3 Pools for return operations

Frontex is required to set up three human resources pools for deployment during return operations and interventions. A pool of forced-return monitors, a pool of forced-return escorts, and a pool of return specialists.²⁶¹ All three pools were established on 7 January 2017.²⁶²

The process of contributing to these pools functions in a similar way to the pool of EBCGT. In essence, the overall number and profile of persons to be made available is decided by the Management Board.²⁶³ Contributions from each member state are then planned on the basis of annual bilateral negotiations with Frontex. Experts registered in the pools must be made available upon request by the agency within 21 days with respect to standard operations, and 5 days with respect to rapid interventions. In both cases (note: also with respect to rapid interventions), member states are freed from this obligation if they are faced with an 'exceptional situation substantially affecting the discharge of national tasks'.²⁶⁴

From these three pools, Frontex assembles ERIT (European Return Intervention Teams) for deployment during return interventions.²⁶⁵

2.3.2.2 Technical resources

2.3.2.2.1 Technical Equipment Pool

The 'Technical Equipment Pool' (TEP) is a centralised record of technical equipment to be deployed during Frontex operations.²⁶⁶ The TEP can include equipment owned and provided by a state on the one hand and equipment owned by the agency or co-owned by the agency and a state on the other (see also Figure 12).²⁶⁷

Each year, the Management Board, on the basis of a proposal from the Executive Director, determines the 'Overall Minimum Number of Technical Equipment' (OMNTE) per type of equipment that the agency needs in order

261 EBCG Regulation (n 18) arts 29-31.

262 For detail on the numbers of experts pledged as of 12 January 2017 and 20 February 2017 see European Commission, 'First report on the operationalisation of the European Border and Coast Guard' (n 214) 7-8; European Commission, 'Second report on the operationalisation of the European Border and Coast Guard' (n 214) 8-9.

263 EBCG Regulation (n 18) arts 29(2), 30(2), 31(2).

264 Ibid arts 29(3), 30(3), 31(3).

265 Ibid art 32(1).

266 Ibid art 39(1); TEP is the successor of the 'Centralised Record of Available Technical Equipment' (CRATE) and was created as a result of the changes introduced with Regulation (EU) 1168/2011, see Frontex, 'EBGT and TEP Report 2013' (n 247) 8.

267 EBCG Regulation (n 18) art 39(1).

to carry out its activities for the following year.²⁶⁸ On that basis Frontex launches a call for contributions by member states inviting them to propose technical equipment.²⁶⁹ During the ensuing bilateral negotiations, Frontex and the respective state decide on the type, number, and duration of the contribution. The agreement reached is considered the contribution by the state.²⁷⁰

To the extent it falls within the agreed minimum number of technical equipment, member states are under an obligation to make the promised equipment available for deployment at the request of the agency, unless they are themselves faced with an exceptional situation substantially affecting the discharge of national tasks.²⁷¹ Assets deployed that form part of the 'Overall Minimum Number of Technical Equipment' are always fully financed by Frontex, whereas assets beyond that may be financed partly or fully by the agency.²⁷²

At the end of 2014 (the latest available data), the TEP was composed of almost 960 pieces of equipment.²⁷³ This includes more than 330 maritime assets, i.e. Offshore Patrol Vessels, Coastal Patrol Vessels, Coastal Patrol Boats, and fast interception boats, almost 100 aerial means, i.e. Fixed Wing Aircrafts and Helicopters, almost 140 terrestrial assets, i.e. Thermo Vision Vehicles and other patrol cars, 40 dog teams, and about 360 pieces of other equipment, such as night vision devices, handheld thermal cameras, document checking equipment, heart-beat detectors, and carbon dioxide detectors as well as mobile offices or laboratories.²⁷⁴ Most contributions are made by Italy (172 pieces) and Portugal (152 pieces).²⁷⁵ Like the EBCGT, the TEP is also managed through OPERA.²⁷⁶

268 Ibid art 39(5, 9); see Frontex, 'EBGT and TEP Report 2015' (n 239) 5; Frontex Management Board, Decision No 20/2012 establishing the rules related to the Technical Equipment to be deployed for Frontex coordinated operational activities in 2013, 27 September 2012, updated by Frontex Management Board, Decision No 6/2014 adopting rules related to the technical equipment, including Overall Minimum Number of Technical Equipment to be deployed for Frontex coordinated operational activities in 2015, 26 March 2014.

269 Frontex, 'EBGT and TEP Report 2015' (n 239) 5–6.

270 Ibid 12.

271 EBCG Regulation (n 18) art 39(8).

272 Ibid art 39(16).

273 Frontex, 'EBGT and TEP Report 2015' (n 239) 5; in comparison: at the end of 2013 the TEP was composed of 804 pieces of equipment, see Frontex, 'EBGT and TEP Report 2014' (n 248) 6.

274 Frontex, 'EBGT and TEP Report 2015' (n 239) 9.

275 Ibid 2.

276 Handbook OPlan Air Border Operations (n 159) 56; Handbook OPlan Land Border Operations (n 159) 64; Handbook OPlan Maritime Border Operations (n 159) 65; Handbook OPlan Return Operations (n 160) 60.

2.3.2.2.2 *Rapid reaction equipment pool*

The TEP also includes a rapid reaction equipment pool containing a limited number of items needed for possible rapid border interventions. Equipment in the rapid reaction pool has to be made available as soon as possible, but no later than ten days from when the Operational Plan is agreed upon. Member states cannot invoke the exception that they are faced with a situation affecting the discharge of national tasks.²⁷⁷

Like the rapid reaction pool of EBCGT, the rapid reaction equipment pool was also launched on 7 December 2016. However, at the end of January 2017 the Commission reported that considerable gaps still exist for most types of equipment to be pledged for availability in the rapid reaction equipment pool.²⁷⁸

2.3.2.3 *Availability of pooled resources*

According to Frontex reports, the contributions registered in the respective pools almost entirely covered the agency's needs. A particular challenge, however, seems to be actual availability of the assets contributed. Neither the TEP nor the EBCGT are physical pools of resources. Rather, the registered resources correspond to the written commitments made by the states. Contrary to those commitments, registered assets have not always been made available in practice, in particular during peak season. There has therefore sometimes been a gap between the number of registered assets and those actually made available.²⁷⁹

Partly, the lack of availability of pooled resources may be addressed through the establishment of the rapid reaction pools.²⁸⁰ However, another possible way for Frontex to meet this challenge is the acquisition or leasing of its own technical equipment as provided for under Article 38 EBCG Regulation. Such equipment will be registered in a member state, if registration is necessary (e.g. for vessels), but has to be made available to the agency at any time. In relation to co-owned equipment, the agency and the respective member state agree on periods during which the piece of equipment shall be fully available to the agency.²⁸¹

277 EBCG Regulation (n 18) art 39(7).

278 European Commission, 'First report on the operationalisation of the European Border and Coast Guard' (n 214) 5.

279 Frontex, 'EBGT and TEP Report 2015' (n 239) 11, 15; see also European Commission, 'First report on the operationalisation of the European Border and Coast Guard' (n 214) 3–4; European Commission, 'Second report on the operationalisation of the European Border and Coast Guard' (n 214) 2–5.

280 See above 2.3.2.1.2 and 2.3.2.2.2.

281 EBCG Regulation (n 18) arts 38, 39(2-3).

Even though, according to the latest available data, the TEP does not yet include Frontex-owned assets, the agency started acquiring smaller pieces of equipment in 2015.²⁸² In addition, several projects are under way to increase Frontex' own operational capacity. In 2013 Frontex launched a pilot project on the acquisition of Aerial Surveillance Services from a commercial operator. The service was deployed in Bulgaria within the framework of JO Poseidon Land 2014 and included the provision of 120 flight hours, a mobile ground station over 40 days, the deployment of equipment and personnel as well as logistical and administrative arrangements.²⁸³ Due to the success of the project, in 2015 Frontex concluded a framework contract for the acquisition of aerial surveillance services, assets and expert support for Frontex operations.²⁸⁴ A similar pilot project was launched in 2015 regarding the leasing of mini-buses, passenger cars, and four-wheel-drive vehicles to be used for transporting deployed officers during operations in Hungary, Greece, and Bulgaria.²⁸⁵ Finally, in June 2015 Frontex organised the emergency rental of twelve mobile field offices deployed in Italy, Spain, Bulgaria, and a number of Greek islands where they were used by Frontex staff, for screening, registration, finger-printing of migrants, and debriefing purposes.²⁸⁶

2.3.3 Deployment of human and technical resources

This section sketches the deployment of human and technical resources. It should be noted, however, that the deployed personnel and equipment always operate alongside the host state's own personnel and equipment. Local staff continue to carry out their tasks according to the relevant national law and EU law. When involved in joint operations they have an additional set of tasks and duties. These include cooperation with and support of deployed officers, knowledge of the respective roles, mandates and tasks, and active contribution towards the full integration of deployed officers within the local work environment.²⁸⁷

2.3.3.1 *Deployment of human resources*

There are two main categories of deployed officer: members of EBCGT or ERIT ('team members', prior to the entry into force of the EBCG Regulation called 'guest officers') and 'other deployed officers' (see also Figure 11). The distinction is crucial since, as discussed in more detail in the following sec-

282 Frontex, 'EBGT and TEP Report 2015' (n 239) 9; Frontex, 'General Report 2015' (n 22) 24.

283 Frontex, 'EBGT and TEP Report 2015' (n 239) 14.

284 Ibid 15; Frontex, 'General Report 2015' (n 22) 24.

285 Frontex, 'General Report 2015' (n 22) 25.

286 Ibid 24.

287 Handbook OPlan Air Border Operations (n 159) 23; Handbook OPlan Land Border Operations (n 159) 31; Handbook OPlan Maritime Border Operations (n 159) 32; Handbook OPlan Return Operations (n 160) 29.

tion, team member status brings with it a range of powers under EU law that other deployed officers do not enjoy.

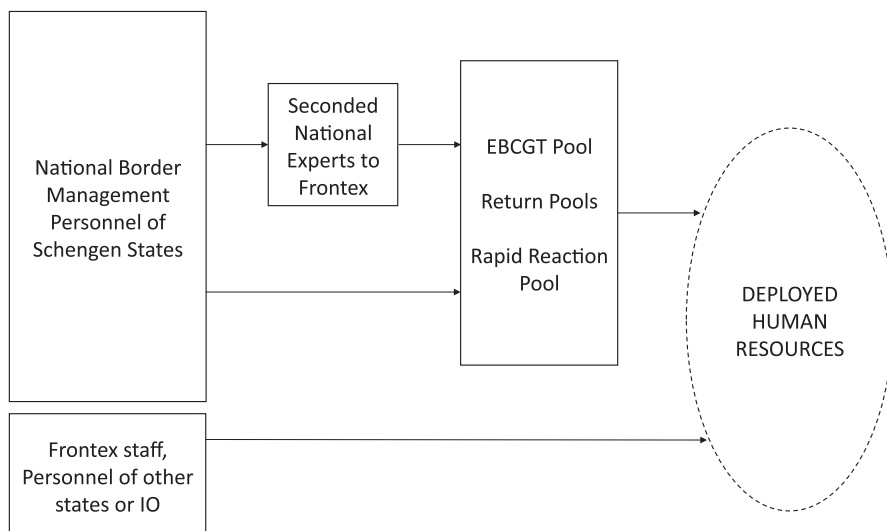


Figure 11: Pooling and deployment of human resources

2.3.3.1.1 Team members (former ‘guest officers’)

Team members are persons deployed to a joint border control or return operation from one of the human resources pools in support of the local staff.²⁸⁸ Most persons deployed for border control operations are officers of border guard services of member states, but they do not necessarily have to be.²⁸⁹ Those deployed during return interventions are return escorts or monitors, or other return specialists.

Team members wear their own uniform when participating in a joint operation, but use a blue armband with the insignia of the EU and Frontex. In addition, they carry with them at all times during their deployment an accreditation document issued by the agency in cooperation with the host state.²⁹⁰

In order to carry out their tasks, team members are conferred a range of powers by virtue of EU law. These are defined in Article 40 EBCG Regulation, according to which they have the capacity to perform all tasks and

288 See in particular EBCG Regulation (n 18) art 2(8); on the human resources pools see above 2.3.2.1.

289 Notably, before the entry into force of the EBCG Regulation, ‘guest officers’ had to belong to border guard services of member states, see Council Regulation (EC) No 2007/2004 (n 16) [as amended] art 1a(6).

290 EBCG Regulation (n 18) arts 40(4), 41.

exercise all powers necessary for border control and return, as well as those necessary for the realisation of the objectives of the Schengen Borders Code and the Return Directive.²⁹¹ The only explicit limitation is that, as a rule, decisions to refuse entry in accordance with the Schengen Borders Code shall be taken by a local border guard. However, since the entry into force of the EBCG Regulation, the host member state may authorise team members to take such decisions on its behalf.²⁹² Currently, team members can only be deployed to other Schengen states. However, the EBCG Regulation created the possibility of deploying team members with executive powers to third states. Their powers will be based on a status agreement, the model for which is to be drawn up by the Commission.²⁹³

Team members may carry weapons, ammunition, and equipment in accordance with the national law of their home member state, unless this includes weapons, ammunition and equipment the use of which the host member state has specifically prohibited.²⁹⁴ They can resort to the use of force in order to exercise their right to self-defence, and in other situations if the home and host states have agreed to that. As a rule, the use of force requires the presence of border guards of the host state, but the host state may, with the consent of the home state, authorise members of the teams to use force in the absence of their border guards.²⁹⁵

2.3.3.1.2 *Other deployed officers*

Human resources deployed during joint operations may also include officers that do not qualify as team members. For the purposes of this study, these will be referred to as ‘other deployed officers’.

As opposed to team members, other deployed officers do not generally have executive powers to carry out border management tasks and are not allowed to take coercive measures against any person. In this light, the distinction between team members and other deployed officers is crucial, due to the implications for the extent of powers they can exercise.

Other deployed officers may include (1) Frontex staff, (2) observers, and (3) advisers.

Frontex staff are personnel that the agency deploys from its own staff members who are not qualified to perform border control functions (as opposed

291 Ibid art 40(1); Handbook OPlan Air Border Operations (n 159) 25; Handbook OPlan Land Border Operations (n 159) 28; Handbook OPlan Maritime Border Operations (n 159) 30; analysing the powers of guest officers Mungianu, ‘Frontex: Towards a Common Policy on External Border Control’ (n 237) 381–384.

292 EBCG Regulation (n 18) art 40(9).

293 Ibid art 54(4-5).

294 Ibid art 40(5).

295 Ibid art 40(6-7).

to personnel seconded to the agency by a member state, and contributed by the agency to the EBCGT or ERIT). Importantly, they may only perform coordination and similar tasks.²⁹⁶ The Frontex Coordinating Officer to be designated for every operation, in order to foster cooperation and coordination between the actors involved, is required to be a Frontex staff member.²⁹⁷

Observers are personnel from Union agencies and bodies, international organisations, or third countries participating in joint operations. Their involvement in any given operation is subject to the agreement of the member states concerned. Participation and tasks of third country observers are based on working arrangements or memoranda of understanding between Frontex and the competent authorities of the third country concerned. In addition, the Operational Plan has to provide detailed rules on their participation.²⁹⁸

Special advisers are officers of border guard services of the United Kingdom and Ireland participating in joint operations.²⁹⁹ Depending on operational needs, other types of special adviser may also be involved in an operation. Other special advisers may for example include EU advisers, i.e. officers of border guard services of member states deployed in third countries during Frontex-coordinated activities, or special debriefing advisers, i.e. an officer deployed in support of the local authorities and debriefing teams.³⁰⁰ The participation of EU advisers (in third countries) is similar to the participation of third country observers, and is based on working arrangements or memoranda of understanding between Frontex and the competent authorities of the third country concerned.

The role of observers and advisers is limited to assisting and advising the local authorities and exchanging or obtaining experience. They are in particular relied upon to serve as intermediaries between the host state and their 'home' authority, provide expertise in the examination of travel documents,

296 Ibid art 20(11).

297 Ibid art 58(2); for more detail see 2.4.2.2.

298 Ibid arts 52(5), 54(7); Participation of third country observers is for example foreseen in the working arrangement with the authorities of Armenia of 22 February 2012, para 3(vi) 'Subject to the consent of the hosting EU Member State, Frontex may invite representatives of the competent authorities of Armenia to participate in certain Frontex coordinated joint operations as observers on a case-by-case basis decided by the Executive Director of Frontex.'

299 Ibid art 51; more specifically see Handbook OPlan Air Border Operations (n 159) 13; see also Frontex, 'EBGT and TEP Report 2015' (n 239) 6–7.

300 With respect to EU advisers see for example Handbook OPlan Air Border Operations (n 159) 13; with respect to special advisers for debriefing activities for example Handbook OPlan Land Border Operations (n 159) 34; Handbook OPlan Maritime Border Operations (n 159) 35; Handbook OPlan Return Operations (n 160) 32.

and assist with language and other professional skills or the exchange of intelligence.³⁰¹

2.3.3.2 Deployment of technical resources

In addition to personnel, host states are commonly also supported with technical equipment ('assets') made available to them. Similarly to deployed personnel, technical equipment can be contributed by a participating state or by Frontex itself (see also Figure 12).

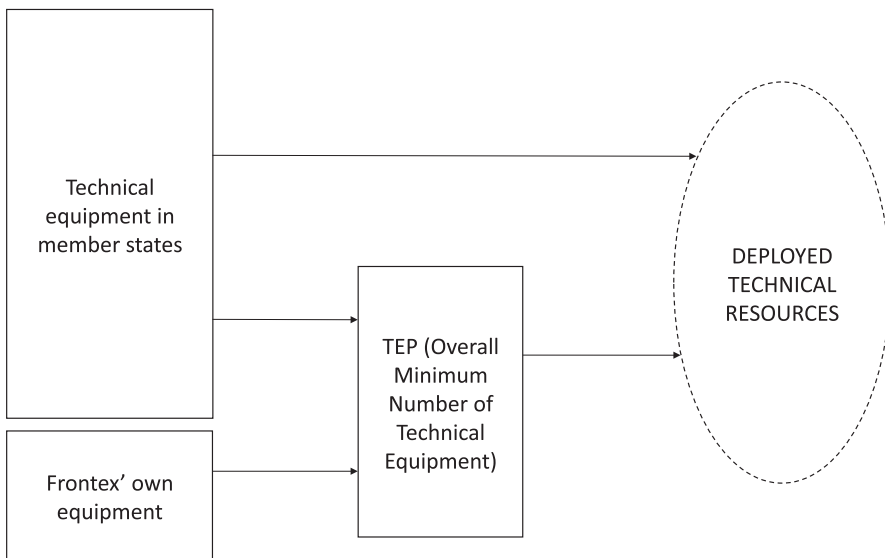


Figure 12: Pooling and deployment of technical resources

Technical equipment relied upon during joint operations includes aerial assets, like aeroplanes or helicopters, terrestrial assets, including Thermo Vision Vehicles, Patrol Cars and Dog Teams, or maritime assets, in particular different types and sizes of vessels.³⁰² However, the possible types of asset that can be contributed are not exhaustively listed in the EBCG Regulation. Depending on the needs of a specific operation, any type of technical equipment that may prove useful can therefore potentially be contributed and deployed.

³⁰¹ EBCG Regulation (n 18) art 40 *a contrario*; see also Handbook OPlan Air Border Operations (n 159) 25–26; Handbook OPlan Land Border Operations (n 159) 34; Handbook OPlan Maritime Border Operations (n 159) 35; Handbook OPlan Return Operations (n 60) 32; for a specific operation see for example OPlan JO Triton 2014 (n 155) Annex 7.

³⁰² Handbook OPlan Land Border Operations (n 159) 13; Handbook OPlan Maritime Border Operations (n 159) 14; for specific operations see for example OPlan JO Triton 2014 (n 155) Annex 5; OPlan JO Hermes 2014 (n 155) Annex 5; for more detail on technical equipment that may be used for joint operations see above 2.3.2.2.

Technical equipment frequently requires expert knowledge for its safe operation, most obviously in the case of large assets, such as aeroplanes, helicopters, or vessels. Depending on the complexity and size of the asset, it may require only a captain/pilot or a whole crew. This has created a particular challenge. Prior to the entry into force of the EBCG Regulation only officers of border guard services of member states could be contributed as team members. Hence, the status of other members of the asset crew, for example the technical staff or a chef on board a large vessel, remained unclear.³⁰³ Especially in light of the consequences of the status of personnel as regards their powers and liability, the question was under what circumstances they would qualify as team members (then 'guest officers'). This dilemma was solved with the entry into force of the EBCG Regulation, which allows not only officers of border guard services to be deployed as team members, but also any other 'relevant staff'.³⁰⁴ In this light, it is likely that in future operations, all asset staff relevant to or actually fulfilling border control functions will be deployed as team members. Even if that should not be the case, it may be assumed that they are subject to the same rules and limitations as team members, in order to avoid a gap in the provisions on criminal and civil liability with respect to their acts, the guarantee of disciplinary authority over them, and other rules designed as safeguards in return for the powers they exercise.³⁰⁵

Up to (and including) 2016, larger technical equipment, such as vessels or aircraft, has always been contributed exclusively with personnel of the respective home member state. Since the handling of certain assets can vary between states, this ensures deployment of a fully and independently functioning asset. At the same time, it allows contributing states to maintain command arrangements on the asset itself untouched, even where certain powers are conferred to other authorities during joint operations.³⁰⁶ However, with the entry into force of the EBCG Regulation, the new profile of the 'European Coast Guard Functions Officer' was created.³⁰⁷ It is envisaged that officers registered under this profile will be deployed on vessels contributed to sea border operations. In December 2016, Frontex announced that in 2017 it will deploy three off-shore patrol vessels from Finland, Romania, and France, which will for the first time have multi-national European

303 See in particular Council Regulation (EC) No 2007/2004 (n 16) [as amended] art 1a(6); see also n 289; for a more detailed overview of technical equipment see also above 2.3.2.2.

304 EBCG Regulation (n 18) in particular art 20.

305 Indeed, the definition of 'guest officers' has not always been applied as strictly in practice as envisaged in the Frontex Regulation. See for example OPlan JO Hermes 2014 (n 155) Annex 5, where debriefing experts contributed by the United Kingdom are explicitly listed as guest officers, instead of special advisers.

306 For more detail see below 2.4.3.1.

307 Frontex, 'Frontex takes first step towards creating European Coast Guard' News Release of 30 November 2016.

crews on board.³⁰⁸ In April 2017, the first of these was deployed to a joint operation. Contributed by Finland, the crew of the vessel includes officers provided by seven other member states.³⁰⁹

If the home or host state requests it, the host state appoints a Liaison Officer skilled in the know-how of the relevant operational matters for aerial and maritime assets. That officer acts as an interface between the asset personnel and the national authorities of the host state.³¹⁰

2.3.3.3 *Operational Resources Management System (OPERA)*

The Operational Resources Management System (OPERA) is not only used to manage pooling of operational resources through creating human resources and technical equipment databases, but also to manage deployment of operational resources.

Managing deployment includes the possibility for Frontex to generate requests for resources to member states, to register deployment of resources, to monitor deployment and the expenses associated with it, and to issue accreditation documents as well as reports. For this purpose, all relevant operational details, comprising duration, location, type of operation, and additional operational needs, are stored. With respect to human resources, important additional details include information regarding arrival and departure dates, means of transportation, and accommodation, but also whether the officer in question travels to the operational area carrying weapons, in which case the weapon itself and the amount of ammunition is to be registered.³¹¹

2.3.3.4 *Overview: personnel deployed during operations*

The previous sections showed that it is crucial to distinguish different categories and types of personnel involved in joint operations. Their powers, command and control arrangements, and concomitant liabilities all depend on their status.³¹² Thus, the status of personnel potentially also affects responsibility resulting from their actions.

Table 2 gives an overview of the different types of human resource that may be involved in joint operations. In the interest of simplicity, the remainder of this study will refer to the border control personnel on vessels, helicop-

308 Ibid.

309 Frontex, 'First ship with multinational crew joins Frontex operation' News Release of 20 April 2017.

310 Handbook OPlan Maritime Border Operations (n 159) 32.

311 Handbook OPlan Air Border Operations (n 159) 56–59; Handbook OPlan Land Border Operations (n 159) 64–68; Handbook OPlan Maritime Border Operations (n 159) 65–69; Handbook OPlan Return Operations (n 160) 60–64.

312 For more detail see below 2.4.3.

ters, aeroplanes, or other large assets as ‘**team members on large assets**’. In contrast, team members contributed independently from large assets, e.g. as part of teams of border patrol, screening, or debriefing officers, as ‘**standard team members**’. This distinction will be essential throughout the study because, as explained in more detail below, participating states retain a significant degree of authority over their large (often military) assets.³¹³

Table 2: Personnel during joint operations

Category	Type	Definition	Tasks	Exec. powers
Local staff	---	Personnel of the host state participating in joint operations	All	Yes (full)
Team members	Team members contributed by member states (‘standard team members’)	Border guards, return specialists, or other relevant staff contributed by member states for participation in joint operations	All activities relevant to border control or return	Yes (limited)
	Team members contributed by Frontex (‘standard team members’)	Border guards, return specialists, or other relevant staff seconded by a member state to Frontex and contributed by Frontex for participation in joint operations	All activities relevant to border control or return	Yes (limited)
	Team members on large assets	Personnel that are deployed on large assets, e.g. vessels, helicopters, or aeroplanes, and exercise border management tasks	All activities relevant to border control or return	Yes (limited)
Other deployed officers	Frontex staff	Frontex staff members not qualified to perform border control functions participating in joint operations	Coordination and similar tasks	No
	Observers	Personnel of Union agencies and bodies, international organisations or third countries participating in joint operations	Experience exchange	No
	Advisers	Officers of border guard services of the United Kingdom and Ireland participating in joint operations or other types of special adviser	Experience exchange	No

313 See below 2.4.3.1.3.

2.4 IMPLEMENTING JOINT OPERATIONS

The following sections discuss the implementation of joint operations, focusing in particular on the roles of the participating actors and their authority over the deployed resources in practical terms. Whilst operations may be subject to specific arrangements agreed upon among the parties involved where necessary, joint operations are commonly implemented according to a standard model. The following analysis is thus based on a 'typical' joint border control operation, such as JO Triton, a joint sea border operation in the Central Mediterranean hosted by Italy.

No further distinction will be made between standard and rapid operations, since virtually no differences exist between them in the implementation phase, in particular as regards the roles of the parties involved. Similarly, no general distinction will be made between border control and return operations. At the time of writing, no return operations that include the deployment of fully-fledged ERIT (European Return Intervention Teams) have yet been completed. However, since the entry into force of the EBCG Regulation, the organisation of return operations is closely modelled on border control operations. It may therefore be assumed that, in the relevant aspects, their practical implementation resembles the model outlined in the following sections.

2.4.1 Applicable rules during joint operations

2.4.1.1 *Generally applicable rules*

All activities during joint operations are subject to the relevant Union law, international law and the national law of the host state.³¹⁴ Apart from the EBCG Regulation itself, the most important pieces of Union legislation are the Schengen Borders Code with respect to border control operations and the Return Directive with respect to return operations. The Schengen Borders Code provides for the absence of border control of persons crossing the internal borders between the member states and establishes rules governing border control of persons crossing the Union's external borders. It in particular lays down the modalities for crossing external borders, the entry conditions for third-country nationals, and the general framework for carrying out border checks and surveillance.³¹⁵ The Return Directive sets out the obligation to return irregular migrants and contains rules as regards the expulsion procedure. These concern *inter alia* the treatment of the returnees, the possibilities for detaining them, and the procedural safeguards that

314 EBCG Regulation (n 18) arts 14(2), 27(1), 40(2).

315 Schengen Borders Code (n 3).

states have to make available.³¹⁶ It also requires that every forced-return operation has to be monitored, a function that may be fulfilled by deployed forced-return monitors in the context of Frontex operations.³¹⁷

With respect to border surveillance at sea, the Schengen Borders Code is amended and supplemented by specific rules laid down in the Sea Borders Regulation.³¹⁸ The latter emphasises the need to ensure the safety of all persons involved, including the persons intercepted or rescued, and reiterates the respect of the protection against *refoulement* and other fundamental rights guarantees, in particular when planning and implementing the disembarkation of intercepted or rescued persons.³¹⁹ The core part of the Sea Borders Regulation sets out the modalities for detection, interception in the territorial sea, on the high seas, and in the contiguous zone respectively, and search and rescue situations including disembarkation.³²⁰ Frontex is required to report annually to the European Parliament, the Council and the Commission on the practical application of the Sea Borders Regulation.³²¹ In its first report, submitted in July 2015, the agency provided information on the amendments made to the Operational Plans as a result of the Sea Borders Regulation and the practical implementation of the Regulation, as well as the need for developing further measures. New rules integrated into Operational Plans include assessments of the general situation in relevant third parties, details of shore-based medical staff and national authorities responsible for follow-up measures in terms of international protection or other persons in particularly vulnerable situations, and an identification of states for disembarkation.³²²

2.4.1.2 Operation-specific rules: the Operational Plan

Each joint operation is implemented according to an Operational Plan ('OPlan'), drawn up beforehand under the responsibility of the Executive Director and covering all aspects considered necessary for carrying out the operation.³²³ In practice, the Operational Plan is prepared by an Operational Manager in cooperation with the host state and then approved by the Exec-

316 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, [2008] OJ L348/98.

317 Ibid art 8(6); EBCG Regulation (n 18) art 28(6).

318 Sea Borders Regulation (n 166).

319 Ibid arts 3, 4.

320 Ibid arts 5–10.

321 Ibid art 13.

322 Frontex, 'Annual Report on the implementation on the EU Regulation 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders' (9 July 2015).

323 EBCG Regulation (n 18) arts 16(2-3), 33(3).

utive Director.³²⁴ It is subject to final agreement by the host member state and participating member states are consulted.³²⁵ The only exception are Operational Plans for joint operations carried out under the lead and within the territory of neighbouring third states. In addition to the agreement of the third state (i.e. the host state), the Operational Plan requires the agreement of the member state(s) bordering the operational area.³²⁶ In relation to rapid interventions, the time limit for finalising the Operational Plan is five working days, starting with the request.³²⁷

Each Operational Plan consists of a Main Part, Annexes, and the Handbook to the Operational Plan. Whilst the Main Part and the Annexes are drafted specifically for every single operation, the Handbooks each cover one of the four types of operation (Air, Land, Sea, and Return).³²⁸ The Handbooks accordingly deal with those aspects that are applicable to all operations of one type and contain the Code of Conduct for all participating persons, the operational concept, including a description of the main activities that can be conducted during joint operations, general guidelines for debriefing and screening activities, the coordination structure, including the tasks and responsibilities of all participating actors, and arrangements for command and control as well as communication and reporting.³²⁹ The Main Part and the Annexes in turn contain the more specific information with respect to each operation, i.e. the assessment of the situation, the aims and objectives of the specific operation, the precise operational area and period of implementation, the plan of deployed resources, specific tasks and instructions to participants (rules of engagement), a command and control scheme including names as well as contact details of relevant personnel, and certain organisational arrangements and logistics.³³⁰ All Operational Plans for operations at the external sea borders have to be established in accordance with the Sea

324 Handbook OPlan Air Border Operations (n 159) 26; Handbook OPlan Land Border Operations (n 159) 31; Handbook OPlan Maritime Border Operations (n 159) 33; Handbook OPlan Return Operations (n 160) 30; for a specific operation see for example OPlan JO Triton 2014 (n 155) 1; on the Operational Manager see 2.4.2.2.

325 EBCG Regulation (n 18) art 16(2); art 33(3) suggests that with respect to return interventions, participating member states have to agree to the Operational Plan.

326 Ibid art 54(3); for more detail on joint operations led by and carried out in third states see above 2.2.3.

327 Ibid arts 17(4, 6), 33(4).

328 Handbook OPlan Air Border Operations (n 159) 7; Handbook OPlan Land Border Operations (n 159) 7; Handbook OPlan Maritime Border Operations (n 159) 7; Handbook OPlan Return Operations (n 160) 8.

329 See Handbook OPlan Air Border Operations (n 159); Handbook OPlan Land Border Operations (n 159); Handbook OPlan Maritime Border Operations (n 159); Handbook OPlan Return Operations (n 160).

330 See for example OPlan JO Pegasus 2014 (n 155); Operational Plan: Joint Operation Poseidon Land 2013 (n 155); OPlan JO Triton 2014 (n 155); It should be noted that the Handbooks were only drawn up in 2014. Operational Plans for joint operations implemented before that date only comprise a Main Part and Annexes that contain the information specific to the operation as well as the more general aspects.

Borders Regulation, which contains a number of additional guarantees with respect to fundamental rights as well as the modalities of interception at sea and disembarkation (see previous section).³³¹

According to the EBCG Regulation, all parts of the Operational Plan are legally binding on the agency, the host state, and participating states.³³² Neither the Main Parts, nor the Annexes and Handbooks are publicly available. Partial access is typically granted by the agency upon request.

2.4.1.3 Fundamental rights

All joint operations have to be implemented in compliance with human rights. This includes, in particular, the human rights obligations contained in the ECHR and the CFR. Both guarantee a broad range of rights relevant to persons that may be affected by Frontex operations, such as the right to life (Article 2 ECHR, Article 2 CFR), the prohibition of torture or inhuman or degrading treatment or punishment (Article 3 ECHR, Article 4 CFR), the prohibition of *refoulement* (in particular Article 3 ECHR, Article 19(2) CFR), the prohibition of collective expulsions (Article 4 Protocol No. 4 ECHR, Article 19(1) CFR), the right to private and family life (Article 8 ECHR, Article 7 CFR), and the right to liberty (Article 5 ECHR, Article 6 CFR).

The ECHR is applicable to all contracting parties. This includes all Schengen states that may be involved in Frontex operations. The EU itself is not currently a party to the Convention, making the ECHR arguably not directly applicable to Frontex' conduct.³³³ It should be noted that there are limitations to the applicability of the ECHR when parties act extraterritorially. This may affect in particular border control operations at sea. Importantly, however, the ECtHR has clarified that when a state vessel carries out interceptions during border control operations at sea, the affected individuals fall within the jurisdiction of that state, making the Convention applicable.³³⁴

The CFR applies to the conduct of EU bodies and to member states when they implement EU law and therefore also when they act within the framework of the Schengen Borders Code and the EBCG Regulation.³³⁵ However, it is arguably not directly applicable to non-EU Schengen states, i.e. to Iceland, Liechtenstein, Norway, and Switzerland.

331 EBCG Regulation (n 18) art 16(3j); Sea Borders Regulation (n 166).

332 EBCG Regulation (n 18) art 16(3); Handbook OPlan Air Border Operations (n 159) 7; Handbook OPlan Land Border Operations (n 159) 7; Handbook OPlan Maritime Border Operations (n 159) 7; Handbook OPlan Return Operations (n 160) 8.

333 For more detail see below 3.1.2.1.1.

334 See in particular ECtHR, *Hirsi* (n 35) paras 70-82; on the definition of 'interception' see above 2.2.1.1; certain conduct of participating states may, however, be excluded from the Convention's applicability, for detail see below 3.4.1.3.2.

335 CFR (n 34) art 51(1).

Thus, together, the ECHR and the CFR impose obligations on all the principal actors involved in Frontex operations to guarantee the above-mentioned rights (see Figure 13).

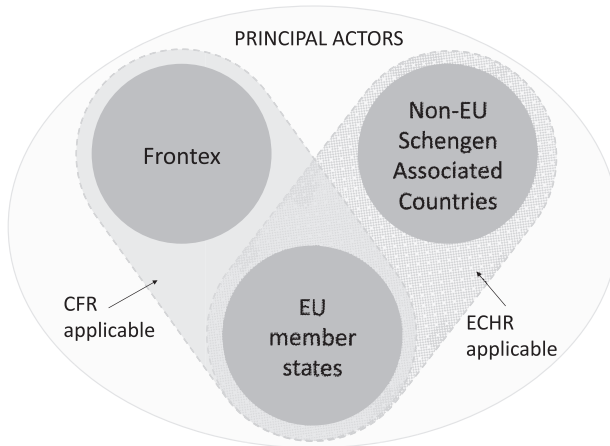


Figure 13: Principal actors and applicability of European human rights law

Human rights obligations are reiterated in the EBCG Regulation, the Schengen Borders Code, the Return Directive, and in the Operational Plans for each operation.³³⁶ In addition, Codes of Conduct drawn up by the agency set out behavioural standards for all persons participating in Frontex activities, including during joint operations. These contain fundamental rights and international protection obligations, prohibit abuse of authority, discrimination, harassment, corruption, as well as the use of drugs and alcohol, and set out rules on ethical and professional behaviour.³³⁷ Whilst the Codes of Conduct as such are not legally binding, they are included in the relevant Handbooks to the Operational Plans that in turn are legally binding.³³⁸

336 EBCG Regulation (n 18) in particular art 34(1); Schengen Borders Code (n 3) in particular art 4; Return Directive (n 316) in particular art 1; Handbook OPlan Air Border Operations (n 159) 6–7; Handbook OPlan Land Border Operations (n 159) 6–7; Handbook OPlan Maritime Border Operations (n 159) 6–7; Handbook OPlan Return Operations (n 160) 7–8.

337 Frontex, Code of Conduct for all persons participating in Frontex activities, undated, http://frontex.europa.eu/assets/Publications/General/Frontex_Code_of_Conduct.pdf; Frontex, Code of Conduct for joint return operations coordinated by Frontex, 7 October 2013, http://frontex.europa.eu/assets/Publications/General/Code_of_Conduct_for_Joint_Return_Operations.pdf; drawn up according to EBCG Regulation (n 18) art 35.

338 Handbook OPlan Air Border Operations (n 159) 8–12; Handbook OPlan Land Border Operations (n 159) 8–11; Handbook OPlan Maritime Border Operations (n 159) 8–11; Handbook OPlan Return Operations (n 160) 10–13; before the Handbooks were drawn up in 2014, it was common practice to annex the Code of Conduct to the Operational Plans, see for example: Frontex (Operations Division, Joint Operations Unit, Sea Borders Sector), Operational Plan: Joint Operation EPN Hermes 2013, undated, on file with the author, Annex 7; Operational Plan: Joint Operation Poseidon Land 2013 (n 155) Annex 5.

2.4.2 Coordination structures during joint operations

Due to the variety of actors involved, a number of coordination instruments are in place to implement joint operations.

2.4.2.1 Coordination structures located in the host state

The centre-piece of the coordination structure established for joint operations is the **International Coordination Centre (ICC)**. The ICC is established by the host state in cooperation with Frontex and located in the premises ensuring the most efficient coordination of the joint operation, normally in the premises of the respective authority of the host state. An exception is joint operations at air borders, where the ICC is located in Warsaw and local centres are established at participating airports.³³⁹ The ICC serves as a focal point for leading and coordinating the implementation of all operational activities as well as for communicating with and coordinating all assets and experts deployed. Its staff consists of an **ICC Coordinator** and duty officers. The ICC Coordinator is an officer assigned by the respective authority of the host state and is responsible for leading and coordinating the daily operational activities and ensuring the fulfilment of the ICC's tasks throughout the joint operation in the whole operational area.³⁴⁰ For coordination at the regional or local level, a **Regional/Local Coordination Centre (R/LCC)** led by an R/LCC Coordinator may be established. Regional or Local Coordination Centres operate under the coordination of the ICC.³⁴¹ Different authorities of host or participating states may appoint and deploy **Liaison Officers (LO)** to the ICC or Regional or Local Coordination Centre to facilitate cooperation between the actors involved and ensure effective implementation of the operational activities.³⁴²

Within the ICC, a **Joint Coordination Board (JCB)** is established in charge of running the joint operation.³⁴³ The JCB is composed of at least the ICC Coordinator, who is at the same time the JCB's chairman, the Frontex Operational Coordinator (see the following section), the Intelligence Officer, and so-called National Officials. The **Intelligence Officer (IO)** is nominated by the host state authority and acts as the daily interface between the host state authorities and the ICC in gathering and sharing relevant operational and intelligence information. **National Officials (NO)** are nominated to the ICC by every participating state who deploys major aerial, terrestrial, or maritime

339 Handbook OPlan Air Border Operations (n 159) 30.

340 Handbook OPlan Land Border Operations (n 159) 26–27; Handbook OPlan Maritime Border Operations (n 159) 27–28; Handbook OPlan Return Operations (n 160) 26–27.

341 Handbook OPlan Land Border Operations (n 159) 26, 28–29; Handbook OPlan Maritime Border Operations (n 159) 27, 30–31; Handbook OPlan Return Operations (n 160) 26, 28–29.

342 Handbook OPlan Land Border Operations (n 159) 30; Handbook OPlan Maritime Border Operations (n 159) 32.

343 For more detail on the JCB's role see below 2.4.3.1.3.

assets (e.g. vessels or aircraft) to the operation for the whole period of deployment of the assets. Their function is to coordinate the actions of their respective national asset(s) according to national legislation. Often large vessels or aeroplanes contributed are military equipment. In this vein, the presence of the National Official is considered necessary in order to safeguard the interests and prerogatives of their sending state. In addition, the National Official adjusts orders according to the technical requirements of the specific assets under their sphere of influence and translates them into the language of their respective crews. The Frontex Operational Coordinator, the Intelligence Officer, and all National Officials have access to the ICC on a 24/7 basis.³⁴⁴

At land or sea borders the host state may in addition set up so-called **Focal Points (FP)** in cooperation with Frontex in order to coordinate activities with respect to specific border crossing points or border surveillance areas.³⁴⁵ Focal Points can be established either to cover areas that are not covered by regular joint operations or to complement pre-existing joint operations. In the latter case, they act under the coordination of the ICC.³⁴⁶

2.4.2.2 *Coordination instruments provided by Frontex*

There are a number of instruments aimed at enabling Frontex to fulfil its coordinating role in the implementation of joint operations. These have mostly been developed in practice and have only to a very limited extent found their way into the EBCG Regulation.

The **Operational Manager (OM)** assigned to every joint operation assumes a central role on the part of Frontex. He is responsible for the joint operation from the very beginning until its evaluation. The Operational Manager drafts the proposal for the Operational Plan in cooperation with the host state, follows the relevant developments during all stages of the implementation, keeps the superiors informed, and if necessary adapts the operational needs or updates and amends the Operational Plan. He also gathers, stores, and analyses information received from different sources and supports cooperation with other actors involved in the joint operation. He additionally performs tasks of a more administrative nature when ensuring professional preparation, maintenance, and archiving of all related documentation and managing the operational funds, including Frontex' financial contribu-

344 Handbook OPlan Land Border Operations (n 159) 26–31; Handbook OPlan Maritime Border Operations (n 159) 27–30; Handbook OPlan Return Operations (n 160) 26–28.

345 See also above 2.2.1.3.

346 Handbook OPlan Land Border Operations (n 159) 29; Handbook OPlan Maritime Border Operations (n 159) 31.

tion. The Operational Manager is supported by a team made up of specialised staff from different Frontex units (the Operational Team, 'OT').³⁴⁷

Whereas the Operational Manager is responsible for the overall administration of joint operations, a **Frontex Coordinating Officer (FCO)** is nominated for every operation in order to foster cooperation and coordination between the actors involved. This already well-established practice was codified during the 2011 revision of the Frontex Regulation and is now found in Article 22 EBCG Regulation.³⁴⁸ The Frontex Coordinating Officer acts on behalf of the agency in all aspects of the deployment of the teams. He provides an interface between host and participating states, between the agency and the host state and between the agency and the members of the teams. In addition, he monitors the correct implementation of the Operational Plan, including in relation to the protection of fundamental rights, and reports back to the agency on all aspects of the deployment of the teams, in particular when instructions to the EBCGT or the ERIT by the host member state are not in compliance with the Operational Plan. If disagreements arise regarding the execution of the Operational Plan or the deployment of teams, the Executive Director may authorise the Frontex Coordinating Officer to assist in resolving the conflict.³⁴⁹ The Frontex Coordinating Officer must be a staff member of the agency.³⁵⁰

Neither the Operational Manager, who operates from the Frontex Headquarters, nor the Frontex Coordinating Officer, who is only required to ensure 'constructive presence during the joint operation when the operational need occurs', are present in the host state for the entire duration of the operation.³⁵¹ However, the Frontex Regulation explicitly requires the agency to ensure that a staff member of Frontex is always present.³⁵² Therefore, and in order to support the Operational Manager and the Frontex Coordinating Officer, a **Frontex Operational Coordinator (FOC)** is permanently deployed throughout the joint operation in the ICC or at the location from where the

347 Handbook OPlan Air Border Operations (n 159) 26–27; Handbook OPlan Land Border Operations (n 159) 31–32; Handbook OPlan Maritime Border Operations (n 159) 33; Handbook OPlan Return Operations (n 160) 30.

348 For the practice of appointing Frontex Coordinating Officers pre-dating the 2011 amendment see for example Frontex (Operations Division, Joint Operations Unit, Sea Borders Sector), Operational Plan: Joint Operation EPN Hermes 2010, undated, on file with the author, 11; Frontex (Operations Division, Joint Operations Unit, Sea Borders Sector), Operational Plan: Joint Operation EPN Hermes 2009, Warsaw, 3 April 2009, on file with the author, 9.

349 EBCG Regulation (n 18) art 22; Handbook OPlan Air Border Operations (n 159) 28; Handbook OPlan Land Border Operations (n 159) 32; Handbook OPlan Maritime Border Operations (n 159) 33–34; Handbook OPlan Return Operations (n 160) 30–31.

350 EBCG Regulation (n 18) art 58(2); see also above 2.3.3.1.2.

351 Handbook OPlan Air Border Operations (n 159) 28; Handbook OPlan Land Border Operations (n 159) 32; Handbook OPlan Maritime Border Operations (n 159) 33; Handbook OPlan Return Operations (n 160) 30.

352 EBCG Regulation (n 18) art 22(1).

most efficient coordination can be accomplished. The Frontex Operational Coordinator monitors and facilitates the correct implementation of the operational activities. He is present during JCB meetings, may give advice in particular to the ICC Coordinator and the National Officials, and provides the Frontex headquarters with daily situation reports, highlighting cases that need immediate attention.³⁵³ Additional support for the Frontex Coordinating Officer and/or the Frontex Operational Coordinator can be provided by a **Frontex Support Officer (FSO)**, normally deployed at the local level, for example in an LCC.³⁵⁴

The central point of contact with respect to all operational information that may have a direct impact on the joint operation is the **Frontex Situation Centre (FSC)**, located in the Operational Division at Frontex' headquarters in Warsaw. Its main role is to generally keep Frontex and the member states updated on the operational situation. It thus maintains situational awareness, monitors media, and provides a constantly updated, almost real-time picture of the situation at the external borders. In addition, the Frontex Situation Centre collects and disseminates information relating to issues needing specific attention, in particular 'Serious Incident Reports', and gives first responses to emergency situations and crises that might occur.³⁵⁵ For that purpose, it provides 24/7 on-call availability.³⁵⁶ The Frontex Situation Centre uses a web-based portal, **Frontex One-Stop-Shop (FOSS)**, for sharing operational-related information with participating states and other partners.³⁵⁷

Frontex can also appoint an **Operational Analyst (OA)** to each joint operation, whose task is to collect and process all relevant information, including the daily reports and incident reports. He produces regular analytical assessments, enabling a wider view of the risks, threats, and overall situation in and around the operational area. The Operational Analyst additionally provides the analytical input for the preparation and evaluation of the operation.³⁵⁸

353 Handbook OPlan Land Border Operations (n 159) 32; Handbook OPlan Maritime Border Operations (n 159) 34; Handbook OPlan Return Operations (n 160) 31.

354 Handbook OPlan Land Border Operations (n 159) 33; Handbook OPlan Maritime Border Operations (n 159) 34; Handbook OPlan Return Operations (n 160) 31.

355 For more detail on 'Serious Incident Reports' see below 2.4.4.1.

356 Handbook OPlan Air Border Operations (n 159) 28–30; Handbook OPlan Land Border Operations (n 159) 34–35; Handbook OPlan Maritime Border Operations (n 159) 35–37; Handbook OPlan Return Operations (n 160) 32–34.

357 Handbook OPlan Air Border Operations (n 159) 38–40; Handbook OPlan Land Border Operations (n 159) 42–45; Handbook OPlan Maritime Border Operations (n 159) 43–46; Handbook OPlan Return Operations (n 160) 39–41.

358 Handbook OPlan Land Border Operations (n 159) 33; Handbook OPlan Maritime Border Operations (n 159) 34; Handbook OPlan Return Operations (n 160) 31.

2.4.3 Authority over deployed resources

2.4.3.1 Command and control arrangements

During joint operations, the operational resources (i.e. in particular team members, but not the Frontex staff with coordinating functions) are subject to a specific command regime detailed in the EBCG Regulation and the respective Operational Plans.³⁵⁹ Essentially, this regime provides for multiple levels of authority over operational resources that are exercised by different participating actors. In other words, none of the actors involved has full authority over the operational resources because it is shared between the parties.

This is not uncommon for multinational contingents participating in joint operations. As explained in more detail in Chapter 3, UN peace operations, the classic example of a multinational force, and NATO and EU CSDP operations also work on the basis of a 'multilayered authority structure'.³⁶⁰ Multilayered authority structures ensure that the operational aims can be achieved by placing all resources involved under a (more or less) unified command structure whilst the contributing states at the same time retain some core elements of authority over their personnel and/or other assets. These core elements of authority commonly relate to discipline and criminal jurisdiction over their personnel as well as contingent-internal command structures.³⁶¹

Transfers of authority raise a broad range of questions. But they are particularly relevant for determining legal responsibility for possible unlawful conduct because it is important in that context to understand where legal powers lie, where orders originate and/or who could have prevented the infringements (for detail see Chapters 3 and 4).

The following section first highlights some terminological challenges, then analyses the command and control arrangements as set out in the EBCG Regulation and in more detail in the Operational Plans, and finally sum-

359 With respect to team members see Handbook OPlan Air Border Operations (n 159) 25, 'Guest officers and seconded guest officers are not within the chain of command of the hosting Member State but they perform their duties according to the command structure of the joint operation.' It is important to note that this regime is only applicable to operational resources. In contrast, personnel deployed to serve in one of the coordination structures of the operation, *inter alia* the Frontex Coordinating Officer, the Frontex Operational Coordinator, the ICC Coordinator, the Intelligence Officer, and the National Officials, remain under the full authority of the entity that contributed them. With respect to the Frontex Coordinating Officer this is explicitly stipulated in the EBCG Regulation (n 18) 8; with respect to National Officials see for many others OPlan JO Hermes 2014 (n 155) 10; OPlan JO Triton 2014 (n 155) 10–11.

360 See below 3.3.3.1.

361 Terry D Gill, 'Legal Aspects of the Transfer of Authority in UN Peace Operations' (2011) 42 *Netherlands Yearbook of International Law* 37, 39.

marises the command and control regime that results from the arrangements discussed.

2.4.3.1.1 Terminology

As opposed to other multinational operations, particularly EU CSDP operations, there is no comprehensive description of the types of authority each participating party exercises over the resources deployed in Frontex operations.³⁶²

The EBCG Regulation speaks of and allocates the authority ‘to issue instructions’, without distinguishing between different types or levels of ‘instructions’.

The Operational Plans are more nuanced in that respect, introducing several layers of authority over deployed resources. They retain the authority ‘to issue instructions’, but also speak of various forms of command and control, in particular ‘operational command and control’, ‘tactical command and control’, and variations thereof.³⁶³ The Operational Plans, however, do not clarify how these forms of authority relate to each other.

‘Command and control’ is language commonly used with respect to military operations. The most relevant levels of military command and control (C2) distinguish between full command, operational command (OPCOM) and control (OPCON), and tactical command (TACOM) and control (TACON). The exact definitions may vary depending on the specific context but are roughly understood as follows: Full command describes the military authority of a commander to issue orders to subordinates covering any aspect of military operations and administration. It may only be exercised at the national level and is for that reason retained by the state contributing troops even when other elements of command authority are delegated to a multinational force commander.³⁶⁴ OPCOM allows for the deployment of units within an area of operation and the designation of missions to reach the strategic objective of the operation as a whole.³⁶⁵ OPCON involves the authority over subordinate commanders or other persons and is normally an attribute

362 European Union Military Committee, EU Concept for Military Command and Control, 22 December 2014, Document EEAS 02021/7/14 REV 7.

363 See for example OPlan JO Triton 2014 (n 155) 11, ‘SGO perform their tasks under the instructions from the border guards of the host MS, while their command and control is exercised by Frontex.’ It is unclear here how ‘instructions’ and ‘command and control’ relate to each other. The same formulation is used in other Operational Plans and in Handbook OPlan Air Border Operations (n 159) 35.

364 EU Concept for Military Command and Control (n 362) Annex A, para 3; Gill (n 361) 46.

365 Gill (n 361) 46–47.

of OPCOM.³⁶⁶ TACOM relates to the authority on the field over (sub)units of a force and the possibility to assign tasks to persons within that unit in order to achieve missions assigned by a higher authority. TACON involves the detailed direction and control over specific movements and manoeuvres on the ground.³⁶⁷ In the context of multinational forces, normally only OPCON and/or OPCOM or parts of it are delegated by the contributing states to a multinational commander of another state or an international organisation.³⁶⁸ TACOM and TACON usually remain with the sending state.

It is unclear whether ‘operational command and control’ and ‘tactical command and control’ when used in the Operational Plans are equivalent in meaning to other multinational operations, such as EU CSDP operations. This is particularly so because the Operational Plans do not always use this terminology consistently. Moreover, operational and tactical command and control sometimes seem to be used in the opposite way to the definitions outlined above.³⁶⁹

Given the absence of uniform terminology in relation to Frontex operations and the lack of certainty whether the terms used correspond to the meaning they are commonly ascribed in relation to other multinational operations, the following terms will be used here in order to avoid confusion: ‘authority to issue instructions on deployment’ will refer to the authority vested in an individual or a body to decide on the course of action to be taken by operational resources. In contrast ‘authority to issue instructions on implementation’ will refer to the authority vested in an individual or a body to direct the operational unit on the field in order to achieve the course of action as defined by the individual or body vested with the authority to issue instructions on deployment.

366 Ibid 46–47; Kirsten Schmalenbach, *Die Haftung Internationaler Organisationen im Rahmen von Militäreinsätzen und Territorialverwaltungen* (Peter Lang 2004) 109; Blaise Cathcart, ‘15. Command and Control in Military Operations’ in Terry D Gill and Dieter Fleck (eds), *The Handbook of the International Law of Military Operations* (Oxford University Press 2010) 237–238; EU Concept for Military Command and Control (n 362) Annex A, para 3.

367 Gill (n 361) 49–50; Schmalenbach (n 366) 111; Cathcart (n 366) 238; EU Concept for Military Command and Control (n 362) Annex A, para 3

368 Gill (n 361) 47; Cathcart (n 366) 235.

369 See for example Operational Plan: Joint Operation EPN Hermes 2009 (n 348) 17, ‘The Command and Control of aerial and maritime means participating in the operation remain under the authority of National Commands, whereas the tactical command are under the authority of the specific Commander of the means’; compare this formulation to the following: Handbook OPlan Maritime Border Operations (n 159) 41, ‘Operational command of aerial, maritime and terrestrial assets of the participating MS remains with the respective MS, while the tactical command of the assets is in the hands of the ICC after consultation with the National Officials (NO).’ Similar formulations are used in Operational Plans for specific operations, for example OPlan JO Hermes 2014 (n 155) 10; OPlan JO Triton 2014 (n 155) 10–11; Frontex (Operations Division, Joint Operations Unit, Sea Borders Sector), Operational Plan: Joint Operation EPN Indalo 2013, undated, on file with the author, 30.

2.4.3.1.2 *Authority regime according to the EBCG Regulation*

By virtue of Article 21(1) EBCG Regulation, the power to issue instructions to team members deployed during joint operations is allocated to the host state. Article 40(3) establishes the concomitant obligation of team members to abide by instructions given by the host state and foresees that, as a general rule, they may perform their tasks and exercise their powers only in the presence of border guards of the host state. The host member state may, however, authorise team members to act on its behalf. There are only two limits to the host state's authority to issue instructions. First, the instructions have to comply with the Operational Plan.³⁷⁰ Second, Frontex, via its Coordinating Officer, may communicate its views on instructions to the host state, who shall 'take those views into consideration and follow them to the extent possible'.³⁷¹

2.4.3.1.3 *Authority regime according to the Operational Plans*

Whilst in principle following the EBCG Regulation, the Operational Plans set out a more elaborate authority regime over operational resources.³⁷² Generally, all activities of deployed personnel and assets are coordinated by the ICC directly or through Regional or Local Coordination Centres if established.³⁷³ Decisions on deployment of the operational resources and their specific tasks are taken in the JCB which holds daily meetings for that purpose where the past and ensuing 24 hours are discussed. In order to enable decision-making by the JCB, all communication in relation to operational activities in the operational area is channelled via the ICC.³⁷⁴

However, the authority transferred to the JCB is 'without prejudice to the privileges of the national operational chain of command and control specific to each participating' state.³⁷⁵ As outlined above, states commonly do not transfer full authority over their military resources to other states or international organisations, but retain certain core aspects of it. This is important in the context of Frontex operations, because large assets contributed to joint

³⁷⁰ EBCG Regulation (n 18) art 21(1).

³⁷¹ Ibid art 21(2).

³⁷² Replicating the above mentioned provisions of the EBCG Regulation see Handbook OPlan Air Border Operations (n 159) 23; Handbook OPlan Land Border Operations (n 159) 28; Handbook OPlan Maritime Border Operations (n 159) 30; Handbook OPlan Return Operations (n 160) 28.

³⁷³ Handbook OPlan Air Border Operations (n 159) 13; Handbook OPlan Land Border Operations (n 159) 26, 12; Handbook OPlan Return Operations (n 160) 26; Handbook OPlan Maritime Border Operations (n 159) 27, 12.

³⁷⁴ Handbook OPlan Land Border Operations (n 159) 39; Handbook OPlan Maritime Border Operations (n 159) 41; Handbook OPlan Return Operations (n 160) 37.

³⁷⁵ Handbook OPlan Air Border Operations (n 159) 13; Handbook OPlan Land Border Operations (n 159) 12; Handbook OPlan Maritime Border Operations (n 159) 12.

operations, in particular vessels or aeroplanes, are often military equipment. In this light, a distinction has to be made between

- team members deployed independently from large assets, e.g. screening and debriefing teams, or teams of border patrol officers ('standard team members'), and
- large assets, e.g. vessels or aeroplanes, including the team members deployed on these.

With respect to standard team members, the JCB takes decisions under the lead of its chair, the ICC Coordinator. Whilst all members of the JCB are present and may be consulted, none of them can formally 'block' a decision. The JCB directs its instructions to the respective team leaders. The team leaders, who are officers of the host state, pass these on to the members of their teams.³⁷⁶

With respect to large aerial, maritime and terrestrial assets, participating states retain authority through two mechanisms. First, when the JCB takes decisions that affect an asset of a participating state, the National Official of that particular state has to be consulted.³⁷⁷ Even though the National Official does not explicitly have the right to block a decision, in practice decisions are not taken until consensus is reached.³⁷⁸ Second, with each asset the contributing state deploys a 'Commanding Officer' (CO) responsible for commanding the asset's staff.³⁷⁹ Commanding Officers receive their orders directly from the respective National Official, who translates or adapts the decisions taken in the JCB to the specific needs of the asset.³⁸⁰ For that purpose the National Official must be vested with the necessary powers to give instructions to the Commanding Officers of the national assets.³⁸¹ The implementation of the JCB's decisions with respect to particular assets can be supported by a host state Liaison Officer assigned to the specific technical equipment.³⁸² The remainder of this study will refer to the assets to which this regime applies simply as '**large assets**'.

It should be noted that it is unclear how this regime will be affected where multinational crews are deployed on vessels contributed to sea border operations.³⁸³ Given the authority that states commonly retain over military equipment, it seems likely that personnel contributed by one participating state to be deployed on a vessel contributed by another participating state

376 See for example OPlan JO Triton 2014 (n 155) 15.

377 Handbook OPlan Maritime Border Operations (n 159) 41.

378 This follows from interviews with Frontex officials.

379 Handbook OPlan Maritime Border Operations (n 159) 30; see also for example OPlan JO Hermes 2014 (n 155) 10; OPlan JO Triton 2014 (n 155) 10–11; OPlan JO Indalo 2013 (n 369) 30.

380 Handbook OPlan Maritime Border Operations (n 159) 30, 27.

381 Ibid 28; Handbook OPlan Return Operations (n 160) 27.

382 Handbook OPlan Maritime Border Operations (n 159) 32.

383 See also above 2.3.3.2.

will be under the latter’s authority to the same extent as all other personnel on that vessel. This would mean that the authority regime sketched out in this section equally applies to the foreign personnel within the multinational crew of a vessel. Proceeding on this assumption, this study will not further distinguish between crews that are of the nationality of the state contributing the vessel and multinational crews.

2.4.3.1.4 Conclusion

In light of the above, the JCB is in principle vested with the authority to issue instructions on deployment, i.e. the JCB decides on the course of action to be taken by operational resources. However, decisions within the JCB are taken in different ‘configurations’ depending on the operational resources concerned. Whilst decisions with respect to standard team members are taken under the lead of the host state, decisions that affect large assets require consultation with the respective National Official.

The authority to issue instructions on implementation in relation to standard team members rests with the team leaders, thereby the host state.³⁸⁴ In contrast, the authority to issue instructions on implementation in relation to large assets remains with the respective contributing state.³⁸⁵

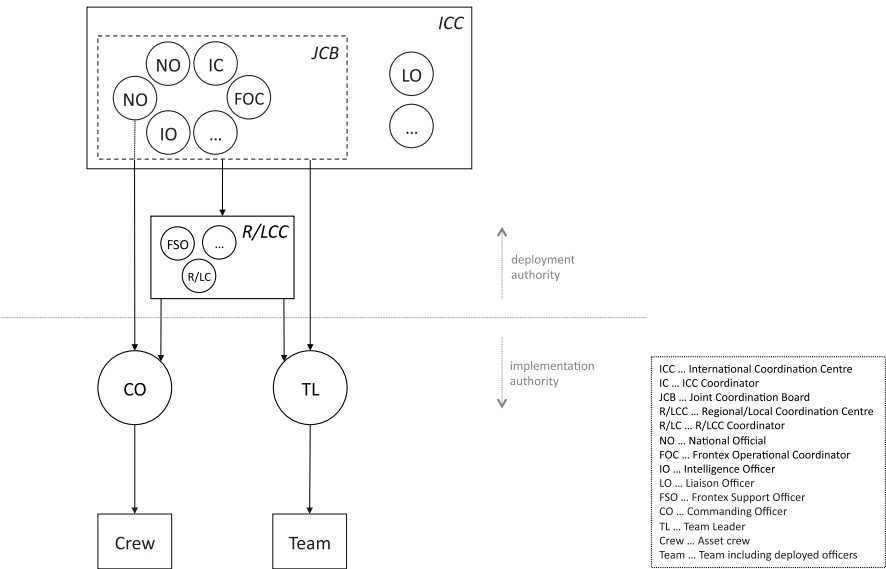


Figure 14: Command and control arrangements during joint operations

384 See also Handbook OPlan Maritime Border Operations (n 159) 41; OPlan JO Hermes 2014 (n 155) 10; OPlan JO Triton 2014 (n 155) 10–11.
385 Handbook OPlan Maritime Border Operations (n 159) 41.

2.4.3.2 Disciplinary authority, criminal jurisdiction, and civil liability

Despite the partial transfer of the authority to issue instructions to the host state, all team members remain subject to the disciplinary authority of their home member state. In particular, the home member state has to provide for appropriate disciplinary and other measures for violations of fundamental rights or international protection obligations in the course of joint operations.³⁸⁶

Articles 42 and 43 EBCG Regulation in addition lay down rules regarding civil liability for and criminal jurisdiction over acts committed by team members.

Article 43 (criminal liability) provides that team members ‘shall be treated in the same way as officials of the host Member State with regard to any criminal offences that might be committed against them or by them’. It thus seems to accord the host state jurisdiction over criminal offences committed by or against team members.³⁸⁷

Article 42 (civil liability) sets out that where members of the teams operate in a host member state, ‘that Member State shall be liable in accordance with its national law for any damage caused by them during their operations’. Even though the drafting history of Articles 42 and 43 (or more precisely their identically formulated predecessors) suggests that the prime concern of both provisions was the liability of the team members themselves, Article 42 thus addresses the liability of the states involved for conduct of team members.³⁸⁸

However, the relevance of Article 42 EBCG Regulation for the purposes of allocating responsibility is limited. On the one hand, it is silent on the liability of the other participating actors, leaving open whether and under what circumstances they may incur liability *in addition* to the host state. On the other hand, it seems to be inapplicable in the context of the legal frameworks studied here. The reason is that Article 42 EBCG Regulation explicitly refers to liability ‘in accordance with [the host state’s] national law’, thereby suggesting that the rule therein is not supposed to determine the allocation

386 EBCG Regulation (n 18) art 21(5).

387 For detail on this question see Joop Voetelink, *Status of Forces: Criminal Jurisdiction over Military Personnel Abroad* (T.M.C. Asser Press 2015) 101.

388 Their predecessors were Articles 10b and 10c as introduced with RABIT Regulation (n 92); European Commission, Proposal for a Regulation of the European Parliament and of the Council establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism, 19 July 2006, COM(2006) 401 final, 8–9, explaining that the ‘criminal and civil liability of guest officers and members of the Rapid Border Intervention Teams while on duty in another Member State than their own’ is regulated [emphasis added]; both Articles are taken almost *verbatim* from Articles 2 and 3 of Council of the European Union, Council Framework Decision 2002/465/JHA on joint investigation teams, 13 June 2002, OJ L162/1.

of responsibility under international or EU law. Chapter 3 discusses in more detail whether Article 42 EBCG may function as a *lex specialis* to the general rules on attribution of conduct under international law.³⁸⁹

2.4.4 Responding to fundamental rights-related incidents

2.4.4.1 General rules on incident reporting

All border-related incidents that occur within the operational area during a joint operation are collected and reported on a daily basis via specific software, the 'Joint Operations Reporting Application' (JORA). Within JORA, incidents can be created, sent, managed, and analysed. Using templates, an authorised host state or deployed officer (the 'incident reporter') creates a report for every incident. The incident report is subsequently verified at several levels, involving first a member of the Local Coordination Centre, second a member of the ICC, and third the Frontex Situation Centre which gives final approval.³⁹⁰

A special system is in place for what are defined as 'serious incidents'. These are incidents that need urgent attention due to their potential effect on or relevance to the mission itself, Frontex' image (*sic*), ensuing obligations, safety and security of participants, or any combination thereof. In order to simplify the identification of a serious incident, the agency drew up a 'Frontex Serious Incident Catalogue', containing a non-exhaustive list of possible serious incidents. These include situations of alleged violations of fundamental rights, of EU or international law, in particular international protection obligations, and of the Frontex Code of Conduct. If in doubt as to whether a situation amounts to a serious incident, every 'incident reporter' can contact the Frontex Situation Centre on a 24/7 basis.³⁹¹

Every participant involved in joint operations is under an obligation to immediately report any serious incidents he is involved in or otherwise gains knowledge of to the Frontex Situation Centre and the host state authorities. 'Immediately' under normal circumstances means within two hours from detection.³⁹² The idea is that the Frontex senior management, member states, the Management Board, and other relevant actors are informed immediately about the occurrence of a serious incident in order

389 See below 3.2.2.2.

390 Handbook OPlan Air Border Operations (n 159) 35-37, 41-48; Handbook OPlan Land Border Operations (n 159) 39-41, 49-56; Handbook OPlan Maritime Border Operations (n 159) 41-42, 50-57; Handbook OPlan Return Operations (n 160) 37-38, 45-52.

391 Handbook OPlan Air Border Operations (n 159) 37, 49-55; Handbook OPlan Land Border Operations (n 159) 40, 57-63; Handbook OPlan Return Operations (n 160) 38, 53-59; Handbook OPlan Maritime Border Operations (n 159) 42, 58-64.

392 Handbook OPlan Air Border Operations (n 159) 37; Handbook OPlan Land Border Operations (n 159) 40; Handbook OPlan Maritime Border Operations (n 159) 42; Handbook OPlan Return Operations (n 160) 38.

to improve situational awareness, increase their reaction capabilities, and facilitate possible follow-up measures and official statements. If a participant is concerned that reporting alleged fundamental rights violations via this procedure may have consequences for his integrity, future deployment, or reputation, he or she can exceptionally make use of any other available channels, including personal reporting.³⁹³

2.4.4.2 *Dealing with fundamental rights-related incidents*

With a view to establishing an internal procedure to allow the Executive Director to adequately react to violations of fundamental rights detected in the course of Frontex operations, Frontex adopted a 'Standard Operating Procedure to ensure respect of Fundamental Rights in Frontex joint operations and pilot projects'.³⁹⁴

This procedure envisages five steps. The first step is internal preparations, predominantly concerned with identifying potential fundamental rights risks before launching a specific operation. The Fundamental Rights Officer assesses proposed projects with a view to their fundamental rights compliance and impact, including on situations outside the mandate of the agency, such as detention conditions in a member state. On that basis, Frontex decides on how to best mitigate fundamental rights risks or avoid potential fundamental rights violations.

The second step consists of ensuring that fundamental rights-related aspects are included in the Operational Plan, i.e. reporting obligations, monitoring tasks, and reference to fundamental rights-relevant national rules. The third and fourth steps reiterate the incident reporting obligation of all participants during joint operations and set out detailed procedures for dealing with these incident reports in the Frontex Situation Centre. The fifth and final step of the standard operating procedure envisages a decision by the Executive Director on the existence and gravity of a fundamental rights violation by an individual participant or a national authority. That decision is reported to the European Commission.

393 Handbook OPlan Air Border Operations (n 159) 49-55; Handbook OPlan Land Border Operations (n 159) 57-63; Handbook OPlan Maritime Border Operations (n 159) 58-64; Handbook OPlan Return Operations (n 160) 53-59.

394 Frontex Executive Director, Decision No 2012/87 on the Standard Operating Procedure to ensure respect of Fundamental Rights in Frontex joint operations and pilot projects, 19 July 2012 [on file with the author]; the document is not publicly available but is made partially available by the agency upon request.

In 2012, the European Ombudsman opened an own-initiative inquiry into Frontex' mechanisms to promote and monitor compliance with its fundamental rights obligations.³⁹⁵ In the course of the enquiry, the Ombudsman recommended the establishment of a complaints procedure available to individuals who consider themselves to be victims of fundamental rights violations that occurred during Frontex operations.³⁹⁶ In its reply, Frontex pointed out that it had no executive powers and merely coordinated the cooperation between member states. It deduced from the nature of its tasks that only member state authorities performed activities capable of affecting individuals' rights. In this vein, it considered the incident reporting system and the standard operating procedure sufficient, on the part of the agency itself, to address possible fundamental rights infringements during Frontex operations and saw no necessity for an individual complaints mechanism.³⁹⁷ The Ombudsman disagreed with Frontex' position, finding that without an individual complaints mechanism, fundamental rights compliance could not be effectively guaranteed.³⁹⁸ Given that Frontex had not satisfactorily addressed this specific recommendation, the Ombudsman prepared a 'special report' to the European Parliament, reiterating the need for an individual complaints mechanism.³⁹⁹

The EBCG Regulation introduced an obligation for Frontex to set up a fundamental rights complaints mechanism 'to monitor and ensure the respect for fundamental rights in all the activities of the Agency'.⁴⁰⁰ Thus, a complaints mechanism was finally established as of 6 October 2016 when the Executive Director adopted 'The Agency's Rules on the Complaints

395 European Ombudsman, Letter from the European Ombudsman opening own-initiative inquiry concerning implementation by Frontex of its fundamental rights obligations, 6 March 2012, OI/5/2012/BEH-MHZ.

396 Ibid in particular at 1(iv), 3(ii), 5(ii); European Ombudsman, Draft recommendation of the European Ombudsman in his own-initiative inquiry concerning the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex), 9 April 2013, OI/5/2012/BEH-MHZ, Draft Recommendation M.

397 Frontex, 'Opinion on the European Ombudsman's own-initiative inquiry into the implementation by Frontex of its fundamental rights obligations' (17 May 2012); 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)' (25 June 2013); both letters are available on the European Ombudsman's homepage.

398 European Ombudsman, Decision closing own-initiative inquiry concerning the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex), 12 November 2013, OI/5/2012/BEH-MHZ, in particular para 79.

399 European Ombudsman, Special Report of the European Ombudsman to the European Parliament in own-initiative inquiry concerning Frontex, 12 November 2013, OI/5/2012/BEH-MHZ.

400 EBCG Regulation (n 18) art 72(1).

Mechanism'.⁴⁰¹ Anyone who considers themselves to have been the direct victim of a human rights violation committed by personnel deployed during a Frontex operation may submit a complaint to the agency.⁴⁰² The procedure is handled by the Frontex Fundamental Rights Officer, who decides on the admissibility of the complaint.⁴⁰³ Importantly, substantive decisions relating to complaints are not made by the Fundamental Rights Officer, but by the Executive Director when the agency's staff are concerned, and the relevant member state authority when their personnel are concerned. In this vein, once a complaint is admissible, the Fundamental Rights Officer has to forward it to the Executive Director or a member state and ensure they follow up on the complaint.⁴⁰⁴

As of 2 March 2017, three complaints were submitted under this procedure, only one of which was declared admissible.⁴⁰⁵ It remains to be seen how the mechanism will be handled by the agency. However, two things are noteworthy. The first is that the complaints mechanism appears to predominantly deal with ensuring the responsibility of the accused border guard, as opposed to the institutional responsibility of the agency and the member states.⁴⁰⁶ At least, in both the EBCG Regulation and the Rules on the Complaints Mechanism, disciplinary measures against the responsible officer are the only example given for a possible 'appropriate follow-up'.⁴⁰⁷ In any case, however, the view seems to prevail that members of European Border Guard or Return Intervention Teams may not engage any responsibility on the agency's part. Whilst this is already suggested in the EBCG Regulation itself, it is made particularly clear in the Rules on the Complaints Mechanism. The latter explicitly excludes seconded national experts that do not work in the agency's headquarters from the meaning of 'agency staff'.⁴⁰⁸ Importantly, however, as noted above, officers contributed by Frontex to European Border Guard or Return Intervention Teams *have to be* officers seconded by member states to the agency.⁴⁰⁹ Thus, under the complaints mechanism, it is clearly upon the member states, not Frontex, to deal with complaints against conduct of officers contributed by Frontex to European Border Guard or Return Intervention Teams. As shown in the course of this

401 Frontex Executive Director, Decision No R-ED-2016-106 on the Complaints Mechanism, Annex 1 'The Agency's Rules on the Complaints Mechanism', 6 October 2016.

402 EBCG Regulation (n 18) art 72(2); Rules on the Complaints Mechanism (n 401) art 3.

403 EBCG Regulation (n 18) art 72(4); the admissibility criteria are set out in the Rules on the Complaints Mechanism (n 401) art 8.

404 EBCG Regulation (n 18) art 72(6-7); Rules on the Complaints Mechanism (n 401) arts 10-11.

405 European Commission, 'First report on the operationalisation of the European Border and Coast Guard' (n 214) 9; European Commission, 'Second report on the operationalisation of the European Border and Coast Guard' (n 214) 10.

406 See also Rijpma, 'The Proposal for a European Border and Coast Guard' (n 23) 30.

407 EBCG Regulation (n 18) art 72(6-7); Rules on the Complaints Mechanism (n 401) art 10(5).

408 Rules on the Complaints Mechanism (n 401) arts 4(8), 10(1).

409 See in particular above 2.3.2.1.1 and Figure 11.

study, the view that only the agency's own staff may engage its responsibility fails to take into account, in particular, the extensive monitoring obligations Frontex incurs under its founding Regulation, and its positive obligations under fundamental rights law.⁴¹⁰

2.4.4.3 *Suspension, termination, or withdrawal of financial support*

As a rule, joint operations terminate when the designated period for the operation ends. Whilst early termination was not originally envisaged, this possibility was introduced into the Frontex Regulation in 2011. Apart from the situation where member states participating in a joint operation simply request that the agency terminates that joint operation, Article 25 EBCG Regulation provides for three more possibilities for early termination, suspension, and/or withdrawal of financial support. All of these require the agency to inform the member state concerned beforehand.⁴¹¹

First, the agency shall terminate joint operations if the conditions for conducting those joint operations are no longer fulfilled.⁴¹² Whilst it is not entirely clear what these 'conditions' are, this should comprise compliance with the relevant applicable legal obligations, in particular the Operational Plan and the Codes of Conduct, but also more generally international and Union law, including fundamental rights.

Second, the Executive Director may (note: not 'shall') withdraw the agency's financing or suspend or terminate an operation, if the Operational Plan is not respected by the host member state.⁴¹³ The Operational Plan reiterates the obligation for all participants to respect fundamental rights and contains the Codes of Conduct.⁴¹⁴ Thus, if the host state fails to comply with fundamental rights, the Executive Director may decide to withdraw its financial support, or suspend or terminate the operation entirely.

Third, after consulting the Fundamental Rights Officer, the Executive Director shall withdraw the financing of a joint operation, or suspend or terminate it in whole or in part if he considers that there are 'violations of fundamental rights [...] that are of a serious nature or are likely to persist'.⁴¹⁵ This obligation was introduced by the European Parliament during the

410 See in particular below 4.4.

411 EBCG Regulation (n 18) art 25.

412 Ibid art 25(1).

413 Ibid art 25(3).

414 For more detail see above see 2.4.1.

415 EBCG Regulation (n 18) art 25(4).

process of adoption of the 2011 amendments to the Frontex Regulation.⁴¹⁶ The threshold for a 'serious violation' or one that is 'likely to persist' is not further defined but it may be assumed that the former refers to the gravity of an incident whereas the latter covers continuing violations or situations where no remedies are in place.

In this light, when fundamental rights violations occur, Frontex clearly has to withdraw its financial support or suspend or terminate joint operations, where they are serious or likely to persist. However, even where this threshold is not met, it seems that the agency would have to take one of these measures because the 'conditions' for conducting the operation are no longer met or because the Operational Plan was not respected.

It should be noted that the rules may differ with respect to joint operations led by and carried out in neighbouring third states. The model agreement that serves as a blueprint for the status agreements that are to be concluded with third states envisages similar early termination possibilities than the EBCG Regulation but conceives them as options rather than obligations upon the Executive Director of the agency.⁴¹⁷ Given the additional fundamental rights concerns such operations raise, this is unfortunate.⁴¹⁸

The logic behind the introduction of possibilities for early termination is that the prospect of a withdrawal of the financial, technical, and personal resources encourages states to comply with the conditions for the conduct of joint operations, including the respect of fundamental rights. Whilst they are hence designed to serve (*inter alia*) the protection of fundamental rights, their impact on fundamental rights compliance may be more complex in reality. Operations coordinated by Frontex generally receive more public attention than unilateral operations. Assuming that upon withdrawal of Frontex-coordinated assets the host state does not cease its activities, termination of a joint operation may not halt fundamental rights violations but

416 Compare: European Commission, Proposal for a Regulation of the European Parliament and 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, 24 February 2010, COM(2010) 61 final, art 3(1), '[...] The Agency may also terminate joint operations and pilot projects if the conditions to conduct these initiatives are no longer fulfilled.' and: European Parliament, Legislative Resolution on 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, 13 September 2011, 2011/C 314 E/29, which introduced new art 3(1a).

417 European Commission, 'Model status agreement as referred to in Article 54(5) of Regulation (EU) 2016/1624' (n 217) Annex, art 5. It should be noted, however, that the model agreement explicitly allows the Executive Director to suspend or terminate activities in case of fundamental rights violations, regardless of whether these are serious or likely to persist, see art 5(3).

418 For more detail on joint operations led by and carried out in third states see above 2.2.3.

rather remove them from the 'public eye'. Thus, before making use of early termination in accordance with Article 25 EBCG Regulation, careful consideration has to be given to the origin of fundamental rights violations, the impact of termination of the joint operation, and the availability of means to address them.

To date, no joint operation has ever been terminated before its envisaged end date. The agency, however, reports that it has made use of the early termination possibilities as a tool to pressure member states into complying with fundamental rights.⁴¹⁹

2.5 CONCLUSION

Frontex is an EU agency established in order to support member states in the implementation of Union measures relating to border management, in particular the Schengen Borders Code. One of its tasks is the organisation, implementation, and financing of joint border control and return operations. The aim of such operations is to assist one or more member states in controlling their segments of the Schengen external border or in returning third country nationals that have no right to stay. This is predominantly achieved by deploying border guards, other experts, and technical equipment made available in particular by other member states.

Each member state is primarily responsible for the management of its respective segment of the external border. This general rule remains unaltered when joint operations are launched to support a member state. In this vein, **the host state** has the overall lead in joint operations at its external borders. This means for example that it has to agree on the operation-specific rules that apply (i.e. the Operational Plan) and enjoys the authority to issue instructions to the deployed resources. It also takes the lead within the bodies established to coordinate the daily running of an operation, in particular by deploying an ICC Coordinator who oversees and coordinates decision-making by the Joint Coordination Board during the implementation of the operation. Its oversight on the ground is typically ensured by combining foreign and local officers in teams, the leaders of which are host state officers.

The **participating states** have a supportive role during joint operations. Their support mainly consists of making technical and human resources available and transferring the authority to issue instructions to the host state. However, that transfer is limited with respect to large assets that are often of a military nature. Practically, this especially concerns vessels

419 This has been pointed out by several Frontex officials independently from each other during interviews.

deployed during sea border operations. The national command structures on these remain intact even during deployment, which means in particular that the Commanding Officer is a national of the respective participating state. In addition, they participate in decision-making during operations by having a so-called National Official present within the Joint Coordination Board who is consulted when decisions affect large technical equipment they have contributed. In practice, decisions are not taken, if the respective National Official has not agreed to them.

Frontex supports, reinforces, coordinates, and monitors the actions of member states before, during, and after joint operations. It takes the lead in the planning phase of an operation, drawing up in particular the Operational Plan on the basis of which the operations are carried out. The agency's role during operations goes well beyond the supporting role of participating states. It not only provides technical or human resources, but also finances or at least co-finances joint operations. In addition, it acts as a coordinator with regard to all aspects of the operations. It does so by setting up an elaborate framework of coordination structures that ensure the presence of Frontex officers at all relevant levels, especially on the ground and within the bodies running the operation (in particular the Joint Coordination Board). Whilst not able to directly issue instructions to deployed officers, it can express its views on such instructions to the host state, who has to follow these to the extent possible. Its presence on the ground and the incident reporting system it sets up safeguard that the agency stays informed on all relevant occurrences during an operation. Importantly, Frontex also assumes a monitoring role, including in particular the monitoring of compliance with the legal requirements at all stages during the operation. As a last resort, it may terminate an operation if the activities during joint operations fail to respect legally binding rules, including fundamental rights.

