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## **Systemic accountability of the European Border and Coast Guard: the legal responsibility of Frontex for human rights violations**

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# PART I

## EMPIRICAL: THE DEVELOPMENT AND HUMAN RIGHTS SENSITIVITIES



## 1 INTRODUCTION

This first substantive chapter introduces the reader to the character, the identity, and the *modus operandi* of the Frontex. A more in-depth description of the agency follows through the multiple alterations in its legislative framework and its ever-growing *de jure* and *de facto* powers and competences.

Reaching a deeper understanding of Frontex and its work, especially on how that has developed throughout the years, since its establishment in Warsaw in 2004, and on the possible impact of its activities upon fundamental rights, in the next chapter, is an essential first step towards the examination of the agency's responsibility and accountability.

## 2 FRONTEX AND THE EUROPEAN BORDER AND COAST GUARD

With a continually growing number of joint surveillance operations at the EU external borders since 2005, and with a budget, which in 2019 is for the first time counted in billions,<sup>1</sup> Frontex and its evolution, the European Border Guards Agency (EBCGA) has become one of the most important actors in border enforcement in Europe.

Frontex is an essential element of cross-border cooperation, defined as 'a more or less institutionalised collaboration between contiguous subnational authorities across national borders'.<sup>2</sup> This has materialised at the EU level in the conceptual framework of European Integrated Border Management, which has been defining EU policies since the beginning of the 2000s.<sup>3</sup> It aims to control access to the EU territory based on a four-tier system, which comprises of cooperation with third countries (for example visa policies), cooperation with neighbouring third countries, control of the external

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1 The budget allocated to Frontex in the 2019 amendment of its Regulation notes a sharp increase. An additional €2.3 billion is proposed for 2019-2020, which is followed by €11.3 billion proposed for the 2021-2027 period. The new budget has at the time of writing not yet been released.

2 M. Perkmann, 'Cross-border Regions in Europe: Significance and Drivers of Regional Cross-Border Co-Operation', *European Urban and Regional Studies* 2013, vol. 10(2), pp.: 153-171.

3 Carrera 2007.

borders, and control measures within the Schengen area.<sup>4</sup> Since early on, the establishment of a European border control agency has been deemed crucial for the effective implementation of integrated border management.

## 2.1 The establishment

In order to accommodate the common Schengen borders with a territorial scope of over 43,000 km of coastline and land borders and 1.3 billion crossings a year,<sup>5</sup> as well as the security concerns of member states after 9/11,<sup>6</sup> Frontex was created in 2004.

The initiative belonged to Italy, Belgium, France, Germany, and Spain.<sup>7</sup> The agency reflected the member states' security concerns, especially in the face of the Union's enlargement towards Eastern Europe, and their commitment to closer integration.<sup>8</sup> The main reasons for supporting the project were that the agency would be a manifestation of solidarity and a useful tool for burden-sharing, it would allow for more efficient use of resources and expertise. It would, at the same time, further European integration.<sup>9</sup>

It pursued the strategic objective of Article 2(4) Treaty on European Union (TEU) to 'maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime'. The same objectives had been expressed earlier in the Treaty Establishing the European Community (TEC) in Articles 61-63, which also establish the competences of the European Council in the area of immigration policy, and constitute the juridical basis for the agency's founding Regulations. It was essentially the concrete implementation of the Schengen Agreement, which

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4 Council of the European Union, Justice and Home Affairs, 2768th Council Meeting, Brussels: 4 December 2006, [https://ec.europa.eu/commission/presscorner/detail/en/PRES\\_06\\_341](https://ec.europa.eu/commission/presscorner/detail/en/PRES_06_341).

5 European Parliament, European Parliamentary Research Service, *The economic impact of suspending Schengen*, March 2016.

The common EU borders are specified in Art. 2(2) Regulation (EU) 2016/399, in accordance with Protocol 19 of the Schengen acquis annexed to the TEU and the TFEU.

6 S. Wolff, 'Border management in the Mediterranean: internal, external and ethical challenges', *Cambridge Review of International Affairs* 2008, vol. 21(2), p. 255; Pollak & Slominski 2009, p. 904; J. D. Fry, 'European Asylum Law: Race-to-the-Bottom Harmonization?', *Journal of Transnational Law & Policy* 2005, vol. 15(1), p. 101.

7 Council of the European Union, *Feasibility study for the setting up of the "European Border Police"*, Rome, March 2002, p. 5.

8 Council of the European Union 2002, p. 5.

9 House of Lords, Select Committee on European Union, *Ninth Report, CHAPTER 3: integrated border management and a European border guard*, European Union Committee Publications, par. 22, <https://publications.parliament.uk/pa/ld200203/ldselect/lddeucom/133/13305.htm>; For a critical analysis on the establishment of Frontex, see Perkowski 2012.

was annexed as a Protocol to the Treaty of Amsterdam,<sup>10</sup> and the Tampere Conclusions, which at point 24 call for closer cooperation and mutual technical assistance between the member states in the field of border control, including exchange programmes and technology transfer, especially on maritime borders.<sup>11</sup>

Initially, the project concerned a 'European Border Police' or a 'European Border Guard' that would be in the centre of an integrated approach combining infrastructures, information exchange, cooperation and coordination, border management, and police cooperation.<sup>12</sup> It would support but not replace national border police forces.<sup>13</sup> It was still unclear whether the future intention was for it to become an 'operational force'.<sup>14</sup> The idea of the body being vested with full operational powers effectively replacing the national border authorities, as it was the intention of the Commission and the European Parliament (EP),<sup>15</sup> was discussed and dismissed for the time being due to the sovereignty concerns of the Member states.<sup>16</sup>

The name has proven controversial with member states, including the UK, Finland and Sweden, that expressed reservations about a fully integrated system of border management represented in a European Border Police Corps.<sup>17</sup> The name was dropped by the European Council already in 2001,<sup>18</sup> but the European Commission (EC) insisted on it as a longer-term plan that would result from progressive integration.<sup>19</sup> The long-term

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10 The Schengen acquis - 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, Official Journal L 239, 22/09/2000 P. 0013 – 0018.

11 Tampere European Council 15 and 16 October 1999 Presidency Conclusions, Tampere: European Council 15 and 16 October 1999.

12 'It should be highlighted that border management is not focusing solely on the immigration aspect but also on other purposes customs purposes, traffic security, prevention of the entry of dangerous or illegal goods, identification of persons wanted for arrest or extradition (...)'. Presidency Conclusions European Council meeting in Laeken 14 and 15 December 2001, Laeken: European Council 14 and 15 December 2001, point 4.4.

13 European Council, Plan for the management of the external borders of the Member states of the European Union, Council document 10019/02, 14 June 2002, paras 118-120.

14 House of Lords 2004.

15 H. Jorry, *Construction of a European Institutional model for managing operational cooperation at the EU's external borders: Is the FRONTEX agency a decisive step forward?* (CEPS Research Paper No. 6), Brussels: Centre for European Policy Studies March 2007, p. 2.

16 J. Monar, 'The Project of a European Border Guard: Origins, Models and Prospects in the Context of the EU's Integrated External Border Management', in M. Caparini and O. Marenin (eds), *Borders and Security Governance, Managing Borders in a Globalised World*, LIT Verlag Münster, 2006, Chapter 10, pp.: 4, 5; Wolff 2008, pp.: 253-271.

17 House of Lords 2004, par. 30; Monar 2006, p. 2.

18 Laeken Conclusions.

19 European Commission Communication to the Council and the European Parliament entitled "Towards integrated management of the external borders of the Member states of the European Union", 2002; Monar 2006, p. 2.

development of Frontex and the exploration of the feasibility of a European system of border guards were included in the Stockholm Programme.<sup>20</sup>

An evanescent attempt to get the wheels turning took place in 2003 with the creation of the External Borders Practitioners' Common Unit (PCU) within the intergovernmental Council working group called Strategic Committee on Immigration, Frontiers and Asylum (SCIFA). CPU would become a 'leader' in border management coordinating and controlling operational projects'.<sup>21</sup> Under PCU the heads of national border guards would deal with and coordinate their activities exclusively on operational matters. After only one year of operation, its limitations soon came to light<sup>22</sup> and it gave space to the establishment of the EU External Borders Agency, 'Frontex', a name derived from the French term for external borders, *frontières extérieures*.<sup>23</sup>

The EC following the mandate given to it by the Thessaloniki European Council to examine alternative governance structures,<sup>24</sup> presented a proposal on the creation of an agency that was soon approved by the Council.<sup>25</sup> The agency was established under the consultation procedure with the active involvement of the EP, the majority of the members of which supported the initiative. Support, however, was not universal. Heated discussions took place at the time, in principle led by members of the GUE/NGL group, which voiced strong concerns regarding the idea of 'Fortress Europe' and the adding 'to the suffering of refugees and migrants'.<sup>26</sup>

Frontex, the European Agency for the Management of Operational Cooperation at the External Borders, was created with Council Regulation (EC) 2007/2004<sup>27</sup> (Frontex Regulation) in fulfilment of the aim of operational cooperation, i.e. collaboration between the competent services. Its historical legal basis is found in Articles 62(2a) and 66 of the Amsterdam Treaty.<sup>28</sup> Today, the EU competence and the procedures in migration policy

20 The Stockholm Programme – An open and secure Europe serving and protecting the citizens, 2 December 2009, p. 56.

21 European Commission 2002, p. 2.

22 S. Wolff and A. Schout 2013, pp.: 312-315. According to the authors, however 'Frontex as an agency has not been a major addition', p. 319.

23 For a more detailed view on the establishment of Frontex, see H. Ekelund, 'The Establishment of FRONTEX: A New Institutional Approach', *Journal of European Integration* 2013, vol. 36(2) and A. W. Neal, 'Securitization and risk at the EU border: the origins of FRONTEX', *Journal of Common Market Studies* 2008, vol. 47(2).

24 European Council, Thessaloniki European Council 19 and 20 June 2003 Presidency conclusions.

25 European Council, Presidency conclusions. European Council meeting in Brussels, 16 and 17 October 2003, Brussels, 15 November 2003, 15188/03.

26 Ekelund 2013, pp.: 107, 108.

27 Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

28 Jorjy 2007, p. 9.

are laid out in Articles 77 and 79 TFEU, which reflect the dynamics of the Schengen system with free movement complemented with efficient control of irregular migration especially at the external borders and a growing emphasis on integrated border management. The aim of the agency is to ensure effective border management by coordinating and assisting the member states in the surveillance and control of the external borders, which is seen as a necessary corollary to the absence of controls when crossing the internal borders.<sup>29</sup>

However, the agency's stated purpose is qualitatively broader<sup>30</sup>: 'improving the integrated management of the external borders, ensuring a uniform and high level of control and surveillance'.<sup>31</sup> Its tasks, a more detailed view of which is given below, have been formed around the definition of integrated border management. This definition includes border checks and surveillance as defined in the Schengen Borders Code, cross-border crime investigation, inter-agency cooperation and cooperation with member states and third countries, as well as coordinating and ensuring coherence of actions at the EU level.<sup>32</sup>

The Management Board of the agency is composed of one representative of the border authorities of the Schengen *acquis* states and two Commission representatives, which serve for a renewable four years term.<sup>33</sup> It makes the strategic decisions and exercises oversight over the agency. Among its tasks is to establish and supervise the execution of the budget, ensure transparent decision-making procedures, appoint the Executive Director of the Agency, and adopt the agency's work programme and annual report. These are subsequently sent to the EP, the Council, the Commission, the European Economic and Social Committee, and the Court of Auditors.<sup>34</sup>

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29 Frontex Regulation 2004, Preamble Paragraph (1).

30 Baldaccini 2010, pp.: 232, 233.

31 Frontex Regulation 2004, Article 1.

32 Conclusions of the Justice and Home Affairs Council meeting of 4-5 December 2006, preceded by the draft Council Conclusions in Integrated Border Management, document 1422/06, 19 October 2006, p. 2. A more narrow interpretation of integrated border management, which restricts the notion to border control and other aspects of the management of the external borders, excludes criminal law from the mandate of Frontex. S. Peers, *EU Justice and Home Affairs Law*, Oxford: Oxford University Press 2011, p. 157; Mungianu 2016, pp: 22, 32.

33 Iceland, Lichtenstein, Norway and Switzerland, as non-EU Member states but signatories to the Schengen *Acquis* have limited voting rights. Article 101 Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624. The United Kingdom and Ireland are invited to participate in the Management Board meetings. Article 104(5) EBCG Regulation.

34 Article 100 EBCG Regulation; Frontex website <http://frontex.europa.eu/about-frontex/organisation/management-board/>.



The Executive Director, a post which since January 2015 belongs to Fabrice Leggeri,<sup>35</sup> is appointed by the Management Board on a proposal of the Commission.<sup>36</sup> He is entirely independent and does not take instructions from the member states or any other body. He answers to the Management Board. He proposes, prepares, and manages the implementation of strategic decisions, programs and activities of the agency, including operational plans and budgets. He proposes the initiation of operations upon project proposals prepared by the Risk Analysis Unit and approves such requests filled by member states.<sup>37</sup>

## 2.2 The mandate

Since it became operational, in May 2005, the Warsaw-based agency has witnessed considerable growth in its operational capacity. Its staff had increased from 43 members in 2005<sup>38</sup> to 330 in 2016<sup>39</sup>, while 2020 finds the agency with its own standing corps. Furthermore, from an initial budget of €6 million<sup>40</sup>, which was enough only to cover the staffing and administration costs,<sup>41</sup> the agency handled today a budget that is counted in billions.

Its mandate has developed in parallel to the growth of its financial and human resources with two amendments of its founding Regulation in 2007 (hereafter RABIT Regulation)<sup>42</sup> and in 2011<sup>43</sup> that expanded the agency's operational powers, while its mandate is also developing on an ad hoc

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35 Ilkka Laitinen served as the agency's first Executive Director since 2005.

36 Article 107 EBCG Regulation.

37 Article 106 EBCG Regulation.

38 Council of the European Union, "Strengthening the European external borders agency Frontex – Political Agreement between Council and Parliament", 11916/11, Presse 192, Brussels, 23 June 2011.

39 House of Lords, Frontex Executive Director, Fabrice Leggeri, hearing before UK Parliament, 16 September 2016, <http://parliamentlive.tv/Event/Index/1e48fc9c-722d-4cc1-9c85-1e5f772630d9>.

40 Council of the European Union 2011.

41 Pollak and Slominski 2009, p. 909.

42 Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing the European Agency for the Management of Operational Cooperation at the External Borders of the Member states of the European Union, [2004] OJ L 349/1 (Frontex Regulation), as amended by 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 L 199/30 (RABIT Regulation).

43 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; Steve Peers has produced a codified version, Statewatch analysis, The Frontex Regulation Consolidated text after 2011 amendments, available here: <http://www.statewatch.org/analyses/no-140-frontex-reg-text.pdf>.

basis.<sup>44</sup> The European Border and Coast Guard (EBCG) Regulation,<sup>45</sup> which replaced the Frontex Regulation in 2016 make a marked change in the status and operational role of Frontex.<sup>46</sup> The first amendment of the 2016 EBCG Regulation came soon after in 2019.

This gradual approach in the development of mandate and capabilities, where the agency is being vested with new powers almost every two years, was a necessary reconciliation between the Commission's vision of fully-integrated border management led by a fully-fledged corps of border guards, and the sovereignty concerns of member states. The following section takes a historical approach in presenting the agency's mandate, where the relevant legislative framework is set in chronological order to showcase this gradual but truly prodigious development of the powers and competences of the agency since its establishment.

### 2.2.1 *Original mandate*

As described in its founding Regulation, the role of Frontex focuses on reinforcing and streamlining the cooperation amongst the member states, which nevertheless remain primarily responsible for their section of the common borders (Article 2(1)(a)).<sup>47</sup> The tasks of the agency were threefold. The first group of tasks concerned the deployment of technical equipment (e.g. aeroplanes, ships), and personnel to those member states that face significant pressure at their borders. Here belonged tasks, such as organisation and coordination of joint operations at the sea, land and air external borders (border surveillance operations), and coordination of joint return operations (operations aiming at the collective return of irregular migrants from several member states) (Articles 2(1)(f), 9).

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44 Frontex had already been participating in operations in the context of bilateral agreements with third countries, e.g. Hera Operation, 2006, before that was foreseen in its founding Regulation in 2011. Operations Triton and Poseidon are awarded a significant 'search and rescue' character after several incidents of mass drowning in the Mediterranean. European Commission, *Frontex Joint Operation 'Triton' – Concerted efforts to manage migration in the Central Mediterranean*, Brussels: European Commission 7 October 2014, [https://ec.europa.eu/commission/presscorner/detail/en/MEMO\\_14\\_566](https://ec.europa.eu/commission/presscorner/detail/en/MEMO_14_566); Council of the European Union, *Special meeting of the European Council, 23 April 2015 – statement*, Brussels, 23 April 2015, <https://www.consilium.europa.eu/en/press/press-releases/2015/04/23/special-euco-statement/>.

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

46 S. Peers, 'The Reform of Frontex: Saving Schengen at Refugees' Expense?', *Blog EU Law Analysis* 16 December 2015, <http://eulawanalysis.blogspot.com/2015/12/the-reform-of-frontex-saving-schengen.html>.

47 Frontex Regulation 2004

The aforementioned operations would take place upon request of a member state facing disproportional pressures at its borders or on the agency's initiative (Article 3(1)). In joint return operations, Frontex was responsible for the organisation, coordination, and (co-)financing of the missions without entering into the merits of return decisions (Article 9). Frontex also built relationships of cooperation with third states (Article 2(2), 14), mainly states of origin and transit countries.

On a second level, Frontex helped member states with capacity building in various areas related to border control, mainly through training of national border guards, setting common training standards, and sharing information and best practices (Articles 2(1)(b), 5, 6). Frontex runs the Network of Training Coordinators and the national training coordinators group, with its common core curriculum facilitating the exchange of best practices among member states. More generally, the meaning of 'capacity building' is not clearly defined and is so general that it could include any border-related activity.

Thirdly, all the aforementioned tasks were carried out in an information-rich environment. The agency used information-sharing links, such as the Information and Coordination Network,<sup>48</sup> and conducted research and risk analyses, allowing the EU and member states to make informed decisions on appropriate measures or tackle identified threats and risks.<sup>49</sup>

### 2.2.2 *Frontex Regulation 2007 amendment*

In 2007 already, the existing system of support with regard to border checks and surveillance at the external borders was considered insufficient, especially when member states were faced with the arrival of a large number of people trying to enter the EU in an irregular manner.<sup>50</sup> Therefore, member states agreed to increase the operational powers of Frontex significantly<sup>51</sup> with the adoption of the amending Regulation (EC) No 863/2007 (RABIT Regulation).

The European Council called upon the Commission to bring a proposal that would regulate the creation of specialised units, which could be deployed in member states that face high immigration flows.<sup>52</sup> The time-

48 Council Decision 2005/267/EC of 16 March 2005 establishing a secure web-based Information and Coordination Network for Member states' Migration Management Services (OJ L 83, 1.4.2005, p. 48).

49 Preamble Paragraph (6), Article 2 (c) and (d) Frontex Regulation 2004; S. Léonard, 'EU border security and migration into the European Union: FRONTEX and securitisation through practices', *European Security* 2010.

50 Preamble Paragraph (5) RABIT Regulation.

51 J.J. Rijpma and M. Cremona, *EUI Working Papers. The Extra-Territorialisation of EU Migration Policies and the Rule of Law*, Fiesole: European University Institute 2007, pp. 20-21.

52 European Council, Presidency Conclusions of 15 and 16 December 2005, Brussels, 30 January 2006.

liness of the proposal, presented in July 2006, is defined by the alarming situation around Lampedusa and the Canary Islands.<sup>53</sup>

The Regulation, finally adopted in 2007, gave the agency the ability to deploy Rapid Border Intervention Teams (RABITs)<sup>54</sup>. These teams, composed and fully financed by the agency (Article 4(1)(4)), consist of national border guards from participating member states and are deployed temporarily upon request of a member state (Article 3 (1)(b)).

Member states may call upon the RABITs in cases, where they face an emergency situation at their borders, such as urgent and exceptional pressure from ‘mass influx’ of migrants that requires increased technical and operational assistance (Article 1). At that stage, Frontex can intervene providing immediate efficient, practical assistance, especially personnel.<sup>55</sup>

Apart from the deployment of the RABITs, the amending Regulation also defined the tasks and powers of border guards participating in joint operations and pilot projects of Frontex (guest officers). Namely, guest officers were given active border control and police tasks, such as investigating nationality, stamping passports, and preventing irregular border crossing (Articles 10, 12). Moreover, guest officers would wear a special uniform and carry EU credentials (Article 6(4)). They were also authorised to use force and carry weapons (Article 6(5)(6)).

The amending Regulation also strengthened the Community character of the agency and its authority over the member states.<sup>56</sup> It conferred a certain amount of coercive power with respect to organising the deployment of RABITs. Based on the principle of ‘compulsory solidarity’, member states were obliged to make border guards available for a mission ‘unless they are faced with an exceptional situation substantially affecting the discharge of national tasks’ (Article 4(3)). Frontex determined the number of seconded officers per member state. However, it remained within the discretion of the member states to select the officers and decide the duration of their secondment.<sup>57</sup>

The first emergency situation, where the RABIT teams were deployed arose in 2010 at the Turkish-Greek border.<sup>58</sup> Twenty-six member states participated in the mission making available more than 200 border guards, interpreters and other experts, and a large number of assets and other equipment in an operation that lasted from November 2010 to March 2011.<sup>59</sup>

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53 Rijkma and Cremona 2007, pp.: 20-21; COM(2006) 401 final, Proposal for the Regulation establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism.

54 The name was replaced by the following 2011 amending Regulation with the name European Border Guard Teams.

55 Preamble paragraph (4) RABIT Regulation.

56 Baldaccini 2010, pp.: 234, 236.

57 Doc. 7497/10 FRONT 35 CODEC 224 COMIX 212; Mungianu 2016. pp.: 43-44.

58 Wolff 2010, p. 122; Council of the European Union 2011.

59 Frontex website <http://frontex.europa.eu/operations/archive-of-accomplished-operations/181>.

The RABIT forces assisted the Greek authorities on multiple levels. Apart from the deployment of border guards at the land border with Turkey, guest officers also assisted in screening apprehended migrants and the return of those found to be staying illegally in Greece. Finally, Frontex was also involved in intelligence activities concerning trans-border crime.<sup>60</sup> The mechanism was deployed once more by Greece in 2015.<sup>61</sup>

### 2.2.3 Regulation on Frontex immigration liaison officers' networks

Council Regulation (EC) No 377/2004 had created the mandate for enhancing cooperation with third states on issues of irregular migration by deploying Immigration Liaison Officers (ILOs) of member states in third countries and regions of interest. Regulation 493/2011 centralised these already existing networks into an EU Network of ILOs operated by Frontex.<sup>62</sup> Frontex liaison officers are posted today in third states, by virtue of the 2011 recast Frontex Regulation, in order to facilitate the collection and exchange of information to be used for operational purposes and for promoting more effective cooperation, while at the same time taking into consideration the relevant human rights aspects. This opportunity had not been implemented until 2015 when the first liaison officer was appointed in Ankara.<sup>63</sup> Frontex has since posted two more liaison officers in Serbia and Niger,<sup>64</sup> while it aims at deploying more liaison officers in key areas of interest, especially in Western Africa and the Western Balkans.<sup>65</sup>

### 2.2.4 Frontex Regulation 2011 amendment

Shortly after the 2007 amendment, new calls were made by the Council at several instances for the enhancement of the efficiency and the expansion of the operational role of the agency.<sup>66</sup> Finally, the Commission published

60 L. Bargiotti, 'FRONTEX: first ever RABIT operation deployed on 2 November', *Blog FREE Group* 14 November 2010, <https://free-group.eu/2010/11/14/frontex-first-ever-rabit-operation-deployed-on-2-november-2/>.

61 Frontex, *General Report 2015*, Warsaw: European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union 2015, <https://op.europa.eu/en/publication-detail/-/publication/474bb018-b537-11e6-9e3c-01aa75ed71a1>, p. 28.

62 Regulation (EU) No 493/2011 of the European Parliament and of the Council of 5 April 2011 amending Council Regulation (EC) No 377/2004 on the creation of an immigration liaison officers network.

63 House of Lords 2016.

64 *A Year in Review: First 12 Months of the European Border and Coast Guard Agency*, Warsaw: European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union 2017, p. 3, [https://frontex.europa.eu/assets/Publications/General/A\\_Year\\_in\\_Review.pdf](https://frontex.europa.eu/assets/Publications/General/A_Year_in_Review.pdf).

65 House of Lords 2016.

66 E.g. European Pact on Immigration and Asylum, 13440/08, October 2008 and in the Stockholm Programme.

its proposal for strengthening the mandate of FRONTEX in February 2010<sup>67</sup> and the amending Regulation (EU) No 1168/2011 was adopted on 25 October 2011.

The 2011 recast had a distinguishable impact on the powers of the agency in the whole range of its activities. In particular, all teams deployed during Frontex operations – be it joint operations, pilot projects or rapid border interventions – were called European Border Guard Teams, giving thus the stamp of the agency (Articles 1(4)(a), 3(1)(a,e), which was until then reserved only for Rapid Border Intervention Teams.

The amendments also included inter alia the secondment to the agency of a pool of border guards, composed of national border guards made available by the member states, to be deployed at joint operations and pilot projects (Article 3(1)(b)). Border guards should operate under the instructions of the authorities of the requesting state (Article 3(1)(c). Nonetheless, the views of the agency on the instructions provided by the member state must be taken into consideration (Article 3(1)(c).

Besides that, the recast Regulation rendered compulsory the contributions of member states to the technical equipment pool, gradually opening the way for the acquisition by Frontex of its own equipment (Article 7).

Concerning joint operations and pilot projects, Frontex, apart from its coordinating tasks, acquired then a co-leading role together with the host member state (Article 3(1)(a)), while the role of the agency was also strengthened with respect to cooperation with third countries. Among others, Frontex may deploy its liaison officers in third countries (Article 14).

Furthermore, the intelligence-led work of the agency was upgraded as it was allowed to develop and operate information and border surveillance systems with a particular focus on information sharing (Articles 2(1)(h,i), 11). Furthermore, it was given the mandate to collect and process personal data related to irregular migration and trans-border criminal activities during all operations. The agency could retain this information for up to three months<sup>68</sup> and exchange it with EUROPOL and other European agencies (Article 11(b,c)).

As a development parallel to the review of the operational mandate of Frontex, several amendments adopted in 2011 referred to the human rights and international law framework in which the agency operates, including the Geneva Convention.<sup>69</sup> This reference occupied a prominent position

67 COM(2010)61 final of the European Commission, Proposal for the Regulation amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX).

68 In practice, the data are destroyed in principle ten days after the operation, but when Frontex charts aircraft itself for a joint return operation, the passenger list is kept for five years. Greens in European Parliament in collaboration with Migreurop, S. Keller et al., *Frontex Agency: Which Guarantees for Human Rights?*, Brussels, March 2011, p. 19.

69 Convention Relating to the Status of Refugees, Geneva, 28 July 1951.

already in Article 1 of the consolidated version of the Frontex Regulation and was repeated in a number of other provisions (Articles 10(2), 14). Prohibition of refoulement and an obligation for special attention to the needs of vulnerable groups was also added in express terms as part of the main tasks of the agency (Article 2(1)(b)).

Furthermore, guarantees for fundamental rights and the rule of law should, according to the 2011 recast, be laid down in an obligatory Code of Conduct (Article 2(a)),<sup>70</sup> which should be drawn up in cooperation with the Consultative Forum (Article 26(a)). The Forum comprised of the European Asylum Support Office (EASO), the Fundamental Rights Agency (FRA), the United Nations High Commissioner for Refugees (UNHCR) and civil society organisations, is mandated to assist in fundamental rights matters (Article 26(b)). Since then, the agency also has a Fundamental Rights Officer (FRO), tasked with monitoring the agency's activities with respect to fundamental rights (Article 26(a)).

The agency had also undertaken the task to provide training to border guards participating in its operations and to instructors of border guards in the member states with regard to human rights and access to international protection (Article 5). Also, its financial support to the member states for return operations became conditional upon the respect of the EU Charter of Fundamental Rights (Article 9).

Moreover, special safeguards were put in place including the deployment of a Data Protection Officer and cooperation with the European Data Protection Supervisor (EDPS) and the FRA (Articles 11(a), 13). Finally, the agency was mandated to draw up a Fundamental Rights Strategy<sup>71</sup> and set up a monitoring mechanism that ensured the respect of fundamental rights in all its activities (Article 26(1)).

### 2.2.5 *EUROSUR Regulation (2013)*

EUROSUR is a pan-European surveillance system of the EU's southern and eastern borders, established with Regulation 1052/2013<sup>72</sup> and coordinated by Frontex, which integrates all maritime surveillance facilities of the member states. The aim is to improve coordination in existing infrastructures, and extend their reach, in order to provide a more complete picture

70 The Code of Conduct for all Persons Participating in Frontex Activities is currently available at [http://www.frontex.europa.eu/assets/Publications/General/Frontex\\_Code\\_of\\_Conduct.pdf](http://www.frontex.europa.eu/assets/Publications/General/Frontex_Code_of_Conduct.pdf)

71 The Fundamental Rights Strategy of Frontex is currently available here: [http://www.frontex.europa.eu/assets/Publications/General/Frontex\\_Fundamental\\_Rights\\_Strategy.pdf](http://www.frontex.europa.eu/assets/Publications/General/Frontex_Fundamental_Rights_Strategy.pdf).

72 Regulation (EU) No 1052/2013 of the European Parliament and of the Council of 22 October 2013 establishing the European Border Surveillance System (Eurosuir).



of the situation in real-time, and thus increase situational awareness<sup>73</sup> and reaction capability<sup>74</sup>.

It does so as part of the Common Information Sharing Environment by a) creating a broad information-sharing network through the inter-linking of national infrastructures and information collected by the member states and Frontex, b) conducting research and development in order to improve the efficiency of surveillance tools and infrastructures, and c) gathering, analysing and communicating data from national, EU, and international surveillance and intelligence tools and reports to develop a common pre-frontier picture.<sup>75</sup>

It has been called the ‘system of systems’, as it employs all currently available infrastructure and resources, including the latest advancements of military technology, such as earth observation satellites, ultraviolet A-rays (UVA’s), and drones. Satellites allow for the monitoring at once of a large part of the Mediterranean beyond the EU territory, into the international waters and third-country territories. Complementarily, UVA radiation, applied to the target area on demand, can produce high-resolution imagery. The combination of these tools can provide a detailed picture of the surveillance area.<sup>76</sup>

The Regulation was the result of several years of negotiations. The Commission expressed its intention in 2006 to create a European Surveillance System for Borders,<sup>77</sup> and was endorsed by the European Council of 14 and 15 December 2006. It has been one of the critical objectives for both the Commission<sup>78</sup> and the member states<sup>79</sup>, while the agency was involved in the development of the European border surveillance system from the beginning, participating actively in the work of the European Security

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73 ‘Situational awareness measures how the authorities are capable of detecting cross-border movements and finding reasoned grounds for control measures.’ Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions Examining the creation of a European Border Surveillance System (EUROSUR), COM (2008) 68 final, p. 4.

74 ‘The reaction capability measures the lapse of time required to reach any cross-border movement to be controlled and also the time and the means to react adequately to unusual circumstances’. European Commission 2008, p. 4.

75 Such as Vessel Monitoring System, Automatic Identification System, Long Range Identification and Tracking System, SafeSeaNet.

76 European Commission 2008, pp.: 8, 10.

77 Commission Communication, COM (2006) 733 final of 30 November 2006, Communication from the Commission to the Council, Reinforcing the management of the European Union’s Southern Maritime Borders.

78 Communication COM (2010) 673 final of 22 November 2010, The EU Internal Security Strategy in Action: Five steps towards a safer Europe.

79 The Stockholm Programme – An open and secure Europe serving and protecting the citizens, 2 December 2009, OJ C 115/1.



Research and Innovation Forum.<sup>80</sup> The EUROSUR Regulation was finally adopted in 2013. EUROSUR's operations officially started on 2 December 2013, but in practice, the system had already been operational on the ground, while its legal basis was still under negotiation.<sup>81</sup>

Supported by EU funding and coordinated by Frontex, member states retain pivotal roles in the system's implementation, as the system is decentralised and information is physically managed by the national coordination centres rather than fed to a central server. The role of Frontex is 'meant to grow steadily', with the agency adopting tasks, such as administering the centralised components of the EUROSUR network, ensuring the common application of surveillance tools and products, and providing the common pre-frontier intelligence picture.<sup>82</sup> The active involvement of third states in providing but also receiving surveillance information is considered a significant factor for the success of EUROSUR.<sup>83</sup>

What is worth mentioning is that the stated goal for EUROSUR in 2008 was to enhance border surveillance 'with the main purpose of preventing unauthorised border crossings, to counter cross-border criminality and to support measures to be taken against persons who have crossed the border illegally'.<sup>84</sup>

The EP hesitantly introduced an additional goal to 'step up search and rescue capabilities so as to save more lives',<sup>85</sup> but the Commission's initial legislative proposal of 2012, had only one mention of 'protecting and saving lives' and this only in the preamble.<sup>86</sup> Later, between 2011 and 2013, when the death toll of migrants at the EU's borders entered the public debate vividly, a shift was observed in the direction of 'humanitarisation' of language and policies, as discussed further below.<sup>87</sup> The 'considerable life-saving potential in situations of distress at sea' became then central in the

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80 European Parliament Report (EU doc. no. A6-0437/2008) on the evaluation and future development of the Frontex Agency and of the European Border Surveillance System (EUROSUR) (2008/2157(INI)), pp.: 13, 14; European Commission, *Commission Staff Working Paper determining the technical and operational framework of the European Border Surveillance System (EUROSUR) and the actions to be taken for its establishment Council of the European Union*, 2011, SEC 45 final, p. 4.

81 Frontex, *General Report 2012*, Warsaw: European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union 2013, p. 20; European Commission 2011a, p. 2.

82 European Commission 2011a, p. 5.

83 European Commission, Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions Examining the creation of a European Border Surveillance System (EUROSUR), COM (2008) 68 final, p. 6; European Commission 2011a, pp.: 5, 7.

84 European Commission 2008, p. 2.

85 European Parliament 2008, p. 14.

86 Proposal for a Regulation of the European Parliament and of the Council Establishing the European Border Surveillance System (EUROSUR), 2011/0427 COD.

87 Aas & Gundhus 2015, pp.: 11, 12.

institutional discussion about EUROSUR,<sup>88</sup> and the system was presented and promoted as ‘protecting migrants’ lives’.<sup>89</sup> Saving the lives of migrants was also introduced as an objective in Article 2 of the Regulation.

However, serious doubts have been expressed as to the life-saving capacity of EUROSUR, as the system was not sufficient to avert the Lampedusa tragedy where almost 400 people lost their lives in a single incident in 2013.<sup>90</sup> Moreover, the current state of remote sensing technologies does not allow for the detection of small vessels.<sup>91</sup> Perhaps more importantly, no legal obligation can be found in the EUROSUR Regulation for either member states or Frontex to respond to the detection of a vessel in distress, or an obligation to address the right to asylum. To some extent, this gap was dealt with for Frontex operations in the Frontex Sea Operations Regulation adopted one year later.

Apart from the concerns that the life-saving potential of the system will not be exploited to the full,<sup>92</sup> it is also feared that cooperation with third states, as envisioned in EUROSUR,<sup>93</sup> will lead to an increase of push backs.<sup>94</sup> EUROSUR Regulation explicitly prohibits sharing information with third countries, which could use it to stop potential asylum seekers from leaving the territory to seek asylum in Europe or punish them for attempting to flee. However, there are no adequate checks and balances in place that would

88 European Commission, Impact Assessment accompanying the Proposal for a Regulation of the European Parliament and of the Council establishing the European Border Surveillance System (EUROSUR) SEC (2011) 1538 final, p. 9; Parliamentary Question, E-006760/2011; answer given by Ms Malmström on behalf of the Commission (28 July 2011).

89 European Commission, press release, Brussels, 29 November 2013, available at [http://europa.eu/rapid/press-release\\_MEMO-13-1070\\_en.htm](http://europa.eu/rapid/press-release_MEMO-13-1070_en.htm).

90 C. Heller and C. Jones, ‘Eurosir: saving lives or reinforcing deadly borders?’, *Statewatch Journal* 2014, vol. 23.

91 According to the result of a Frontex pilot study, ‘maritime surveillance with high resolution images would require a large number of images to cover wide maritime areas, which is very expensive and for the time being technically not feasible’. Charles Heller and Chris Jones, ‘Eurosir: saving lives or reinforcing deadly borders?’, Heller and Jones 2014.

92 ECRE interview with Adriano Silvestri, Head of Asylum, Migration and Borders Sector at the EU Fundamental Rights Agency, ‘Joint operations outside EU waters must not lead to the circumvention of European fundamental rights safeguards’, 29 March 2013, [http://www.cir-onlus.org/Interview%20with%20Adriano%20Silvestri%20\(1\).pdf](http://www.cir-onlus.org/Interview%20with%20Adriano%20Silvestri%20(1).pdf); Hayes Ben and Vermeulen Mathias, Heinrich Böll Foundation, ‘Borderline, The EU’s New Border Surveillance Initiatives, Assessing the Costs and Fundamental Rights Implications of EUROSUR and the “Smart Borders” Proposals’, June 2012, p. 46; Report of the UN Special Rapporteur on the human rights of migrants, François Crépeau, Regional study: management of the external borders of the European Union and its impact on the human rights of migrants, 2013, par 44.

93 Article 18 EUROSUR Regulation Proposal.

94 Hayes and Vermeulen 2012, pp.: 4, 5; European Union Fundamental Rights Agency, *Fundamental rights at Europe’s southern sea borders*, Luxembourg: European Union Agency for Fundamental Rights 27 March 2013, p. 61, [https://fra.europa.eu/sites/default/files/fundamental-rights-europes-southern-sea-borders-jul-13\\_en.pdf](https://fra.europa.eu/sites/default/files/fundamental-rights-europes-southern-sea-borders-jul-13_en.pdf).

assure that.<sup>95</sup> Finally, there is no provision in the Regulation concerning identifying persons in need of international protection. In particular, Article 2(3) states that the Regulation does not apply to legal or administrative measures taken after the interception, while the impact assessment explicitly states that asylum, readmission, and return are out of the scope of EUROSUR.<sup>96</sup>

EUROSUR Regulation has been repelled by and incorporated in the 2019 amendment of the EBCG Regulation without substantial changes.

### 2.2.6 Sea Operations Regulation (2014)

In response to the criticism that arose especially after the *Hirsi Jamaa* case, concerning the forced return of persons to an unsafe country during a Frontex operation,<sup>97</sup> the Council and the EP adopted rules concerning the surveillance of the external sea borders in the context of Frontex operations, thus recognising the human rights implications of these operations and setting down safeguards for refugees and migrants' rights.<sup>98</sup>

An earlier attempt to establish rules for maritime surveillance, Council Decision 252/2010 implementing the Schengen Borders Code, was annulled by the CJEU on the ground that the rules on maritime operations include measures of a coercive nature that can affect human rights. As such, they should be adopted using the regular legislative procedure, which requires the approval of the EP.<sup>99</sup> After this ruling, the Council returned with a legislative measure.

The Sea Operations Regulation establishes, on the one hand, binding rules on interception, search and rescue in territorial waters and the high seas (Articles 3, 5-10).<sup>100</sup> These rules include the definition of when a vessel is in a state of 'alert', 'uncertainty' or 'distress' (Article 9), and specific rules on the place of disembarkation (Article 10). Lack of agreement among member states on these points had caused the death of 63 people in 2011

95 FRA 2013, p. 62.

96 European Commission 2011b, p. 24; Hayes and Vermeulen 2012, p. 46.

97 ECtHR 23 February 2012, Judgment, App. No. 27765/09 (*Hirsi Jamaa and Others v Italy*).

98 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.

99 ECJ, 5 September 2012, C-355/10, ECLI:EU:C:2012:516 (*European Parliament v. Council*).

100 Several member states attempted during the negotiations to 'water-down' the binding rules on search and rescue and disembarkation but were ultimately unsuccessful. S. Peers, 'New EU rules on maritime surveillance: will they stop the deaths and push-backs in the Mediterranean?', *Statewatch Analysis* February 2014, <https://www.statewatch.org/media/documents/analyses/no-237-maritime-surveillance.pdf>;

at the infamous ‘left-to-die-boat’ case.<sup>101</sup> This necessary reinstatement and clarification of the law of the sea aimed at reducing the ‘human cost of border control’.<sup>102</sup>

On the other hand, the Regulation focused on protecting refugees and those at risk of ill-treatment upon return to their country of origin or any other country (Article 4). It was promoted as putting an end to the practice of push backs at sea and bringing Frontex operations in line with international law.<sup>103</sup>

In particular, the Regulation clarifies and details the obligations of non-refoulement, respect for human dignity and human rights. Article 4 introduces the principle of non-refoulement, stating that no one shall be disembarked in, (...) or otherwise handed over to the authorities of a state that is considered unsafe. The article also covers the possibility of chain refoulement, i.e. the case where the person would be forced to enter a country that is in itself safe but from which there is a serious risk of expulsion, removal or extradition to another country where they would face risk to their life or freedom.

Moreover, following the *Hirsi Jamaa* ruling, the Regulation provides that, when deciding whether a state can be considered safe, the general situation in the country should be taken into account already when drafting the operational plan (Article 4(2)). This decision shall be informed from a ‘broad range’ of sources, such as member state, EU bodies’, offices’ and agency’s reports, and reports of international organisations, as well as the existence of agreements and projects engaging Union funds. Concerns have been expressed as to the latter sources’ relevance in assessing the human rights situation in a country.<sup>104</sup> As infamous examples of these sources, we can mention the EU-Turkey deal<sup>105</sup> and the direct linking of EU development aid with containing migration in third states.<sup>106</sup>

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101 PACE, Council of Europe, Tineke Strik (Rapporteur), *Lives lost in the Mediterranean Sea: who is responsible?*, [https://assembly.coe.int/CommitteeDocs/2012/20120329\\_mig\\_RPT.EN.pdf](https://assembly.coe.int/CommitteeDocs/2012/20120329_mig_RPT.EN.pdf).

102 See ‘Deaths at the Borders Database’ that is the collection of official evidence on people who have died while attempting to reach southern EU countries, available at <http://www.borderdeaths.org/>.

103 *Rescuing Refugees at Sea. Frontex Treatment of Refugees at Sea to be Retasked Following EP Vote*, The Greens/EFA Group European Parliament 9 December 2014, <https://www.greens-efa.eu/en/article/press/rescuing-refugees-at-sea-4602/>.

104 S. Keller, ‘New rules on Frontex operations at sea’, *The Libe Flash* April 2014, <https://www.statewatch.org/media/documents/news/2014/apr/ep-green-keler-mep-frontex-operations-at-sea.pdf>.

105 S. Peers and E. Roman, ‘The EU, Turkey and the Refugee Crisis: What could possibly go wrong?’, *Blog EU Law Analysis* 5 February 2016, <https://eulawanalysis.blogspot.com/2016/02/the-eu-turkey-and-refugee-crisis-what.html>.

106 N. Jensen, ‘EU to use aid and trade to stop Africa migration’, *EUObserver* 28 June 2016, <https://euobserver.com/migration/134067>.

The Regulation further provides for attending to the unique needs of vulnerable groups, such as children or victims of torture, protection of personal data, human dignity, and for the appropriate training of everyone participating in an operation (Article 4 (4-8)).

As far as the procedural rights of those intercepted are concerned, Article 4(3) provides that the participating units shall use all means to identify the persons on board, assess their personal circumstances and inform them of the destination to which they are sent in a way that they understand. They shall be given the opportunity to express any reasons for believing that disembarkation in the proposed state would be in violation of non-refoulement.

The provision presents these obligations in a general manner, generating questions about the criteria based on which the specific procedures and guarantees or those in need of protection will be identified. These are left to be specified in the operational plan. The crucial role of the operational plan in laying down the procedural safeguards that will ensure compliance is evident, as, without it, the provisions of the Regulation would be merely a repetition of the rights and principles found already in international law and the EU Charter. Furthermore, the operational plan must ‘where necessary’ provide for shore-based medical staff, such as medical personnel, interpreters, legal advisers and other relevant experts.<sup>107</sup> Thus, it depends on the operational plan, whether the procedural guarantees are adequate to ensure access to asylum and protection from refoulement. Moreover, Frontex must provide in its Annual Reports further details on cases of disembarkation in third states, regarding the compliance with the guarantees of the Regulation.

Although the Sea Operations Regulation was an improvement to the existing framework regarding search and rescue and disembarkation, it has fallen short from fulfilling the expectations for protection of the rights of those intercepted, and an enhanced accountability framework.<sup>108</sup> Without concrete procedural guarantees and legal remedies, the provisions concerning access to protection and non-refoulement are at risk of remaining mere declarations. At the same time, the Regulation has been criticised as not providing adequate protection from refoulement.<sup>109</sup>

107 The European Parliament resisted this phrasing, but the Council finally succeeded in including ‘when necessary’. The flexibility that this phrasing allows is a cause for concern, as it is the basic understanding of asylum law professionals that interpreters and legal advisers are always necessary to guarantee a fair process. Peers and Roman 2016, p. 3.

108 UNHCR’s Observations on the European Commission’s 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 (Frontex), COM (2010)61 Final.

109 Keller 2014; Peers 2014b, p. 2; Meijers Committee, *Note on the Proposal for a Regulation establishing rules for the surveillance of the external sea borders in the context of operations coordinated by Frontex* (COM(2013) 197 final), Utrecht, 23 May 2013.

Finally, it can be pointed out that the EU legislature missed then the opportunity to introduce a legislative amendment that would satisfy the European Ombudsman's recommendation to set up a complaints mechanism, only to come back to it two years later, at the European Coast and Border Guard Regulation.

### 2.2.7 *European Border and Coast Guard Regulation (2016)*

After continuous amendments of its mandate and powers, the member states felt that time was ripe to accept a name that symbolically limits the absolute sovereign control over their borders and brings them closer to a fully integrated scheme of border management.

In September 2016 Regulation 2016/1624 creating a 'European Border and Coast Guard.' EBCG was adopted, which repels the Frontex Regulation and its amendments.<sup>110</sup>

With the EBCG, Schengen passed to a more advanced phase of the integrated border management, but still, the plan fell short of the Commission's original idea of a permanent European Border Police Corps, as the agency still has to rely on the cooperation of member states to provide information, staff and equipment, but also for the conduct of a joint operation as a whole.<sup>111</sup> Member states remain primarily responsible,<sup>112</sup> and the main legal framework of the joint operations does not change substantially.<sup>113</sup> The Regulation, nevertheless, made a marked change in the status and operational role of Frontex.<sup>114</sup>

In fact, the EBCG consists of the EBCGA, Frontex, and the national authorities of member states responsible for border management, including coast guards to the extent that they carry out border control tasks (Article 3).

The new EBCGA, which assumed operations immediately after the adoption of the Regulation, is the evolution of Frontex with more powers and competences, as well as resources. The permanent staff of the agency is more than doubled, its budget has increased accordingly, while better access to resources has been ensured with the creation of staff and equipment pools.<sup>115</sup>

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110 EBCG Regulation 2016.

111 It has been argued that further supranationalisation to the extent that a European system of border guards would fully replace national coast guards, would be in violation of the division of competence between the EU and its Member states (Article 72 TFEU). Mungianu 2016, p. 43.

112 J. Rijpma, *The proposal for a European Border and Coast Guard: evolution or revolution in external border management?*, Brussels: Study for the LIBE Committee, Policy Department C: Citizens' Rights and Constitutional Affairs European Parliament 2016, p. 32.

113 Fink 2017, p. 29.

114 Peers 2015.

115 Section 2.3.

Integrated management of the common borders becomes under the Regulation a ‘shared responsibility’ of member states and the agency (Article 7(1)). Member states retain the primary responsibility to control their part of the external borders, ‘in close cooperation with the agency’, while the stated role of the agency is to support them by reinforcing, assessing, and coordinating their actions (Article 7(1-3)).

#### 2.2.7.1 *Returns*

As far as the powers of the agency are concerned, one of the most important developments was the enhanced role of the agency with respect to returns, combined with its increased budget in this area.<sup>116</sup> Frontex was then mandated to organise and coordinate joint return operations and return intervention, focusing on the voluntary repatriation or deportation of irregular migrants. The agency further, finances (and co-finances) the operations, deploys the European Return Intervention teams and offers technical and operational reinforcements to national return systems, including translation services, acquisition of the necessary travel documents, and country of origin information (Article 27).

A return operation could then be conducted upon request of a member state or on the agency’s own initiative. Frontex would draw a ‘rolling operational plan’ based on the monthly updates it received from the member states regarding their return needs, including the number of prospective returnees, and their countries of return (Article 28(1)(2)). A return operation can take the form of a ‘collecting return operation’, where the means of transport and the forced-return escorts are provided by the country of return (a third country) (Article 28(3)).

Frontex since 2016 has a dedicated Return Office responsible for organising and coordinating removal operations, and it can now carry out deportations on its own initiative (Article 18). It manages pools of forced return specialists who will form part of European Return Intervention teams (Article 32). These teams consist of forced-return monitors who supervise the operation (Article 29), forced-return escorts who will carry out the operation (Article 30), and forced-return specialists with specific skills and expertise to carry out activities such as identifying particular groups of third-country nationals, the acquisition of travel documents from third countries and facilitation of consular cooperation (Article 31).

The agency should not enter into the merits of return decisions issued by member states or provide information for the purposes of return decisions (Article 28(1)). However, if the agency has concerns regarding the compliance with fundamental rights, including refugee protection, it needs to communicate those to the Commission and the participating member states (Article 28(7)). To ensure the observance of fundamental rights

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116 The budget for returns was increased from EUR 13 million to EUR 66 million in a year. Frontex, Budget 2016, 24 December 2016, [http://frontex.europa.eu/assets/About\\_Frontex/Governance\\_documents/Budget/Budget\\_2016.pdf](http://frontex.europa.eu/assets/About_Frontex/Governance_documents/Budget/Budget_2016.pdf).



standards, at least one member state representative and one forced-return monitor deployed either from the pool of forced return monitors or from the national monitoring body of a participating member state needed to be present until arrival at the third country (Article 28(3)).

Apart from return operations, the agency is also mandated for the first time in the EBCG Regulation with launching return interventions. A return intervention may include the organisation of one or several return operations, as well as the deployment of European return intervention teams. It can take place in support of a member state, which faces a burden with respect to returns (Article 33(1)). When such a burden becomes disproportionate and challenges the member state's capacity, the intervention can take the form of a rapid return intervention, which can take place on the agency's own initiative (Article 33(2)).

In preparation of such return intervention, a pool of forced-return monitors, along with a pool of forced-return escorts, and a pool of return specialists is compiled by the agency, after consulting with the FRO, with personnel from the national bodies that carry out forced-returns. These need to have received appropriate training (Articles 29(1), 30(1), 31(1)). Upon the Executive Director's proposal, the management board decides on the number and the profiles of experts composing each of these pools (Articles 29(2), 30(2), 31(2)). Member states contribute to the pools based on bilateral negotiations and binding agreements with the agency (Articles 29(3,4), 30(3,4), 31(3,4)). A tailor-made European return intervention team is set up for each return intervention, compiled with members from the above pools (Article 32).

#### 2.2.7.2 *Monitoring and supervisory powers*

Turning from return operations to the agency's general monitoring and supervisory responsibilities, we notice that these were operationalised in the EBCG Regulation. The agency was mandated with carrying out a vulnerability assessment at least once a year to assess the capacity and readiness of member states to face present and future challenges at the external borders and identify possible consequences at the external borders and for the Schengen Area (Article 13). Based on a set of common objective criteria, the assessment covers the availability of technical and operational equipment, system and infrastructure, capabilities, financial and other resources, and staff necessary for border control.

Based on this assessment, Frontex has the 'right to intervene' to cope with a crisis at a state's external borders. Upon consultation with the member state concerned, the Executive Director recommends the measures to be taken by the member state within a specified deadline to eliminate the identified vulnerabilities. Such measures may include initiating and carrying out joint operations or rapid border interventions (Article 15(4)). If the deadline passes unfulfilled, the Executive Director refers the matter to the Management Board that will adopt a binding decision upon his proposal. If the member state fails to implement the measures within the given deadline,



further action may be taken by the Council and the Commission in accordance with Article 19.

Article 19 covered situations at the external borders requiring urgent action. In case a member state does not implement the measures ordered by the Frontex management board, or when a member state is not managing to effectively address disproportionate pressure at its borders while not requesting sufficient support from the agency, the agency can intervene and impose measures upon the member state, which is required to cooperate for their implementation. These measures may be politically sensitive and touch on national executive and enforcement powers.<sup>117</sup> In other words, the agency acquires the right to intervene even when a member state is unable or unwilling to take the necessary measures.

Due to the sensitivity of the issue, the initial proposal was watered-down. While in the initial proposal, the agency could intervene on its own even without the permission of the member state, in the final compromise the measures proposed by the agency can be implemented by the Council upon the proposal of the Commission.<sup>118</sup> The Regulation allowed for internal border checks to be reintroduced, in accordance with Article 29 of the Schengen Borders Code in the member state does not cooperate.

#### 2.2.7.3 *Intelligence Activities*

The agency's 2016 mandate permitted it to collect, process and share personal data not only for purposes of migration management but also for purposes of law enforcement, including combating terrorism, human trafficking and human smuggling, as well as document fraud.

As part of the Common Information-Sharing Environment, the agency has further a duty to exchange intelligence collected in all its field activities with member states and other EU agencies, such as EUROPOL for the purpose of criminal investigations (Article 9, 10, 44). In 2018 all members of the EBCG operational teams acquired access to a reinforced Schengen Information System (SIS) for the purpose of carrying out their tasks in the hotspots.<sup>119</sup>

#### 2.2.7.4 *Cooperation with Third Countries and at Hotspots*

Further, the agency acquired mandate to operate in third countries not only by sending liaison officers but also by launching joint operations in their territory. Such operations may be hosted by the third state. The 2016 Regulation limited the possibility to host an operation to neighbouring third countries (Article 54(3)).

117 Preamble paragraph 28 EBCG Regulation 2016.

118 S. Peers, 'The EU Border Guard takes shape', *Statewatch Analysis* 13 March 2016, <https://www.statewatch.org/media/documents/analyses/no-285-eu-border-guard.pdf>.

119 European Commission, Press Release, *Security Union: Commission welcomes agreement on a reinforced Schengen Information System*, Brussels, 12 June 2018, [https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT\\_18\\_4133](https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_18_4133).

The role of the agency in the hotspots is identified in the Regulation. A hotspot is a location where Frontex works together with the Commission, the EASO and other EU agencies and national authorities, to manage a ‘disproportionate migratory challenge characterised by a significant increase in the number of migrants arriving at the external borders’ (Article 2(10)). The agency deploys since Border and Coast Guard teams and the required technical equipment to assist in screening, debriefing, identification, and fingerprinting, provide initial information to persons in need for international protection, and provide technical and operational assistance in the field of return (Articles 8(i), 18(4)).<sup>120</sup>

### 2.2.7.5 *Individual Complaints Mechanism*

A final marked change concerned the introduction of an individual complaints mechanism where individuals can report an alleged human rights abuse. This has been the request of the European Ombudsman when she closed her own initiative inquiry in 2013 on the responsibility of Frontex for fundamental rights violations. In the beginning, Frontex had been resisting any such responsibility, so the introduction of the individual complaints mechanism three years later is an important step forward.<sup>121</sup>

However, this falls remarkably short of the standards of effective legal protection, since as it stands in the Regulation, it is just an internal administrative procedure. When a complaint is sent through, it will be handled by the Frontex FRO in accordance with the right to good administration. She will assess the admissibility of the complaint and register admissible complaints. This first assessment stage is essentially a judgment on the division of responsibility by the FRO herself. She will decide whether a complaint concerns a member state and will forward it to that member state. Alternatively, if she concludes that the agency was responsible for the incident, she will forward it to the Executive Director. Subsequently, she will register the follow-up measures taken by either the member state or the agency.

The Executive Director will be responsible for dealing with the claim. There are several inadequacies in this mechanism. First of all, it concerns only the liability of the staff members, the border guards themselves, and not that of the agency. Second, the Executive Director is left with considerable discretion to decide on the responsibility of his own staff, since the Regulation does not identify any specific criteria or procedures. Finally, there is no mention of criminal procedures or any involvement of Courts.

120 For further information on the role of Frontex in the hotspots and its cooperation with Europol and EASO there in the context of integrated border management, see Fernández-Rojo 2021 and S. Horii, *Accountability, Dependency, and EU Agencies: The Hotspot Approach in the Refugee Crisis*, Refugee Survey Quarterly, 2018, pp.: 219-222.

121 A complaint form can be found on Frontex website in six languages (English, French, Arabic, Pashtu, Urdu, Tigrinya), but complaints may be submitted in any EU official languages, <http://frontex.europa.eu/complaints/>.

The Regulation simply says that the Executive Director will be responsible for the appropriate follow-up and that the mechanism should be effective, ensuring that the complaints are properly followed-up, without specifying what this follow-up should be.<sup>122</sup> While the Regulation clearly states that the member states should conduct criminal investigations, the only specific obligation set for the agency is to report on the complaints in the annual report, including ‘where possible’ the follow-up measures taken.<sup>123</sup>

### 2.2.8 *European Border and Coast Guard Regulation 2019 amendment*

The next step towards the direction of fully integrated scheme of border management was taken soon after with the 2019 amendment of the EBCG Regulation. The amendment built upon the 2016 Regulation. The overall framework and the structure of the operations have not changed radically, but the agency’s powers are now significantly enhanced.

Aiming at greater autonomy and operational effectiveness, and moving towards full operational capacity the agency will have its own equipment and personnel, combined with an impressive budget, and is vested with an even broader mandate in border surveillance, returns, and cooperation with third countries.

This study takes into account this latest legislative amendment. However, it needs to be noted that the preparation for the implementation of the new legislative framework is still ongoing and will not be completed before 2021.<sup>124</sup> Moreover, the budget that will allow for the implementation of the expansion of competences and the acquisition of large assets has yet to be approved. A complete legal analysis would not have been possible without a better picture of how the new Regulation will operate in practice. Nevertheless, while not fully incorporated, the most important points have been included.

#### 2.2.8.1 *Standing corps of 10,000 border guards*

The most monumental change brought by the 2019 amendment was the establishment of a ‘standing corps of 10,000 operational EU staff with executive power and their own equipment’.<sup>125</sup>

So far, Frontex joint operations have relied solely on the contributions of member states. Now, the agency acquires its own operational arm: an EBCG standing corps with broad executive powers. Starting with 5.000

122 Preamble paragraph 50 EBCG Regulation 2016.

123 Preamble paragraph 50 EBCG Regulation 2016.

124 Frontex, DG Home, *Roadmap for the implementation of the European Border and Coast Guard 2.0*, 2019, p. 2; Statewatch, EU: Statewatch, EU: *German Presidency: how can Frontex help deport unaccompanied children?*, 2020, <https://www.statewatch.org/news/2020/september/eu-german-presidency-how-can-frontex-help-deport-unaccompanied-children/>.

125 European Commission, *State of the Union, A strengthened and fully equipped European Border and Coast Guard*, 12 September 2018.

operational staff in 2021, the standing corps will be fully operational by 2027 counting 10.000 staff members under the exclusive and direct control of Frontex.<sup>126</sup> The standing corps is meant to form a ‘reliable intervention force’ of agency staff and seconded or deployed officers, i.e. border guards and return experts.<sup>127</sup>

Moreover, the agency can still make use of temporary deployments and long-term secondments from member states, while a rapid reaction pool of 3.000 members will be at its immediate disposal for rapid border interventions.

The standing corps will have executive powers similar to the border guards and return specialists of the member states, including competence to perform identity checks, authorise or refuse entry, and intercept persons crossing irregularly. Also, they will perform identity checks using the False and Authentic Documents Online system,<sup>128</sup> which the agency will take over from the Council General Secretariat. Finally, the power to carry weapons will extend from the deployed national border guards to all members of the standing corps, including agency staff (Article 82(8)).

#### 2.2.8.2 Returns

Another one of the most highlighted changes concerns the enhancement of the agency’s mandate on returns of irregularly staying third country nationals to their countries of origin, which the 2019 amendment makes a top priority. Frontex is now vested with a broad mandate in return-related activities, including, most importantly, providing its own return escorts and return monitors from the standing corps.

Moreover, Frontex return operations (except for collecting operations) may no longer be organised at the request of a member state, but only on the agency’s initiative upon agreement of the member state (Article 50(1) (3)). The agency, further, acquires an enhanced role in assisting member states in pre-return and return-related activities, which stops short of drafting the return decision itself. The agency essentially prepares the return decision as it identifies irregularly staying third-country nationals, assists in obtaining travel documents, collects information relevant for the return, analyses such information and provides recommendations regarding the country of return (Article 48(1)). The agency is, nevertheless, not allowed to enter the merits of the return decision (Articles 48(1), 50(1)).

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126 Annex 1 EBCG Regulation.

127 European Commission 2018c.

128 European Commission, False and Authentic Documents Online (FADO), [https://ec.europa.eu/home-affairs/what-we-do/networks/european\\_migration\\_network/glossary\\_search/false-and-authentic-documents-online\\_en](https://ec.europa.eu/home-affairs/what-we-do/networks/european_migration_network/glossary_search/false-and-authentic-documents-online_en).

### 2.2.8.3 *In the centre of extensive data processing*

The information-sharing aspect of the agency's work is also significantly strengthened along with the creation of new specialised structures and mechanisms. At the same time, EUROSUR is encompassed in the EBCG Regulation aiming at improving its functioning and enlarging its scope (Article 18).

In the context of its new powers, Frontex can exchange information with EU agencies, including Europol as well as third countries for a variety of different and not clearly delineated purposes ranging from border surveillance to combating terrorism (Article 12(2)). This, combined with the interoperability-related competencies of Frontex,<sup>129</sup> creates a quite broad mandate for the processing and especially the sharing of data both within the EU and outside, involving EU institutions, agencies, and law enforcement authorities.

Most of its extensive data management powers are related to returns in order for the agency to facilitate more efficient returns. In particular, Frontex was mandated to collect from various sources information necessary for issuing return decisions, identifying individuals subject to removal, and other pre-return, return-related and post-arrival and post-return activities. (Article 49(1)(a)(i)).

Moreover, it was tasked with developing and operating a centralised return management platform for processing all relevant information (Articles 15(4), 49(1)(d), 50(1)). This platform integrates the existing national and EU-wide return management systems<sup>130</sup> and allows for an automated transfer of data. Member states shall submit to this platform the operational data necessary for the agency to assess the return needs, along with their needs for assistance or coordination by the agency, so that the agency can decide upon the necessary return operation and draft a rolling operational plan (Article 51(2)).

### 2.2.8.4 *Cooperation with Third Countries*

The cooperation of the agency with third countries has been strengthened since 2016.

Now the agency may launch and finance technical assistance projects in third countries, and provide other operational and technical assistance relevant to returns (Article 74 (6-7), 75).

More importantly, the 2019 amendment allows a border control operation to be launched in any third country, not limited to neighbouring countries, as the case was in the 2016 Regulation.

129 Statewatch, *EU: Interoperability: Member States want "substantial changes" to Entry/Exit System; questions over "red links" and the role of Frontex*, 09 May 2018, <https://www.statewatch.org/news/2018/may/eu-interoperability-member-states-want-substantial-changes-to-entry-exit-system-questions-over-red-links-and-the-role-of-frontex/>.

130 See further on the existing IT systems operated by Frontex, C. Jones, J. Kilpatrick, M. Gkliati, *Deportation Union Frontex and Return Operations*, 2020, pp.: 43-45.

### 2.3 Operational capacity

The operational role and workload of Frontex have been advancing in parallel with the size of the agency. The budget of Frontex at the time of its creation in 2004, amounting almost to 6 million EUR, as indicated in Table 1 (Budget and Personnel) was enough only to cover the staffing and administration costs.<sup>131</sup> Already in 2006, the budget of the agency reached 19 million EUR, while it increased by almost 120% in 2007 with the revision of the agency's operational responsibilities.

In view of the 2011 amendment that 'places new and increased obligations on the Agency, entails new tasks for the Agency, and specifies that certain tasks have to be carried out by certain categories of the agency staff', the agency's funding rose to 94 million in 2013. Now a total of 11.3 billion EUR total Frontex budget has been proposed for the 2021- 2027 period.

These figures are substantially exceeding the initial budgetary estimations for the agency, which is 'turning out into a costlier than expected venture for the EU budget'.<sup>132</sup> Regularly, more than 50% of the budget is allocated to the financing of joint operations,<sup>133</sup> a percentage that reached 73% in 2016 (see Table 1).<sup>134</sup>

Concerning human resources, the agency is still mostly dependent upon border guards and other relevant staff made available by member states to the European Border and Coast Guard teams. Member states pledge a number of border guards to the agency based on annual bilateral agreements. This staff is registered in the EBCG teams pool and should be deployed upon request of the agency, unless that would seriously affect the border management capabilities of the sending state.

The EBCG Regulation set the absolute minimum of seconded border guards that should be available at any time in order to ensure the effectiveness of the agency on short notice. A minimum of 1,500 border guards and other experts, such as finger scanning experts, document officers, and nationality screening experts, need to be made available to the agency for a Rapid Reaction Pool of the EBCG teams. This serves as a standing corps in the immediate disposal of the agency amounting to a minimum of 1,500

131 Pollak and Slominski 2009, p. 909.

132 J. Jeandesboz, *An analysis of the Commission Communications on future development of Frontex and the creation of a European Surveillance System*, Brussels: Briefing Paper Future development of Frontex and the creation of Eurosur, Policy Department C: Citizens' Rights and Constitutional Affairs European Parliament 2008, p. 12. The rapporteur foresees the rise of the costs of the agency, as it may have to pay pecuniary damages to individuals that may have died during operations.

133 *Consolidated Annual Activity Report*, Warsaw: European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union 2018, 12 July 2019, p. 70; COWI Consultants, *External evaluation of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union*, Kongens Lyngby, January 2009.

134 Frontex 2019, p. 14.

(Articles 10(1)(j), 42).<sup>135</sup> Thus, Frontex is now able to draw on at least 1,500 border guards that can be deployed in under three days addressing a vital operational issue. In fact, Frontex had in 2018 more than 1,700 officers deployed at the EU borders assisting with functions such as surveillance, registration, document checks, fingerprinting and security checks.<sup>136</sup> The number of deployed border guards is expected to rise by 10,000 additional border guards in 2020.<sup>137</sup>

Next to that, Frontex has established since 2016 three more staff pools to facilitate return operations, a pool of forced-return monitors, a pool of forced-return escorts, and a pool of return specialist (Article 51).<sup>138</sup> These pools provide the members of the European Return Intervention teams,<sup>139</sup> and currently involve 550 return experts the profiles of which have been developed by Frontex in accordance with the identified needs. These can assist in document checks and the identification of irregular migrants, while they may cooperate with consular authorities for their return to their countries of origin. Return monitors are tasked with the monitoring the compliance with human rights during return operations, while return escorts assist the national escorts in carrying out the operation.<sup>140</sup>

The agency's own staff has also been steadily growing, especially since the 2019 amendment of the EBCG Regulation as shown in Table 1. The agency started with 70 employees in 2006, while more than 500 people worked in Warsaw in 2017. In the first months of 2018, the agency required another 112 new staff, which means that one in six working in Warsaw were hired in 2018 alone. This includes officials, temporary and contract staff and seconded national experts.<sup>141</sup> The promise is that by 2021 the agency's permanent staff will reach 1,000 experts (Article 55(1), Annex 1).

135 The Rapid Reaction Pool became operational on 7 December 2016. European Commission, 'Report on the operationalisation of the European Border and Coast Guard', COM (2017) 42 final, 25 January 2017, [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/securing-eu-borders/legal-documents/docs/20170125\\_report\\_on\\_the\\_operationalization\\_of\\_the\\_european\\_border\\_and\\_coast\\_guard\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/securing-eu-borders/legal-documents/docs/20170125_report_on_the_operationalization_of_the_european_border_and_coast_guard_en.pdf).

136 Frontex 2017, p. 3.

137 D. M. Herszenhorn and F. Eder, 'Brussels readies new border enforcement plan', *Politico* 7 June 2018, <https://www.politico.eu/article/jean-claude-juncker-sebastian-kurz-brussels-readies-new-border-enforcement-plan-migration/>.

138 European Commission 2017a, pp.: 7, 8. The return pools are operational since 7 January 2017. European Commission 2017a, pp.: 7, 8.

139 For more detailed information on the pools, see Fink 2017, pp.: 58-61.

140 Frontex 2017, p. 3.

141 European Court of Auditors, *Report on the Annual Accounts of the European Border and Coast Guard Agency for the Financial Year 2016 Together with the Agency's Reply*, Luxembourg, 6 December 2017, p. 2, [https://www.eca.europa.eu/Lists/ECADocuments/FRONTEX\\_2016/FRONTEX\\_2016\\_EN.pdf](https://www.eca.europa.eu/Lists/ECADocuments/FRONTEX_2016/FRONTEX_2016_EN.pdf).



Table 1 Budget and Personnel

Frontex (2005-2017)	Budget (million €)	Budget increase	Total staff	Staff increase
2005	6		45	
2006	19	217%	70	56%
2007	42	121%	128	83%
2008	70	67%	181	41%
2009	88	26%	226	25%
2010	93	6%	294	30%
2011	118	27%	304	3%
2012	90	-24%	303	-0,3%
2013	94	4%	302	-0,3%
2014	93	-1%	311	3%
2015	143	54%	309	-0.6%
2016	254	78%	370	20%
2017	302	19%	531	44%
2018	320	6%	643	21%
2019 – 2020	1,300 (1.3 billion)	306%	1,000	56%
2021 – 2027	11,300 (11.3 billion)	770%	3,000	200%

Mariana Gkliati, 2019<sup>142</sup>

Finally, the agency’s operational effectiveness depends on the availability of technical equipment, such as helicopters, vessels, or dog teams, and smaller items, such as thermal cameras. At first, such equipment was made available by the member states on an ad hoc basis, but in 2007, Frontex created the Centralised Record of Available Technical Equipment (CRATE), to which states contributed on a voluntary basis, but in a more structured manner, in accordance with the needs specified by the agency.<sup>143</sup> CRATE listed in 2010 476 items of technical equipment, such as mobile radars, thermal cameras, CO2 detectors, heartbeat detectors and a passive millimetric wave imager (PMMW).<sup>144</sup>

142 The author wants to acknowledge student assistant, Nilson Milheiro Anselmo, for his help in the production of this table. The numbers have been rounded up where necessary. The data for the period 2005-2015 have been collected from the agency’s annual activities reports. The data for the period 2016-2018 have been extracted from the ‘Frontex, 2018 In Brief, Warsaw 2018, p. 32, <https://frontex.europa.eu/assets/Publications/briefreport2018/2/>. The prognosis for 2020 and 2027 is in accordance with the 2019 amendment of the EBCG Regulation, Article 55(1) and Annex 1 (personnel), and the European Commission’s press release, European Commission 2018b. A final agreement for the text of the Regulation has been reached, while the budget has at the time of writing not yet been formally approved.

143 Frontex 2007a.

144 Frontex, 2010 Working programme and related aspects. Presentation by Ilkka Laitinen, FRONTEX Executive Director, to the European Parliament, LIBE Committee, 11 January 2010, <http://www.poptel.org.uk/stawatch/news/2010/jan/eu-frontex-workprog-2010.pdf>; Migreurop and Greens 2011, p. 7.



CRATE was replaced in 2016 with the Technical Equipment Pool, which serves a record of all technical equipment available to the agency, whether owned by a member state or the agency or co-owned by both (Article 64). Similarly to the Rapid Reaction Pool of the EBCG teams, the Executive Director determines the minimum number of items of technical equipment required for a rapid border intervention, including smaller and larger vessels, aircraft, helicopters, patrol cars and other vehicles. These form the Rapid Reaction Equipment Pool and can be deployed by the agency within two weeks.<sup>145</sup> The equipment is made available based on annual bilateral agreements, while requests of additional pledges are still possible (Article 64).

According to the latest Frontex' reporting on the operational resources, in 2019, host member states contributed with the deployment of 128 large assets. In 2019 Frontex acquired and leased its own technical equipment and was able to contribute with 41 large assets, such as fixed wing aircrafts and ferries for readmission operations.<sup>146</sup> Table 2 represents the current state of play of the Technical Equipment Pool.<sup>147</sup>

Member states need to provide the equipment specified in the bilateral agreements unless they are faced with a critical situation at a national level, which prevents them from doing so.

It needs to be noted that while the contributions on paper seem almost entirely to cover the agency's needs, the actual availability of the pledged assets by the member states can be more problematic, especially during the summer.<sup>148</sup>

Therefore there is a growing emphasis on developing the agency's own capabilities. As of 2017, Frontex had EUR 10 million per year in its disposal (EUR 40 million in total for 2017-2020) to acquire its own equipment, while co-ownership with a member state, renting, leasing, and long-term deployments are additional options in the 2016 Regulation (Articles 63, 64).<sup>149</sup>

145 Frontex 2017, p. 3.

146 Frontex, *Annual information on the commitments and deployments of the Member States to the European border and coast guard teams and the technical equipment pool. Report on the operational resources in 2018*, Warsaw, 5 July 2019, p. 35, <https://op.europa.eu/nl/publication-detail/-/publication/c5a27b03-a131-11e9-9d01-01aa75ed71a1/language-en/format-RDF>.

147 Frontex 2019a, p. 28.

148 Fink 2017, p. 62.

149 European Commission, Fourth Report from the Commission to the European Parliament, The European Council and the Council on the operationalisation of the European Border and Coast Guard, COM(2017) 325 final, 13 July 2017, [https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKEwjTqKK13fHdAhXSqQKHbWnAEQQFjAAegQICRAC&url=https%3A%2F%2Fec.europa.eu%2Fhome-affairs%2Fsites%2Fhomeaffairs%2Ffiles%2Fwhat-we-do%2Fpolicies%2FEuropean-agenda-security%2F20170613\\_report\\_on\\_the\\_operationalisation\\_of\\_the\\_european\\_border\\_and\\_coast\\_guard\\_en.pdf&usq=AOvVaw0y4mNOvBQ\\_oj6QVp\\_xo0Gd](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKEwjTqKK13fHdAhXSqQKHbWnAEQQFjAAegQICRAC&url=https%3A%2F%2Fec.europa.eu%2Fhome-affairs%2Fsites%2Fhomeaffairs%2Ffiles%2Fwhat-we-do%2Fpolicies%2FEuropean-agenda-security%2F20170613_report_on_the_operationalisation_of_the_european_border_and_coast_guard_en.pdf&usq=AOvVaw0y4mNOvBQ_oj6QVp_xo0Gd).

Table 2 Composition of the Technical Equipment Pool – 2019

TE Type	Number	Percent of the total
<i>Major Equipment</i>	444	100%
Offshore Patrol Vessel (OPV)	27	6%
Coastal Patrol Vessel (CPV)	58	13%
Coastal Patrol Boat (CPB)	276	62%
Fixed Wing Aircraft (FWA)	35	8%
Helicopter	48	11%
<i>Light Equipment</i>	195	100%
Patrol Car	148	76%
Thermo-Vision Vehicle (TVV)	32	16%6%
Transportation Vehicle/Canine Team Vehicle	2	1%
Mobile Laboratory	13	7%
<i>Portable Equipment</i>	590	100%
Basic Forgery Detection Kits	140	24%
CO <sub>2</sub> Detector	71	12%
Heartbeat Detector	12	2%
Document checking device with microscope connected to a computer	77	13%
Other Equipment for border checks	9	2%
Mobile Radar Unit	1	0%
Infrared Camera	2	0%
Thermal Camera	67	11%
Night Vision Goggles	82	14%
Other equipment for border surveillance	129	22%
<i>Total</i>	1 229	

Frontex, 2019

The Commission made its priorities clear with the 2019 legislative amendment, which substantially increased the capacity of the agency to acquire and operate its own air, maritime and land assets, including aircrafts and vessels, another step closer to improving its stability, flexibility and autonomy of the agency. The Commission intends that the agency's own equipment "should ultimately become the backbone of [its] operational deployments with additional contributions of Member States to be called upon in exceptional circumstances."<sup>150</sup> A total of €2.2 billion of the EU budget for 2021-2027 has now been earmarked to allow Frontex to acquire, but also to maintain and operate the necessary air, maritime and land assets.

150 Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the European Border and Coast Guard and repealing Council Joint Action n°98/700/JHA, Regulation (EU) n° 1052/2013 of the European Parliament and of the Council and Regulation (EU) n° 2016/1624 of the European Parliament and of the Council A contribution from the European Commission to the Leaders' meeting in Salzburg on 19-20 September 2018, COM/2018/631 final.

## 2.4 Joint operations in a nutshell

The above sections form our understanding of the progressive development of the powers of the agency, both in terms of mandate and of resources. They also help us create a picture of the structure of joint operations. Both these elements will be utilised in later chapters when discussing the responsibility of Frontex.

To sum up, the agency conducts joint operations, pilot projects, and rapid border interventions (swift assistance for ‘specific and disproportionate challenges’) in the form of joint return operations or joint surveillance operations of the land, air, or sea external borders. Such operations may also take place in the territory of a third country. Furthermore, Frontex works closely with third countries, based on working arrangements it concludes with them.

A member state hosts an operation (or a third state), the national border guard of which takes the lead in implementing the operational plan. Other member states contribute with seconded border guards and other experts, such as translators, which staff the EBCG teams and the European Return Intervention teams, and with equipment which they have made available at the Technical Equipment Pool. The agency’s own staff is not part of the EBCG and Return Intervention teams, also referred to as ‘guest officers’. These are the physical actors of the operation on the ground, and their powers and tasks are defined in Article 40 EBCG Regulation. The effectiveness of the agency depends on the actual availability of the staff and assets registered in the pools.

Frontex plans, organises and coordinates the operation, deploys experts and equipment from these pools, in accordance with the needs identified in the operational plan, which is drawn up by the agency’s Executive Director and agreed upon by the host member state. The operational plan is binding and covers all aspect necessary for carrying out a joint operation, including the division of tasks and responsibilities, the composition of the EBCG teams, and command and control provisions (Article 38 EBCG Regulation).

A joint operation may be initiated by a member state’s request, and approved by Frontex, or upon the recommendation of the Executive Director, with the consent of the host member state.<sup>151</sup> In exceptional circumstances, when the member state is unwilling or unable to cooperate, and there is an urgent need for action at the external borders, the operation or rapid intervention may be launched with a Council decision upon the initiative of Commission (Article 42).

Decisions concerning the launch of an operation, as well as others concerning the content of the operational plan, are made based on research and risk analysis conducted by the agency. This takes into account the situational picture provided by EUROSUR, and the information of the vulner-

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151 For a summary of the main joint border control operations implemented by Frontex, see Fink 2017, p. 49.

ability assessment, which evaluates the capacity and readiness of a member state to manage their section of the external borders (Articles 37, 39). In this regard, the agency also has a vital role in the collection and processing of data, which it may exchange with member states and other agencies in the context of a common information-sharing environment (Article 11, 12).

Apart from the organisation of the operation, and the deployment of staff and equipment, Frontex also finances (and co-finances) the operations, and coordinates the different actors participating in them. It monitors and supervises the operations as well as the general capacity and conduct of host member states, including compatibility with fundamental rights.

The members of the EBCG teams either belong to the agency's own staff or are seconded by the member states and under the direct command of the authorities of the host state, which follow the operational plan. A Frontex Coordinating Officer(s), who belongs to the agency's own staff, monitors the instructions given and the overall compliance with the operational plan, including the protection of fundamental rights. She may communicate the views of the agency to the national authorities, which should be followed to the extent possible, and will report back to the Executive Director (Articles 43, 44). The seconded officers remain subject to the disciplinary powers of their home state (Article 43).

## 2.5 The European Border and Coast Guard: What it is and what it's not

In 2016 Frontex passed from an agency for the coordination of the operational cooperation of the member states for the management of the EU external borders, to the European Border and Coast Guard. In 2019, it acquired even more autonomy and operational effectiveness so that it has become the fastest-growing EU agency.

These changes bring the agency closer to a fully integrated scheme of border management, with centralisation (e.g. EUROSUR, centralized returns management system) and autonomy (e.g. own border guards and operational assets) being marked as clear priorities. Neither the symbolic re-naming, though, nor the explosive expansion of powers and competencies were adequate to fully transmogrify the agency. The Commission's original idea of a permanent European Border Police Corps still has a long way to cover. The most recent Regulations do not create a genuine European Corps of Border Guards with full and exclusive competences in border management,<sup>152</sup> while the main operational and governance framework remains the same. The agency is still to the largest extent dependent upon the approval of the host member state to launch an operation and upon national deployments, while EBCG teams are still under the orders and directions of the host member state. Finally, the agency is led by its Manage-

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152 D. Fernandes Rojo, 'The Umpteenth Reinforcement of FRONTEX's Operational Tasks: Third Time Lucky?', *EU Law Analysis*, 04.06.2019, <http://eulawanalysis.blogspot.com/2019/06/the-umpteenth-reinforcement-of-frontex.html>.

ment Board, which is composed of national delegates of all member states and two representatives of the Commission.

While the agency has undoubtedly gained a more independent and crucial role and has come much closer to the Commission's original vision, the dominant paradigm of its operation in this very sensitive area of border controls is still an intergovernmental one. In normative terms, Frontex in its current form is not yet a true European Border and Coast Guard that can singlehandedly ensure the constant and uniform application of EU law across the EU borders.<sup>153</sup> Moreover, in terms of practical implementation the Court of Auditors in its most recent investigation of the agency concluded that Frontex has not yet managed to adapt its organisation to the requirements of its 2016 mandate and it is not ready to implement its 2019 mandate effectively.<sup>154</sup>

The European Border and Coast Guard is composed of the agency and national authorities of the member states that carry out border and coast guard functions, and the agency depends on their active participation and approval in order to achieve the goal of operational cooperation. As shown by CEPS, the national authorities that carry out such functions vary considerably from country to country. In fact, several countries at the external borders, border and coast guard authorities also include military or (para-) military actors.<sup>155</sup> Thus, in 2016, the network of cooperation of Frontex expanded even further, which further complicated the environment of actual division of competences and responsibility in joint operations. This exacerbates the problem of many hands, which is examined later in Chapter IV.

### 3 CONCLUSIONS

The European Border and Coast Guard Agency, Frontex, is one of the most outstanding products of the process of EU agencification. It plays an increasingly important role in EU administration, while its powers, staff and budget continue to grow, as its work constitutes a central part of the EU's response to the 'migration crisis'.

In this chapter, I have introduced the agency and its *modus operandi*. I have also described its purpose and legislative basis, along with its powers and activities. The chronological sequence was chosen as the method for data analysis to showcase the agency's dynamic growth as that is reflected both in its operational capacity and in its growing mandate. While the foundations for our examination of the agency are now set, I will proceed to examine the human rights sensitivities of the agency's work in the following chapter.

153 S. Carrera, L. den Hertog, 'A European Border and Coast Guard: What's in a name?' CEPS Paper in Liberty and Security in Europe, no. 88, March 2016, p. 1, 12.

154 European Court of Auditors, Special Report 08/2021: Frontex's support to external border management: not sufficiently effective to date, 07.06.2021.

155 Carrera, den Hertog, 2016, p. 3.