



EVOLUTION OF THE OPERATIONAL TASKS OF FRONTEX, EASO AND EUROPOL

**TOWARDS AN INTEGRATED BORDER MANAGEMENT, MIGRATION
AND ASYLUM ADMINISTRATION IN THE EUROPEAN UNION?**

DAVID FERNÁNDEZ ROJO

**EVOLUTION OF THE OPERATIONAL TASKS OF FRONTEX, EASO AND
EUROPOL: TOWARDS AN INTEGRATED BORDER MANAGEMENT,
MIGRATION AND ASYLUM ADMINISTRATION
IN THE EUROPEAN UNION?**

By

David Fernández Rojo

2018
Faculty of Law
Universidad de Deusto
Universidad Pontificia Comillas
Universidad Ramon Llull

**EVOLUTION OF THE OPERATIONAL TASKS OF FRONTEX, EASO AND
EUROPOL: TOWARDS AN INTEGRATED BORDER MANAGEMENT,
MIGRATION AND ASYLUM ADMINISTRATION
IN THE EUROPEAN UNION?**

Mr. David Fernández Rojo, LL.M.
Ph.D. Researcher

Prof. Beatriz Pérez de las Heras
Supervisor

The research leading to this thesis received:

- A full Ph.D. scholarship by the Basque Country Government (Programa de Formación de Personal Investigador no Doctor del Departamento de Educación, Política Lingüística y Cultura del Gobierno Vasco).
- An Aristos Campus Mundus Research Training Mobility Grant.

Front Cover Layout: Gonzalo Basulto Calvo and Lucía de Blas Noval

© Copyright D. Fernández Rojo 2018
All Rights Reserved
Universidad de Deusto

A mis padres, Logi y Maribel

**EVOLUTION OF THE OPERATIONAL TASKS OF FRONTEX, EASO AND
EUROPOL: TOWARDS AN INTEGRATED BORDER MANAGEMENT,
MIGRATION AND ASYLUM ADMINISTRATION
IN THE EUROPEAN UNION?**

ABSTRACT

The “refugee crisis” prompted the urge to ensure the functioning of the Schengen area and the Common European Asylum System (CEAS), the need to operationally assist those Member States most affected by the sudden and extraordinary arrival of mixed migratory flows, and the convenience to effectively and uniformly implement the European Union (EU) measures adopted in regards to migration, asylum and border management matters. This thesis analyzes the evolution of the operational tasks bestowed upon Frontex, Easo and Europol. Special attention is paid to the expansion of the legal mandates of these agencies, the reinforcement of the activities they undertake in practice on the ground, and to what extent a gap exists between these two dimensions.

From the analysis of the evolution of the operational tasks of Frontex, Easo and Europol, this thesis makes four main contributions. First, it explores the establishment and early operational functions conferred to Frontex, Easo and Europol within the institutional framework of the Area of Freedom, Security and Justice (AFSJ). Second, it defines and classifies Frontex, Easo and Europol as EU decentralized agencies, which are clearly distinguished by their operational powers. The internal administrative organization and governance of Frontex, Easo and Europol is also studied, as to determine the influence and actual control that the Member States may exert over the increasing operational powers these agencies are conferred. Third, it comparatively analyzes the reinforcement of the operational tasks vested in Frontex, Easo and Europol, as well as the extent of their assistance on the ground and influence on the implementation prerogatives of the national authorities. Fourth, it addresses the increasing bilateral and multilateral inter-agency cooperation between Frontex, Easo and Europol. In particular, the expanded multilateral and operational cooperation that takes place in the recently designed hotspots is studied.

This thesis concludes by highlighting two trends in the administration of the AFSJ, and specifically, the common border management, asylum and migration matters. On the one hand, while the new legal frameworks of Frontex, Easo and Europol continue to stress that their operational roles are limited to providing the competent national authorities with the technical assistance they may require, it has been studied that the tasks on the ground of Frontex, Easo, and, to a more limited extent, Europol, have a clear operational nature. On the other

hand, Frontex, Easo and Europol are increasingly involved in guaranteeing the effective and uniform implementation of the EU migration, asylum and border management measures, as well as ensuring that the Member States do not jeopardize the functioning of the Schengen area and the CEAS.

EVOLUCIÓN DE LAS TAREAS OPERATIVAS DE FRONTEX, EASO Y EUROPOL: ¿HACIA UNA ADMINISTRACIÓN INTEGRADA DE LA GESTIÓN DE LAS FRONTERAS, LA MIGRACIÓN Y EL ASILO EN LA UNIÓN EUROPEA?

RESUMEN

La “crisis de los refugiados” puso de relieve la urgencia de garantizar el funcionamiento del espacio Schengen y el Sistema Europeo Común de Asilo (SECA), la creciente necesidad de prestar asistencia operativa a los Estados miembros más afectados por la llegada repentina y excepcional de flujos migratorios mixtos, así como la conveniencia de priorizar la implementación uniforme y eficaz a nivel nacional de las medidas de la Unión Europea (UE) adoptadas en materia de migración, asilo y gestión de fronteras. Por ello, esta tesis analiza la evolución de las tareas operativas conferidas a Frontex, Easo y Europol. Especial atención se presta a la expansión de los mandatos legales de estas agencias del Espacio de Libertad, Seguridad y Justicia (ELSJ), el refuerzo de las actividades que llevan a cabo en la práctica sobre el terreno y en qué medida existe una brecha entre estas dos dimensiones.

A partir del análisis de la evolución de las tareas operativas de Frontex, Easo y Europol, esta tesis realiza cuatro aportaciones principales. En primer lugar, se explora el establecimiento y las funciones operativas inicialmente conferidas a Frontex, Easo y Europol en el marco institucional del ELSJ. En segundo lugar, se define y clasifica a Frontex, Easo y Europol como agencias descentralizadas de la UE caracterizadas por las tareas operativas que desarrollan sobre el terreno. La organización administrativa interna y la gobernanza de Frontex, Easo y Europol también es estudiada con el fin de determinar la influencia y el control real que los Estados miembros ejercen sobre las crecientes funciones operativas que les han sido delegadas. En tercer lugar, se analiza comparativamente el refuerzo de las tareas operativas conferidas a Frontex, Easo y Europol, así como el alcance de su asistencia sobre el terreno y la influencia en las prerrogativas de implementación de las autoridades nacionales. En cuarto lugar, se explora la creciente cooperación bilateral y multilateral entre Frontex, Easo y Europol y, en

particular, la cooperación multilateral y operativa reforzada que tiene lugar en los recientemente establecidos *hotspots*.

Esta tesis concluye destacando dos tendencias en la administración del ELSJ y, específicamente, en la gestión operativa de las fronteras exteriores, el asilo y la migración. Por un lado, si bien los nuevos marcos normativos de Frontex, Easo y Europol continúan enfatizando que su función operativa se limita meramente a proporcionar a las autoridades nacionales competentes la asistencia técnica que puedan requerir, se pone de relieve que las tareas que Frontex, Easo y, de forma más limitada, Europol desarrollan sobre el terreno presentan una clara naturaleza operativa. Por otra parte, Frontex, Easo y Europol participan progresivamente en garantizar la aplicación efectiva y uniforme de las medidas de migración, asilo y gestión de fronteras de la UE, así como supervisar que los Estados miembros no pongan en peligro el funcionamiento del espacio Schengen y el SECA.

ACKNOWLEDGMENTS

Completing a PhD program is a challenging and time-consuming endeavor, one which accompanies you for many years. Far from being a one-man job, writing this thesis would not have been possible without the help and input of many individuals. While I cannot mention all those whose dedication helped my thesis come to fruition, I would like to acknowledge those that have made a special impact.

Firstly, I would like to thank my supervisor, Beatriz Pérez de las Heras, who has provided me with much guidance, patience, and attention to detail in revising this thesis. Her help, in addition to the advice and support of other professors from the University of Deusto and the Erasmus University of Rotterdam have made all of this possible. I would also like to mention Felipe Gómez Isa, who has been an example to me of how to face the true challenges that life may bring. Your positivity, dedication, and determination are virtues that are extremely admired. Furthermore, I would like to thank the committee and the professors who have completed an external review of this thesis for their comments and feedback.

This thesis would also not have been possible without the generous financial support of the Pre-doctoral scholarship from the Basque Government and the Aristos Campus Mundus grant. In this respect, I would also like to thank the University of Deusto, particularly the Faculty of Law, for their help, involvement, and support throughout these four years. Additionally, I am extremely appreciative to the library staff for their help and efficiency in supplying me with the numerous documents that I requested for my research.

I would additionally like to acknowledge my incredible hosts during my research stays at Washington College of Law and Georgetown Law Center: Fernanda Nicola, Jeffrey Lubbers, Diego Rodríguez-Pinzón, Vicki Arroyo, and Andrew Schoenholtz. Furthermore, I would also like to thank Mira Scholten for inviting me to complete a research stay at the University of Utrecht and, particularly, for encouraging me to participate in the Project, RENFORCE. Mira, I would like to extend a heartfelt thank you for all of your generosity, help, time, and support. I would also like to acknowledge those individuals who accepted my invitation to be interviewed, though their names will not be disclosed for the

sake of preserving their anonymity. Nevertheless, their time, dedication, and important feedback is greatly appreciated.

During my research stays and while writing my thesis, I have been very fortunate to receive advice and guidance from experts and professors, including but not limited to: Alberto Alemanno, Joana Abrisketa, Gil Arias, Inmaculada Arnáez, Luis Arroyo, Sergio Carrera, Leonhard den Hertog, Francina Esteve, Paula García, Mariona Illamola, Christian Kaunert, Juan Fernando López, David Martin, Mark Noferi, Montserrat Pi, Jorrit Rijpma, Juan Santos, Stacy Shore, and Lilian Tsourdi. The giving of their time and generosity, to say the least, greatly deserves to be mentioned.

My research has also been influenced by the active participation of two academic networks: the Young Researchers Platform of TARN and Odysseus. I would especially like to thank Professor Ellen Vos and Philippe de Bruycker for the opportunity to participate in many events, seminars, and workshops that they organized. Similarly, I am extremely thankful for all of the feedback that I received at different conferences I attended and the articles that I published, which have all contributed to strengthening this thesis.

I would like to reserve a final mention for those individuals that have offered the closest support to me, guiding me day in and day out through this doctoral adventure. First and foremost, I must sincerely thank my parents, who I will always admire and look up to as a constant source of inspiration and dedication. My thanks also goes out to my brother Rubén, who knows better than anyone how to conceptualize problems and has a way of lightening the load when I need it the most. Furthermore, I would like to express my appreciation to my friends, who always seem to provide laughter and words of encouragement. Lastly, I would like to thank Sarah, who always brings out the best version of myself. I will never be able to thank you enough for all of your support, sacrifice, and continuous hours revising pages and pages of this thesis.

David Fernández Rojo
Bilbao, July 2018

TABLE OF CONTENTS

LIST OF FIGURES AND TABLES	XIV
LIST OF ABBREVIATIONS	XV
CHAPTER 1. Introduction	1
I. SETTING THE SCENE	1
1. The <i>Agencification</i> of the EU Area of Freedom, Security and Justice	1
2. From a Secondary to a Key Operational Role of Frontex, Easo and Europol	6
II. RESEARCH STRATEGY	12
1. Research Problem	12
2. Research Question and Aim	14
3. Scope of the Research	16
III. SCIENTIFIC RELEVANCE	18
IV. METHOD AND SOURCES	21
V. OUTLINE	25
CHAPTER 2. The Establishment of Frontex, Easo and Europol in Light of the Institutional Evolution of the EU Area of Freedom, Security and Justice	27
I. THE TREATY OF MAASTRICHT AND THE CREATION OF EUROPOL: PAVING THE WAY FOR DESIGNING FRONTEX AND EASO	28
1. The Dominant Intergovernmental Nature of the Third Pillar and the Marginal Role of the EU Institutions	28
2. The Establishment of Europol: Ending the Intergovernmental Deadlock in the AFSJ?	32
II. THE TREATY OF AMSTERDAM AND THE TAMPERE MILESTONES: AN INSTITUTIONAL TURNING POINT FOR THE EU AREA OF FREEDOM, SECURITY AND JUSTICE?	35
1. The Timorous Communitarization of the AFSJ under the Treaty of Amsterdam	35
2. The Tampere Program and the Introduction of New Institutional Players in the AFSJ	40
III. THE TREATY OF NICE AND THE HAGUE PROGRAM: TOWARDS THE <i>AGENCIFICATION</i> OF THE AREA OF FREEDOM, SECURITY AND JUSTICE?	45
1. The Limited Impact of the Treaty of Nice and the Ambitious Strategic Objectives of the Hague Program	45

2.	The <i>Agencification</i> of the AFSJ: The Reinforcement of Europol and the Creation of Frontex	49
2.1.	Strengthening Europol	50
2.2.	The Establishment of Frontex	53
IV.	THE TREATY OF LISBON AND THE STOCKHOLM AGENDA: FURTHERING THE OPERATIONAL IMPLEMENTATION OF THE EU MEASURES ADOPTED WITHIN THE AFSJ	69
1.	The End of the Pillar Structure and the Communitarization of the AFSJ	69
1.1.	Overview of the Novelties Brought by the Treaty of Lisbon to the AFSJ	69
1.2.	Institutional Implications of the Entrance into Force of the Treaty of Lisbon	71
2.	The Strategic Role of Frontex, Easo and Europol in Operationally Developing the AFSJ	76
2.1.	Article 88 TFEU: Europol	77
2.2.	Frontex: Towards a Gradual Establishment of an Integrated Management System for the European External Borders?	78
2.3.	The Establishment of the European Asylum Support Office (Easo): The Institutionalization of the Operational Assistance to the National Asylum Systems	83
3.	The Post-Stockholm Scenario: Towards a Growing Operational and Emergency Driven AFSJ?	88
3.1.	The 2014 AFSJ Strategic Guidelines for the 2015-2020 Period: Ensuring a Coherent and Effective Implementation of the Existing AFSJ Framework	88
3.2.	The European Agenda on Migration: Ensuring a Coherent and Effective Response to Emergencies at the AFSJ	92
V.	CONCLUSION	94
CHAPTER 3. Frontex, Easo, and Europol as EU Decentralized Operational Agencies: Classification, Conferral of Powers, and Governance		
		97
I.	THE AD-HOC <i>AGENCIFICATION</i> PROCESS IN THE EU	98
1.	Four Waves of the Creation of EU Decentralized Agencies	99
2.	The Lack of a Common Legally-Binding Framework for the Creation, Operation, and Governance of EU Decentralized Agencies	102
II.	MAPPING FRONTEX, EASO, AND EUROPOL AS EU DECENTRALIZED OPERATIONAL AGENCIES	107
1.	Defining Frontex, Easo, and Europol as EU Decentralized Agencies	107
2.	The Explicit Establishment of Europol versus the Implicit Recognition of Frontex and Easo in Primary Law	109
3.	The Functional and Instrumental Classification of Frontex, Easo, and Europol: Their Operational Nature as a Distinctive Feature	114
3.1.	Functional Classification: Frontex, Easo, and Europol as Agencies that Develop Operational Tasks	115

3.2.	Instrumental Classification: Frontex, Easo, and Europol as Agencies that Hold Operational Powers	119
III.	THE OPERATIONAL TASKS OF FRONTEX, EASO AND EUROPOL IN LIGHT OF THE CJEU'S NON-DELEGATION DOCTRINE	122
1.	The Delegation of Powers and Unsuitability of a Principal-Agent Approach as an Explaining Model for Frontex, Easo, and Europol	123
2.	From the Stringency of “Meroni” and “Romano” to the Leniency of “Short Selling”: The CJEU’s Non-Delegation Doctrine	127
2.1.	Meroni & Co., Industrie Metallurgiche, SpA v. High Authority of the European Coal and Steel Community (1958)	128
2.2.	Giuseppe Romano v. Institut national d’assurance maladie-invalidité (1981)	130
2.3.	UK v. European Parliament and Council of the EU (Short Selling-ESMA Case, 2012)	132
3.	The Impact of the Lightened CJEU’s Non-Delegation Doctrine on the Conferral of Operational Powers to Frontex, Easo, and Europol	136
3.1.	A Stringent Application of the Current CJEU’s Non-Delegation Doctrine to Frontex, Easo, and Europol	137
3.2.	Primary Law Limits the Powers to be Conferred to Frontex, Easo, and Europol	141
IV.	THE (NEW) ADMINISTRATIVE GOVERNANCE OF FRONTEX, EASO, AND EUROPOL	143
1.	The Management Boards: Intergovernmental and <i>à la Carte</i>	144
1.1.	Composition	144
1.2.	Working Practices	149
2.	The Executive Directors of Frontex, Easo, and Europol: Caught Between the EU Institutions’ Increasing Role in their Appointment and the Tight Control Exerted by the Agencies’ Management Boards	152
3.	Frontex and Easo’s Internal Fundamental Rights Bodies: The Consultative Forum and the Fundamental Rights Officer	155
3.1.	Frontex’ Consultative Forum and Fundamental Rights Officer	155
3.2.	The EUAA’s Consultative Forum and Fundamental Rights Officer	162
3.3.	The EBCG and EUAA’s Individual Complaint Mechanism	164
4.	The Practical Interaction Between the Management Board and the Executive Director: Adoption of the Work Program, the Annual Report and the Budget of Frontex, Easo, and Europol	176
4.1.	Adoption of the Work Program and the Annual Activity Report	176
4.2.	Adoption of the Annual Budget	178
V.	CONCLUSION	181

CHAPTER 4. The Growing Operational Role of Frontex, Easo, and Europol and the Impact of their Activities on the Ground	183
I. THE INITIAL OPERATIONAL SUPPORT AND TECHNICAL ASSISTANCE OF FRONTEX, EASO, AND EUROPOL	184
1. The Nascent Operational Activities of Europol	185
2. The Technical Assistance and Operational Support of Frontex	190
2.1. Capacity Building Tasks	191
2.2. Operational Support Tasks	194
2.3. The Dependence of Frontex on the Member States' Resources	204
3. The Technical Assistance and Operational Tasks of Easo	208
3.1. Information, Third-Country, and Permanent Support of Easo	210
3.2. The Special and Emergency Operational Support of Easo	212
II. THE OPERATIONAL TASKS THAT FRONTEX, EASO, AND EUROPOL CONDUCT ON THE GROUND: BEYOND TECHNICAL COORDINATION AND OPERATIONAL ASSISTANCE?	216
1. Europol's Participation in JITs and the Deployment of Frontex' EBGTs and Easo's ASTs	217
2. The Functioning of the JITs, EBGTs, and ASTs	222
2.1. The Participation of Europol in the JITs	222
2.2. Frontex: From the RABITs to the EBGTs	224
2.3. The Operational Support of Easo through the Deployment of ASTs	232
III. THE REINFORCED MANDATE OF EUROPOL AND THE ESTABLISHMENT OF THE EBCG AND THE EUAA: A TURNING POINT IN THESE AGENCIES' OPERATIONAL AND IMPLEMENTATION ROLE?	235
1. Regulation 2016/794 of Europol and the Establishment of the Migrant Smuggling Center	236
2. Regulation 2016/1624: From Frontex to the European Border and Coast Guard	244
2.1. The EBCG's Monitoring Role	247
2.2. The EBCG's Expanded Operational Tasks	250
2.3. The EBCG's Competence to Intervene	253
2.4. The EBCG's Coast Guard Functions, Return Operations, and Relations with Third Countries	255
3. The Proposed Transformation of Easo into a European Union Agency for Asylum	258
3.1. The EUAA's Monitoring Role	262
3.2. The EUAA's Greater Operational Tasks	265
3.3. The EUAA's Competence to Intervene	267
3.4. The EUAA's Role in Examining Applications for International Protection	269
IV. CONCLUSION	272

CHAPTER 5. Reinforced Operational Cooperation among Frontex, Easo, and Europol: From Working Arrangements to the Introduction of the Hotspot Approach	275
I. INTER-AGENCY COOPERATION IN THE EU AREA OF FREEDOM, SECURITY AND JUSTICE	276
II. THE BILATERAL COOPERATION AND SIGNATURE OF WORKING ARRANGEMENTS BETWEEN FRONTEX, EASO, AND EUROPOL	283
1. Bilateral Cooperation between Frontex and Europol	284
2. Bilateral Cooperation between Frontex and Easo	287
3. Working Arrangements: Formal Bilateral Cooperation among Frontex, Easo, and Europol	289
III. MULTILATERAL COOPERATION AMONG FRONTEX, EASO, AND EUROPOL	293
1. The Emerging Need for Multilateral Cooperation among Frontex, Easo, and Europol	294
2. The COSI's Role in Promoting the Multilateral Operational Cooperation of the EU AFSJ Agencies	296
IV. THE HOTSPOT APPROACH: A REINFORCED, MULTILATERAL, AND OPERATIONAL INTER-AGENCY COOPERATION	302
1. Hotspots: What is in a Name?	303
2. The Functioning of the Hotspots	307
3. The Specific Operational Tasks that Frontex, Easo, and Europol Conduct in the Hotspots	310
3.1. Frontex' Assistance in Registering, Screening, Debriefing, and Returning the Arriving Migrants	311
3.2. Easo's Assistance in Informing, Registering, and Examining Requests for International Protection	315
3.3. Europol's Assistance in Averting and Combating Migrant Smuggling and Human Trafficking Networks	319
V. THE HOTSPOT APPROACH: <i>DE IURE</i> VERSUS <i>DE FACTO</i> OPERATIONAL COOPERATION OF FRONTEX, EASO, AND EUROPOL ON THE GROUND	321
1. The Delay and Criticism Surrounding the Implementation of the Hotspot Approach	321
2. The Hotspots: An Inter-Agency Operational Cooperation that Exceeds Frontex, Easo, and Europol's Legal Mandate?	326
VI. CONCLUSION	332

CHAPTER 6. Conclusions	335
I. MAIN FINDINGS	336
1. The Establishment and Reinforcement of Frontex, Easo and Europol under the Unrelenting Integration of the EU Area of Freedom, Security and Justice	336
2. The Distinctive Operational Tasks that Frontex, Easo and Europol Undertake on the Ground	340
3. The EBCG, the Future EUAA and Europol: Developing Operational, Implementation and Supervisory Teeth?	345
4. Reinforced Multilateral and Operational Cooperation of Frontex, Easo and Europol under the Hotspot Approach	349
II. TAKING STOCK OF THE EVOLVING OPERATIONAL AND IMPLEMENTATION POWERS OF FRONTEX, EASO AND EUROPOL	352
III. RESEARCH CHALLENGES	359
IV. AVENUES FOR FURTHER RESEARCH	363
APPENDIX A: Public Access to Documents	367
APPENDIX B: EU Decentralized Agencies	378
APPENDIX C: Evolution of the Legal Mandates of Frontex, Easo and Europol	381
APPENDIX D: Interview Questions	389
APPENDIX E: List of Interviews	394
REFERENCES	395

LIST OF FIGURES AND TABLES

List of Figures

Figure 1: Aim of the Research.	15
Figure 2: Scope of the Research.	17
Figure 3: Institutional Evolution of the Area of Freedom, Security and Justice.	28
Figure 4: AFSJ Institutional Framework.	74
Figure 5: The development of the EU JHA Agencies in the Tampere, The Hague, Stockholm and 2014 Strategic Guidelines.	92
Figure 6: Functional Classification of the EU AFSJ Agencies.	119
Figure 7: Frontex' Organizational Structure.	161
Figure 8: Easo's Organization Structure.	164
Figure 9: Phases of the Individual Complaint Mechanism.	169
Figure 10: Evolution of Europol's Annual Budget.	180
Figure 11: Evolution of Frontex' Annual Budget.	180
Figure 12: Evolution of Easo's Annual Budget.	181
Figure 13: Frontex' Tasks.	191
Figure 14: Joint Operations organized and coordinated by Frontex.	202
Figure 15: Evolution of the total number of assets registered in the TEP by type of equipment.	208
Figure 16: Easo Support Tasks.	210
Figure 17: Easo Emergency Support.	215
Figure 18: Total number of Frontex' Seconded Guest Officers deployments by profile and year.	231
Figure 19: Europol Migrant Smuggling Center.	242
Figure 20: EBCG's Intervention Power.	255
Figure 21: EUAA's Emergency Intervention.	269
Figure 22: cooperation scenarios that may arise when an issue affects two policy fields at the same time, and in which two different agencies may exert their influence.	279
Figure 23: Bilateral Cooperation among Frontex, Easo, and Europol.	284
Figure 24: the role of Frontex, Easo and Europol in the Hotspots.	311
Figure 25: Evolution of Frontex, Easo and Europol under the Maastricht, Amsterdam, Nice and Lisbon Treaties.	340
Figure 26: Evolution of the Operational Cooperation of Frontex, Easo and Europol.	350
Figure 27: Evolution of the Implementation of EU Border Management, Migration and Asylum Laws and Policies.	354
Figure 28: Evolution of the Operational and Implementation Role of Frontex, Easo and Europol.	356

List of Tables

Table 1: Original Mandate of Frontex, Easo and Europol.	13
Table 2: Frontex, Easo and Europol's Management Board Composition.	148
Table 3: Allocation of operational powers in the hotspots.	310

LIST OF ABBREVIATIONS

AFSJ	Area of Freedom, Security and Justice
AIP	Asylum Intervention Pool
AST	Asylum Support Teams
CATS	Coordinating Committee in the Area of Police and Judicial Cooperation in Criminal Matters
CEAS	Common European Asylum System
Cepol	European Union Agency for Law Enforcement Training
CF	Consultative Forum
CJEU	Court of Justice of the European Union
COI	Country of Origin Information
COSI	Committee on Internal Security
CRATE	Centralized Records of Available Technical Equipment
Easo	European Asylum Support Office
EBA	European Banking Authority
EBCG	European Border and Coast Guard Agency
EBGT	European Border Guards Teams
EBCGT	European Border and Coast Guard Teams
ECJ	European Court of Justice
EDU	Europol Drugs Unit
EEA	European Economic Area
EEC	European Economic Community
EIGE	European Institute for Gender Equality
EIOPA	European Insurance and Occupational Pensions Authority
EMAST	Europol Mobile Analysis Teams
EMCDDA	European Monitoring Centre for Drugs and Drug Addiction
EMIST	Europol Mobile Investigation Teams
EMSC	European Migrant Smuggling Center
ESMA	European Securities and Markets Authority
EU	European Union
EUAA	European Union Agency for Asylum
EU-LISA	European Agency for the operational management of large-scale IT Systems in the AFSJ
Eurojust	European body for the enhancement of judicial co-operation
Europol	European Police Office
Eurosur	European Border Surveillance System
EURTF	European Union Regional Task Force
FRA	Fundamental Rights Agency
FRO	Fundamental Rights Officer
Frontex	European Agency for the Management of Operational Cooperation at the External Borders
ICC	International Coordination Center
JHA	Justice and Home Affairs
JITs	Joint Investigation Teams
JOT-MARE	Joint Operational Team to combat irregular migration and tackle the smugglers operating in the Mediterranean
LIBE	Committee on Civil Liberties, Justice and Home Affairs
MS	Member States
OCTA	Organized Crime Threat Assessment

PCTF	Police Chief Task Force
RABIT	Rapid Border Intervention Teams
SCIFA	Strategic Committee on Immigration, Frontiers and Asylum
SGO	Seconded Guest Officers
SOP	Standard Operating Procedures
TEC	Treaty of the European Community
TEP	Technical Equipment Pool
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
TREVI	Terrorisme, Radicalism et Violence International
UNHCR	United Nations High Commissioner for Refugees

Note: The research for this thesis was completed in June 2018. Subsequent developments are therefore not reflected in this study. This dissertation is written in American English and was submitted to language review.

I. SETTING THE SCENE

1. The *Agencification* of the EU Area of Freedom, Security and Justice

Article 3(2) Treaty on the European Union (TEU) states that the Union shall offer its citizens an Area of Freedom, Security and Justice (AFSJ)¹. The AFSJ covers a wide range of policy fields: border management, asylum, migration, the recognition of judgments in civil and criminal matters, and police cooperation (article 67 Treaty on the Functioning of the European Union (TFEU)²). While these are very sensitive and politicized matters, representing traditional State-centered competences that are directly connected with national sovereignty and the fundamental rights of the individuals, the European Union (EU or the Union) has a shared competence in AFSJ matters (article 4(2)(j) TFEU). Additionally, the Member States shall adopt all measures of national law necessary to implement the Union acts (article 291(1) TFEU in relation to article 4(3) TEU).

The evolution of the AFSJ has been characterized by the Member States' reluctance to vest the EU institutions with more powers. However, events like the abolition of internal borders, the increasing migratory pressure at European external borders, the rise in asylum applications or cross-border criminality could no longer be effectively managed by the national administrations individually.

¹ Consolidated Version of the Treaty on European Union, OJ C-326, 26.10.2012.

² Consolidated Version of the Treaty on the Functioning of the European Union, OJ C-326, 26.10.2012.

Therefore, one such way to support the Member States and streamline their cooperation was through the establishment of several decentralized European agencies. These agencies' mission centers on providing operational assistance to the competent national authorities to ensure that the AFSJ policies, though challenging, are implemented.

As the European Commission observes, "agencies have proved particularly relevant in field of shared competences, when the implementation of new policies at Community level needs to be accompanied by close cooperation between the Member States and the EU"³. EU decentralized agencies institutionally shape the AFSJ, deepen European integration to better tackle supranational and cross-border challenges, and ensure the effective and uniform implementation of EU laws and policies at the national and local level.

Currently, the AFSJ has nine independent regulatory agencies, each with their own legal personality: European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex), European Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice (EU-Lisa), European Asylum Support Office (Easo), European Institute for Gender Equality (EIGE), European Monitoring Centre for Drugs and Drug Addition (EMCDDA), European Police College (Cepol), European Police Office (Europol), European Union Agency for Fundamental Rights (FRA) and the European Union's Judicial Cooperation Unit (Eurojust)⁴.

Frontex, Easo and Europol stand out for their operational role in border

³ Commission, "European agencies – The way forward", COM(2008) 135 final, 11.03.2008, p. 5.

⁴ BUSUIOC, Madalina and CURTIN, Deirdre, "The EU internal security strategy, the EU policy cycle and the role of (AFSJ) agencies: promise, perils and pre-requisites", *Study for the LIBE Committee*, PE 453.185, 2011; CARRERA, Sergio, DEN HERTOOG, Leonhard and PARKIN, Joanna, "The peculiar nature of EU Home Affairs agencies in migration control: beyond accountability versus autonomy?", *European Journal of Migration and Law*, 15(4), 2013, pp. 337-358; KAUNERT, Christian, LÉONARD, Sarah and OCCHIPINTI, John, "Agency Governance in the European Union's Area of Freedom, Security and Justice", *Perspectives on European Politics and Society*, 14(3), 2013, pp. 273-284; PARKIN, Joanna, "EU Home Affairs Agencies and the Construction of EU Internal Security", *CEPS Papers in Liberty and Security in Europe*, 53, 2012, pp. 1-47; PI LLORENS, Montserrat, "El nuevo mapa de las agencias europeas del Espacio de Libertad, Seguridad y Justicia", *Revista de Derecho Comunitario Europeo*, 56, 2017, pp. 77-117; SANTOS VARA, Juan, "The EU's agencies. Ever more important for the governance of the Area of Freedom, Security and Justice" in TRAUNER, Florian and RIPOLL SERVENT, Ariadna (eds.), *Routledge Handbook of Justice and Home Affairs Research*, Routledge, 2018, pp. 445-455.

management, migration and asylum matters. Europol began operations in 1998 to facilitate the exchange of information and intelligence between the Member States⁵. At that time, Europol was fully dependent on the willingness of the national authorities to provide them with valuable information. Only in recent years has Europol been conferred operational tasks to support the Member States in their illegal migrant smuggling and human trafficking investigations.

Frontex was established in 2004 to improve the integrated management of the external borders of the Member States, to render more effective the application of the Community measures relating to the management of external borders, and to ensure the coordination of Member States' actions in the implementation of these measures. Easo was created in 2010 with the mission of strengthening practical cooperation among Member States on asylum matters, ensuring an effective implementation of the Common European Asylum System (CEAS) and providing operational support to Member States subject to particular pressure on their asylum and reception systems.

However, *agencification* has not been a process confined solely to the AFSJ, but rather developed in parallel to the European integration process, which requires a harmonized implementation of the EU laws and policies. As stressed by the European Commission, “the creation of further autonomous EU regulatory agencies in clearly defined areas will improve the way rules are applied and enforced across the Union”⁶.

The added value of the EU agencies as an institutional and administrative governance option underpinned to a great extent their exponential creation and empowerment⁷. Credibility, efficiency and crisis management are widely acknowledged by the literature as key reasons for the creation of EU agencies. Firstly, agencies shall be autonomous from any political influence, which

⁵ See, House of Lords (Select Committee on the European Union), “Europol’s Role in Fighting Crime”, Session 2002–03 5th Report, 28.01.2003, p. 12.

⁶ Commission, “European Governance: A White Paper”, COM(2001) 428 final, 25.07.2001, p. 24.

⁷ See, Analytical Fiche Nr 2, “Creation of Agencies”, 2010; Commission, “Meta-Evaluation on the Community Agency System”, 15.09.2003, pp. 28-31.

enhances their operations' credibility and transparency⁸. As BUSUIOC argues "an important means of ensuring policy credibility is to make long-term commitments through delegation to independent bodies"⁹. Specifically, EU agencies are one step away from the politicization surrounding the European Commission and the Member States. The agencies' indefinite nature provides stability to the short-term results-based approach that characterizes political objectives both at the national and EU level.

In this respect and in relation to one of the EU agencies under study here, the Commission's proposal to establish Frontex declared that there was a "clear need for creating an independent specialized Community operational structure [since] the Agency will be in a better position than even the Commission itself to accumulate the highly technical know-how on control and surveillance of the external borders (...)"¹⁰. The Commission added that Frontex would increase the visibility of the EU's actions, the coherence with other EU related policies and the long-term impact of Frontex' activities on its final beneficiaries¹¹.

However, it must be borne in mind that the autonomy of EU agencies is far from absolute since they "operate in highly politicized environments", which requires them to "manage their relations with and competing expectations from, the multiple political actors within their environment and their governance structures"¹². This holds particularly true for agencies like Frontex, Easo or Europol, whose tasks may impact very sensitive national competences. The distinguishing ambiguity and openness of some of the provisions in these AFSJ agencies' regulations, which ultimately hinder their effective control and responsibility, reveal nothing else but the struggle to find political compromises

⁸ For a more detailed literature review of the advantages of delegating powers to EU agencies see, MATHIEU, Emmanuelle, *Regulatory Delegation in the European Union: Networks, Committees and Agencies*, London: Palgrave Macmillan, 2016, pp. 2-15.

⁹ BUSUIOC, Madalina, *European Agencies: Law and Practices of Accountability*, Oxford University Press, 2013, p. 26.

¹⁰ Commission, "Proposal for a Council Regulation establishing a European Agency for the Management of Operational Co-operation at the External Borders", COM(2003) 687 final, 20.11.2003, p. 7.

¹¹ Ibid., p. 7. See, LEONARD, Sarah, "The creation of FRONTEX and the politics of institutionalisation in the EU external borders policy", *Journal of Contemporary European Research*, 5(3), 2009, pp. 371-388.

¹² BUSUIOC, Madalina, *European Agencies...*, *op. cit.*, p. 28.

during their adoption.

Another central motive for the creation of EU agencies is the added uniformity and efficiency that they provide to apply and implement EU legislation, policies and programs¹³. In this respect, MAJONE stressed that the staff of the agencies is better specialized than politicians to effectively develop EU policies and facilitate the decision-making process¹⁴. Considering the growing cross-border challenges requiring a supranational strategy in the EU, agencies are well suited to streamline and coordinate Member States' action.

Whereas the Commission institutionally and organizationally was unfit to overcome the implementation divergences of EU law, agencies could effectively ensure a harmonized application of the common goals at the national level. As BUSUIOC and GROENLEER highlight, the Commission was a very rigid, politicized and vast bureaucratic institution with “no presence on the ground to ensure the application of European Union law and most Member States were not willing to agree on the build-up of such capacity, fearing an even further loss of sovereignty to Brussels”¹⁵. In regards to Frontex, Easo and Europol, it should be noted that these AFSJ agencies' mission neither consists in alleviating the work, nor providing the Commission with a highly specialized technical expertise. Instead, as PI LLORENS indicates, the tasks of Frontex, Easo and Europol are distinguished by the fact that they aim to strengthen the Member States' operational cooperation when facing transnational challenges¹⁶.

Lastly, the delegation of powers to EU agencies is claimed to contribute to shift or elude blame for potential policy failures¹⁷. Many EU agencies have been created or transformed in the aftermath of a crisis (e.g. migratory crisis or financial crisis) or a controversial and politically sensitive matter (e.g. food safety, environment or police cooperation). Crises, emergencies and disasters have

¹³ DEHOUSSE, Renaud, “Regulation by networks in the European Community: the role of European agencies”, *Journal of European Public Policy*, 4(2), 1997, pp. 246-261.

¹⁴ MAJONE, Giandomenico, “The regulatory state and its legitimacy problems”, *West European Politics*, 22(1), 1999, p. 3.

¹⁵ BUSUIOC, Madalina and GROENLEER, Martijn, “The theory and practice of EU agency autonomy and accountability: early day expectations, today's realities and future perspectives” in EVERSON, Michelle, MONDA, Cosimo and VOS, Ellen (eds.), *European Agencies in between Institutions and Member States*, Alphen aan den Rijn: Kluwer Law International, 2014, p. 179.

¹⁶ PI LLORENS, Montserrat, “El nuevo mapa...”, *op. cit.*, p. 85.

¹⁷ MAJONE, Giandomenico, “The regulatory state...”, *op. cit.*, p. 4.

expanded the EU administrative space and empowered agencies. In particular, under these transboundary scenarios, the agencies are responsible for providing a coordinated and unified reaction.

Both the Member States and the Commission benefit from EU agencies' activities in crises contexts. The Commission and competent national authorities may dodge their responsibilities, hiding behind the agencies¹⁸. In this regard, RIJPMA precisely argued that Frontex was designed to enhance the credibility of the EU, to overcome the lack of trust between the national border guards from different Member States, and to dodge potential policy failures¹⁹. In other words, Frontex is an instrument allowing the Commission and the Member States to “shift the blame for the loss of life and human suffering (...) [and] a failure to curb irregular migration would be attributed to the agency rather than the EU institutions or Member States”²⁰.

2. From a Secondary to a Key Operational Role of Frontex, Easo and Europol

While the early activities of Frontex, Easo and Europol centered on providing the competent national authorities on-the-spot information, training, or operational advice, these AFSJ agencies were progressively conferred reinforced operational powers by directly assisting the Member States on the ground. Since 2007, Europol was authorized to assist in every activity of the Joint Investigation Teams

¹⁸ GROENLEER, Martijn, *The Autonomy of European Union Agencies: A Comparative Study of Institutional Development*, PhD thesis: Technical University of Delft, 2009, p. 103.

¹⁹ RIJPMA, Jorrit, “Hybrid agencification in the area of Freedom, Security and Justice and its inherent tensions: the case of Frontex” in BUSUIOC, Madalina, GROENLEER, Martijn and TRONDAL, Jarle, *The agency phenomenon in the European Union: Emergence, institutionalisation and everyday decision-making*, Manchester University Press, 2012, p. 90.

²⁰ Ibid., p. 92. See also, FINK, Melanie, “Salami Slicing Human Rights Accountability: How the European Border and Coast Guard Agency may inherit Frontex' genetic defect”, *Blog of the European Journal of International Law*, 10.03.2016, <http://bit.ly/2htyD20>, (last accessed: 30/04/2018); MAJCHER, Izabella, “Human Rights Violations During EU Border Surveillance and Return Operations: Frontex's Shared Responsibility or Complicity?”, *Silesian Journal of Legal Studies*, 7, 2015, pp. 45-78; MUNGIANU, Roberta, *Frontex and Non-Refoulement: The International Responsibility of the EU*, Cambridge: Cambridge University Press, 2016.

(JITs) and to participate in their establishment²¹. That same year, Frontex' operational powers on the ground were significantly reinforced since the agency could, upon request of a Member State, deploy Rapid Border Intervention Teams (RABITs)²². Subsequently, Regulation 1168/2011 introduced the European Border Guard Teams (EBGT), which could not only be deployed in the territory of a Member State facing an extraordinary and sudden arrival of irregular migrants, but also in every Joint Operation coordinated by Frontex²³. Regulation 439/2010 of Easo, following the model of Frontex' RABITs, designed the Asylum Support Teams (AST)²⁴. The AST can be deployed in the territory of a requesting Member State to provide emergency support to the national asylum and reception systems facing a particular pressure.

Nonetheless, the real thrust and reinforcement of the operational powers originally bestowed upon Frontex, Easo and Europol came in the aftermath of the "refugee crisis". During 2015, the number of migrants who arrived at European shores grew exponentially. According to the United Nations High Commissioner for Refugees (UNHCR), while 216,054 migrants crossed the Mediterranean in 2014, 1,015,078 migrants travelled the same route in 2015, and 3,771 of them perished in the attempt²⁵. Over 90% of these migrants resorted to criminal networks, which illegally smuggled them into the Member States²⁶. In parallel, the number of asylum applications received by the frontline Member States in the course of 2015 amounted to 1,255,600, doubling the number of applications

²¹ Protocol amending the Convention on the establishment of a European Police Office (Europol Convention) and the Protocol on the privileges and immunities of Europol, the members of its organs, the deputy directors and the employees of Europol, OJ C-312, 16.12.2002

²² 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, OJ L-199, 31.07.2007.

²³ 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, OJ L-304, 22.11.2011

²⁴ Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office, OJ L-132, 29.05.2010.

²⁵ UNHCR, "Refugees/Migrants Emergency Response - Mediterranean", <http://data.unhcr.org/mediterranean/regional.php> (last accessed 30/04/2018).

²⁶ Europol, "Migrant smuggling in the EU", February 2016, p. 13.

registered in 2014²⁷. Despite the stabilization of the migratory pressure in 2017 (204,719 irregular border-crossings along the EU external borders²⁸ and 706,913 asylum applications lodged within the EU Member States, including Norway and Switzerland²⁹) the situation is still unstable³⁰.

The “refugee crisis” revealed significant gaps in how the Member States applied EU laws and policies adopted in regards to migration, asylum and border management, hampering solidarity among the Member States³¹. Among the foremost measures put forward at the EU level to cope with this implementation deficit was the creation of the European Border and Coast Guard (EBCG) and the European Union Agency for Asylum (EUAA), the reinforcement of Europol’s mandate, and the promotion of their operational inter-agency cooperation on the ground through the hotspot approach.

As stated by BUSUIOC, “in an area [the AFSJ] defined by strong national sovereignty concerns, policy development has been patchy and incremental characterized by a preference for lighter instruments of governance punctuated by ‘spasmodic’ efforts at integration, often in response to and driven by crises”³². Precisely, the European Commission viewed the unprecedented “refugee crisis” in

²⁷ Eurostat, “Asylum in the EU Member States Record number of over 1.2 million first time asylum seekers registered in 2015. Syrians, Afghans and Iraqis: top citizenships”, 04.03.2016.

²⁸ Frontex, “Risk Analysis for 2018”, February 2018, <https://bit.ly/2whHwnX> (last accessed 30/04/2018).

²⁹ Easo, “Overview of 2017 EU+ asylum trends”, February 2018, <https://bit.ly/2FACoeA> (last accessed 30/04/2018).

³⁰ For the most recent report regarding the situation along the main migration routes see, Commission, “Progress report on the Implementation of the European Agenda on Migration”, COM(2018) 301 final, 16.05.2018. See also, European Migration Network, “Annual Report on Migration and Asylum 2017”, 15.05.2018 and CHALKIA, Anastasia and GIOUZEPAS, Anastasios, “It’s Just Europe’s Turn: EU’s and Greece’s Responses to the Current Refugee and Migration Flows” in KURY, Helmut and REDO, Sławomir, *Refugees and Migrants in Law and Policy*, Springer, 2018, pp. 437-456.

³¹ Parliament, “The situation in the Mediterranean and the need for a holistic EU approach to migration”, 2015/2095(INI), 12.04.2016.

³² BUSUIOC, Madalina, “EU Justice and Home Affairs Agencies: Securing Good Governance”, *Study for the LIBE Committee*, PE 596.812, 2017, p. 10. See, CAMPESI, Giuseppe, “Crisis, Migration and the Consolidation of the EU Border Control Regime”, *International Journal of Migration and Border Studies*, forthcoming; GOLDNER LANG, Iris, “The EU Financial and Migration Crises: Two Crises - Many Facets of EU Solidarity” in BIONDI, Alessandra, DAGILYTE, Egle and KÜÇÜK, Esin (eds.), *Solidarity in EU Law: Legal Principle in the Making*, Edward Elgar Publishing, forthcoming; MCDONOUGH, Paul and TSOURDI, Evangelia, “The “other” Greek crisis: Asylum and EU solidarity”, *Refugee Survey Quarterly*, 31 (4), 2012, pp. 67-100; SCIPIONI, Marco, “Failing forward in EU migration policy? EU integration after the 2015 asylum and migration crisis”, *Journal of European Public Policy*, 2017, pp. 1-19; TRAUNER, Florian, “Asylum policy: the EU’s ‘crises’ and the looming policy regime failure”, *Journal of European Integration*, 38(3), 2016, pp. 311-325.

the EU from the end of the Second World War as an opportunity to put forward ambitious reforms of the original Regulations of Frontex, Easo and Europol.

In 2016, Europol's mandate was strengthened³³, Frontex was transformed into the EBCG³⁴, and the European Commission put forward the creation of the EUAA³⁵. Although a partial agreement on the future EUAA has already been reached between the Council and the European Parliament³⁶, the Regulation repealing Easo has not yet been adopted³⁷. While the new legal frameworks of the EBCG and the EUAA formally repeal the Regulations establishing Frontex and Easo, these two agencies have not disappeared, but have been renamed in order to emphasize the reinforcement of their operational functions. The EBCG and the future EUAA strictly build on the powers originally conferred respectively to Frontex and Easo. Since the EBCG continues to be referred to as Frontex and the Regulation of the EUAA has not yet been adopted, the terms "Frontex" and "Easo" are the ones generally used throughout this thesis unless the intention is to stress the novelties that their new legal mandates bring about.

The recently adopted mandate of Europol, the EBCG, and the future EUAA aim to minimize the risk of future crises in the AFSJ and expand their operational support to the Member States. The new legal frameworks shift the reasoning of these agencies' powers and move from a reactive to a proactive approach. That is, their tasks shall not only center on assisting the Member States and enhancing their coordination, but also preventing potential national vulnerabilities that may subsequently lead to an untenable scenario for the competent national authorities.

The new Regulations of the EBCG, the EUAA and Europol aim to keep strengthening their autonomy from the Member States and to deepen their

³³ Regulation (EU) No 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol), OJ L-135, 24.05.2016.

³⁴ Regulation (EU) No 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard, OJ L-251, 16.09.2016.

³⁵ Commission, "Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010", COM(2016) 271 final, 04.05.2016.

³⁶ Council, "Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010 – State of play and guidance for further work", doc. 10555/17, 27.06.2017.

³⁷ See below Chapter 4, section III.3.

operational, monitoring and implementation role. Europol is now authorized to launch and carry out investigations. In the case that a concerned Member State decides not to participate in such an investigation, it is required to provide Europol with a reasoned justification for such refusal within one month. The recently established EBCG and the future EUAA may require the competent national border and asylum authorities to effectively implement EU law and to take immediate action under emergency situations, and to this end, conduct vulnerability assessments or issue recommendations. The EBCG and the EUAA may even intervene in the territory of the Member States to ensure that the EU border management and asylum measures are applied, and that the Schengen area and the CEAS are not ultimately jeopardized.

Moreover, as a result of the refugee crisis of unprecedented dimensions, the European Commission adopted on 13 May 2015 the European Agenda on Migration³⁸. The Agenda aimed to design a common strategy in which the Member States, the EU institutions, the AFSJ agencies, international organizations, civil society, local authorities and third countries are all involved in a coordinated manner³⁹. Among all these actors, Frontex, Easo and Europol were mandated to play a key inter-agency operational role at the hotspots.

While Frontex, Easo and Europol were already bilaterally and multilaterally cooperating before the hotspot approach was designed, their inter-agency interactions were essentially informal and flexible without binding them to concrete joint operational results. The “refugee crisis” revealed, however, the need to develop a more systematic multilateral cooperation between Frontex,

³⁸ Commission, “A European Agenda on Migration”, COM(2015) 240 final, 13.05.2015. See, CARRERA, Sergio, BLOCKMANS, Steven, GROS, Daniel and GUILD, Elspeth, “The EU’s Response to the Refugee Crisis: Taking Stock and Setting Policy Priorities”, *CEPS Essay*, 20, 2015, pp. 1-27.

³⁹ See, CARRERA, Sergio, GROS, Daniel and GUILD, Elspeth, “What priorities for the new European agenda on migration?”, *CEPS Commentary*, 22 April 2015; DAVITTI, Daria and La CHIMIA, Annamaria, “A Lesser Evil? The European Agenda on Migration and the Use of Aid Funding for Migration Control”, *UCD Working Papers in Law, Criminology & Socio-Legal Studies*, 7, 2017, pp. 1-46; DEL VALLE GÁLVEZ, Alejandro, “Los refugiados, las fronteras exteriores, y la evolución del concepto de frontera internacional”, *Revista de Derecho Comunitario Europeo*, 55, septiembre-diciembre 2016, pp. 759-777; DEL VALLE GÁLVEZ, Alejandro, “Unión europea, crisis de refugiados, y ‘limes imperii’”, *Revista General de Derecho Europeo*, 38, 2016, pp. 1-13; TRIANDAFYLIDOU, Anna and MANTANIKI, Regina, “Emergencia de refugiados en el Mediterráneo: evaluación de las respuestas políticas de la Unión Europea”, *Migración y Desarrollo*, 15(28), 2017, pp. 7-38.

Chapter 1

Easo and Europol on the ground. The multilateral cooperation of Frontex, Easo and Europol has achieved an unprecedented degree of operationalization, coordination and systematization with the adoption of the “hotspot approach”⁴⁰.

In the hotspots, Europol’s guest officers are in charge of identifying risk profiles, performing second-line security checks, and providing analytical and investigation support to dismantle smuggling and trafficking in human being networks⁴¹. Easo assists the national asylum authorities by informing the arriving migrants, as well as identifying, registering and relocating applicants for international protection. The experts and technical equipment deployed by Frontex in the hotspots facilitate national sea border surveillance and search and rescue operations. Frontex also assists the national authorities in disembarking, screening, registering, identifying, fingerprinting, debriefing and assessing the nationality of the arriving migrants, as well as facilitating and coordinating the return operations of those migrants with no right to remain in the EU⁴².

In the hotspots, the Member States are no longer exclusively competent to register, identify, screen, debrief, inform or return arriving migrants, nor examine asylum applications. The competent national authorities, facing extraordinary migratory pressure at their external borders, further rely on Frontex, Easo and Europol. The hotspot approach is a flexible framework that allows the agencies to tailor the degree of their operational assistance depending on the specific needs of the concerned Member States on the ground. The strengthened operational role and cooperation of these agencies may progressively move the AFSJ towards an integrated migration, asylum and border protection administration.

⁴⁰ See, HORII, Satoko, “Accountability, Dependency, and EU Agencies: The Hotspot Approach in the Refugee Crisis”, *Refugee Survey Quarterly*, 0, 2018, pp. 1-27.

⁴¹ Commission, “EU Action Plan against migrant smuggling (2015 - 2020)”, COM(2015) 285 final, 27.05.2015, p. 5 and Commission, “A European Agenda on Migration”, COM(2015) 240 final, 13.05.2015, p. 3.

⁴² Explanatory note on the “Hotspot” approach, 15.07.2015, <http://www.statewatch.org/news/2015/jul/eu-com-hotspots.pdf> (last accessed 30/04/2018).

II. RESEARCH STRATEGY

1. Research Problem

The Regulations originally establishing Frontex, Easo and Europol described their mission as to strengthen, facilitate, coordinate, support or assist the Member States and their cooperation. These are ambiguous terms that were not further clarified in the body of these agencies' Regulations and, over time, were extensively interpreted in the daily operations conducted by Frontex, Easo and Europol. The imprecise and flexible legal frameworks of these AFSJ agencies reflect how challenging it is to balance the effective management of supranational matters such as migration, asylum or border management at the EU level with the Member States' reluctance to see their sovereign powers impinged. The success of Frontex, Easo, and Europol lies to a great extent in the trust of the Member States and their willingness to make these agencies work.

AGENCY	Constituent Act	Headquarter	Mandate
EUROPOL	Council Act of 26 July 1995 drawing up the Convention on the establishment of a European Police Office (Treaty of Maastricht, former third pillar)	The Hague (The Netherlands)	"To <i>improve</i> (...) the effectiveness and cooperation of the competent authorities in the Member States in preventing and combating terrorism, unlawful drug trafficking and other serious forms of international crime where there are factual indications that an organized criminal structure is involved and two or more Member States are affected by the forms of crime in question (...)" (article 2(1))
FRONTEX	Council Regulation (EC) No 2007/2004 of 26 October 2004 (Treaty of Nice, former first pillar)	Warsaw (Poland)	"(...) the Agency shall <i>facilitate</i> and render more effective the application of existing and future Community measures relating to the management of external borders. It shall do so by <i>ensuring</i> the coordination of Member States' actions in the implementation of those measures (...)" (article 1(2))
EASO	Regulation (EU) No 439/2010 of 19	La Valetta (Malta)	" <i>help to improve</i> the implementation of the Common European Asylum System (the CEAS), to <i>strengthen</i>

	May 2010 (Treaty of Lisbon, former first pillar)		practical cooperation among Member States on asylum and to <i>provide and/or coordinate</i> the provision of operational support to Member States subject to particular pressure on their asylum and reception systems” (article 1)
--	---	--	---

Table 1: Original Mandate of Frontex, Easo and Europol (emphasis added). Source: Author’s own elaboration.

The real push for Frontex, Easo and Europol’s operational powers came from the experimentalist, dynamic and broad interpretative approach and practices they took in regards to their legal mandates⁴³. Frontex, Easo and Europol’s founding legal instruments did not clarify the operational implications or practical limits of these agencies’ assistance to the competent national authorities⁴⁴. In other words, “the ‘operational role’ of these agencies as ‘initiators’ and ‘contributors’ of the EU-level coordinated action might indeed lead to ‘unexpected terrains’, even for the representatives of the agencies themselves, in relation to their de jure mandate and responsibilities”⁴⁵. The soft law and non-binding nature of the operational powers bestowed upon Frontex, Easo and Europol have progressively and in practice become “harder”. Hiding behind the merely technical and administrative concepts of facilitation, coordination or assistance lie operational tasks involving genuine initiation and planning by the agencies.

The original operational tasks conferred to Frontex, Easo and Europol were reinforced in the aftermath of the “refugee crisis” and these agencies are increasingly called to develop a noteworthy policy-implementing role⁴⁶. Whereas the operational powers of Europol are still limited and remind us of the initial operational functions bestowed upon Frontex and Easo, the EBCG and the future EUAA shall not only monitor that the Member States effectively and uniformly

⁴³ See, POLLAK, Johannes and SLOMINSKI, Peter, “Experimentalist but not accountable governance? The role of Frontex in managing the EU’s external borders”, *West European Politics*, 32(5), 2009, pp. 904-924.

⁴⁴ CARRERA, Sergio, DEN HERTOOG, Leonhard and PARKIN, Joanna, “The peculiar nature...”, *op. cit.*, p. 343. See, RIJPMMA, Jorrit, “Hybrid Agencification...”, *op. cit.*, p. 93.

⁴⁵ GUILD, Elspeth, *et. al.*, “Implementation of the EU Charter of Fundamental Rights and its Impact on EU Home Affairs Agencies”, *Study for the European Parliament LIBE Committee*, PE 453.196, 2011, p. 94.

⁴⁶ See, Appendix C: Evolution of the Legal Mandates of Frontex, Easo and Europol.

implement the border management and asylum *acquis*, but also intervene by assisting the national authorities facing emergency situations at their external borders. The EBCG and EUAA are mandated to respectively ensure the functioning of the Schengen area and the CEAS.

Moreover, the hotspot approach strengthens, like never before, the operational assistance and inter-agency cooperation of Frontex, Easo and Europol. Particularly relevant is the deployment of officials of Easo and Europol on the ground, since until the hotspots were launched in 2015, Frontex was the main agency with field presence on the Member States. Nonetheless, there is not yet a legally binding framework regulating and delimiting the tasks of these agencies and the competent national authorities in the hotspots.

Therefore, the vague legal mandates of Frontex, Easo and Europol, which obscurely delimit their operational powers and inter-agency cooperation, and the dearth of research and public information on the activities that these agencies conduct in practice, further complicate the analysis. The key issue to address is the operational tasks that characterize Frontex, Easo and Europol among the rest of the EU regulatory agencies, and particularly, the specific scope of action and degree of intervention of these AFSJ agencies on the ground.

2. Research Question and Aim

The powers of Frontex, Easo and Europol seem to be moving from technically assisting and supporting the Member States to developing tasks with an operational nature that may have an impact in ensuring the effective and uniform implementation at the national level of the EU AFSJ laws and policies. Precisely, throughout the analysis of the evolution of the operational tasks of Frontex, Easo and Europol, this hypothesis is tested. A hypothesis based on the notion that Frontex, Easo and Europol are playing a growing operational role in the AFSJ, as well as increasingly involved in steering and shaping the implementation of EU border management, migration and asylum policies at the national and local level, is the basis for this research.

Hence, the research question in this study analyzes to what extent the

operational tasks and inter-agency cooperation of Frontex, Easo and Europol are reinforced in order to assist the concerned Member States in effectively and uniformly implementing the border management, asylum and migration measures adopted at the EU level. This main research question can be divided into three closely related sub-questions: 1) To what degree is the legal mandate of Frontex, Easo and Europol strengthened to operationally support the Member States? 2) To what degree are the operational tasks that Frontex, Easo and Europol undertake in practice on the ground strengthened? 3) To what degree does a gap exist between the legal mandates of Frontex, Easo and Europol and the operational tasks that they conduct in practice on the ground?

Consequently, the aim of this study is to analyze the evolution of the *de iure* and *de facto* operational tasks of Frontex, Easo and Europol in EU border management, migration and asylum matters.

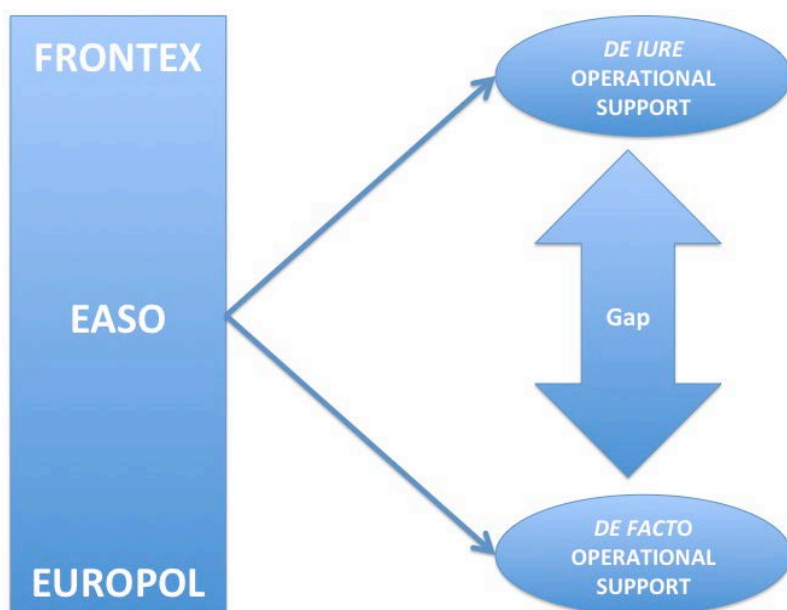


Figure 1: Aim of the Research. Source: Author's own elaboration

This aim is addressed in four steps. Firstly, to understand the evolution and expansion of the operational functions bestowed upon Frontex, Easo and Europol, the distinctive EU AFSJ institutional system, the establishment, and the growing role of these agencies within is explored. Secondly, Frontex, Easo and Europol are described and classified as EU decentralized agencies that are characterized by their operational powers and the possibility to deploy their

officials on the ground to directly assist the competent national authorities. Special attention is paid in this study to the nature of the delegation of powers to Frontex, Easo and Europol, the impact of the recently mellowed non-delegation doctrine on their growing operational tasks and the influence of the Member States in their administration and governance. Thirdly, this study details the new and expanded tasks that Frontex, Easo and Europol have developed to operationally assist the competent national authorities. Lastly, the increasing inter-agency operational cooperation of Frontex, Easo and Europol on the ground is examined.

3. Scope of the Research

Frontex, Easo and Europol's scope of action is not limited to operationally assisting Member States. Frontex has also been conferred capacity building tasks designed to assist Member States in training national border guards, creating common training standards, carrying out risk analysis, developing research for the management of external borders, and providing a constantly updated picture of the EU's external borders and migration situation⁴⁷.

Apart from the special and emergency operational support and the deployment of AST on the ground by Easo, the agency also conducts training, quality, information, and analysis activities (e.g. developing common asylum training material and common Country of Origin Information or sharing information, data, analyses and assessments)⁴⁸.

Europol is not an agency whose activities merely center on migration and asylum matters. Additionally, Europol is responsible for assisting two or more Member States in fighting serious and organized forms of crime (e.g. terrorism, international drug trafficking, money laundering, intellectual property crime fraud or cybercrime) by providing law enforcement expertise, developing

⁴⁷ See, article 8 Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard, OJ L-251, 16.09.2016. See below chapter 4, section I.2.1.

⁴⁸ See, article 2 Regulation (EU) 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office, OJ L-132, 29.05.2010. See below chapter 4, section I.3.1.

information on criminal activities, and facilitating law enforcement operations⁴⁹.

These non-operational tasks of Frontex, Easo and Europol are not the subject matter of this study. As figure 2 shows, this study exclusively centers on analyzing: 1) the operational support that Frontex, Easo and Europol provide to a concerned Member State of the EU, excluding any operational task bestowed upon these agencies that is not addressed to a Member State; 2) the operational cooperation between Frontex, Easo and Europol, excluding any bilateral and multilateral exchange of information between these agencies, and any operational cooperation between these agencies and the EU Institutions or third countries.



Figure 2: Scope of the Research. Source: Author's own elaboration.

Lastly, the accountability, responsibility and fundamental rights consequences that may derive from the expansion of the operational functions and inter-agency cooperation of Frontex, Easo and Europol are not the focus of this study. In other words, how the operational activities of Frontex, Easo and

⁴⁹ See, article 4 Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol), OJ L-135, 24.05.2016.

Europol are monitored, to what extent these agencies are held accountable, or the allocation of responsibilities between the actors involved in their operations are not the subject matter of this study. Nevertheless, by examining the *de iure* and *de facto* operational tasks of Frontex, Easo and Europol, this thesis may indirectly shed light on the distribution of responsibilities or better monitoring of these agencies' operational activities.

III. SCIENTIFIC RELEVANCE

This study sheds light on the exponential *agencification* of the AFSJ, the distinctive characteristics of three EU decentralized agencies that operate within the AFSJ, the noteworthy expansion of the operational tasks and cooperation of Frontex, Easo and Europol, and the crucial role that these agencies are called to play in ensuring an effective and uniform implementation of the common border management, migration and asylum laws and policies.

The *agencification* phenomenon in the EU has received profound scholarly attention⁵⁰. Academics are interested in the rationale behind the agencies' establishment⁵¹, the balance between their independence and accountability⁵², their constitutionality, their legal bases, and the control of their ever-growing

⁵⁰ See in particular "The Academic Research Network on Agencification of EU Executive Governance" (TARN) project, <https://tarn.maastrichtuniversity.nl>.

⁵¹ CHRISTENSEN, Jorgen and NIELSEN, Vibeke, "Administrative capacity, structural choice and the creation of EU agencies", *Journal of European Public Policy*, 17(2), 2010, pp. 176-204; CURTIN, Deidre, *Executive Power of the European Union. Law, Practices and the Living Constitution*, Oxford: Oxford University Press, 2009; FUENTETAJA PASTOR, Jesús Ángel, "Las Agencias Ejecutivas de la Comisión Europea", *Revista de Derecho de la Unión Europea*, 6, 2004, pp. 123-159; GERADIN, Damien, "The development of European regulatory agencies: what the EU should learn from American experience", *Columbia Journal of European Law*, 11, 2004, pp. 1-52; THATCHER, Mark, "The creation of European regulatory agencies and its limits: a comparative analysis of European delegation", *Journal of European Public Policy*, 18(6), 2011, pp. 790-809; VÍRGALA FORURIA, Eduardo, *Las Agencias Reguladoras de la UE*, Granada: Comares, 2011.

⁵² BUSUIOC, Madalina, *European Agencies...*, *op. cit.*; CURTIN, Deidre, "Holding (Quasi-) Autonomous EU Administrative Actors to Public Account", *European Law Journal*, 13(4), 2007, pp. 523-541; EVERSON, Michelle, "Independent agencies: hierarchy beaters?", *European Law Journal*, 1(2), 1995, pp. 180-204; EVERSON, Michelle, MONDA, Cosimo and VOS, Ellen (eds.), *European Agencies in between Institutions and Member States*, Alphen aan den Rijn: Kluwer Law International, 2014; GROENLEER, Martijn, *The Autonomy...*, *op. cit.*; MAJONE, Giandomenico, "The rise of the regulatory state in Europe", *West European Politics*, 17(3), 1994, pp. 77-101; SAURER, Johannes, "The Accountability of Supranational Administration: The Case of European Union Agencies", *American University International Law Review*, 24(3), 2008, pp. 429-488.

tasks in each EU policy⁵³. In particular, it has recently been noticed that the powers bestowed upon the European decentralized agencies are not only expanding, but are also increasingly involved in making political, economic or social choices, which their mandates vaguely and openly regulate⁵⁴.

Although Frontex, Easo and Europol have also been subject to analysis⁵⁵, the literature has centered on studying those EU decentralized agencies involved in the application of laws and policies relating to the single market, rather than the AFSJ⁵⁶. Within the AFSJ, the scholarly attention regarding EU decentralized agencies has focused on Frontex, its establishment⁵⁷, its operational powers⁵⁸, its accountability⁵⁹, its impact on the fundamental rights of the individuals,⁶⁰ or the

⁵³ BUSUIOC, Madalina, GROENLEER, Martijn and TRONDAL, Jarle (eds.), *The Agency Phenomenon in the European Union*, Manchester, Manchester University Press, 2012; CHAMON, Merijn, *EU Agencies: Legal and Political Limits to the Transformation of the EU Administration*, Oxford: Oxford University Press, 2016; CHITI, Edoardo, “An Important Part of the EU’s Institutional Machinery: Features, Problems and Perspectives of European Agencies”, *Common Market Law Review*, 46(5), 2009, pp. 1395-1442; DEHOUSSE, Renaud, “Regulation by networks...”, *op. cit.*, pp. 246-261; GERADIN, Damien, *et al.* (ed.), *Regulation through agencies in the EU: a new paradigm of European governance*, Cheltenham: Edward Elgar Publishing, 2005.

⁵⁴ SCHAMMO, Pierre, “The European Securities and Markets Authority: Lifting the Veil on the Allocation of Powers”, *Common Market Law Review*, 48, 2011, pp. 1879-1887; SCHOLTEN, Miroslava and VAN RIJSBERGEN, Marloes, “Limits of Agencification in the European Union”, *German Law Journal*, 15(7), 2014, pp. 1223-1256; VAN CLEYNENBREUGEL, Pieter, “Meroni circumvented? Article 114 TFEU and EU regulatory agencies”, *Maastricht Journal of European and Comparative Law*, 21, 2014, pp. 64-88; VOS, Ellen, “EU agencies on the move: challenges ahead”, *Swedish Institute for European Policy Studies*, 1, 2018.

⁵⁵ See in particular “El reto del nuevo mapa de las Agencias del Espacio de Libertad, Seguridad y Justicia” (MAGELS) project, <http://www.magels.es>.

⁵⁶ KAUNERT, Christian; LÉONARD, Sarah and OCCHIPINTI, John, “Agency Governance...”, *op. cit.*, p. 275.

⁵⁷ EKELUND, Helena, “The establishment of FRONTEX: A new institutionalist approach”, *Journal of European Integration*, 36(2), 2014, pp. 99-116; LEONARD, Sarah, “The creation of FRONTEX...”, *op. cit.*, pp. 371-388; NEAL, Andrew, “Securitization and risk at the EU border: The origins of FRONTEX”, *Journal of Common Market Studies*, 47(2), 2009, pp. 333-356.

⁵⁸ BALDACCINI, Anneliese, “Extraterritorial border controls in the EU: The role of FRONTEX in operations at sea”, in BERNARD, Ryan and VALSAMIS, Mitsilegas, *Extraterritorial Immigration Control*, The Netherlands: Martinus Nijhoff Publishers, 2010, pp. 229-256; MUNGIANU, Roberta, “Frontex: Towards a common policy on external border control”, *European Journal of Migration and Law*, 15(4), 2013, pp. 359-385; RIJPMAN, Jorrit, “Hybrid agencification...”, *op. cit.*, pp. 77-99; URREA CORRES, Mariola, “El control de fronteras exteriores como instrumento para la seguridad: una aproximación al nuevo marco jurídico de frontex”, *Revista del Instituto Español de Estudios Estratégicos*, 2012, pp. 153-172.

⁵⁹ POLLAK, Johannes and SLOMINSKI, Peter, “Experimentalist...”, *op. cit.*, pp. 904-924.

⁶⁰ Among many, see Council of Europe (Parliamentary Assembly), “Frontex: human rights responsibilities”, doc. 13161, 08.04.2013; MAJCHER, Izabella, “Human Rights Violations...”, *op. cit.*, pp. 45-78; MARIN, Luisa, “Policing the EU’s External Borders: A Challenge for the Rule of Law and Fundamental Rights in the Area of Freedom, Security and Justice? An Analysis of Frontex Joint Operations at the Southern Maritime Border”, *Journal of Contemporary European Research*, 7(4), 2014, pp. 468-487.

demarcation of responsibilities between the agency and the Member States⁶¹.

The evolution of the operational tasks of Frontex, Easo and Europol, their reinforced inter-agency cooperation on the ground, the expansion of their operational assistance to the frontline Member States in the aftermath of the 2015 “refugee crisis”, and their increasing role in ensuring an effective and harmonized national implementation of border management, migration and asylum measures adopted at the EU level is under-researched. A significant knowledge gap exists between the operational functions *de iure* conferred to Frontex, Easo and Europol and the activities that these agencies conduct *de facto*. In particular, the increasing operational role of Europol and Easo regarding migration and asylum matters at the EU level has been overlooked to a great extent⁶².

Hence, while the operational tasks of Frontex, and to a much lesser extent Easo and Europol, have been separately studied by the literature, a comparative analysis on the operational powers and cooperation of Frontex, Easo and Europol is necessary. The expansion of the operational activities and multilateral cooperation of these agencies on the ground to the frontline Member States is unprecedented. It is timely to comparatively analyze the evolution of the operational powers of Frontex, Easo and Europol in border management, asylum and migration matters, and to examine to what extent the tasks that they conduct in practice are aligned with the provisions established in their recently

⁶¹ CASOLARI, Federico, “The EU’s hotspot approach to managing the migration crisis: a blind spot for international responsibility?”, *The Italian Yearbook of International Law Online*, 25(1), 2016, pp. 109-134; FINK, Melanie, *Frontex and Human Rights: Responsibility in ‘Multi-Actor Situations’ under the ECHR and EU Public Liability Law*, PhD thesis: Leiden University and the University of Vienna, 2017; MUNGIANU, Roberta, *Frontex and non-refoulement...*, *op. cit.*

⁶² BUSUIOC, Madalina and GROENLEER, Martijn, “Beyond design: The evolution of Europol and Eurojust”, *Perspectives on European Politics and Society*, 14(3), 2013, pp. 285-304; COMTE, Françoise, “A new agency is born in the European Union: The European Asylum Support Office”, *European Journal of Migration and Law*, 12(4), 2010, pp. 373-405; DE BUCK, Bart, “Joint Investigation Teams: The participation of Europol officials”, *ERA Forum*, 8(2), 2007, pp. 260-261; DE MOOR, Alexandra and VERMEULEN, Gert, “The Europol council decision: transforming Europol into an agency of the European Union”, *Common Market Law Review*, 47(4), 2010, pp. 1089-1121; OCCHIPINTI, John D., *The politics of EU police cooperation: Toward a European FBI?*, London: Lynne Rienner Publishers, 2003; ROZÉE, Stephen, KAUNERT, Christian and LÉONARD, Sarah, “Is Europol a Comprehensive Policing Actor?”, *Perspectives on European Politics and Society*, 14(3), 2013, pp. 372-387; SANTOS VARA, Juan, “El desarrollo de las competencias de la Oficina Europea de Policía (EUROPOL): el control democrático y judicial”, *Revista de Derecho Comunitario Europeo*, 7(14), 2003, pp. 141-179; TSOURDI, Evangelia, “Bottom-up Salvation? From Practical Cooperation Towards Joint Implementation Through the European Asylum Support Office”, *European Papers*, 1(3), 2016, pp. 997-1031.

adopted or proposed regulations. That is, little is still known about the degree of operational support that Frontex, Easo and Europol have provided and the impact of these agencies' activities in shaping the implementation of a further integrated AFSJ.

The study also contributes to the current scholarly research regarding the increasing involvement of the EU in the implementation or enforcement of laws and policies⁶³. Specifically, this study argues that the focus of the EU in border management, migration and asylum matters is shifting from adopting measures to tackling the existing implementation deficit. The analysis of the evolution of the operational tasks of Frontex, Easo and Europol contributes to understanding to what extent the assistance of these agencies has an impact on the implementation prerogatives of the Member States.

IV. METHOD AND SOURCES

While several bodies are actively involved in the AFSJ (primarily the Council, European Commission, European Parliament, European Council, Court of Justice of the EU or the Member States), this study centers on examining the role that the decentralized agencies play in the implementation of EU legislation and policies. Specifically, out of the nine independent regulatory agencies that operate in the AFSJ, only Frontex, Easo and Europol are studied.

These three agencies were chosen as case studies due to their salient

⁶³ Among many, see GROENLEER, Martijn; KAEDING, Michael and VERSLUIS, Esther, "Regulatory governance through agencies of the European Union? The role of the European agencies for maritime and aviation safety in the implementation of European transport legislation", *Journal of European Public Policy*, 17(8), 2010, pp. 1212-1230; LUCHTMAN, Michiel and VERVAELE, John, "European Agencies for Criminal Justice and Shared Enforcement (Eurojust and the European Public Prosecutor's Office)", *Utrecht Law Review*, 10(5), 2014, pp. 132-150; OTTOW, Annetje, "Europeanization of the supervision of competitive markets", *European Public Law*, 18(1), 2012, pp. 191-221; SCHOLTEN, Miroslava, "Mind the trend! Enforcement of EU law has been moving to 'Brussels'", *Journal of European Public Policy*, 24(9), 2017, pp. 1348-1366; SCHOLTEN, Miroslava and SCHOLTEN, Daniel, "From regulation to enforcement in the EU policy cycle: a new type of functional spillover?", *Journal of Common Market Studies*, 55(4), 2017, pp. 925-942; TREIB, Oliver, "Implementing and complying with EU governance outputs", *Living Review European Governance*, 1(1), 2006, pp. 1-26; VERSLUIS, Esther, "Even rules, uneven practices: Opening the 'black box' of EU law in action", *West European Politics*, 30(1), 2007, pp. 50-67. See also, "The Utrecht Centre for Regulation and Enforcement in Europe" (RENFORCE), <http://renforce.rebo.uu.nl>.

operational tasks, their ability to conduct field operations, the recent expansion of their legal mandates, and the prominent inter-agency cooperation they develop on the ground under the hotspot approach in the aftermath of the “refugee crisis”. Additionally, the AFSJ agencies selected were established at different times under different Treaties and pillars, further enriching the analysis. Europol was originally created in 1995 under the Treaty of Maastricht (former third pillar), while Frontex was established in 2004 under the Treaty of Nice (former first pillar), and Easo, in 2010, under the current Treaty of Lisbon (former first pillar)⁶⁴.

Consequently, case study research is the method followed in this thesis, described as “a versatile form of qualitative inquiry most suitable for a comprehensive, holistic, and in-depth investigation of a complex issue (...)”⁶⁵. The selection of Frontex, Easo and Europol as cases generates great insight into the evolution of their operational functions and in-depth understanding of the activities that these agencies conduct in practice on the ground.

Case study research is defined as a method “primarily exploratory and explanatory in nature” employed to “gain an understanding of the issue in real life settings”. Case study research is then a suitable method for this study due to the lack of research on the specific operational powers that Frontex, Easo and Europol conduct, as well as to better understand the degree of support that these agencies provide to the Member States.

Moreover, as a legal study that addresses the evolution of the operational tasks of Frontex, Easo and Europol, this analysis interprets EU instruments related to these three agencies. The available information connected to their operational tasks, including documents issued by the EU institutions, the agencies under analysis, civil society, and Member States, was considered. It should be noted here that in the aftermath of the “refugee crisis”, the amount of information and attention devoted to Frontex, Easo and Europol increased

⁶⁴ For more detail see Chapter 2.

⁶⁵ HARRISON, Helena, *et al.*, “Case Study Research: Foundations and Methodological Orientations”, *Forum Qualitative Sozialforschung/Forum: Qualitative Social Research*, 2017 and ZAINAL, Zaidah, “Case study as a research method”, *Jurnal Kemanusiaan*, 5(1), 2007. See also, GERRING, John, “What is a case study and what is it good for?”, *American political science review*, 98(2), 2004, pp. 341-354.

exponentially⁶⁶. The study of this information was at all times completed with the doctrinal analysis (mainly legal publications, yet where deemed necessary, supplemented by political science and public administration publications), case law and other relevant secondary sources like reports, analyses, missions, evaluations, studies and reviews.

Given the novelty of this study and the dispersion and lack of public information available, the analysis in this thesis heavily relied on requests for access to documents lodged to Frontex, Easo, Europol and the Council of the European Union. Pursuant article 2(1) Regulation 1049/2001, “any citizen of the Union (...) has a right of access to documents of the institutions (...)”⁶⁷. In total, for this study, 41 such requests for access to documents were filed: 18 to Frontex, 5 to Easo, 7 to Europol and 11 to the Council of the European Union⁶⁸.

Since the information publicly available in regards to the operational activities and inter-agency cooperation among Frontex, Easo and Europol is very scarce, and gaining access to documents was challenging, this study’s research was also complemented by semi-structured interviews. From April to November of 2017, several interviews were conducted with officials of Frontex, Easo and Europol, as well as policy officers of the Directorate-General of the European Commission in charge of the Migration and Home Affairs policy area, experts of the Council of the European Union (Justice and Home Affairs Configuration) and members of the Civil Liberties, Justice and Home Affairs (LIBE) Committee of the European Parliament⁶⁹.

These interviews were conducted at the end of the research, since their foremost aim consisted in verifying certain findings, filling in particular knowledge gaps, and clarifying the operational role of the agencies. The semi-structure interviews undertaken are not used as formal sources for this study. That is, the findings and conclusions of the thesis are not based on the

⁶⁶ For a general and recent overview of the measures adopted in the asylum, borders and migration matters at the EU level see, European Parliamentary Research Service, “EU asylum, borders and external cooperation on migration: recent developments”, PE 621.878, May 2018.

⁶⁷ Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L-145, 31.05.2001.

⁶⁸ See Appendix A: Public Access to Documents.

⁶⁹ See, Appendix E: List of Interviews.

interviews, since the sample of individuals interviewed is not sufficiently representative⁷⁰ and the interviewees reflect their own professional and personal experience, which is a subjective interpretation of reality.

The interviews followed a semi-structured design. A list of questions was prepared beforehand but room was left to the interviewees in order to elaborate on their answers⁷¹. In this respect, several interviewees assisted in narrowing down my documentary research and identifying specific documents to be requested from Frontex, Easo and Europol. Most of the interviewees asked me not to disclose their names or position, thus for the sake of consistency, every interview of this study has been anonymized.

Lastly, this study also benefited from field research. I conducted two research stays in the United States, both at Washington College of Law (American University) from September to December 2016, and at Georgetown Law Center from May to August 2017. During these stays, the functioning, cooperation mechanisms and operational activities of the U.S. Department of Homeland Security was explored. This comparative research served as a starting point for understanding the *agencification* in the EU, mapping the cooperation and operational functions bestowed upon Frontex, Easo and Europol, and examining to what extent the AFSJ is moving towards a Europeanized and centralized administration.

Furthermore, I had the pleasure of partaking in additional field research at the Utrecht Centre for Regulation and Enforcement in Europe (RENFORCE), at the University of Utrecht. RENFORCE is a central point of research on the issues concerning enforcement of EU laws and policies and the new models of enforcement in the EU. During this research stay, the expanding role of Frontex, Easo and Europol, in ensuring an effective and harmonized implementation at the national and local level of EU migration, asylum and border management laws and policies, was examined.

⁷⁰ Given financial and resource constraints, no interviews could be carried out in the headquarters of Frontex (Poland), Easo (Malta) and Europol (The Netherlands). The interviews for this study were conducted by telephone or in Brussels.

⁷¹ See, Appendix D: Interview Questions.

V. OUTLINE

This study is divided into six chapters. The first and last chapters are devoted to the introduction and the conclusion. The second chapter studies the establishment of Frontex, Easo and Europol within the EU AFSJ institutional system, which directly influenced the current operational powers and cooperation bestowed upon these agencies. In particular, the *agencification* of the AFSJ, the increasing delegation of operational tasks to Frontex, Easo and Europol, and the progressive Europeanization of the Justice and Home Affairs (JHA) matters are examined. Frontex, Easo and Europol reflect, as the refugee crisis has clearly revealed, the institutional tug-of-war between the Member States and the EU in very sensitive matters such as border management, asylum and migration.

Chapter 3 maps Frontex, Easo and Europol as EU decentralized agencies. These AFSJ agencies conduct operational activities that distinguish them from the regulatory agencies established in other EU policy fields. It is unclear whether the EU institutions or the Member States conferred their operational powers to Frontex, Easo and Europol. Therefore, this chapter firstly defines and functionally and instrumentally classifies Frontex, Easo and Europol. The constitutionality and limits to the delegation of tasks to Frontex, Easo and Europol is also analyzed. In this respect, special attention is paid to the degree of discretion that Frontex, Easo and Europol enjoy in operationally supporting the competent national authorities to effectively and uniformly implement the AFSJ objectives. Lastly, the internal governance and administrative structures of Frontex, Easo and Europol, and the influence that the Member States exert through the management board and executive director of the agencies, is studied.

Chapter 4 analyzes the operational functions and their reinforcement from the time that Frontex, Easo and Europol were created. Secondly, the distinctive activities that these agencies conduct on the ground are analyzed. Specifically, the deployment of EBGT by Frontex, AST by Easo, and the participation of Europol in JITs, is examined. Lastly, the operational novelties of the recently adopted Regulation 2016/794 of Europol, the Regulation 2016/1624, which transforms Frontex into a EBCG, and the future Regulation on the EUAA,

repealing Easo, are explored. Special attention is paid to the increasing operational role of Europol, the autonomy and overseeing tasks of the EBCG and the future EUAA, as well as their role in shaping and steering a uniform and effective implementation.

Chapter 5 centers on studying the operational cooperation between Frontex, Easo and Europol. In particular, this chapter firstly describes the concept and implications of operational cooperation, as well as the terms, “duplication”, “overlap” and “fragmentation”. Secondly, the bilateral and multilateral operational cooperation between Frontex, Easo and Europol is explored. Thirdly, the hotspot approach, established in 2015 by the European Agenda on Migration, is examined. In particular, the functioning and the operational tasks of Frontex, Easo and Europol in the hotspots are scrutinized. Lastly, the limitations and impact of the reinforced multilateral inter-agency cooperation between Frontex, Easo and Europol in the hotspots is studied. Special attention is paid to the activities that these agencies conduct in practice at the hotspots, as to ensure an effective and harmonized implementation of the migration, border management and asylum policies.

CHAPTER 2. The Establishment of Frontex, Easo and Europol in Light of the Institutional Evolution of the EU Area of Freedom, Security and Justice

The EU AFSJ Agencies carry out their tasks in a policy field where external border controls, asylum, migration, the prevention and fight of cross-border crime, and the free movement of persons must be ensured. These agencies shall develop their tasks in an intricate and politicized field in which the EU and the Member States share competences. The institutional evolution and decision-making in the AFSJ is a highly complex process characterized by its intergovernmental nature. In 1992, the Treaty of Maastricht integrated the powers regarding judicial and police cooperation in criminal matters under the former third pillar of the EU. Thereafter, in 1997, the Treaty of Amsterdam established the AFSJ, which marked the beginning of the communitarization of migration, asylum, and visas matters. Finally, the Treaty of Lisbon set the AFSJ as a key objective for the EU and strengthened the role of the European Institutions to achieve such objective.

This chapter studies the establishment of Frontex, Easo, and Europol within the institutional evolution and progressive communitarization of the AFSJ. The specific AFSJ foundations under which Frontex, Easo, and Europol were created determine to an important extent their current nature, operational powers, and cooperation. Specifically, the novelties that the Treaties of Maastricht, Amsterdam, Nice, and Lisbon brought to the AFSJ and the significance of the multiannual programs of Tampere, The Hague, Stockholm, and the 2014 Strategic Guidelines in shaping Frontex, Easo, and Europol's operational tasks are analyzed (see figure 3). Particular attention is paid to the evolution of the operational

powers bestowed upon these agencies, and the increasing need of the Member States to be supported in consistently and effectively implementing the European policies of migration, asylum, and border management into a further integrated AFSJ.

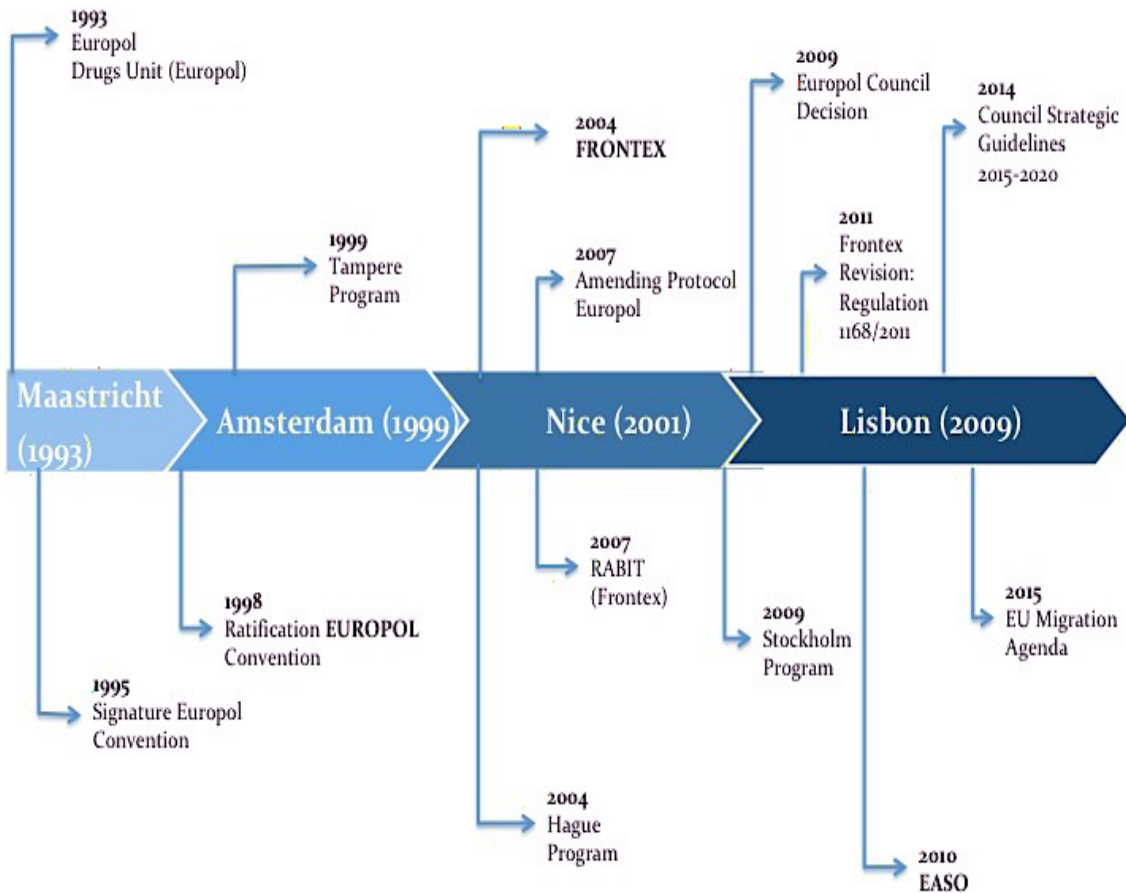


Figure 3: Institutional Evolution of the Area of Freedom, Security and Justice. Source: Author's own elaboration.

I. THE TREATY OF MAASTRICHT AND THE CREATION OF EUROPOL: PAVING THE WAY FOR DESIGNING FRONTEX AND EASO

1. The Dominant Intergovernmental Nature of the Third Pillar and the Marginal Role of the EU Institutions

The EU Institutions did not have any competence in the AFSJ until the Treaty of Maastricht entered into force on 1 November 1993. The Commission was only

allowed to observe the intergovernmental negotiations and the Parliament could be asked for its opinion. The EU Institutions were, for instance, completely excluded in the negotiations that led to the gradual abolition of controls at the internal borders. Belgium, Germany, Luxembourg, France, and The Netherlands signed the first Schengen Agreement on 14 June 1985, which was implemented by the Schengen Convention in 1990⁷².

A nascent operational cooperation in the AFSJ started with the TREVI (*terrorisme, radicalism et violence internationale*) framework⁷³. In 1975, under the momentum of the Rome European Council (1 December 1975), the Member States decided to strengthen their cooperation to better manage the terrorist challenges of the time. The TREVI group consisted of intergovernmental meetings at the ministerial level to exchange information on terrorism and design harmonized strategies between Member States. Particularly, the Group was internally organized into three levels: JHA Ministers and Ministers of migration, senior officials, and working groups. The working groups correspondingly dealt with terrorism (TREVI I, 1975), training, technical equipment, and public order (TREVI II, 1975). Additionally, these working groups fought against organized and international crime (TREVI III, 1985) and irregular migration, as well as strengthened police cooperation and the abolition of borders (TREVI'92, 1988)⁷⁴.

The TREVI group issued reports and exchanged information through liaison offices in each participating Member State. TREVI was based on inexplicit intergovernmental cooperation, with no reference to the Treaties, no

⁷² PEERS, Steve, *EU Justice and Home Affairs Law* (Third Ed.), Oxford: Oxford University Press, 2011, p. 9.

⁷³ See, BUNYAN, Tony, "Trevi, Europol and the European state", *Statewatching the new Europe*, 1993, pp. 1-15; DEN BOER, Monica and WALKER, Neil, "European policing after 1992", *Journal of Common Market Studies*, 31(1), 1993, pp. 3-28; KAUNERT, Christian, "The Area of Freedom, Security and Justice: The Construction of a 'European public order'", *European security*, 14(4), 2005, pp. 459-483; MONAR, Jörg, "The dynamics of justice and home affairs: laboratories, driving factors and costs", *Journal of Common Market Studies*, 39(4), 2001, pp. 747-764; OCCHIPINTI, John D., *The politics of EU police cooperation...*, *op. cit.*, pp. 29-34.

⁷⁴ PEEK, Johannes, "International Police Cooperation Within Justified Political and Juridical Frameworks: Five Theses on TREVI" in MONAR, Jörg and MORGAN, Roger (eds.), *The Third Pillar of the European Union: Cooperation in the fields of Justice and Home Affairs*, Brussels: European Interuniversity Press, 1994, pp. 201-207.

participation of the EU Institutions, and a very limited mandate⁷⁵. According to BUNYAN, the group consisted in a “forum for discussion and co-operation between the member states”⁷⁶. Nevertheless, the group paved the way by developing the future intergovernmental structures of the Third Pillar, as well as designing the JHA area. Precisely, most of the provisions included in the Europol Convention were originally established in the *ad hoc* TREVI working group created in 1992⁷⁷.

The Treaty of Maastricht was signed on 7 February 1992 and entered into force on 1 November 1993. This Treaty replaced the TREVI working groups and the informal cooperation between the Member States with permanent structures. The Maastricht Treaty introduced a single institutional framework and three “pillars”: the European Communities, the Common Foreign and Security Policy, and cooperation in the fields of JHA⁷⁸. Article K1 of the Treaty on European Union (TEU) detailed the areas included under the new third pillar (Title VI TEU): 1) asylum policy, 2) external border checks, 3) migration, 4) combatting drugs, 5) fighting international fraud, 6) judicial cooperation in civil matters, 7) judicial cooperation in criminal matters, 8) customs cooperation and, 9) police cooperation. The cross-border character of these matters and the need of the Member States to effectively manage them led to the establishment of the third pillar.

Whereas the creation of the third pillar revealed an incipient political will of the Member States to join forces and integrate common interest matters, the role of the EU Institutions still remained highly marginal. Contrary to the European Communities pillar, the third pillar was based on specific decision-making rules

⁷⁵ MONAR, Jörg, “The Institutional Framework of the AFSJ: Specific Challenges and Dynamics of Change” in MONAR, Jörg, *The Institutional Dimension of the European Union’s Area of Freedom Security and Justice*, Brussels: P.I.E. Peter Lang, 2010, p. 27.

⁷⁶ BUNYAN, Tony, “Trevi, Europol and the European state”, *op. cit.*, p. 5.

⁷⁷ See, WOODWARD, Rachel, “Establishing Europol”, *European Journal on Criminal Policy and Research*, 1(4), 1993, pp. 7-33.

⁷⁸ PEERS, Steve, *EU Justice and Home Affairs Law*, *op. cit.*, pp. 9-41. See, RIJPMAN, Jorrit, “The Third Pillar of the Maastricht Treaty: The Coming Out of Justice and Home Affairs” in DE VISSER Maartje and VAN DER MEI, Anne Pieter (Eds.), *The Treaty on European Union 1993-2013: Reflections from Maastricht*, Cambridge: Intersentia, 2013, pp. 269-288.

and intergovernmental cooperation mechanisms, with the aim of safeguarding Member States' sovereignty.

Firstly, the JHA Council, composed of the Member States' JHA Ministers, was the decision-making body in charge of adopting joint positions and actions, promoting cooperation between the EU and the Member States, and drawing up conventions to be adopted by the Member States (article K₃(2) TEU). The Council had to coordinate its decision-making tasks with the Member States (article K₃(1) TEU). Frequently, the Council's activity was paralyzed, since it was required to act unanimously when adopting any measure under the third pillar. Secondly, the Commission shared the right of initiative with Member States in all JHA matters. However, the Member States monopolized the right of initiative in judicial cooperation in criminal matters, customs cooperation, and police cooperation. According to article K₄(2) TEU, the Commission needed to be fully integrated in JHA matters to coordinate the various policy areas of Title VI TEU. Thirdly, the responsibilities of the Parliament were even more limited (article K₆ TEU). The Council was simply required to inform the Parliament of the discussions taking place between the Presidency and the Commission. Lastly, the European Court of Justice (ECJ) had no jurisdiction regarding third pillar matters. Article K₃(2)(c) TEU stated that the Court could only be granted jurisdiction to interpret or settle disputes when adopted conventions explicitly provided so.

Consequently, the Treaty of Maastricht designed a third pillar primarily based on intergovernmental cooperation⁷⁹. Member States were still highly reluctant to communitarize JHA matters due to their close connection with national sovereignty. Yet, the incipient role that the EU Institutions started to play under the Treaty of Maastricht can be considered a positive step towards a nascent communitarization. In this respect, KAUNERT considered that the most important innovation of the Treaty of Maastricht "was the institutionalization of

⁷⁹ See, MONAR, Jörg, "The Evolving Role of the Union Institutions in the Framework of the Third Pillar", in MONAR, Jörg and MORGAN, Roger (eds.), *op. cit.*, pp. 69-83; ULRICH JESSURUN D'OLIVEIRA, Hans, "Expanding External and Shrinking Internal Borders: Europe's Defense Mechanisms in the areas of Free Movement, Immigration and Asylum" in O'KEEFFE, David and TWOMEY, Patrick M. (eds.), *Legal Issues of the Maastricht Treaty*, Chichester: Wiley Chancery, 1994, pp. 261-278.

what the aim of cooperation in JHA already is a flanking measure of the Single Market”⁸⁰.

2. The Establishment of Europol: Ending the Intergovernmental Deadlock in the AFSJ?

A crucial institutional achievement under the third pillar was the signature of the Europol Convention in 1995⁸¹. The abolition of border checks between Member States and the fall of the Berlin wall led to a rise in cross-border criminality, which accentuated the need to strengthen cooperation between the competent national police authorities⁸². In fact, even before the Treaty of Maastricht entered into force, the Member States had already agreed to introduce a EU law enforcement office. At the Luxembourg European Council of June 28-29 1991, the German chancellor, Helmut Kohl, tabled a plan for the establishment of a European Federal Police mirroring the U.S. Federal Bureau of Investigation.

The proposed office was to be created in two consecutive stages: the office would begin to facilitate the exchange of information between the competent national law enforcement authorities; later on, the office would be granted independent investigative powers. However, the office never became a European Federal Bureau of Investigation, but rather, remained as an information-sharing center⁸³. In this regard, article K2(2) TEU indicated that the powers conferred to Europol “shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security”.

Article K1(9) TEU included police cooperation as a common interest area “under the organization of a Union-wide system for exchanging information

⁸⁰ KAUNERT, Christian, “The Area of Freedom, Security and Justice...”, *op. cit.*, p. 466.

⁸¹ OCCHIPINTI, John, *The politics of EU police cooperation...*, *op. cit.*, pp. 51-63.

⁸² DEN BOER, Monica and WALKER, Neil, “European policing after 1992”, *op. cit.*, pp. 8-9.

⁸³ Europol, “Ten Years of Europol 1999-2009”, 2009, <http://bit.ly/1Vzgg10> (last accessed: 30/04/2018); House of Lords (European Union Committee), “EUROPOL: coordinating the fight against serious and organised crime”, 29th Report of Session 2007-08, 12.11.2008, p. 11. See, MONACO, Francis R., “Europol: The culmination of the European Union’s international police cooperation efforts”, *Fordham International Law Journal*, 19(1), 1995, pp. 247-308.

within a European Police Office (Europol)”. Due to the anticipated lengthy negotiations to establish Europol, the Member States thus decided to create the Europol Drugs Unit (EDU) in 1993. The EDU was designed as an embryonic Europol⁸⁴ – a non-operational team in charge of exchanging and analyzing information and intelligence related to the trafficking of drugs between two or more Member States⁸⁵. The main objective of the EDU was “to help the Police and other Member States to combat the criminal activities (...) more effectively”⁸⁶. The autonomy of the EDU was minimal, despite having been tasked to assist and strengthen the cooperation of the national police to fight more effectively against new illegal activities⁸⁷. The Member States strictly controlled the activities and the data exchanged with liaison officers⁸⁸.

The EDU extended its activities until 1999, when all the required Member States ratified the Europol Convention. Europol finally started its operations on 1 October 1998 (article 45 Europol Convention), almost two years after the Treaty of Amsterdam had already entered into force. During the negotiations of the Europol Convention, it was especially difficult to reach an agreement regarding the role that the new police office was to play in very sensitive issues such as handling personal data or accessing and exchanging information. Additionally, the Member States were unable to reach a common position on the ECJ’s jurisdiction to hear disputes arising from Europol activities (article K3(2)(c) TEU)⁸⁹. In an effort not to excessively extend the negotiations, the national authorities ultimately decided to sign the Europol convention on 26 July 1995 and to attach a separate protocol specifying the ECJ’s competences to interpret the

⁸⁴ OCCHIPINTI, John D., *The politics of EU police cooperation...*, *op. cit.*, p. 34.

⁸⁵ European Council, Lisbon Summit, 26-27 June 1992. See, Ministerial agreement on the establishment of the Europol Drugs Unit, signed in Copenhagen on 2 June 1993 (unpublished, it can be found in BUNYAN, Tony (ed.), “Key texts on justice and home affairs in the European Union: 1976-1993”, *Statewatch*, 1997, pp. 46-47.)

⁸⁶ Council, “Joint Action of 10 March 1995 adopted by the Council on the basis of Article K.3 of the Treaty on European Union concerning the Europol Drugs Unit”, 95/73/JHA, OJ L-62, 20.03.1995.

⁸⁷ WOODWARD, Rachel, “Establishing Europol”, *European Journal on Criminal Policy and Research*, 1(4), 1993, p. 19.

⁸⁸ Council, “Joint Action of 10 March 1995 adopted by the Council on the basis of Article K.3 of the Treaty on European Union concerning the Europol Drugs Unit”, 95/73/JHA, OJ L-62, 20.03.1995.

⁸⁹ OCCHIPINTI, John D., *The politics of EU police cooperation...*, *op. cit.*, p. 57.

Europol convention⁹⁰. The ECJ was competent to interpret the Europol convention only if the Member States had accepted the competence of the ECJ to do so.

The Convention of Europol was passed with the objective of facilitating the exchange of information between Member States and assisting them in drug trafficking, illegal migrant smuggling, trafficking in nuclear and radioactive substances, trade in human beings, and motor vehicle crimes⁹¹. In 1995, Member States were not yet ready to delegate key tasks of national sovereignty to a supranational police office, yet recognized the importance of developing a common approach to serious crimes affecting two or more Member States.

Europol was designed as an intergovernmental body, excluded from the EU institutional framework. Put differently, Europol was not set up as a European Federal Police with independent investigative and operational powers, but rather as an information and intelligence hub. According to HAYES, Europol was originally established “to act as both a ‘clearing house’ for bilateral and multilateral exchanges of data and as curator and custodian of a central EU intelligence database, and when it was agreed every opportunity was taken to stress this non-operational constitution”⁹².

Hence, under the Treaty of Maastricht, the European Police Office lacked autonomy and was fully dependent on the willingness of the national authorities to provide the office with valuable information. Europol was not part of the institutional framework of the Union and was exclusively funded by the Member States’ contributions. The Office was established as an intergovernmental body, which ultimately hampered its day-to-day performance, since every amendment

⁹⁰ European Council, “Act of 23 July 1996 drawing up, on the basis of Article K.3 of the Treaty on European Union, the Protocol on the interpretation, by way of preliminary rulings, by the Court of Justice of the European Communities of the Convention on the establishment of a European Police Office”, OJ C-299, 09.10.1996.

⁹¹ Council, “Council Act of 26 July 1995 drawing up the Convention based on Article K.3 of the Treaty on European Union, on the establishment of a European Police Office (Europol Convention)”, OJ C-316, 27.11.1995, article 2.

⁹² HAYES, Ben, “The activities and development of Europol - towards an unaccountable ‘FBI’ in Europe”, *Statewatch*, January 2002, p. 2.

to its founding convention required the adoption of an additional protocol ratified by all Member States' parliaments⁹³.

Despite the primarily intergovernmental nature of Europol under the Treaty of Maastricht and its very limited operational competences, the establishment of the European police office revealed the Member States' need to further cooperate in cross-border crime matters at the EU level. Europol was the first and most relevant institutional player under the JHA pillar. In a way, Europol paved the way for the future establishment of more EU agencies, with the objective of assisting the competent national authorities in implementing very sensitive fields, such as police cooperation, migration, asylum, or border management.

II. THE TREATY OF AMSTERDAM AND THE TAMPERE MILESTONES: AN INSTITUTIONAL TURNING POINT FOR THE EU AREA OF FREEDOM, SECURITY AND JUSTICE?

a. The Timorous Communitarization of the AFSJ under the Treaty of Amsterdam

Whereas the emerging role of the EU Institutions under the Maastricht Treaty was a positive step towards supranational integration⁹⁴, the third pillar represented an ineffective institutional system (i.e. multiplicity of working levels, complexity, lack of transparency, and slow decision-making), in which the

⁹³ GROENLEER, Martijn, *The Autonomy of European Union Agencies...*, *op. cit.* p. 280. In this respect, DE MOOR and VERMEULEN argued "the main advantage of a decision over a convention in terms of flexibility and effectiveness is that it is relatively easy to adapt to changing circumstances, because it does not require ratification by Member States. Contrary to conventions, which only become binding upon ratification by the national governments after having been approved by the national parliaments or the citizens via referendum (...)". DE MOOR, Alexandra, and VERMEULEN, Gert, "The Europol council decision...", *op. cit.*, pp. 1092-1093. See also, House of Lords (European Union Committee), "EUROPOL: coordinating the fight against serious and organised crime", 29th Report of Session 2007-08, 12.11.2008, pp. 12-13.

⁹⁴ MARTÍN Y PÉREZ DE NANCLARES, José, "La inmigración en la Unión Europea: la difícil configuración de una política de inmigración", *Revista General de Derecho Europeo*, 5, 2003, pp. 83-90.

judicial and democratic mechanisms of oversight were lacking⁹⁵. Despite the initial opposition of the Member States to abandon the intergovernmental method in third pillar matters, the Amsterdam Treaty achieved some further communitarization of migration, asylum, and visas matters⁹⁶.

According to MONAR, four factors were crucial in this process towards further supranationalization: 1) the enhanced cross-border criminality as a result of the realization of the internal market; 2) the removal of controls on persons at internal borders per the gradual implementation of the Schengen framework; 3) the perception that the planned EU enlargement to the East and the South would increase the permeability of the European external borders and alter the existing crime threat perceptions and; 4) the control of the rising migratory influxes represented a challenge that the national authorities were not in a position to handle effectively if it was not in a coordinated manner at the EU level⁹⁷.

The Treaty of Amsterdam was signed in 1997 and entered into force in 1999. For the first time, this Treaty included one of the paramount objectives of the Union, the development of an AFSJ⁹⁸ and the incorporation of the Schengen

⁹⁵ Commission, "Towards an Area of Freedom, Security and Justice", COM(1998) 459 final, 14.07.1998, p. 2 and Council, "Reflection Group's Report", SN 520/95 (REFLEX 21), 05.12.1995, paras 46-48. See, DE ZWAAN, Jaap and VROUENRAETS, Mireille, "The Future of the Third Pillar: An Evaluation of the Treaty of Amsterdam" in HEUKELS, Ton, BLOKKER, Niels and BRUS, Marcel (eds.), *The European Union after Amsterdam: A Legal Analysis*, The Hague: Kluwer Law International, 1998, p. 206.

⁹⁶ For the negotiation and origins of the Amsterdam Treaty see among others, BUNYAN, Tony, "The Impact of the Amsterdam Treaty on Justice and Home Affairs Issues", *European Parliament Civil Liberties Series*, 2000; DE WITTE, Bruno, "The Pillar Structure and the Nature of the European Union: Greek Temple or French Gothic Cathedral?" in HEUKELS, Ton, BLOKKER, Niels and BRUS, Marcel (eds.), *op. cit.*, pp. 51-68; MANGAS MARTÍN, Araceli, "La reforma institucional en el Tratado de Ámsterdam", *Revista de Derecho Comunitario Europeo*, 2(3), 1998, pp. 7-40; MORAVCSIK, Andrew and NICOLAÏDIS, Kalypso, "Explaining the Treaty of Amsterdam: interests, influence, Institutions", *Journal of Common Market Studies*, 37(1), 1999, pp. 59-85; OREJA AGUIRRE, Marcelino, *et al.*, *El Tratado de Ámsterdam de la Unión Europea: análisis y comentarios*, Madrid: McGraw-Hill, 1998; PÉREZ DE LAS HERAS, Beatriz, "La reforma institucional: hacia una mayor legitimidad democrática y transparencia", *Cuadernos Europeos de Deusto*, 15, 1996, pp. 103-120.

⁹⁷ MONAR, Jörg, "Cooperation in the justice and home affairs domain: characteristics, constraints and progress", *European Integration*, 28(5), 2006, p. 496. In this regard see, European Council, "Council of the European Union & JHA: Cooperation in the fields of Justice and Home Affairs", BX-01-96-599-EN-C, 20.07.2000. See also, DEL VALLE GÁLVEZ, Alejandro, "Las fronteras de la Unión: el modelo europeo de fronteras", *Revista de Derecho Comunitario Europeo*, 12(6), 2002, pp. 299-341.

⁹⁸ Former article B fourth indent of the Maastricht Treaty established as an objective of the European Union "to develop close cooperation on justice and home affairs". The Treaty of

Convention into the institutional framework of the EU⁹⁹. The new Title IV Treaty of the European Community (TEC) covered the free movement of persons, the controls at the EU external borders, asylum, migration, visas, and judicial cooperation in civil matters. However, these policies were not immediately communitarized, since a transitory period of five years (until 2004) was prescribed. After this period, the Community method and a greater participation of the EU Institutions would extend to Title IV TEC. The areas related to internal security, criminal law, and police and judicial cooperation in criminal matters were not affected and remained governed by the provisions of Title VI TEU (Third Pillar)¹⁰⁰.

Furthermore, the United Kingdom, Ireland, and Denmark were granted a privileged position regarding the AFSJ matters communitarized by the Treaty of Amsterdam¹⁰¹. The United Kingdom and Ireland were granted an “opt-out”, combined with a selective “opt-in” to Title IV TEC¹⁰². The AFSJ would not apply to Denmark, yet as a Schengen member, it had the possibility to decide whether it would implement any Council decision regarding the Schengen *acquis*. If so, the assumed decision would only generate an obligation under international law between Denmark and the other Member States¹⁰³.

Amsterdam stated in the new article B that the Union shall set itself the objective “to maintain and develop (...) 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”. For an analysis of the provisions and priorities of the Treaty of Amsterdam in AFSJ see, Council, “Action Plan of the Council and the Commission on how Best to Implement the Provisions of the Treaty of Amsterdam on an Area of Freedom, Security and Justice”, OJ C-19, 23.01.1999, pp. 1-15. See, DEL VALLE GÁLVEZ, Alejandro, “La refundación de la libre circulación de personas, Tercer Pilar y Schengen: el espacio europeo de libertad, seguridad y justicia”, *Revista de Derecho Comunitario Europeo*, 3, 1998, pp. 41-78.

⁹⁹ PEERS, Steve, *EU Justice and Home Affairs Law*, *op. cit.*, pp. 36-41.

¹⁰⁰ For an analysis of the changes in the third pillar see, DE ZWAAN, Jaap and VROUENRAETS, Mireille, *op. cit.*, pp. 203-214.

¹⁰¹ See, MARTÍN Y PÉREZ DE NANCLARES, José, “La flexibilidad en el Tratado de Ámsterdam: especial referencia a la noción de cooperación reforzada”, *Revista de Derecho Comunitario Europeo*, 3, 1998, pp. 205-232; TOTH, A.G., “The Legal Effects of the Protocols Relating to the United Kingdom, Ireland and Denmark” in HEUKELS, Ton, BLOKKER, Niels and BRUS, Marcel (eds.), *The European Union after Amsterdam: A Legal Analysis*, The Hague: Kluwer Law International, 1998, pp. 227-252.

¹⁰² Protocol (No 4) on the position of the United Kingdom and Ireland (1997).

¹⁰³ Protocol (No 5) on the position of Denmark (1997).

The protocols signed with Denmark, the United Kingdom, and Ireland, as well as the matters that remained under the former Third Pillar watered down the communitarization of the AFSJ. Nonetheless, as soon as the five-year transitory period elapsed, the EU Institutions started to play a more prevailing role in the areas transferred to Title IV TEC.

Firstly, the JHA Council continued as an essential decision-making body in the AFSJ. Five years after the Treaty of Amsterdam entered into force, the Council was bestowed the power to adopt or reject, by unanimity, the legislative texts proposed by the Commission or the Member States (article 67(1) TEC)¹⁰⁴. After the five-year transitory period, qualified majority voting was extended to the Council when adopting measures regarding policy areas under the new Title IV (article 67(2) TEC) and unanimity continued in the Council when deciding on third pillar matters.

Secondly, the European Commission was granted an exclusive right of initiative after the five-year transitory period, although it was required to consider any request made by a Member State (article 67(2) TEC). Regarding police and judicial cooperation in criminal matters, the Commission shared its right of initiative with the Member States¹⁰⁵. The strengthened role of the Commission led to the creation of a Directorate-General for JHA.

Thirdly, in May 2004, the European Parliament's powers evolved from mere consultation to co-decision with the Council in visa, asylum, and migration

¹⁰⁴ See, NILSSON, Hans G. and SIEGL, Julian, "The Council in the Area of Freedom Security and Justice", in MONAR, Jörg, *The Institutional Dimension...*, *op. cit.*, pp. 53-82.

¹⁰⁵ The European Commission stressed the importance of interinstitutional cooperation in the AFSJ: "It is true that one of the features of the new Amsterdam set-up is an adjustment of responsibilities giving the Commission a bigger role. But what is important is not so much the fact of having a right of initiative, be it shared or exclusive, as the way in which this right is exercised. In any case the Treaty provides that for five years the right of initiative will be shared between the Commission and the Member States for matters transferred to the Community framework. In these areas more than in others it will therefore be necessary to continue a constructive dialogue between the Member States and the Commission". Commission, "Towards an Area of Freedom, Security and Justice (Vienna Action Plan)", COM(1998) 459 final, 14.07.1998, p. 3.

policies (article 67 TEC)¹⁰⁶. The Council was required to consult the Parliament before adopting any third pillar measure (article K.1(1) TEU).

Lastly, whereas the ECJ, under the Treaty of Maastricht, had no competences in the AFSJ and was completely excluded in reviewing any measure adopted by the Council, the Treaty of Amsterdam expanded the Court's jurisdiction to the communitarized matters (article 68 TEC), and to a certain extent, to third pillar policies (article K.7 TEU)¹⁰⁷.

Since the Treaty of Amsterdam deepened the split between communitarized and third pillar matters, two committees of the Council were mandated to operationally coordinate these two pillars. "Article 36 Committee" or CATS (Coordinating Committee in the Area of Police and Judicial Cooperation in Criminal Matters), which succeeded the previous "K4 Committee", was tasked to prepare the Council's discussions of the remaining matters under the third pillar¹⁰⁸. The second committee created was the SCIFA (Strategic Committee on Immigration, Frontiers and Asylum), integrated by high officials of the Member States, in charge of coordinating and preparing the instruments and policies of Title IV TEC¹⁰⁹.

¹⁰⁶ For an analysis of the role of the European Parliament in the AFSJ see, BOELES, Pieter, "Parliamentary and Judicial Control in Matters of Asylum and Immigration under the Treaty of Amsterdam" in HEUKELS, Ton, BLOKKER, Niels and BRUS, Marcel (eds.), *op. cit.*, pp. 217-222; NAVARRO BATISTA, Nicolás, "El déficit democrático y la reforma de las instituciones comunitarias" in OLESTI RAYO, Andreu (coord.), *Las incertidumbres de la Unión Europea después del Tratado de Amsterdam*, Barcelona: Jose Maria Bosh, 2000, pp. 55-66.

¹⁰⁷ MONAR, Jörg, "Justice and Home Affairs in the Treaty of Amsterdam: Reform at the price of Fragmentation", *European Law Review*, 23, 1998, pp. 330-331. See also, DEL VALLE GÁLVEZ, Alejandro, "La refundación de la libre circulación de personas, tercer Pilar y Schengen: el espacio europeo de libertad, seguridad y justicia", *Revista de Derecho Comunitario Europeo*, 2(3), 1998, pp. 62-70.

¹⁰⁸ Ever since the CATS was created it has assisted the Council of the European Union in very relevant matters (e.g. drafting Europol Regulation, merging Cepol and Europol, reforming Eurojust, guaranteeing coordination and consistency at EU level between national administrations, EU agencies and bodies). See, Council, "The future of CATS - Contribution to the evaluation by COREPER", doc. 14207/1/14 REV 1 CATS 152, 07.11.2014, p. 3.

¹⁰⁹ Council, "The future of SCIFA", doc. 17182/11, 18.11.2011.

2. The Tampere Program and the Introduction of New Institutional Players in the AFSJ

While it was not until the Treaty of Lisbon that the European Council became a European Institution, it was already in charge of defining the priorities and strategic objectives in JHA matters under the Treaty of Amsterdam. By adopting multi-annual programs, the European Council was responsible for defining policy orientations and developing integration in the AFSJ. The European Council held its first meeting in Tampere (Finland) on 15 and 16 October 1999, which centered exclusively on JHA matters¹¹⁰. The policy agenda in the AFSJ, centering on the period from 1999–2004, was set with the mission of facilitating mutual recognition between Member States and establishing minimum principles to safeguard individual rights¹¹¹. The European Council called for closer cooperation and mutual technical assistance between the Member States in the border control services and in the investigation of cross-border crime.

The Tampere Program declared that EU agencies should play a key role in supporting national authorities in the implementation of AFSJ policies. As expressed by DEN BOER, there was a proliferation and institutionalization of law enforcement cooperation initiatives¹¹². Specifically, the European Council considered that the mandate of Europol “should be strengthened by means of receiving operational data from Member States and authorizing it to ask Member States to initiate, conduct or coordinate investigations or to create joint investigative teams in certain areas of crime (...)”¹¹³. Furthermore, the Tampere Program indicated that a European Police College Network for training senior

¹¹⁰ European Council, Tampere Presidency Conclusions, 15–16 October 1999. For an analysis of the adoption of the Tampere Program see, BUNYAN, Tony, “The Story of Tampere: An Undemocratic Process Excluding Civil Society”, *Statewatch briefing*, September 2003; House of Lords, “Prospects for the Tampere Special European Council”, 27.07.1999.

¹¹¹ BUONO, Laviero, “From Tampere to The Hague and beyond: towards the Stockholm Programme in the Area of Freedom, Security and Justice”, *ERA Forum*, 10, 2009, p. 333.

¹¹² DEN BOER, Monica, *op.cit.*, p. 275.

¹¹³ European Council, Tampere Presidency Conclusions, 15–16 October 1999, para 45.

law enforcement officials, a European Police Chiefs Operational Task Force, and a European Union Judicial Unit (Eurojust) should be established¹¹⁴.

Whereas the tasks of Europol were limited under the Maastricht Treaty to merely collecting and analyzing information and then forwarding such information to the Member States, the Treaty of Amsterdam, in article 30(2) TEU, expanded Europol's powers and further promoted police cooperation¹¹⁵. Europol was tasked to facilitate, coordinate, and carry out specific investigative and operational actions to support and assist the Member States. In this respect, Europol could request that the competent national authorities conduct and coordinate their investigations to better assist the Member States in investigating cases of organized crime. In the same vein, the Council was mandated to promote liaison arrangements between prosecuting/investigating officials, specializing in the fight against organized crime, and Europol¹¹⁶.

The Tampere Program specified that JITs shall "be set up without delay" in order to "allow representatives of Europol to participate, as appropriate, in such teams in a support capacity"¹¹⁷. JITs were introduced with the aim of facilitating the exchange of information and strengthening the operational cooperation between the law enforcement and judicial authorities of the Member States, to swiftly and effectively investigate cross-border crimes¹¹⁸. According to BLOCK, JITs were introduced since "the traditional strategy of cross-border police

¹¹⁴ Ibid., para 47.

¹¹⁵ In line with the recommendations included for instance in the Action plan to combat organized crime adopted by the Council on 28 April 1997. See, Council, "Action plan to combat organized crime", OJ C-251, 15.08.1997, pp. 1-16, recommendation 25. See also, SANTOS VARA, Juan, "El desarrollo de las competencias...", *op. cit.*, pp. 141-179.

¹¹⁶ See, Council, "First reflections concerning the Tampere Conclusions as far as they relate to Europol", doc. 13370/99, 25.11.1999.

¹¹⁷ European Council, Tampere Presidency Conclusions, 15-16 October 1999, para 43.

¹¹⁸ DE MOOR, Alexandra, "The Role of Europol in Joint Investigation Teams: a Foretaste of an Executive European Police Office" in COOLS, Marc, *et. al.*, *Readings on Criminal Justice, Criminal Law and Policing*, Antwerp: Maklu, 2009, pp. 330-331. This section only deals with the role that Europol plays in JITs rather than JITs in criminal matters between Member States in which Europol is excluded. In this regard see, GUALTIERI, Claudia, "Joint Investigation Teams", *ERA forum*, 8(2), 2007, pp. 233-238 and RIJKEN, Conny, "Joint Investigation Teams: principles, practice, and problems: Lessons learnt from the first efforts to establish a JIT", *Utrecht Law Review*, 2(2), 2006, pp. 99-118. For a comprehensive study of JITs in the EU see, RIJKEN, Conny and VERMEULEN, Gert, *Joint Investigation Teams in the European Union: From Theory to Practice*, The Hague: TMC Aser Press, 2006.

cooperation in criminal investigations (...) was outdated and insufficient”¹¹⁹. That is, JITs aimed to streamline the exchange of information, develop an effective cooperation, and avoid the duplication of investigations between the law enforcement and judicial authorities of the Member States.

In 2002, a protocol was signed to amend the Europol convention, which included a provision permitting Europol officials to participate in a support capacity in JITs¹²⁰. This amending protocol, which was not ratified until 29 March 2007, allowed Europol officials to assist in all activities (excluding the development of coercive measures) and exchange information with the participating members of the concerned JIT¹²¹. According to article 3a(4) of the 2002 amending protocol, “Europol officials may liaise directly with the members of the joint investigation team and provide members and seconded members of the joint investigation team (...) with information from any of the components of the computerized system of collected information (...)”. Furthermore, article 3b stated that Europol may request Member States to initiate, conduct, or coordinate investigations. If the national authority decided “not to comply with a request from Europol, they shall inform Europol of their decision and of the reasons for it”. Hence, the 2002 amending protocol of the Europol Convention expanded its original supporting role to a more operational one¹²².

While the amending protocol did not enter into force until 2007, Europol was already indirectly involved in JITs¹²³ by: 1) providing knowledge; 2) assisting in the

¹¹⁹ BLOCK, Ludo, “EU Joint Investigation Teams: Political Ambitions and Police Practices”, in HUFNAGEL, Saskia, BRONIT, Simon and HARFIELD, Clive (eds.), *Cross-Border Law Enforcement Regional Law Enforcement Cooperation - European, Australian and Asia-Pacific Perspectives*, London: Routledge, (2011), p. 107.

¹²⁰ Protocol amending the Convention on the establishment of a European Police Office (Europol Convention) and the Protocol on the privileges and immunities of Europol, the members of its organs, the deputy directors and the employees of Europol, OJ C-312/1, 16.12.2002.

¹²¹ Regarding the contradiction of article 3a between the terms “can assist in all activities” and “shall not take part in the taking of any coercive measures” see, DE BUCK, Bart, “Joint Investigation Teams...”, *op. cit.*, pp. 260-261.

¹²² NIEMEIER, Michael and WIEGAND, Marc André, “Europol and the Architecture of Internal Security” in MONAR, Jorg (ed.), *op. cit.*, p. 183. Regarding the operational powers of Europol see, SCHALKEN, Tom and PRONK, Maarten, “On joint investigation teams, Europol and supervision of their joint actions”, *European Journal of Crime Criminal Law and Criminal Justice*, 10(1), 2002, pp. 74-76.

¹²³ HERZ, Annette, “The Role of Europol and Eurojust in Joint Investigation Teams”, in RIJKEN, Conny and VERMEULEN, Gert (eds.), *op. cit.*, p. 171.

coordination of the operations; 3) advising on technical matters and; 4) assisting in the analysis of offences through the Analysis Work Files (criminal intelligence gathered by Europol including operational and strategic measures to tackle high-priority serious crime areas impacting the EU)¹²⁴. Until the amending protocol entered into force in 2007, Europol had the opportunity to demonstrate and convince the Member States that its assistance in the JITs could not only strengthen the transmission and collection of information, but also lead to a more effective multilateral cooperation, than if national authorities resorted to traditional bilateral agreements¹²⁵.

The Tampere Program also declared that a Police Chief Task Force (PCTF) shall be in charge of exchanging, in cooperation with Europol, “experience, best practices and information on current trends in cross-border crime and contribute to the planning of operative actions”¹²⁶. The PCTF was introduced in order to fill in the gap between the intelligence on serious organized crime gathered by Europol and its translation into operational activity¹²⁷. Furthermore, the PCTF was also created due to the lack of a permanent forum where European top law enforcement officials could formally convene to tackle problems that directly concerned them¹²⁸.

The PCTF is a high level informal group, independent from Europol, made up of chief police officers from each Member state. The PCTF centers on specific priority organized crime threats, such as trafficking in human beings, irregular migration, car theft, and child abuse¹²⁹. The PCTF was mandated to report and

¹²⁴ Council recommendation of 30 November 2000 to Member States in respect of Europol's assistance to joint investigative teams set up by the Member States, OJ C-357, 13.12.2000. See DE MOOR, Alexandra, *op. cit.*, p. 342 and DE BUCK, Bart, *op. cit.*, p. 257.

¹²⁵ DE MOOR, Alexandra, *op. cit.*, p. 342.

¹²⁶ European Council, Tampere Presidency Conclusions, para 44. For a detailed analysis of the evolution of the PCTF see, BUNYAN, Tony, “The EU's Police Chief Task Force (PCTF) and Police Chiefs Committee”, *Statewatch Analysis*, pp. 1-12.

¹²⁷ Council, “European Police Chiefs Operational Task Force”, doc. 5858/00, 2 February 2000, p. 1.

¹²⁸ *Ibid.*, p. 2.

¹²⁹ For instance, regarding irregular migration the Task Force focused on developing cooperation with third countries and distinguishing between trafficking in human beings and migrant smuggling. European Council, “Presidency conclusions from the 6th meeting of police chiefs task force (Copenhagen, Denmark, 22-23 July 2002)”, doc. 11751/02, 09.09.2002.

send out priorities and recommendations to the JHA Council at least annually¹³⁰. The PCTF's role was "to plan, decide, coordinate and assess intelligence led police operations against international terrorism and cross border crime", as well as to suggest operational cooperation among law enforcement actors¹³¹.

However, a report on the achievements of the Tampere Program highlighted that the PCTF needed to focus "to a greater extent on the planning and executions of actual police operations at Union level"¹³². The report continued to state that the exact role of the PCTF in the Union's institutional architecture and working methods needed to be fine-tuned. In this respect, it was declared that "while the establishment of Europol (...) had been based on a specific legal act (...) the PCTF had no institutional or legal status" and stressed that "the place of the PCTF (...) in the architecture of the European Union's Institutions had to be specified and its work methods clarified if coordination between the three bodies was to be effective"¹³³.

The PCTF did not have a legal basis until the Committee on Internal Security (COSI) took over its tasks after the Treaty of Lisbon entered into force¹³⁴. While the PCTF met at Europol's offices with the support and assistance of the European Council and the Council secretariat¹³⁵, it lacked a constitutional or legal basis, which concurrently hindered its accountability and transparency. Nevertheless, the flexibility and lack of accountability of the PCTF appealed to

¹³⁰ Council, "European Police Chiefs Operational Task Force", doc. 5858/00, 02.02.2000, p. 2.

¹³¹ Council, "Presidency conclusions of the extraordinary meeting of the European Chiefs of Police Task Force held in Brussels on 10 May 2004", doc. 9453/04, 11.05.2004.

¹³² Council, "Evaluation of the conclusions of the Tampere European Council", doc. 13416/2/01 REV 2, 14.11.2001, p. 11.

¹³³ Council, "Coordination between Europol, (Pro-) Eurojust, the EU Police Chiefs Task Force – Conclusion No 12 of the JHA Council on 20 September 2001", doc. 15389/01, 14.12.2001.

¹³⁴ Council, "Consequences of the entry into force of the Lisbon treaty: the COSI", doc. 5815/10, 29.01.2010.

¹³⁵ Council, "Role and positioning of the Police Chiefs Task Force with a view to strengthening the EU operational police cooperation", doc. 14708/04, 15.11.2004. Regarding the institutional framework within the Task Force should operate two options were considered: Europol and the Council. The European Council considered that "(...) a natural link exists between the Task Force and the tasks of Europol as set out in the Europol Convention. (...) [T]he Europol Convention could be used as a framework for such a Task Force. It could also be set up as a working party of the Management Board (...). For setting up such a Task Force in the Council framework, a decision of Coreper is sufficient, given that Coreper is responsible for the setting up of working parties (...)". See, Council, "First reflections concerning the Tampere Conclusions as far as they relate to Europol", doc. 13370/99, 25.11.1999.

the Member States, since the States preferred to organize multilaterally at the PCTF rather than through the JITs¹³⁶.

III. THE TREATY OF NICE AND THE HAGUE PROGRAM: TOWARDS THE *AGENCIFICATION* OF THE AREA OF FREEDOM, SECURITY AND JUSTICE?

1. The Limited Impact of the Treaty of Nice and the Ambitious Strategic Objectives of the Hague Program

The institutional framework of the EU did not experience any significant revision after the Treaty of Nice entered into force on 2 February 2003 (signed on 26 February 2001)¹³⁷. The novelties brought by the Treaty of Amsterdam were not even halfway implemented when the Treaty of Nice was adopted. In fact, the Treaty of Nice was signed only two years into the five-year transitory period, which the Treaty of Amsterdam put forward as a time frame to fully implement the new AFSJ rules. Hence, the Treaty of Nice essentially amended specific provisions, with the objective of adapting the recently established AFSJ to the

¹³⁶ BUNYAN, Tony, "The EU's Police Chief Task Force...", *op. cit.*, p. 11. Regarding the preference of the Member States of the PCTF over the JITs see among others, Council, "Summary of discussions", doc. 9494/05, 30.05.2005; Council, "Summary of discussions", doc. 11034/07, 25.06.2007 or Council, "Summary of discussions", doc. 11033/09, 23.06.2009.

¹³⁷ For a detailed analysis of the institutional innovations of the Treaty of Nice see, ALDECOA LUZARRAGA, Francisco, "El Tratado de Niza, consolidación y reforma de la Unión Europea", *Cuadernos Europeos de Deusto*, 25, 2001, pp. 11-54; ANDRÉS SÁENZ DE SANTAMARÍA, Paz, "La reforma institucional en el Tratado de Niza: la búsqueda del círculo cuadrado" in MOREIRO GONZÁLEZ, Carlos J. (coord.), *Tratado de Niza: análisis, comentarios y texto*. Madrid: Colex, 2002, pp. 41-66; CALONGE VELÁZQUEZ, Antonio (coord.), *La reforma institucional en el Tratado de Niza*, Valladolid: Lex Nova, 2004; LAURSEN, John C. (ed.), *The Treaty of Nice: actor preferences, bargaining and institutional choice*, Leiden: Brill Academic Publishers, 2005; USHER, John A., "Assessment of the Treaty of Nice - Goals of institutional reform", in ANDENAS, Mads and USHER, John A. (eds.), *The Treaty of Nice and Beyond. Enlargement and Constitutional Reform*, Portland: Hart Publishing, 2003, pp. 183-206; YATAGANAS, Xenophon A. "The Treaty of Nice: The Sharing of Power and the Institutional Balance in the European Union - A Continental Perspective", *European Law Journal*, 7(3), 2001, pp. 242-291.

new EU decision-making scenario, since ten new countries were to accede the Union in May 2004¹³⁸.

The Treaty of Nice added a fifth paragraph to article 67 TEC, ordering that the Council shall act by qualified majority when adopting decisions concerning visas, asylum, migration, and judicial cooperation in civil matters¹³⁹. In this regard, the Council Decision 2004/927 of 22 December 2004 modified the decision-making rules as from January 2005. In matters of asylum, migration, and border protection under Title IV TEC (excluding legal migration, family law, visa lists, and visa formats), the Commission had an exclusive right of initiative, qualified majority voting ruled in the Council, and the full involvement of Parliament as a co-legislator¹⁴⁰.

Furthermore, the Treaty of Nice amended the jurisdiction of the ECJ. Article 67(2) TEC stated that after the five-year transitory period, the Council shall revise the special rules of the ECJ regarding Title IV TEC matters¹⁴¹. According to article 68 TEC, the ECJ could only answer questions of interpretation coming from Member States' tribunals of final appeal¹⁴². This limitation represented a significant "anomaly [in] an area that it is particularly sensitive in terms of

¹³⁸ MANGAS MARTÍN, Araceli, "El Tratado de Niza: los complejos equilibrios en la futura Unión Europea ampliada" in *Cursos de Derecho Internacional de Vitoria-Gasteiz 2001*, Bilbao: Servicio Editorial Universidad del País Vasco, 2002, pp. 245-284.

¹³⁹ For an analysis of the EU Asylum and Immigration Law changes brought by the Nice Treaty see, DE ZWAAN, Jaap W., "EU Asylum and Immigration Law and Policy: State of Affairs in 2005" in DE ZWAAN, Jaap W. and GOUDAPPEL, Flora A.N.J. (eds.), *Freedom, Security and Justice in the European Union: Implementation of the Hague Programme*, The Hague: TMC Asser Press, 2006, pp. 91-150; DONAIRE VILLA, Francisco Javier, "El espacio de libertad, seguridad y justicia en el Tratado de Niza", *Cuadernos de derecho público*, 13, 2011, pp. 103-124; QUEL LÓPEZ, Francisco Javier, "Análisis de las reformas en el Espacio de Libertad, Seguridad y Justicia en el Tratado de Niza", *Revista de Derecho Comunitario Europeo*, 5(9), 2001, pp. 117-144.

¹⁴⁰ For decision making under the Nice Treaty see, MOBERG, Axel, "The Nice Treaty and voting rules in the Council", *Journal of Common Market Studies*, 40(2), 2002, pp. 259-282; PEERS, Steve, "Transforming Decision-Making on EC Immigration and Asylum Law", *European Law Review*, 30(2), 2005, pp. 285-296; TSEBELIS, George and YATAGANAS, Xenophon, "Veto Players and Decision-making in the EU After Nice", *Journal of Common Market Studies*, 40(2), 2002, pp. 283-307.

¹⁴¹ The Council never adopted the Communication from the Commission, "Adaptation of the provisions of Title IV of the Treaty establishing the European Community relating to the jurisdiction of the Court of Justice with a view to ensuring more effective judicial protection", 28.6.2006, (COM(2006) 346 final), which was approved by the European Parliament Resolution of 25.04.2007 (A6-0082/2007).

¹⁴² See, PEERS, Steve, "The future of the EU judicial system and EC immigration and asylum law", *European Journal of Migration and Law*, 7(3), 2005, pp. 263-274.

fundamental rights”, since affected individuals are deprived of “effective judicial protection”¹⁴³.

The main novelty for third pillar matters, brought by the Treaty of Nice, was the promotion of “closer cooperation between judicial and other competent authorities of the Member States, including cooperation through the European Judicial Cooperation Unit (Eurojust)” (article 29 TEC). The Council was ordered to encourage cooperation and coordination between national prosecuting authorities and Eurojust in serious cross-border crime cases (article 31(2) TEC). By including a specific reference to Eurojust, the Treaty of Nice intended to put in an equal footing police and judicial cooperation, since the treaty of Amsterdam was clearly favoring the former¹⁴⁴.

The Treaty of Nice did not introduce any significant development to the institutional setting of the AFSJ. Nevertheless, the new five-year agenda, succeeding the Tampere Program, constituted an essential blueprint for the Constitutional Treaty; yet due to the Constitutional Treaty’s unsuccessful ratification, the Tampere Program became a blueprint for the Treaty of Lisbon. The Hague Program was adopted at the European Council Summit of 4-5 November 2004 and further deepened the objectives of the Tampere Program¹⁴⁵. The Hague Program was organized under ten priorities that were to be developed

¹⁴³ BALDACCINI, Anneliese and TONER, Helen, “From Amsterdam and Tampere to the Hague: An Overview of Five Years of EC Immigration and Asylum Law” in BALDACCINI, Anneliese, GUILD, Elspeth and TONER, Helen (eds.), *Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy*, Oxford: Oxford University Press, 2007, p. 20.

¹⁴⁴ QUEL LÓPEZ, Francisco Javier, *op. cit.*, p. 127.

¹⁴⁵ European Council, “Presidency Conclusions 4/5 November 2004”, doc. 14292/1/04 REV 1, 08.12.2004. See, European Council, “The Hague Programme: Strengthening Freedom, Security and Justice in the European Union”, OJ C-53, 03.03.2005, pp. 1-14. For a general overview of the Hague Program, see BALZACQ, Thierry and CARRERA, Sergio, “The Hague Programme: The Long Road to Freedom, Security and Justice” in BALZACQ, Thierry and CARRERA, Sergio (eds.), *Security versus Freedom? A Challenge for Europe’s Future*, New York: Routledge, 2006, pp. 1-34; DE ZWAAN, Jaap and GOUDAPPEL, Flora (eds.), *Freedom, Security and Justice in the European Union - Implementation of the Hague Programme 2004*, The Hague: T.M.C. ASSER PRESS, 2006; ELSEN, Charles, “From Maastricht to The Hague: the politics of judicial and police cooperation”, *ERA Forum*, 8(1), 2007, pp. 13-26; NASCIBENE, Bruno, “The global approach to migration: European Union policy in the light of the implementation of the Hague Programme”, *ERA Forum*, 9(2), 2008, pp. 291-300; PLENDER, Richard, “EU Immigration and Asylum Policy: The Hague Programme and the way forward”, *ERA Forum*, 9(2), 2008, pp. 301-325.

in the AFSJ from 2005 to 2010¹⁴⁶. Precisely, with the aim of monitoring the execution of the new program and translating its objectives into concrete actions, the European Council suggested that the Commission presented an Action Plan¹⁴⁷ as well as yearly reports¹⁴⁸.

The ten priorities of the Hague Program consisted in: 1) creating fully-fledged policies regarding fundamental rights and citizenship such as the transformation of the European Monitoring Center for Racism into a Fundamental Rights Agency; 2) developing a global response to fight against terrorism; 3) establishing a Common European Asylum System before the end of 2010, after which a European Support Office should be designed; 4) defining a balanced approach towards migration management; 5) maximizing the positive impact of migration through integration policies; 6) developing an integrated management of internal borders, external borders (with the support of a Border Management Agency) and visas for a safer Union; 7) striking the right balance between privacy and security in sharing of information; 8) developing a strategic concept of organized crime, which requires improving cooperation between law enforcement services as well as making full use of and further developing Europol and Eurojust; 9) guaranteeing an effective European area of justice, in which Eurojust should be considered as the key actor and; 10) sharing responsibility and solidarity.

Three contemporary driving forces markedly influenced the content of these priorities: 1) the claim for more securitization, as a result of the terrorist attacks that took place in New York on 11 September 2001 and in Madrid on 11 March 2004; 2) the preparatory works for the adoption of the Treaty, establishing a Constitution for Europe (the European Council planned to review the Hague Program at the end of 2006 after the foreseen adoption of the Constitutional

¹⁴⁶ Commission, “The Hague Programme: Ten priorities for the next five years - The Partnership for European renewal in the field of Freedom, Security and Justice”, COM(2005) 184 final, 10.05.2005.

¹⁴⁷ Council, “Council and Commission Action Plan implementing the Hague Programme on strengthening freedom, security and justice in the European Union”, OJ C-198, 12.08.2005, pp. 1–22.

¹⁴⁸ Commission, “Report on the implementation of the Hague Programme for 2005”, COM(2006) 333 final, 28.06.2006; Commission, “Report on the implementation of The Hague Programme for 2006”, COM(2007) 373 final, 03.07.2007; Commission, “Report on implementation of the Hague programme for 2007”, COM(2008) 373 final, 02.07.2008.

Treaty); 3) the effective promotion and respect of fundamental rights, since the Constitutional Treaty planned to incorporate the EU Charter of Fundamental Rights into its text and to access the European Convention on Human Rights.

2. The Agencification of the AFSJ: The Reinforcement of Europol and the Creation of Frontex

The Action Plan of the Hague Program paid special attention to the operational competences and practical cooperation of the actors in charge of assisting the Member States in implementing the expanding AFSJ legal and policy instruments. The European Council determined that “coordination of operational activities by law enforcement agencies and other agencies in all parts of the area of freedom, security and justice, and monitoring of the strategic priorities set by the Council, must be ensured”¹⁴⁹.

The emphasis of the European Council in promoting the operational powers of the EU agencies in the AFSJ responded to the deficient national implementation of the Community measures¹⁵⁰. In this respect, the situation was even more acute regarding the legal instruments adopted under the former intergovernmental third pillar, since they lacked direct effect in the Member States’ legal systems. As LADENBURGER pointed out, the functioning of the decisions regarding police and judicial cooperation in criminal matters depended “entirely on the good will of each member state to transpose them faithfully in national law, and this all the more so since the Commission has no tools for

¹⁴⁹ European Council, “The Hague Programme: Strengthening Freedom, Security and Justice in the European Union”, OJ C-53, 03.03.2005, p. 10, section 2(5); Council, “Council and Commission Action Plan implementing the Hague Programme on strengthening freedom, security and justice in the European Union”, OJ C-198, 12.08.2005, p. 16.

¹⁵⁰ See, the annual reports on monitoring the application of Community Law in the Justice and Home Affairs sector issued by the European Commission. These reports can be found in the website: <http://bit.ly/2eUifUc>. Particularly, the “Nineteenth annual report on monitoring the application of community law (2001)”, COM(2002) 324 final, 28.06.2002, p. 70 stated that the communitarized provisions of the AFSJ might be monitored in accordance with the principles of Community law and the failure to respect them may lead to an infringement proceeding. On the other hand, regarding the instruments under the Title VI of the EU Treaty, the Commission may only ensure their proper transposal by tabling a report, which can ultimately be used to impose political penalties when one of the Member States fail to comply with one of the adopted instruments.

controlling their correct implementation, such as the infringement procedure (...)”¹⁵¹.

This section studies the enhanced operational tasks that the Hague Program brought to Europol and the adoption of the new Europol’s Council Decision. Furthermore, the process, factors, and negotiations that led to the creation of Frontex are analyzed. While The Hague Program also suggested the introduction of Easo, the establishment of this agency is studied later on in this chapter since the regulation of Easo was not adopted until May 2010, when the Treaty of Lisbon had already entered into force ¹⁵².

2.1. *Strengthening Europol*

The Hague Program took to deepening the police cooperation and the institutional framework set up by the Treaty of Amsterdam and the Tampere Agenda. The Hague Program stressed that “in specific border areas, closer cooperation and better coordination is the only way to deal with crime and threats to public security and national safety”¹⁵³. Through The Hague Program, the European Council did not only promote the full use of Europol, but also recommended that Europol’s tasks and mandate should be enhanced in order to transform the office into a central actor in the AFSJ.

In fact, after the terrorist attacks in New York, Madrid, and London, Europol’s role became more prominent¹⁵⁴. Europol had to function in a very different context than the one under which it was originally created. In 2007, the EU was

¹⁵¹ LADENBURGER, Clemens, “Police and Criminal Law in the Treaty of Lisbon”, *European Constitutional Law Review*, 4(1), 2008, p. 22.

¹⁵² See, Chapter 2, section IV.2.3.

¹⁵³ European Council, “The Hague Programme: Strengthening Freedom, Security and Justice in the European Union”, OJ C-53, 03.03.2005, p. 9.

¹⁵⁴ In this regard see, ARGOMANIZ, Javier, “Post-9/11 institutionalisation of European Union counter-terrorism: emergence, acceleration and inertia”, *European Security*, 18(2), 2009, pp. 151-172; BOSWELL, Christina, “Migration control in Europe after 9/11: Explaining the absence of securitization”, *Journal of Common Market Studies*, 45(3), 2007, pp. 589-610; BURES, Oldrich, “Europol’s fledgling counterterrorism role”, *Terrorism and Political Violence*, 20(4), 2008, pp. 498-517; GREGORY, Frank, “The EU’s response to 9/11: a case study of institutional roles and policy processes with special reference to issues of accountability and human rights”, *Terrorism and Political Violence*, 17(1-2), 2005, pp. 105-123.

enlarged to 27 Member States and a growing number of (competing) participants in the AFSJ were to be introduced (i.e. Frontex or Easo)¹⁵⁵. Taking into account these factors, the European Council considered that fighting cross-border organized crime required enhanced operational cooperation between national police authorities and Europol.

Europol was mandated to develop cross-border police coordination and combat organized crime by encouraging cooperation between the competent national authorities and the European police office¹⁵⁶. In this respect, before January 2006, The Hague Program required Europol to replace its “crime situation reports” with annual “threat assessments” on serious forms of organized crime. These analyses, based on information provided by the Member States and the Police Chiefs Task Force, would allow the Council to develop its yearly strategic priorities and guidelines for further action¹⁵⁷. In addition, the Action Plan, implementing The Hague Program, designed the Organized Crime Threat Assessment (OCTA). The OCTA was a strategic product assigned to Europol with the aim of improving the knowledge of organized crime and enhancing operational cooperation¹⁵⁸.

The Hague Program detailed that “the Council should adopt the European law on Europol, provided for in Article III-276 of the Constitutional Treaty, as soon as possible after the entry into force of the Constitutional Treaty and no later than 1 January 2008, taking account of all tasks conferred upon to Europol”. Yet, the Constitutional Treaty never entered into force and the transformation of Europol’s legal framework had to be addressed differently.

In June 2006, the Council ordered to “commence work in order to consider whether and how to replace by 1 January 2008, or as soon as possible thereafter,

¹⁵⁵ DEN BOER, Monica and BRUGGEMAN, Willy, “Shifting gear: Europol in the contemporary policing era”, *Politique Européenne*, 23(3), 2007, p. 82.

¹⁵⁶ European Council, “The Hague Programme: Strengthening Freedom, Security and Justice in the European Union”, OJ C-53, 03.03.2005, p. 9.

¹⁵⁷ *Ibid.*, p. 9.

¹⁵⁸ Council, “Council and Commission Action Plan implementing the Hague Programme on strengthening freedom, security and justice in the European Union”, OJ C-198, 12.08.2005, p. 13.

the Europol Convention by a Council Decision”¹⁵⁹. The European Commission, in December 2006, presented its Proposal for a Council Decision establishing Europol¹⁶⁰. Finally, on 6 April 2009, the JHA Council agreed with the Commission’s proposal of replacing Europol’s Convention by a Council Decision. The new legal framework of Europol entered into force on 1 January 2010.

The Impact Assessment which accompanied the Commission’s proposal indicated that Europol should be provided with a flexible legal framework to better adapt to the volatile cross-border criminal environment¹⁶¹. In particular, the requirement of adopting additional protocols each time the original Europol Convention needed to be amended impeded the police office, in practice, from effectively supporting the competent national authorities in combatting organized crime¹⁶². According to the Friends of the Presidency’s Report to the Future of Europol, “the time frame for changing the Europol legal framework is generally considered to be unacceptable”¹⁶³.

The Commission’s proposal aimed to expand the mandate and functions of Europol by namely extending its powers to the field of criminality and providing Europol the power to manage new information processing tools. Under this proposal, Europol could also support a Member State in major international events with a public order policing impact. Additionally, according to the Commission’s proposal, Europol could be competent to coordinate, organize, and execute investigative and operational action jointly with the concerned Member States or in the context of JITs. In particular, Europol could also suggest that the competent national authorities involved in the JITs take coercive measures.

¹⁵⁹ Council, “Council Conclusions on the Future of Europol”, doc. 9670/2/06, 06.06.2006, p. 3, conclusion 3.

¹⁶⁰ Commission, “Proposal for a Council Decision establishing the European Police Office (EUROPOL)”, COM(2006) 817 final, 20.12.2006.

¹⁶¹ Commission, “Accompanying document to the proposal for a Council Decision establishing the European Police Office (EUROPOL): Impact Assessment”, SEC(2006) 1682, 20.12.2006.

¹⁶² *Ibid.*, p. 5.

¹⁶³ Council, “Friends of the Presidency’s report to the Future of Europol”, doc. 9184/1/06, 19.05.2006, p. 5.

These amendments put forward, in the words of PEERS, represented a move towards Europol “becoming a form of [a] federal police force (...)”¹⁶⁴.

However, the Member States ultimately continued as the main actors responsible for fighting organized crime. Europol’s operational role was limited to assisting the competent national authorities in their investigations, providing them with analytical support, and if previously requested by a Member State, coordinating JITs. That is, Europol was not conferred any autonomous enforcement powers and it was mandated to assist the competent national police authorities. Europol’s Council Decision was a step forward to break from the well-established bilateral cooperation between the Member States and their constant reluctance to share information with Europol.

2.2. *The Establishment of Frontex*

The Hague Program welcomed the establishment of Frontex and recommended introducing teams of national experts in charge of providing rapid technical and operational assistance to the national border authorities requesting so. In order for Frontex to effectively function, The Hague Program considered it essential to promote the agency’s cooperation with the national border and customs authorities and to support those Member States subject to “special and unforeseen circumstances due to exceptional migratory pressures”¹⁶⁵.

Frontex was established on 26 October 2004 and was the first EU agency with a mandate directly related to migration, asylum, and border management. The creation of Frontex represented a crucial step towards “the gradual introduction of an integrated management system for external borders” (article III-265 of the Treaty establishing a Constitution for Europe). The factors that led to the adoption of a European approach to border management, the institutional

¹⁶⁴ PEERS, Steve, “Europol: The final step in the creation of an ‘Investigative and Operational’ European Police Force”, *Statewatch Analysis*, 2007, p. 4. Regarding the use of Impact Assessments see, TONER, Helen, “Impact Assessments: A Useful Tool for ‘Better Lawmaking’ in EU Migration Policy?” in BALDACCINI, Anneliese, GUILD, Elspeth and TONER, Helen, *op. cit.*, pp. 109-148.

¹⁶⁵ European Council, “The Hague Programme: Strengthening Freedom, Security and Justice in the European Union”, OJ C-53, 03.03.2005, p. 6.

models that were assessed by the European Commission before Frontex was finally established, and the negotiations of Frontex Regulation 2007/2004 are examined here.

2.2.1. Factors Determining the Need for Adopting a European Approach to Border Management

The need for a shared responsibility and a common European approach to border management was not addressed at The Hague Program, but rather in a European Parliament Resolution of 3 April 1998 on the implications of the enlargement of the EU for cooperation in the field of JHA. This Resolution stated that a “European border control force should be introduced to control future external borders which draws on the national experience of border control forces for implementation at Community level as, in the long-term, the responsibility for controlling the EU’s external borders cannot simply be left to the most northerly, easterly, southerly or westerly Member State but must be borne, both technically and financially, on a Community basis”¹⁶⁶.

In 2004, ten new Member States, which were less financially and operationally prepared, were to be in charge of an important extension of the European external borders¹⁶⁷. As MONAR pointed out, “the external border control capabilities of the future new Member States were not going to fulfill EU/Schengen standards by the time of accession (...), and (...) substantial EU help would be needed well beyond the time of accession”¹⁶⁸.

While the EU enlargement influenced the debate at the European level surrounding the cooperation between Member States in the management of their

¹⁶⁶ Resolution of 3 April 1998 on the implications of enlargement of the European Union for cooperation in the field of justice and home affairs, OJ C-138, 04.05.1998, A4-0107/98, para 19.

¹⁶⁷ HOBGING, Peter, “Management of External EU Borders: Enlargement and the European Border Guard Issue” in CAPARINI Marina and MARENIN, Otwin (eds.), *Borders and Security Governance. Managing Borders in a Globalised World*, Geneva: Geneva Centre for the Democratic Control of Armed Forces, 2006, p. 178.

¹⁶⁸ MONAR, Jorg, “The Project of a European Border Guard: Origins, Models and Prospects in the Context of the EU’s Integrated External Border Management” in CAPARINI Marina and MARENIN, Otwin (eds.), *op. cit.*, p. 195.

external borders, the incorporation of the Schengen *acquis* into the framework of the EU was the key factor for the integration of border management. In this regard, MONAR argued that “the Schengen system (...) created de facto a single internal security zone encompassing all Schengen members in which the absence of any internal border controls meant that the external border parts of each individual Schengen member became a matter of common concern”¹⁶⁹. Precisely, in October 1999, the Tampere Program stressed that the integration of the Schengen *acquis* into the Union required an enhanced cooperation and mutual technical assistance between the Member States and the candidate countries to effectively control the European external borders¹⁷⁰.

Two additional factors contributed to strengthening the European external border controls and the establishment of Frontex: terrorist threats and the increasing migratory pressure. The terrorist attacks in New York and Madrid, in 2001 and 2004 respectively, brought to the forefront the need to reinforce the European external borders to effectively secure and prevent cross-border organized crime¹⁷¹. Furthermore, since the early 2000’s, the migratory pressure at the Southern European border has continually risen and currently remains high, further straining the Schengen system¹⁷². In line with the principles of fair sharing of responsibility and solidarity, the Member States facing an extraordinary arrival of undocumented migrants should be operationally assisted.

¹⁶⁹ Ibid., p. 195.

¹⁷⁰ European Council, Tampere Presidency Conclusions, 15-16 October 1999, paras 24-25.

¹⁷¹ JORRY, H el ene, “Construction of a European Institutional Model for the Management of Operational Cooperation at the EU External Borders: Does the FRONTEX Agency take a decisive step forward?”, *Challenge Liberty and Security*, Research Paper 6, March 2007, p. 1. However, the degree to which the terrorist attacks in New York and in Madrid led to a securitization of the European external border is disputed. In this regard see, BOSWELL, Christina, “Migration control in Europe after 9/11...”, *op. cit.*, pp. 589-610; L EONARD, Sarah, “EU border security and migration into the European Union: FRONTEX and securitisation through practices”, *European Security*, 19(2), 2010, pp. 231-254; NEAL, Andrew, “Securitization and risk at the EU border...”, *op. cit.*, pp. 333-356.

¹⁷² In this respect see, European Commission Communication, “Reinforcing the management of the European Union’s Southern Maritime Borders”, COM(2006) 733 final, 30.11.2006; ACOSTA S ANCHEZ, Miguel Angel and DEL VALLE G ALVEZ, Alejandro, “La crisis de los cayucos. La Agencia Europea de Fronteras FRONTEX y el control mar ıtimo de la inmigraci on clandestina”, *Tiempo de paz*, 83, 2006, pp. 19-30; CARRERA, Sergio, “The EU Border Management Strategy: FRONTEX and the Challenges of Irregular Immigration in the Canary Islands”, *CEPS Working Document*, 261, March 2007.

Consequently, steady migratory pressure, terror threats, and cross-border organized crimes at the external borders required a European institutional approach (a common framework for Member States to operationally and effectively cooperate) to safeguard the functioning of the Schengen system. A more integrated approach to border management was desirable, since “differences in national legislation and administrative practice was causing security discrepancies between sections of external borders controlled by the different Member States”¹⁷³.

2.2.2. Institutional Models for the Management of the European External Borders

The communitarization of the external border management is a highly sensitive matter for the Member States¹⁷⁴. In this regard, the establishment of Frontex in 2004 represented a middle-way approach, since the agency promotes an increasingly needed operational cooperation between the Member States, while respecting their sovereignty and exclusive responsibility in managing their external borders. Despite the fact that Frontex may only operationally assist the competent national authorities, its creation still signified, according to HOBGING, a revolution “of Member States’ monopoly in implementing and enforcing EU legislation at the borders”¹⁷⁵. Specifically, the following paragraphs examine the institutional models that were considered for the effective and harmonized management of the European external borders.

In November 2001, the European Commission announced the adoption of a coherent strategy to guarantee high standard external border controls. The Communication called for the creation of a permanent technical cooperation support facility in charge of information gathering and dissemination, coordination of operational cooperation, and the administration of the European

¹⁷³ MONAR, Jorg, “The Project of a European Border Guard...”, *op. cit.*, p. 195.

¹⁷⁴ See, House of Lords, Select Committee on the European Union, “Proposals for a European Border Guard”, Session 2002–03, 29th Report, 1.07.2003, p. 10.

¹⁷⁵ HOBGING, Peter, “Management of External EU Borders...”, *op. cit.*, p. 175.

migration systems (Schengen Information System, Eurodac, European Visa Identification System)¹⁷⁶.

In December 2001, the European Council of Laeken considered that a better management of the European external borders would “help in the fight against terrorism, illegal immigration networks and the traffic in human beings”. In order to achieve these objectives, the European Council asked the Council and the Commission “to work out arrangements for cooperation between services responsible for external border control and to examine the conditions in which a mechanism or common services to control external borders could be created”¹⁷⁷.

The Commission followed the mandate of the European Council of Laeken and financially contributed (through the Odysseus Program) to a feasibility study led by Italy (with the participation of Belgium, France, Germany, Italy and Spain) regarding the establishment of a European Border Police¹⁷⁸. On 30 May 2002, the study was made public and two organizational models, “unitary” and “network”, were identified according to the degree of integration and supranationality desired to be conferred to the EU in the management of the external borders¹⁷⁹.

The unitary model would centralize all the executive competences of border control at the European level. This model was organizationally described as the most efficient, since it would eliminate any kind of duplicity or lack of coordination between the several national authorities responsible for border surveillance. However, it would also be the most difficult of models to implement, since not only would the Member States be highly hesitant to delegate such powers, which are directly linked to their national sovereignty, but because it would also require all the national border authorities to merge¹⁸⁰.

On the other hand, the network model would imply the development of a

¹⁷⁶ Commission, “Communication on a Common Policy on Illegal Immigration”, COM(2001) 672 final, 15.11.2001, p. 19.

¹⁷⁷ Presidency Conclusions - Laeken, 14 and 15 December 2001, doc. SN 300/1/01 REV 1, para 42.

¹⁷⁸ Feasibility Study for the Setting-up of a European Border Police, Final Report, Roma, 2002, <http://www.statewatch.org/news/2005/may/eba-feasibility-study.pdf>, (last accessed: 30/04/2018), p. 29. See, House of Lords (European Union Committee), “Proposals for a European Border Guard”, 29th Report of Session 2002–03, 01.07.2003, pp. 10–11.

¹⁷⁹ For a detailed description of the “unitary” and “network” models see, MONAR, Jorg, “The Project of a European Border Guard...”, *op. cit.*, p. 197.

¹⁸⁰ Feasibility Study for the Setting-up of a European Border Police, *op. cit.*, p. 29.

European Border Corps that would coordinate and assist the national authorities in charge of the external borders. This model would have a more flexible structure, easily adaptable to a context as volatile as the external borders, and the Member States would receive it more positively. Yet, a European Border Corps would not guarantee a border coordination at the European level as uniform and effective as the one offered by the unitary model¹⁸¹. The Italian study finally recommended an intermediate and predominantly intergovernmental model, which would consist of “a modified network structure with a centralized body with coordination functions” and “articulated in a series of ‘knots’, each of them related to specific and sector requirements/objectives, organized as operational Centers with a little nucleus of support and assisted by a certain number of consultants/experts”¹⁸².

Following the mandate of the European Council of Laeken and having consulted the feasibility study led by Italy, the Commission published a communication in May 2002 entitled “towards integrated management of the external borders of the Member States of the European Union”¹⁸³. The main challenge that the Commission identified in the management of the European external borders consisted in the lack of effective operational coordination between the national authorities, preventing the achievement of a more uniform level of security in the borders. The Commission considered it essential to design an operational common cooperation and coordination body, that in the short-term, would consist of an External Borders Practitioners Common Unit, and in the medium-term, a European Corps of Border Guards¹⁸⁴.

The External Borders Practitioners Common Unit would have an intergovernmental nature and would be integrated into the structures of the Council, and particularly, would develop from the SCIFA working group. On the contrary, the European Corps of Border Guards would be an independent supranational organization in charge of developing first surveillance and control

¹⁸¹ Ibid., p. 30.

¹⁸² Ibid., p. 30.

¹⁸³ Commission, “Communication towards Integrated Management of the External Borders of the Member States of the European Union”, COM(2002) 233 final, 07.05.2002.

¹⁸⁴ Ibid., p. 24.

missions at the external borders, and would commission its own border guards at a later stage.

The European Commission acknowledged that the design of the European Corps of Border Guards would require revising the treaties and overcoming a major constitutional challenge such as “conferring the prerogatives of public authority on staff of the European Corps who do not have the nationality of the Member State where they are deployed”¹⁸⁵. Furthermore, two other practical issues would need to be settled: the recruitment, statutory, and disciplinary conditions of the border guards placed at the disposal of the European Corps by the Member States, and the allocation of its own equipment¹⁸⁶.

The European Commission concluded that operational coordination and cooperation should rest upon two instruments: an External Borders Practitioners Common Unit and a permanent process of exchange of data and information. The Common Unit would be in charge of conducting common integrated risk analysis, assisting Member States subject to crisis situations, acting as a manager to guarantee greater convergence between the national border guards in the field of personnel and equipment, and exercising an inspection function when a specific crisis or risk analysis requests it¹⁸⁷.

Finally, in June 2002, the Council decided to introduce the External Borders Practitioners Common Unit, integrated by the heads of the border control services of the Member States and the SCIFA¹⁸⁸, which altogether constituted SCIFA+. The Council requested the Member States to initiate joint operations at the external borders and pilot projects, establish a network of Member States’ migration liaison officers, prepare a common risk analysis model, and design a common core curriculum for border guard training. The EU political leaders in the Seville European Council welcomed the Council’s plan and recommended its immediate implementation¹⁸⁹. The Member States followed the Seville European

¹⁸⁵ Ibid., p. 21.

¹⁸⁶ Ibid., p. 21.

¹⁸⁷ Ibid., p. 14.

¹⁸⁸ Council, “Plan for the management of the external borders of the Member States of the European Union”, doc. 10019/02, 14.06.2002.

¹⁸⁹ Council, “Presidency Conclusions, Seville European Council, 21-22 June 2002”, 22.06.2002, para

Council's mandate and developed joint operations and pilot projects in the external borders, as well as created ad-hoc centers.

The External Borders Practitioners Common Unit was tasked to coordinate the ad-hoc centers on border control and to manage the network of national contact points, which were in charge of facilitating the cooperation between the national border guard authorities as well as approving and monitoring common operations and pilot projects¹⁹⁰. To some extent, the Council followed the Italian feasibility study, since it proposed the creation of a network structure of interdependent, but operationally autonomous and specialized ad-hoc centers in the territories of the Member States¹⁹¹. The centers were the Land Borders (Germany), the Western Sea Borders (Spain), the Air Borders (Italy), the Eastern Sea Borders (Greece), the Risk Analysis Center (Finland), the Center for Training (Austria and Sweden), and the Centre of Excellence (United Kingdom).

The main functions of the ad-hoc centers of land, sea, and air borders consisted in facilitating the exchange of personnel and information, as well as coordinating and providing operational assistance during joint operations¹⁹². The Risk Analysis Center was in charge of carrying out periodical reports and analyzing border security risks¹⁹³. The ad-hoc Training Center was assigned the task of establishing a Common Core Curriculum and designing training sessions for national border guards in order to set up common standards and harmonize the Member States' procedures in this field¹⁹⁴. Lastly, the Center of Excellence aimed to establish new technologies to facilitate the control and surveillance of the external borders¹⁹⁵.

In regards to common and joint operations, the heads of the national border guards, based on intelligence and common risk analysis, were required to identify

32.

¹⁹⁰ Council, "Plan for the management of the external borders of the Member States of the European Union", *op. cit.*, para 45. See, WOLFF, Sarah and SCHOUT, Adriaan, "Frontex as Agency: More of the Same?", *Perspectives on European Politics and Society*, 14(3), 2013, p. 311.

¹⁹¹ *Ibid.*, para 56.

¹⁹² Council, "Report on the implementation of programmes, ad hoc centres, pilot projects and joint operations", doc. 10058/1/03, 11.06.2003, p. 9.

¹⁹³ *Ibid.*, p. 12.

¹⁹⁴ *Ibid.*, p. 8.

¹⁹⁵ *Ibid.*, p. 14.

and determine the operational needs at their external borders¹⁹⁶. The Member States were required to provide experts and equipment to common and joint operations¹⁹⁷. Several joint operations were launched between 2002 and 2004 concerning sea borders (Ulysses, Triton, RIO IV, ORCA), land borders (monitoring of the eastern external land borders, with Greece as the leading country), and air borders (RIO III)¹⁹⁸. The Member States did not only launch joint operations and establish ad-hoc centers, but also initiated pilot projects, which aimed to improve the operational standards and procedures of the national border guard authorities. For instance, France led two pilot projects regarding the removal of irregular migrants and the investigation of cross-border crime¹⁹⁹.

Hence, the Council abandoned the idea of developing a European Corps of Border Guards, since at the time it was not supported by most of the Member States, thus opting instead for an approach with a strong intergovernmental character - the External Borders Practitioners Common Unit. The Member States considered the operational and financial support of the EU, through the Common Unit, sufficient to ensure a coherent and consistent management of the external borders and to improve the effective implementation of EU law. The Common Unit's mandate was limited to increasing the operational coordination between the national authorities, remaining exclusively competent to manage and monitor their external borders²⁰⁰.

2.2.3. Negotiating the Establishment of Frontex

Over the course of a year, the External Borders Practitioners Common Unit had a

¹⁹⁶ Ibid., para 58.

¹⁹⁷ Ibid., para 58.

¹⁹⁸ For a detailed description of these joint operations see, Council, "Progress Report for the Implementation of the Plan for the management of external borders of the Member States of the European Union and the comprehensive plan for combating illegal immigration", doc. 7504/03, 17.03.2003.

¹⁹⁹ Council, "Report on the implementation of programmes, ad hoc centres, pilot projects and joint operations", doc. 10058/1/03, 11.06.2003, pp. 15-17.

²⁰⁰ House of Lords (European Union Committee), "Proposals for a European Border Guard", 29th Report of Session 2002-03, 01.07.2003, p. 18.

very limited impact on the efficient management of the Union's borders. According to the report on the implementation of programs, ad-hoc centers, pilot projects and joint operations of the Council, the Common Unit proved incapable to carry out its work systematically and to receive the respect and trust of the parties involved. The failure of the Common Unit was largely due to its inadequate preparation and planning, as well as an insufficient operational cooperation and legal basis that prevented the Common Unit from developing common operations²⁰¹.

Meanwhile, the Member States also failed to fully comply with their obligations towards the Common Unit, which ended up being highly politicized and mainly "promoting individual Member States' pet projects"²⁰². Ultimately, the realization of a uniform and effective European border management depended on the operational powers conferred to the Common Unit and the commitment of the Member States to further communitarize this area.

Likewise, the European Commission considered that the institutional status of the Common Unit, which met under the SCIFA+ formation, hindered the effective implementation of the risk assessments, the joint operations, and the pilot projects. The Common Unit was unable to develop a uniform, effective, and operational coordination of the ad-hoc centers. The European Commission concluded that "a much more operational body should perform the daily operational management of these activities requiring a permanent and systematic activity"²⁰³.

The Common Unit needed to be reviewed with the aim of delegating the operational tasks to a "new permanent Community structure able to exercise this day-to-day management and coordination tasks and to respond in time to

²⁰¹ Council, "Report on the implementation of programmes, ad hoc centres, pilot projects and joint operations", doc. 10058/1/03, 11.06.2003 and Council, "Progress Report for the Implementation of the Plan for the management of external borders of the Member States of the European Union and the comprehensive plan for combating illegal immigration", doc. 7504/03, 17.03.2003.

²⁰² NEAL, Andrew, "Securitization and risk at the EU border...", *op. cit.*, p. 342.

²⁰³ Commission, "Communication in view of the European Council of Thessaloniki on the Development of a Common Policy on Illegal Immigration, Smuggling and Trafficking of Human Beings, External Borders and the Return of Illegal Residents", COM(2003) 323 final, 03.06.2003, p. 7.

emergency situations”²⁰⁴. Therefore, in a report to the Council by the Greek Presidency, it was considered necessary to design a new institutional structure to promote effective operational cooperation in the management of external borders²⁰⁵. In November 2003, following the Thessaloniki European Council²⁰⁶, the European Commission proposed the creation of Frontex²⁰⁷.

The Commission pointed out that the implementation of common European rules by the national border authorities was insufficient. So as to effectively apply these rules, a harmonized control and surveillance of the external borders was necessary. Precisely, the mission of the proposed regulation consisted in rendering “more effective the implementation of Community policy on the management of the external borders by better coordinating the operational co-operation between the Member States via the creation of an Agency”²⁰⁸. To achieve this purpose, the new agency would not have regulatory or enforcement powers, but would support the Member States in applying the European legislation regarding border management. Frontex would be mandated to fill an important institutional gap in the AFSJ – the difficulty in “verifying the implementation of policies by national authorities, given the limited role of the Court of Justice and the restricted powers of the Commission (...)”²⁰⁹.

While the Council positively received the proposal for the creation of the agency to promote solidarity and operationally support the competent national authorities, it stressed that the Member States shall remain responsible for the control and surveillance of their external borders²¹⁰. The Council pointed out that

²⁰⁴ Ibid., p. 8.

²⁰⁵ Ibid., pp. 6-8.

²⁰⁶ Thessaloniki European Council 19 and 20 June 2003, doc. 11638/03, 01.10.2003, p. 4. Previously, the European Commission presented a Feasibility study on the control of the European Union’s maritime borders see, Council, “Feasibility study on the control of the European Union’s maritime borders – Final Report”, doc. 11490/1/03 REV 1, 19.09.2003.

²⁰⁷ Commission, “Proposal for a Council Regulation establishing a European Agency for the Management of Operational Co-operation at the External Borders”, COM(2003) 687 final/2, 20.11.2003.

²⁰⁸ Ibid., p. 4.

²⁰⁹ Commission, “Area of Freedom, Security and Justice: Assessment of the Tampere programme and future orientations”, COM(2004) 4002 final, 02.06.2004, pp. 4-5.

²¹⁰ Council, “Proposal for a Council Regulation establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union”, doc. 5803/04, 29.01.2004, p. 3.

the Member States shall voluntarily participate in the common joint operations and pilot projects²¹¹, and shall continue to cooperate bilaterally if their actions complement those of Frontex²¹². The intergovernmental governance structure of the agency was guaranteed, since each Member State would have a representative in the Management Board of the agency²¹³. Despite Frontex' operational support to the national authorities in a very sensitive competence like the management of the external borders, the Member States would see their sovereignty safeguarded, since the Commission would be underrepresented in the management board of Frontex (one representative per State against two from the Commission).

The position of the Council clearly contrasted with the European Parliament's opinion, which was requested according to article 67 TEC. The European Parliament argued for a more Europeanized structure of Frontex²¹⁴, in which the Commission and the Parliament should play a greater role to effectively control and hold the agency accountable. The Parliament recommended a change in the proposed configuration of the management board of the agency, which it argued, should be composed of six members appointed by the Commission and six by the Member States²¹⁵. The Parliament recommended that the Commission, rather than the Management Board, should be in charge of appointing the Executive Director of Frontex²¹⁶. The Parliament considered that the Executive Director should be heard before her appointment or upon the Parliament's request, and

²¹¹ Council, "Council Conclusions on the main elements of the Commission proposal for a Council Regulation establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union", doc. 15446/03, 28.11.2003, p. 5.

²¹² Council, "Draft Council Regulation establishing on the main elements of the Commission proposal for a Council Regulation establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union", doc. 7428/04, 16.03.2004, p. 4.

²¹³ Council, "Proposal for a Council Regulation establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union", doc. 5803/04, 29.01.2004, p. 3.

²¹⁴ Parliament, "Report on the proposal for a Council regulation establishing a European Agency for the Management of Operational Co-operation at the External Borders (COM(2003) 687 - C5-0613/2003 - 2003/0273(CNS))", A5-0093/2004, 24.02.2004, p. 30. See, EKELUND, Helena, "The establishment of FRONTEX...", *op. cit.*, p. 108.

²¹⁵ Parliament, "Report on the proposal for a Council regulation establishing a European Agency for the Management of Operational Co-operation at the External Borders (COM(2003) 687 - C5-0613/2003 - 2003/0273(CNS))", A5-0093/2004, 24.02.2004, p. 18.

²¹⁶ *Ibid.*, p. 20.

should report her tasks and submit a general report regarding Frontex operations to the Parliament²¹⁷.

The European Parliament was also against the agency's function of coordinating and organizing joint return operations²¹⁸, arguing that the insufficient cooperation division of responsibilities among the bodies operating in Frontex' field of activity would lead to a risk of duplication of work²¹⁹. However, as the Parliament critically anticipated in its report, the Council did not open a public discussion regarding the establishment of Frontex and the Parliament's amendments were disregarded²²⁰.

The negotiations for establishing Frontex lasted less than a year, since the agency was proposed on 20 November 2003 and adopted on 26 October 2004²²¹. Two factors rushed these negotiations: 1) the imminent EU enlargement (expected by May 2004); 2) the completion on 1 January 2005 of the five-year transitional period, after which external border matters would be governed by the co-decision procedure (article 68(2)) TEC), which would imply that the European Parliament shall actively be involved, rather than merely consulted, in the legislative process²²².

Since Regulation 2007/2004 was a development of the Schengen *acquis*, the

²¹⁷ Ibid., p. 22.

²¹⁸ Ibid., p. 31. Regarding the coordination of joint return operations by Frontex see, Opinion of the European Economic and Social Committee on the proposal for a Council Regulation establishing a European Agency for the Management of Operational Co-operation at the External Borders, (COM(2003) 687 final - 2003/0273(CNS)), OJ C-108, 30.04.2004, pp. 97-100.

²¹⁹ Parliament, "Report on the proposal for a Council regulation establishing a European Agency for the Management of Operational Co-operation at the External Borders (COM(2003) 687 - C5-0613/2003 - 2003/0273(CNS))", A5-0093/2004, 24.02.2004, p. 18.

²²⁰ Ibid., p. 29.

²²¹ 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, OJ L-349, 25.11.2004, pp. 1-11. See, URREA CORRES, Mariola, "Control de fronteras exteriores y seguridad interna en la Unión Europea: la puesta en marcha de Frontex" in ALDECOA LUZARRAGA, Francisco and SOBRINO HEREDIA, Jose Manuel (Eds.), *Migraciones y desarrollo: II Jornadas Iberoamericanas de Estudios Internacionales*, Madrid: Marcial Pons, 2007, pp. 469-482.

²²² LEONARD, Sarah, "The creation of FRONTEX and the politics of institutionalisation in the EU external borders policy", *Journal of Contemporary European Research*, 5(3), 2009, p. 380. In this respect, the CJEU examined the implementation competences held by the Council after the transitional period of five years see, Judgment of the Court (Grand Chamber) of 6 May 2008, "European Parliament v Council of the European Union", Case C-133/06, ECLI:EU:C:2008:257 and Judgment of the Court (Full Court) of 18 January 2005, "Commission of the European Communities v Council of the European Union", Case C-257/01, ECLI:EU:C:2005:25.

United Kingdom and Ireland did not take part in its adoption and were not bound by it²²³. If the United Kingdom and Ireland were to decide to join any operation of Frontex, the Management Board of the agency would be responsible for deciding the extent of their participation. Similarly, Regulation 2007/2004 declared that Denmark was not subject to its application unless transposed into the Danish legal system within six months from its adoption²²⁴. Norway and Iceland were, however, bound by the application of Regulation 2007/2004 since they participated as associated States in the Schengen *acquis*²²⁵.

2.2.4. Frontex Regulation 2007/2004 and the Rapid Border Intervention Teams

The Council adopted Frontex' Regulation on 26 October 2004, but it was officially launched on 1 May 2005 in Warsaw²²⁶ and started operations on 3 October 2005²²⁷. The mandate of the agency was based on articles 62(2)(a) and 66 TEC, according to which the Council shall adopt measures regarding the crossing of external borders and take measures to ensure cooperation between the Member States and the European Commission. Hence, the start of Frontex' operations and the development of its activities went hand in hand with the implementation of The Hague Program.

Besides requesting that the Commission submit an evaluation of Frontex before the end of 2007²²⁸, The Hague Program also called for the establishment of "teams of national experts that can provide rapid technical and operational

²²³ Council Regulation (EC) No 2007/2004 of 26 October 2004, recital 25. The exclusion of the United Kingdom and Ireland from taking part in Frontex was confirmed by the European Court of Justice. See, Judgment of the Court (Grand Chamber) of 18 December 2007, United Kingdom of Great Britain and Northern Ireland v Council of the European Union, Case C-77/05, ECLI:EU:C:2007:803.

²²⁴ Council Regulation (EC) No 2007/2004 of 26 October 2004, recital 24.

²²⁵ Council Regulation (EC) No 2007/2004 of 26 October 2004, recital 23.

²²⁶ Council Decision of 26 April 2005 designating the seat of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (2005/358/EC), OJ L-114/13, 04.05.2005.

²²⁷ Frontex, "Annual Report 2006", 2006, <http://bit.ly/2jsPxOv>, (last accessed: 30/04/2018), p. 2.

²²⁸ European Council, "The Hague Programme: Strengthening Freedom, Security and Justice in the European Union", OJ C-53, 03.03.2005, p. 6.

assistance to Member States requesting it (...) on the basis of a proposal by the Commission on the appropriate powers and funding for such teams (...)”²²⁹. The European Council welcomed this recommendation by requiring to “bring forward a proposal for the creation of rapid reaction teams made up of national experts able to provide rapid technical and operational assistance at times of high influxes of migrants, in accordance with the Hague Programme, by Spring 2006”²³⁰.

On 19 July 2006, the European Commission put forward a Regulation to create Rapid Border Intervention Teams (RABIT)²³¹. While article 8 of Regulation 2007/2004 already declared that a Member State may request increased technical and operational assistance from Frontex, the Commission considered it necessary to determine “common rules on the tasks that can be performed by border guard officers from one Member State operating in the territory of another Member State (...)”²³². The Commission thus aimed to expand Frontex’ tasks by designing a mechanism capable of better supporting those Member States facing extreme difficulties in managing their external borders.

The RABIT would consist of temporarily and swiftly deploying border guards of other Member States, which would make use of their expertise and manpower to support a requesting Member State under a disproportionate and extraordinary arrival of irregular migrants at its shores. On 11 July 2007, Regulation 863/2007 was adopted²³³, which incorporated the RABIT within the

²²⁹ Ibid., p. 6.

²³⁰ Council, “Brussels European Council 15/16 December 2005 Presidency Conclusions”, doc. 15914/1/05 REV 1, 30.01.2006, p. 10.

²³¹ Commission, “Proposal for a Regulation of the European Parliament and of the Council establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism”, COM(2006) 401 final, 19.07.2006. An impact assessment regarding the creation of Rapid Border Intervention Teams was jointly presented see, Commission, “Analyse d’Impact COM(2006) 401 final”, SEC(2006) 954, 19.07.2006.

²³² Ibid., p. 2. In this regard, the Commission requested a study in charge of analyzing the feasibility of conferring executive powers to border guards operating at the external borders of another Member State. See, UNISYS, “Study on Conferring Executive Powers on Border Officers Operating at the External Borders of the EU”, Brussels, April 2006, <http://bit.ly/2ENiYGv> (last accessed: 30/04/2018).

²³³ 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

mandate of Frontex and regulated the powers that the national border guards, deployed at the territory of another Member State, may conduct.

Consequently, Frontex was introduced as an independent European decentralized agency, which institutionalized the operational cooperation and was mandated to assist the Member States in effectively implementing EU border management policies and rules²³⁴. Regulation 2007/2004 ordered the Member States to refrain from undertaking any activity that may jeopardize the functioning of the agency or the achievement of its objectives. Additionally, the operations of Frontex were to a certain extent based on its own risk analyses, planning, and coordination, rather than the political considerations of the national authorities²³⁵.

However, Member States remained exclusively competent in managing their external borders with Frontex in charge of coordinating their work. According to RIJPMA, “Frontex can be seen as the outcome of a ‘re-balancing’ of powers between the Member States, the Council and the Commission (...), constituting an important shift from the intergovernmental coordination of operational activity under the Council to a more Community-based approach”²³⁶. The creation of Frontex represented an important institutional step towards the development of an integrated border management, and ultimately towards the integration of the AFSJ.

Council Regulation (EC) No 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers, OJ L-199, 31.7.2007, pp. 30-39.

²³⁴ MONAR, Jorg, “The Project of a European Border Guard...”, *op. cit.*, p. 204.

²³⁵ BALDACCINI, Anneliese, “Extraterritorial border controls...”, *op. cit.*, p. 234.

²³⁶ RIJPMA, Jorrit, “Frontex: successful blame shifting of the Member States?”, *Análisis del Real Instituto Elcano*, 69, 2010, p. 2.

IV. THE TREATY OF LISBON AND THE STOCKHOLM AGENDA: FURTHERING THE OPERATIONAL IMPLEMENTATION OF THE EU MEASURES ADOPTED WITHIN THE AFSJ

1. The End of the Pillar Structure and the Communitarization of the AFSJ

1.1. *Overview of the Novelties Brought by the Treaty of Lisbon to the AFSJ*

After shortly mourning the non-ratification of the Constitutional Treaty, the EU decided to keep moving integration forward²³⁷. The Treaty of Lisbon, which entered into force on 1 December 2009, represented a turning point for the institutional, legal, and policy framework of the AFSJ. The end of the pillar structure and the expansion of the EU Institutions' powers clearly favored an integrated approach for JHA matters. The Treaty of Lisbon considered the AFSJ as important an objective to achieve as the establishment of the EU Internal Market or the Economic and Monetary Union. The Treaty of Lisbon encompassed the TEU and the TFEU, which amended the previous Treaty on European Union and the Treaty establishing the European Community, respectively. The TFEU regulates the AFSJ in its Title V and merges the policies that were formerly divided between Title IV TEC and Title VI TEU (the former first and third pillars)²³⁸.

²³⁷ See, DEL VALLE GÁLVEZ, Alejandro, "Europa como espacio de libertad, seguridad y justicia. Las provisiones del Tratado Constitucional" in BOU FRANCH, Valentín and CERVERA VALLTERRA, María, *El derecho de la Unión Europea: 20 años después de la adhesión de España*, Tirant lo Blanch, 2007, pp. 143-178; MARTÍN Y PÉREZ DE NANCLARES, José, "El Espacio de Libertad Seguridad y Justicia en el Tratado de Lisboa", *Revista de las Cortes Generales*, 70-72, 2007, pp. 85-126 and GORTÁZAR ROTAECHÉ, Cristina, "Entre la Utopía y el posibilismo: el Tratado de Lisboa y el Espacio de Libertad, Seguridad y Justicia", *Revista de las Cortes Generales*, 70-72, 2007, pp. 155-174.

²³⁸ For a detailed analysis of the principles and characteristics of the AFSJ under the Lisbon Treaty see, ÁLVAREZ RUBIO, Juan José, "El Tratado de Lisboa y la plena comunitarización del espacio de libertad, seguridad y justicia", *Revista electrónica de estudios internacionales (REEI)*, 15, 2008, pp. 1-33; DEL VALLE GÁLVEZ, Alejandro, "Inmigración, extranjería y fronteras de la Unión Europea. Cinco problemas conceptuales" in FORNER I DELAYGUA, Joaquim Joan (ed.), *Fronteras*

Articles 77 to 88 TFEU regulate border management, asylum, migration, and judicial and police cooperation. Article 77 declares that the EU must develop a policy with the aim of ensuring the absence of internal border controls, carrying out checks at external borders, and introducing an integrated management system for external borders. Article 78 orders the development of a common policy on asylum, subsidiary protection, and temporary protection. Article 79 points out that the Union shall develop a common migration policy. Article 80 establishes that the principle of solidarity and fair sharing of responsibility between the Member States must govern these policies and their implementation. Lastly, the Treaty of Lisbon regulates judicial cooperation in civil matters (article 81 TFEU), criminal matters (articles 82 to 86 TFEU), and police cooperation (articles 87 and 88 TFEU).

The abolition of the former pillar structure led to the extension of the ordinary legislative procedure of co-decision (article 294 TFEU) to the whole AFSJ. The ordinary legislative procedure provides the Commission with an exclusive right of initiative. A qualified majority substitutes unanimity at the Council and the European Parliament is no longer only consulted, but now co-legislates in equal footing with the Council. Moreover, Regulations and Directives replaced the rather inter-governmental instruments of the former third pillar (conventions, common positions, and framework decisions). Lastly, the Treaty of Lisbon bestowed the EU Charter of Fundamental Rights the same legal value as the Treaties (article 6(1) TEU), which implied that the EU Institutions, EU agencies and bodies, and the Member States shall respect the fundamental rights of the Charter when applying EU law²³⁹.

exteriores de la U.E. e inmigración a España: relaciones internacionales y derecho, Tirant lo Blanch, 2007, pp. 43-80; DE ZWAAN, Jaap, "The New Governance of Justice and Home Affairs...", *op. cit.*, pp. 7-25; MURPHY, Cian and ACOSTA ARCARAZO, Diego, "Rethinking Europe's Freedom, Security and Justice" in MURPHY, Cian and ACOSTA ARCARAZO, Diego (eds.), *EU Security and Justice Law: After Lisbon and Stockholm*, Oxford: Hart Publishing, 2014, pp. 1-16; PEERS, Steve, "Mission Accomplished - EU Justice and Home Affairs Law after the Treaty of Lisbon", *Common Market Law Review*, 48, 2011, pp. 661-693.

²³⁹ See, RAULUS, Helena, "Fundamental Rights in the Area of Freedom, Security and Justice", in WOLFF, Sarah, GOUDAPPEL, Flora and DE ZWAAN, Jaap (eds.), *Freedom, Security and Justice after Lisbon and Stockholm*, The Netherlands: T.M.C. ASSER PRESS, 2011, pp. 213-240; ENGSTRÖM, Viljam and HEIKKILÄ, Mikaela, "Challenges and complexities in the protection of

1.2 *Institutional Implications of the Entrance into Force of the Treaty of Lisbon*

The European Commission and the ECJ were the institutions that most benefited from the entrance into force of the Lisbon Treaty. The powers delegated to these institutions in order to tackle the national implementation differences of the AFSJ's measures were reinforced. Under the Treaty of Amsterdam, the ECJ had a very narrow jurisdiction, merely to hear first pillar matters since preliminary references were only allowed to be made by national courts, against whose decisions there was no national judicial remedy. In addition, the ECJ was excluded from ruling on any measure or decision concerning the removal of internal borders, the maintenance of law and order, and the safeguarding of internal security. Regarding third pillar matters, the ECJ's jurisdiction was further curtailed since it had no competences in relation to infringement proceedings, and it could give preliminary rulings only if the Member States had expressly accepted the jurisdiction of the ECJ.

Under the Treaty of Lisbon, the judicial control of the ECJ, rebranded as the Court of Justice of the EU (CJEU), expanded to the whole AFSJ and preliminary references were available to any national tribunal. However, article 10 of the Protocol No 36 on transitional provisions, attached to the Lisbon Treaty, pointed out that as a transitional measure, which ceased to have effect five years after the date of entry into force of the Treaty of Lisbon²⁴⁰, the CJEU's jurisdiction in the field of police and judicial cooperation in criminal matters would be limited. In the same vein, article 276 TFEU stated that the CJEU "shall have no jurisdiction to review the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State or the exercise of the

fundamental rights in the EU's Area of Freedom, Security and Justice", *Cuadernos Europeos de Deusto*, 53, 2015, pp. 107-130.

²⁴⁰ See, MITSILEGAS, Valsamis, CARRERA, Sergio and EISELE, Katharina, "The End of the Transitional Period for Police and Criminal Justice Measures Adopted before the Lisbon Treaty. Who Monitors Trust in the European Justice Area?", *Study for the European Parliament LIBE Committee*, PE 509.998, November 2014.

responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security”.

The Treaty of Lisbon also reinforced the European Commission’s powers. It now presents an exclusive right of initiative (with the exception of criminal justice and police legislation, in which the Commission shares its right of initiative with a quarter of the Member States – article 76 TFEU) in AFSJ matters and in delineating policy and legislative priorities. As a consequence of the expansion of the Commission’s competences, the former Directorate General for Justice, Freedom and Security was divided into a Directorate General for Home Affairs and a Directorate General for Justice in 2010.

The competence to initiate infringement procedures enhanced the role of the Commission in monitoring the correct implementation of AFSJ matters by the Member States (article 258 TFEU). This infringement competence was also subject to the transitory Protocol No 36 provisions. Until December 2015, the Commission was not allowed to launch an infringement proceeding to Member States that unduly or untimely applied criminal justice and police cooperation measures.

While the CJEU and the Commission were the EU Institutions that further benefited from the novelties brought by the Treaty of Lisbon, the extension of the ordinary legislative procedure to most of the AFSJ policies also reinforced the powers of the Council and the European Parliament. The Council (meeting under its JHA configuration) and the European Parliament acted as co-legislators and jointly co-owned the AFSJ. Nevertheless, certain areas still remained subject to a special legislative procedure. The Council shall act unanimously, after obtaining the consent of the European Parliament, regarding the creation of a European Public Prosecutor’s Office from Eurojust (article 86(1) TFEU). Police operations (article 87(3) and 89 TFEU), family law (article 81(3) TFEU), and identity cards (article 77(3) TFEU) also require the Council to act unanimously after consulting the European Parliament. Despite these exceptions, the application of the ordinary legislative procedure to AFSJ matters signified that the European Parliament had a more preminent position in defining and proposing its own

priorities, and ultimately, in enhancing the democratic legitimacy of the AFSJ²⁴¹. The Treaty of Lisbon thus transformed the European Parliament into a full decision-making organization²⁴².

Furthermore, the Treaty of Lisbon transformed the European Council into an Institution of the EU (article 13(1) TEU). Although the European Council does not have legislative powers, it is responsible for providing the EU with the necessary impetus for its development and defining the general political directions and priorities (article 15 TEU). Regarding the EU AFSJ, article 68 TFEU determines that the European Council is in charge of defining the “strategic guidelines for legislative and operational planning within the area of freedom, security and justice”.

The European Council thus remained the institution responsible for outlining the policies of the AFSJ and adopting multiannual policy programs. The Stockholm Program, which was extremely detailed and dense, replaced the previous Hague Program and set strategic guidelines and policy priorities for the period from 2009 to 2014²⁴³. The European Council invited the Commission to put forward an Action Plan to translate the Stockholm Program into concrete actions with a clear timetable for adoption and implementation. In April 2010, the European Commission published the requested action plan to effectively realize the Stockholm Program objectives²⁴⁴.

²⁴¹ In this respect see, CARRERA, Sergio, HERNANZ, Nicholas and PARKIN, Joanna, “The ‘Lisbonisation’ of the European Parliament: Assessing progress, shortcomings and challenges for democratic accountability in the Area of Freedom, Security and Justice”, *Centre for European Policy Studies Liberty and Security in Europe Paper*, 58, 2013; DE CAPITANI, Emilio, “The Evolving Role of the European Parliament”, in MONAR, Jorg (ed.), *op. cit.*, pp. 113-144.

²⁴² See, RIPOLL SERVENT, Ariadna, “Playing the co-decision game? Rules’ changes and institutional adaptation at the LIBE committee”, *Journal of European integration*, 34(1), 2012, pp. 55-73.

²⁴³ European Council, “The Stockholm Programme — An Open and Secure Europe Serving and Protecting Citizens”, OJ C-115, 04.05.2010. Previously, in June 2009 the European Commission published a Communication outlining its vision for the future of the EU AFSJ during the next five years, Commission, “An Area of Freedom, Security and Justice Serving the Citizen”, COM(2009) 262 final, 10.06.2009. See, Council, “Preparing the Stockholm Programme – Conference in Bruges on 4-5 March 2009”, doc. 10576/09, 02.06.2009. See also, GORTÁZAR ROTAECHE, Cristina, *et. al.* (eds.), *European Migration and Asylum Policies: Coherence Or Contradiction : an Interdisciplinary Evaluation of the EU Programmes of Tampere (1999), The Hague (2004), and Stockholm (2009)*, Brussels: Bruylant, 2012.

²⁴⁴ Commission, “Delivering an area of freedom, security and justice for Europe’s citizens Action Plan Implementing the Stockholm Programme”, COM(2010) 171 final, 20.04.2010.

The adoption of the Action Plan of the Stockholm Program revealed a latent turf war between the European Council and the Commission, which illustrated the new institutional leverages in the AFSJ policy-making under the Treaty of Lisbon. Particularly, the European Council considered that “the actions proposed by the Commission are not in line with the Stockholm Program and that others, being included in the Stockholm Program, are not reflected in the Communication of the Commission”²⁴⁵. Yet, both the Commission and the European Council considered that the emphasis for the coming years shall be the citizens, ensuring their fundamental rights and freedoms in a secured Europe.

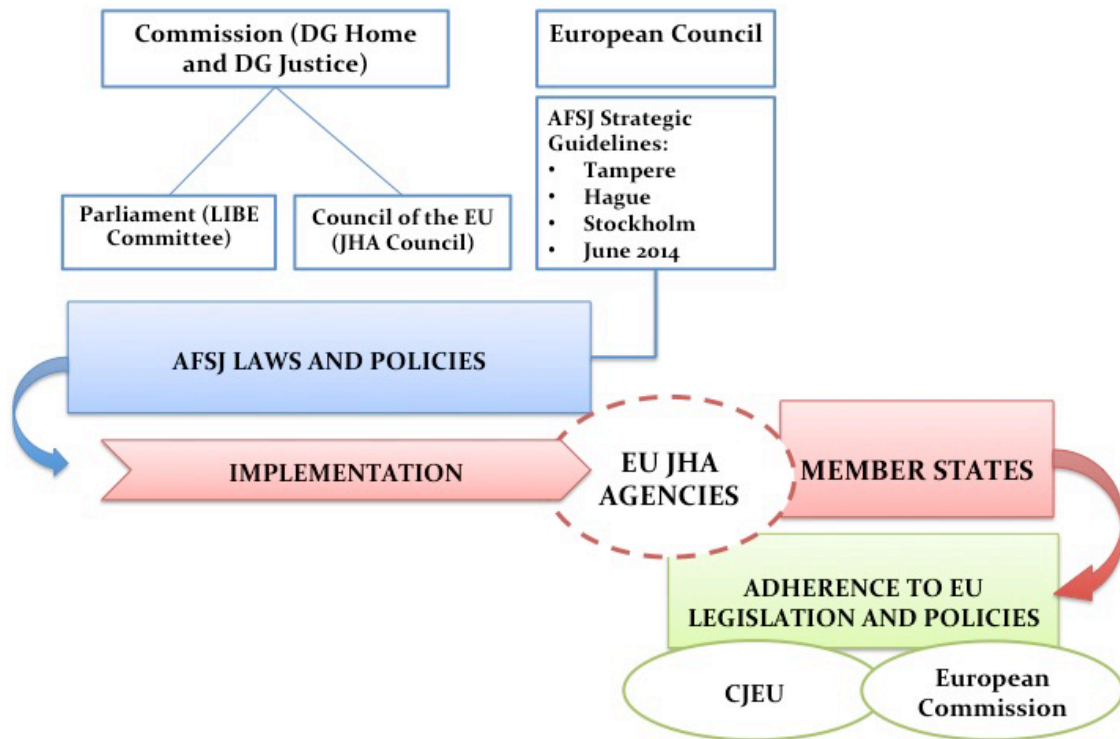


Figure 4: AFSJ Institutional Framework. Source: Author’s own elaboration.

The last institutional novelty that the Treaty of Lisbon brought about was the creation of a *Comité permanent de coopération opérationnelle en matière de sécurité intérieure* (COSI). Article 71 TFEU stated that “a standing committee shall be set up within the Council in order to ensure that operational cooperation on

²⁴⁵ Council, “Draft Council Conclusions on the Commission Communication “Delivering an area of freedom, security and justice for Europe’s citizens - Action Plan Implementing the Stockholm Programme, COM(2010) 171 final”, doc. 9935/10, 19.05.2010. In this regard see, CARRERA, Sergio and GUILD, Elspeth, “Does the Stockholm Programme matter? The Struggles over Ownership of AFSJ Multiannual Programming”, *CEPS Paper in Liberty and Security in Europe*, 51, December 2012, p. 3.

internal security is promoted and strengthened within the Union (...)” and that “representatives of the Union bodies, offices and agencies concerned may be involved in the proceedings of this committee (...)”.

Previously, The Hague Program stressed that “coordination of operational activities by law enforcement agencies and other agencies in all parts of the area of freedom, security and justice (...) must be ensured”²⁴⁶. In this regard, the Council was invited to organize “a joint meeting every six months between the chairpersons of the Strategic Committee on Immigration, Frontiers and Asylum (SCIFA) and the Article 36 Committee (CATS) and representatives of the Commission, Europol, Eurojust, the EBA, the Police Chiefs’ Task Force, and the SitCEN”²⁴⁷.

The COSI is a Council body in charge of assessing and promoting effective cooperation between the authorities of the Member States competent in the field of internal security, identifying potential shortcomings, issuing recommendations, as well as ensuring a common and coherent action by the EU AFSJ agencies and bodies²⁴⁸. The COSI is responsible for supporting, promoting, and reinforcing the coordination of the internal security activities of the Member States and is not empowered to conduct operational activities or adopt legislative measures.

To conclude, the clear commitment of the Treaty of Lisbon to communitarization and integration at the AFSJ was subject to several exceptions, transitory provisions, and differentiation²⁴⁹. As explained above, the ordinary legislative procedure did not apply to the whole AFSJ, and the European Commission’s power to initiate an infringement procedure, as well as the

²⁴⁶ European Council, “The Hague Programme: Strengthening Freedom, Security and Justice in the European Union”, OJ C-53, 03.03.2005, p. 10. In this regard see, Council, “Discussion paper on the future Standing Committee on Internal Security (COSI) – Constitutional Treaty, art.III-261”, doc. 6626/05, 21.02.2005.

²⁴⁷ Ibid., p. 10.

²⁴⁸ Council Decision of 25 February 2010 on setting up the Standing Committee on operational cooperation on internal security, OJ L-52, 03.03.2010. See, RIJPMA, Jorrit, “Institutions and Agencies: Government and Governance after Lisbon” in ACOSTA ARCARAZO, Diego and MURPHY, Cian C. (eds.), *op. cit.*, pp. 69-71.

²⁴⁹ See, CARRERA, Sergio and GUILD, Elspeth, “Implementing the Lisbon Treaty Improving the Functioning of the EU on Justice and Home Affairs”, Study for the European Parliament AFCO Committee, PE 519.225, 2015, pp. 18-20.

jurisdiction of the CJEU, were transitorily curtailed in the field of police and judicial cooperation in criminal matters. Furthermore, the competences more closely related to national sovereignty, such as the maintenance of law and order and the safeguarding of internal security (article 72 TFEU), remained an exclusive responsibility of the Member States.

The Treaty of Lisbon also deepened the differentiated integration conferred to the United Kingdom, Ireland, and Denmark regarding AFSJ matters²⁵⁰. Protocols 21 and 22 specified that the United Kingdom, Ireland, and Denmark shall not take part in the adoption of the proposed measures under Title V of Part Three of the TFEU (unless the United Kingdom and Ireland decide to opt-in), which not only includes the former third pillar instruments, but also migration, asylum, and border management matters. This integration *à la Carte* hinders the long-term objective of achieving a single AFSJ, since as CARRERA and GUILD argue, several “integration or concentric circles’ or ‘areas’ where different degrees of freedom(s), security(ies) and justice(s) exist depending on where the individual actually is or moves to”²⁵¹.

2. The Strategic Role of Frontex, Easo and Europol in Operationally Developing the AFSJ

This section firstly describes the updated mandate of Europol under article 88 TFEU. Furthermore, the institutional revisions of Frontex, established in order to progressively develop an integrated management system for the external borders, are analyzed. Specifically, the introduction of a European Border Surveillance

²⁵⁰ See, PEERS, Steve, “In a world of their own? Justice and Home Affairs Opt-outs and the Treaty of Lisbon”, *Cambridge Yearbook of European Legal Studies*, 10, 2008, pp. 383-412; HERLIN-KARNELL, Ester, “Denmark and the European area of freedom, security and justice: a Scandinavian arrangement”, *Amsterdam Law Forum*, 5, 2013, pp. 95-105; SANTOS VARA, Juan and FAHEY, Elaine, “Transatlantic Relations and the Operation of AFSJ flexibility”, in BLOCKMANS, Steven (ed.), *Differentiated Integration in the EU: From the inside Looking Out*, Brussels: Centre for European Policy Studies, 2014, pp. 103-125.

²⁵¹ CARRERA, Sergio and GUILD, Elspeth, “Implementing the Lisbon Treaty Improving the Functioning of the EU on Justice and Home Affairs”, Study for the European Parliament AFCCO Committee, PE 519.225, 2015, p. 21. In this regard see, CARRERA, Sergio and GEYER, Florian, “El Tratado de Lisboa y un espacio de libertad, seguridad y justicia: excepcionalismo y fragmentación en la Unión Europea”, *Revista de Derecho Comunitario Europeo*, 12(29), 2008, p. 156.

System (Eurosir) and the amendment of the original mandate of Frontex by Regulation 1168/2011 are examined. Lastly, the establishment of Easo, Frontex' sister agency, is studied.

2.1 Article 88 TFEU: Europol

Despite the important role that the EU agencies are called upon to play in the AFSJ, only Eurojust and Europol are explicitly regulated in articles 85 and 88 TFEU, respectively. Article 88 TFEU states that Europol shall support and strengthen cooperation between the competent national law enforcement authorities to prevent and combat cross-border crime. To achieve this objective, the tasks delegated to Europol consist in managing information and organizing investigative and operational action²⁵². Importantly, article 88 TFEU stresses that any operational activity undertaken by Europol must be previously agreed upon by the concerned Member State, which holds an exclusive competence to apply coercive measures.

The Stockholm Program recommended that Europol become “a hub for information exchange between the law enforcement authorities of the Member States, a service provider and a platform for law enforcement services”²⁵³. The provisions of article 88 TFEU regarding Europol were to a large extent already included in the Council's decision to establish the European Police Office, adopted in April 2009. According to VOS, “after the period of creativity (1995–2008) in police cooperation, it is now time for enhancing implementation of the existing instruments and improving the functioning of existing organizations”²⁵⁴.

²⁵² See, DAVIES, Bleddyn, “Delegation and Accountability of Criminal Agencies after Lisbon: An Examination of Europol” in TRYBUS, Martin and RUBINI, Luca (eds.), *The Treaty of Lisbon and the future of European law and policy*, London: Edward Elgar Publishing, 2012, pp. 325-340.

²⁵³ European Council, “The Stockholm Programme — An Open and Secure Europe Serving and Protecting Citizens”, OJ C-115, 04.05.2010, p. 20.

²⁵⁴ VOS, Johannes, “Police Cooperation on an EU-Wide Level 1998–2010: Developments and Challenges” in GUILD, Elspeth, CARRERA, Sergio and EGGENSCHWILER, Alejandro, *The Area of Freedom, Security and Justice Ten Years on: Successes and Future Challenges under the Stockholm Programme*, Brussels: Centre for European Policy Studies, 2010, p. 89.

2.2 *Frontex: Towards a Gradual Establishment of an Integrated Management System for the European External Borders?*

While the Member States ultimately remain responsible for managing their external borders under the Treaty of Lisbon, Frontex plays an essential role in the gradual establishment of an integrated management system for the European external borders (article 77(2)(d) TFEU). Article 74 TFEU states that the Council shall adopt measures to ensure administrative cooperation between the relevant departments of the Member States in the areas covered by Title V. Paragraphs (b) and (c) of Article 77(1) empower the EU to design a policy to carry out checks on persons and to efficiently monitor the crossing of external borders.

2.2.1 The 2008 European Commission's Border Package

The Stockholm Program called for the reinforcement of Frontex' mandate. Specifically, the European Council requested the Commission to: 1) adopt a proposal to clarify the mandate and enhance the role of Frontex to respond more effectively to changing migration flows, as well as to effectively promote and respect fundamental rights during its operations; 2) consider establishing specialized offices to better cope with the diverse land and sea border situations; 3) initiate a debate on the long-term development of Frontex; 4) promote the cooperation and coordination of the activities of Frontex and Easo; 5) create Eurosur²⁵⁵. To this end, during the negotiations of the Stockholm Program, the European Commission put forward a "Border Package" in February 2008²⁵⁶, which included three different communications to: 1) evaluate Frontex and assess

²⁵⁵ European Council, "The Stockholm Programme — An Open and Secure Europe Serving and Protecting Citizens", OJ C-115, 04.05.2010, p. 26.

²⁵⁶ For a detailed analysis of the Border Package see, JEANDESBOZ, Julien, "An Analysis of the Commission Communications on Future Development of Frontex and the Creation of a European Border Surveillance System (Eurosur)", *European Parliament Briefing Paper*, PE 408.295, 2008.

its future development²⁵⁷; 2) examine the creation of Eurosur²⁵⁸; and 3) prepare the next steps in EU border management²⁵⁹.

Firstly, the Commission's evaluation of Frontex warned about the insufficient commitments of the Member States to provide the agency with the necessary equipment for border activities and to enhance the operability of the RABIT teams. The Commission thus recommended exploring the possibility of allowing Frontex to acquire or lease its own equipment and personnel. Similarly, the 2009 external evaluation of Frontex pointed out that while the agency had successfully improved cooperation between Member States in managing their European external borders, the operational activities undertaken by Frontex could be further planned and executed²⁶⁰. In this regard, it was recommended that the Member States should make personnel and equipment sufficiently available to the agency.

Furthermore, the objective of the Commission's communication regarding Eurosur²⁶¹ was to analyze "the parameters within which a European Border Surveillance System (Eurosur) (...) could be developed and to suggest to Member States a roadmap for the setting up of such a system"²⁶². This roadmap was built upon previous communications in which a Mediterranean Coastal Patrols Network (MEDSEA)²⁶³ was proposed in order to reinforce the management of the

²⁵⁷ Commission, "Report on the evaluation and future development of the FRONTEX Agency", COM(2008) 67 final, 13.02.2008.

²⁵⁸ Commission, "Examining the creation of a European Border Surveillance System (EUROSUR)", COM(2008) 68 final, 13.02.2008.

²⁵⁹ Commission, "Preparing the next steps in border management in the European Union", COM(2008) 69 final, 13.02.2008.

²⁶⁰ COWI A/S, "External evaluation of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union", January 2009.

²⁶¹ See, Frontex, "BORTEC: Study on technical feasibility of establishing a surveillance system (European Surveillance System)", December 2006. Previously, Council, "Feasibility Study on the Control of the European Union's maritime borders – Final Report", doc. 11490/1/03, 19.09.2003.

²⁶² Commission, "Examining the creation of a European Border Surveillance System (EUROSUR)", COM(2008) 68 final, 13.02.2008, p. 2.

²⁶³ Council, "Frontex feasibility study on Mediterranean Coastal Patrols Network – MEDSEA", doc. 12049/06, 20.11.2006.

EU's southern maritime borders²⁶⁴. In 2011, the Commission finally proposed the Eurosur regulation²⁶⁵, which was finally adopted in 2013²⁶⁶.

Eurosur consists in setting a common framework for the exchange of information and cooperation between the Member States and Frontex²⁶⁷. Eurosur shall provide precise situational awareness and increase the capacity of the Member States to detect, prevent, and combat irregular migration and cross-border crime, as well as assist in protecting and saving the lives of migrants at sea²⁶⁸. Frontex is in charge of establishing and maintaining the Eurosur communication network, the European situational picture, the common pre-frontier intelligence picture, and coordinating the common application of surveillance tools (article 6 Eurosur Regulation).

2.2.2 Regulation 1168/2011: Further Expanding and Clarifying Frontex' Operational Powers

The Council²⁶⁹, the European Commission²⁷⁰, and the European Parliament²⁷¹ considered that Frontex' mandate needed to be clarified and its powers and

²⁶⁴ Commission, "Reinforcing the management of the European Union's Southern Maritime Borders", COM(2006) 733 final, 30.11.2006.

²⁶⁵ Commission, "Proposal for a regulation of the European Parliament and of the Council establishing the European Border Surveillance System (EUROSUR)", COM(2011) 873 final, 12.12.2011.

²⁶⁶ Regulation (EU) No 1052/2013 of the European Parliament and of the Council of 22 October 2013 establishing the European Border Surveillance System (Eurosur).

²⁶⁷ For a detailed analysis of the functioning of EUROSUR see, BELLANOVA, Rocco and DUEZ, Denis, "The Making (Sense) of EUROSUR: How to Control the Sea Borders?" in BOSSONG, Raphael and CARRAPICO, Helena (eds.), *EU Borders and Shifting Internal Security*, Basel: Springer International Publishing, 2016, pp. 23-44; JEANDESBOZ, Julien, "Beyond the Tartar Steppe: EUROSUR and the ethics of European border control practices" in BURGESS, Peter and GUTWIRTH, Serge (eds.), *A threat against Europe? Security, migration and integration*, Brussels: VUB Press, 2011, pp. 111-132; MARIN, Luisa, "Is Europe turning into a 'Technological Fortress'? Innovation and technology for the management of EU's external borders: Reflections on FRONTEX and EUROSUR" in HELDEWEG, Michiel and KICA Evisa (eds.), *Regulating Technological Innovation*, UK: Palgrave Macmillan, 2011, pp. 131-151.

²⁶⁸ The capability of EUROSUR to save lives at sea has been contested. In this regard see, HELLER, Charles and JONES, Chris, "Eurosur: Saving lives or reinforcing deadly borders?", *Statewatch Journal*, 23(3/4), 2014, pp. 9-11 and RIJPM, Jorrit and VERMEULEN, Mathias, "EUROSUR: saving lives or building borders?", *European security*, 24(3), 2015, pp. 454-472.

²⁶⁹ Council, "Conclusions on the management of the external borders of the member states of the European Union", 2873rd Justice and Home Affairs Council meeting Luxembourg, 5 and 6 June 2008.

operational capacities strengthened. The Stockholm Program requested the Commission to “clarify the mandate and enhance the role of Frontex” before 2010²⁷². At the beginning of 2010, the Commission published the results of the impact assessment undertaken for the amendment of Frontex’ 2007/2004 Regulation.

The Impact Assessment stressed that the operational cooperation between Frontex and the Member States was inefficient and insufficient, as illustrated by the actual deployment of equipment. Frontex’ joint operations relied on the technical equipment voluntarily provided by the Member States, which ultimately had “a negative impact on the capacity of the Agency to plan operations and allocate resources between operations in the most optimal way” at the EU borders²⁷³. Additionally, the unclear legal provisions hindered the European agency from effectively assisting the Member States in managing their external borders²⁷⁴.

The European Commission put forward an amended Regulation of Frontex²⁷⁵, which was adopted by the Parliament and the Council on 25 October 2011²⁷⁶. Regulation 1168/2011 reinforced the operational capacity of Frontex and its

²⁷⁰ Commission, “Report on the evaluation and future development of the FRONTEX Agency”, COM(2008) 67 final, 13.02.2008.

²⁷¹ Parliament, “Report on the evaluation and future development of the FRONTEX Agency and of the European Border Surveillance System (EUROSUR) (2008/2157(INI))”, A6-0437/2008, 11.11.2008.

²⁷² European Council, “The Stockholm Programme — An Open and Secure Europe Serving and Protecting Citizens”, OJ C-115, 04.05.2010, p. 26.

²⁷³ Commission, “Impact Assessment accompanying the Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX)”, SEC(2010) 149, 24.02.2010, p. 18.

²⁷⁴ *Ibid.*, p. 11.

²⁷⁵ Commission, “Proposal for a Regulation of the European Parliament and the Council amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX)”, COM(2010) 61 final, 24.02.2010.

²⁷⁶ 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, OJ L-304, 22.11.2011. See, URREA CORRES, Mariola, “El control de fronteras exteriores...”, *op. cit.*, pp. 153-172.

autonomy²⁷⁷, and established that Member States shall provide a minimum annual contribution of technical equipment²⁷⁸. Frontex was allowed to acquire or lease its own technical equipment. However, in reality, the resources of Frontex mainly consisted of equipment owned by Member States, because in order for the agency to purchase or lease equipment, it needed to have been previously registered in a Member State²⁷⁹. Regulation 1168/2011 rebranded the RABIT as European Border Guard Teams (EBGT). Frontex could contribute to these teams with its own competent border guards, seconded by the Member State as national experts. That is, for a period of up to six months, Frontex was competent to decide where and for how long these seconded guest officers would be deployed.

Moreover, Regulation 1168/2011 stressed that Frontex shall ensure the respect of fundamental rights and international protection in every level of its actions. Frontex was required to foster and implement a Fundamental Rights Strategy (article 26(1))²⁸⁰, which included both an Action Plan²⁸¹ and a Fundamental Rights Annual Progress Report²⁸². In addition, a Consultative Forum and an independent Fundamental Rights Officer were created within Frontex to report and monitor fundamental rights²⁸³.

²⁷⁷ Frontex, “Annual Information on the Commitments of the Member States to the European Border Guard Teams and the Technical Equipment Pool for 2013”, 2014.

²⁷⁸ See, JONES, Chris, “Border guards, planes, “thermal vision vans” and heartbeat detectors – who is equipping Frontex?”, *Statewatch Analysis*, May 2014, pp. 1-9.

²⁷⁹ Frontex, “Annual Information on the Commitments of the Member States to the European Border Guard Teams and the Technical Equipment Pool for 2014”, 2015.

²⁸⁰ Frontex, “Fundamental Rights Strategy”, 31.03.2011.

²⁸¹ Frontex, “Fundamental Rights Action Plan”, 29.09.2011.

²⁸² Frontex, “Fundamental Rights Strategy”, 31.03.2011, para 37.

²⁸³ See below, Chapter 3 section IV.3.

2.3. *The Establishment of the European Asylum Support Office (Easo): The Institutionalization of the Operational Assistance to the National Asylum Systems*

2.3.1 The Introduction of a Common European Asylum System

The establishment of a CEAS dates back to the entrance into force of the Treaty of Amsterdam in 1999²⁸⁴. Particularly, the Tampere Program outlined the short and long term guidelines in order to design a CEAS²⁸⁵. Afterwards, The Hague Program confirmed the introduction of a common asylum procedure, a uniform status for those who are granted asylum or subsidiary protection, and the creation of a “European support office for all forms of cooperation between Member States relating to the Common European Asylum System”²⁸⁶. For the first time, The Hague Program mentioned that establishing Easo²⁸⁷ would be advantageous in order to better assist the Member States’ asylum services, assess information on countries of origin, and address sudden pressures on national asylum and reception systems²⁸⁸.

²⁸⁴ See, GARLICK, Madeline, *Solidarity under Strain: Solidarity and Fair Sharing of Responsibility in Law and Practice for the international Protection of Refugees in the European Union*, PhD Dissertation: Radboud University, 2016, pp. 93-150; GIL-BAZO, Maria Teresa, “The Protection of Refugees under the Common European Asylum System: The Establishment of a European Jurisdiction for Asylum Purposes and Compliance with International Refugee and Human Rights Law”, *Cuadernos Europeos de Deusto*, 36, 2007, pp. 153-182; KAUNERT, Christian and LÉONARD, Sarah, “The European Union asylum policy after the Treaty of Lisbon and the Stockholm Programme: towards supranational governance in a common area of protection?”, *Refugee Survey Quarterly*, 31(4), 2012, pp. 1-20.

²⁸⁵ European Council, Tampere Presidency Conclusions, 15-16 October 1999, paras 13-17. The Commission specified in its communication of 22 November 2000 on the common asylum procedure and uniform status that the objective of setting up a European asylum system would comprise a two-stage legislative plan. First a common procedure and a uniform status for asylum had to be set up, then the mechanisms established would be deepened. See, Commission, “Towards a common asylum procedure and a uniform status, valid throughout the Union, for persons granted asylum”, COM(2000) 755 final, 22.11.2000 and Commission, “On the common asylum policy, introducing an open coordination method”, COM(2001) 710 final, 28.11.2001.

²⁸⁶ European Council, “The Hague Programme: Strengthening Freedom, Security and Justice in the European Union”, OJ C-53, 03.03.2005, p. 4.

²⁸⁷ For a detailed analysis of the foundations of Easo see, COMTE, Françoise, “A new agency is born...”, *op. cit.*, pp. 373-405.

²⁸⁸ Commission, “Strengthened Practical Cooperation. New Structures, New Approaches:

In 2007, the European Commission published a Green Paper in which it referred to the role that Easo should play in the CEAS. The Commission stated that Easo's tasks shall consist in coordinating all the activities of common practical cooperation, providing structural support for any processing activities that Member States may undertake, training all parties involved in the asylum process, supporting Member States subject to particular pressures on their asylum systems and reception capacities, managing teams of asylum experts to be deployed to Member States facing particular pressures, implementing the asylum policy initiatives adopted, and monitoring the implementation of reception conditions granted to asylum seekers²⁸⁹. The Commission pledged to conduct a feasibility study to assess the specific mission and mandate that Easo was to play.

The Council requested that “the feasibility study should, in particular, examine the conditions necessary for the timely establishment of a European Support Office and outline the tasks which it might undertake (...), as well as possible financial arrangements and organizational structure (...)”²⁹⁰. Notwithstanding that the EU had adopted a relevant asylum legislative framework to harmonize the national legislation and practices of the competent asylum services, effective practical cooperation to avoid the existing discrepancies between asylum decisions was also needed. Precisely, Easo should be in charge of promoting asylum decision-making convergence and supporting the Member States in uniformly and effectively implementing the asylum *acquis*. Finally, the Council decided that Easo was to be set up in 2009 “with the task of facilitating the exchange of information, analyses and experience among Member States, and developing practical cooperation between the administrations in charge of examining asylum applications”²⁹¹.

Improving the Quality of Decision Making in the Common European Asylum System”, COM(2006) 67 final, 17.02.2006, p. 8.

²⁸⁹ Commission, “Green Paper on the future Common European Asylum System”, COM(2007) 301 final, 06.06.2007, p. 9.

²⁹⁰ Council, “2863rd Council meeting Justice and Home Affairs Luxembourg, 18 April 2008”, doc. 8397/08, 18.04.2008, p. 25. In this regard see, Commission, “Policy Plan On Asylum: An Integrated Approach to Protection Across the EU”, COM(2008) 360 final, 17.06.2008, p. 6.

²⁹¹ Council, “European Pact on Immigration and Asylum”, doc. 13440/08, 24.09.2008, p. 11.

2.3.2 Easo Regulation No 439/2010

In 2009, the European Commission proposed the creation of Easo²⁹². Easo's mission consists in facilitating and strengthening practical cooperation between the national authorities in charge of asylum, which ultimately should improve the application of the CEAS. According to the Commission, Easo's tasks are threefold: to enhance practical cooperation on asylum matters, to assist Member States under particular pressure, and to contribute to the implementation of the CEAS²⁹³.

Before the Commission tabled its proposal on the establishment of Easo, it launched an impact assessment study²⁹⁴. The impact assessment firstly pointed out that despite the European asylum legislative framework adopted, significant differences in processing asylum applications in the Union prevailed. Particularly, the central issues that Easo needed to tackle were: the divergences in practices and inefficient exchange of best practices at the EU level, the pressures on Member State asylum systems, and the limited cooperation and coordination of the CEAS external dimension²⁹⁵.

Subsequently, the impact assessment centered on deciding the preferred institutional policy option for the future Easo. The creation of a regulatory agency was deemed the most suitable option for uniformly and effectively implementing the CEAS, and the best received institutional choice among the Member States and the EU Institutions. Consequently, the option of designing a EU asylum decision-making agency or bestowing the powers of the future Easo upon already existing agencies (the Fundamental Rights Agency or Frontex) were ruled out. Nevertheless, the former solution was not possible under the existing positive law and the Member States were not willing to delegate decisional powers in asylum matters to a fully independent supranational body. The latter

²⁹² Proposal for a Regulation of the European Parliament and of the Council establishing a European Asylum Support Office, COM(2009) 66 final, 18.02.2009.

²⁹³ *Ibid.*, p. 4.

²⁹⁴ Commission, "Staff Working Document Accompanying the Proposal for a Regulation of the European Parliament and of the Council Establishing an European Asylum Support Office", SEC(2009) 153, 18.02.2009.

²⁹⁵ *Ibid.*, p. 8.

alternative was also discarded since the FRA or Frontex would need to incorporate new asylum powers to their mandate, which may have hindered their original mission and activities²⁹⁶.

After these preliminary negotiations, the European Parliament and the Council quickly agreed on a text. In May 2010, Regulation (EU) No 439/2010, establishing Easo, was introduced based on articles 74 and 78(1) and (2) TFEU²⁹⁷. The United Kingdom and Ireland invoked their “opt-in” right to take part and implement the Easo Regulation. Denmark, according to Protocol 22 annexed to the TEU and TFEU, did not participate in the adoption of the Regulation and is therefore not bound by it. Nonetheless, considering Denmark’s contribution to the asylum *acquis*, Easo shall facilitate the operational cooperation, the exchange of information, and best practices with Denmark (article 48 Regulation 439/2010).

Regulation 439/2010 strictly followed the delineated role that the Stockholm Program initially recommended that the agency play²⁹⁸. Firstly, the Stockholm Program suggested that Easo enhance all forms of practical cooperation among the competent national authorities with the aim of adopting asylum decisions based on a common knowledge in order to reduce disparities²⁹⁹. In this regard, the Regulation of Easo stated that the agency shall identify and disseminate best practices in asylum matters (article 3), organize information on countries of origin (article 4), coordinate the exchange of information and activities in regards to relocation of asylum seekers within the EU (article 5), and provide training for national officers in charge of asylum issues (article 6).

Secondly, the Stockholm Program declared that Easo should assist Member States facing particular pressures in their asylum systems³⁰⁰. Precisely, Easo’s Regulation empowered the agency to coordinate common action and capacity

²⁹⁶ COMTE, Françoise, “A new agency is born...”, *op. cit.* p. 385.

²⁹⁷ Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office, OJ L-132, pp. 11-28, 29.05.2010.

²⁹⁸ For an overview of the activities undertaken by Easo during its first year see, European Asylum Support Office, “Work Programme 2011”, 2011.

²⁹⁹ European Council, “The Stockholm Programme — An Open and Secure Europe Serving and Protecting Citizens”, OJ C-115, 04.05.2010, p. 32.

³⁰⁰ *Ibid.*, p. 33.

building measures (article 9), support the preliminary analyses of asylum requests (article 10), or deploy asylum support teams upon the request of the Member State in need (article 13). Lastly, article 11 of the Regulation of Easo specified the Stockholm Program's objective to contribute to the development and implementation of a uniform and affective CEAS³⁰¹.

In June 2011, Easo was officially inaugurated in Malta, where its seat is located³⁰². The new European agency's mandate consists in strengthening mutual trust and the operational cooperation between the competent national asylum authorities in order to "increase convergence and ensure ongoing quality of Member States' decision-making procedures"³⁰³. In this respect, the European Commission stressed that Easo should closely cooperate with Frontex and Europol "to ensure there is clarity on the respective roles of each and to ensure that emergency operating procedures are rapid and effective"³⁰⁴. Similarly, the Council stated that in emergency situations requiring a rapid assistance to a Member State, Easo and Frontex should closely cooperate "both at expert and management level (...) to help ensure a focused approach to asylum, border and return management"³⁰⁵.

Therefore, Easo was established to assist the Member States in coherently applying the existing asylum *acquis* and guaranteeing the effective implementation of all the legislative and operational measures. However, the agency was not delegated "direct or indirect powers in relation to the taking of decisions (...) on individual applications for international protection"³⁰⁶. The relationship between the Member States and Easo is one of mutual dependency.

³⁰¹ Ibid., p. 32.

³⁰² Seat Agreement Between the Government of Malta and the European Asylum Support Office, 24.05.2011, <https://www.easo.europa.eu/sites/default/files/Seat-Agreement.pdf>, (last accessed: 30/04/2018).

³⁰³ Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office, OJ L-132, pp. 11-28, 29.05.2010, recital 5.

³⁰⁴ Commission, "Enhanced intra-EU solidarity in the field of asylum: An EU agenda for better responsibility-sharing and more mutual trust", COM(2011) 835 final, 02.12.2011, p. 4.

³⁰⁵ Council conclusions on a Common Framework for genuine and practical solidarity towards Member States facing particular pressures on their asylum systems, including through mixed migration flows, 3151st Justice and Home Affairs Council meeting Brussels, 08.03.2012.

³⁰⁶ Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office, OJ L-132, pp. 11-28, 29.05.2010, recital 14.

Easo's operational assistance may enhance the capacity of the Member State to effectively implement the European asylum framework, provided that they contribute sufficient human and material resources that allow the agency to fully develop its operational goals and conduct its activities. The actual impact of Easo thus depends on "the Member States' willingness to use the possibilities it offers and on their commitment to engage in such collaboration"³⁰⁷.

3. The Post-Stockholm Scenario: Towards a Growing Operational and Emergency Driven AFSJ?

3.1. The 2014 AFSJ Strategic Guidelines for the 2015-2020 Period: Ensuring a Coherent and Effective Implementation of the Existing AFSJ Framework

The European Commission initiated a public consultation in 2013 with the aim of contributing to the future agenda of the JHA, since the Stockholm Program, which provided the EU with a roadmap in the AFSJ for the period from 2010 to 2014, was about to conclude³⁰⁸. While the multiannual scheme following the Stockholm Program would have highly benefited from an in-depth assessment of its progress and achievements, the Commission did not conduct any report reviewing the implementation of the Stockholm Program, though the European Council sent an invitation to submit a mid-term review before June 2012. In lieu, the Cypriot Presidency and the European Parliament respectively issued a mid-term report³⁰⁹.

³⁰⁷ Commission, "Enhanced intra-EU solidarity in the field of asylum: An EU agenda for better responsibility-sharing and more mutual trust", COM(2011) 835 final, 02.12.2011, p. 3.

³⁰⁸ Commission, "Public Consultation: Debate on the future of Home Affairs policies: An open and safe Europe – what next?", https://ec.europa.eu/home-affairs/what-is-new/public-consultation/2013/consulting_0027_en (last accessed: 30/04/2018).

³⁰⁹ Council, "Stockholm Programme mid-term review", doc. 15921/12, 13.11.2012 and Parliament, "Report: Plenary sitting on the mid-term review of the Stockholm Programme (2013/2024(INI))", 04.03.2014. See also, European Migration Network, "A Descriptive Analysis of the Impacts of the Stockholm Programme 2010-2013", May 2014 and LABAYLE, Henri and DE BRUYCKER, Philippe, "Towards the Negotiation and Adoption of the Stockholm Programme's Successor for the Period 2015-2019", Study to the European Parliament's LIBE Committee, PE 493.015, August 2013.

The post-Lisbon Treaty scenario revealed an institutional clash between the competences of the European Commission and the European Council in terms of designing and determining the priorities at the EU AFSJ³¹⁰. As CARRERA and GUILD argued, “there has not been a Stockholm Program *per se*, or indeed a unique EU policy programming strategy or framework of reference on the AFSJ”, but rather, “a plurality of policy agendas, strategies and roadmaps on a wide array of AFSJ policies have proliferated, often containing specific lines of action and policy priorities”³¹¹.

According to article 68 TFEU, the European Council shall define the strategic guidelines, operational planning, and priorities for the AFSJ until 2020. In this regard, it is considered that the future JHA agenda needs to focus on consolidation and implementation instead of promoting the adoption of new legislation and additional measures³¹². The new strategic guidelines should move away from the “shopping list” approach taken in the Stockholm Program, since it was excessively detailed³¹³.

Both the Member States and the European Commission contributed to the negotiations and the content of the next multiannual agenda for the JHA. Member States agreed on result-oriented strategic guidelines that should consolidate the progress already achieved by focusing on the coherent and effective implementation of the existing AFSJ framework. Additionally, the Member States stressed that in the wake of the economic crisis, it was essential to strengthen operational cooperation and ensure greater coordination with the

³¹⁰ See, ENGSTRÖM, Viljam and HEIKKILÄ, Mikaela, “Lisbonising back and forth? Strategic planning and fundamental rights in the AFSJ” in WOLFGANG, Benedek, *et. al.* (eds.), *European Yearbook on Human Rights 2015*, United Kingdom: Intersentia, 2015, pp. 295-306.

³¹¹ CARRERA, Sergio and GUILD, Elspeth, “The European Council’s Guidelines for the Area of Freedom, Security and Justice 2020: Subverting the ‘Lisbonisation’ of Justice and Home Affairs?”, *CEPS Essay*, 13, 14 July 2014, p. 5.

³¹² PASCOUAT, Yves, “The future of the area of freedom, security and justice: Addressing mobility, protection and effectiveness in the long run”, *European Policy Centre*, 23 January 2014, p. 9; House of Lords (European Union Committee), “Strategic guidelines for the EU’s next Justice and Home Affairs programme: steady as she goes”, 13rd Report of Session 203-14, 14.04.2014, p. 40.

³¹³ *Ibid.*, p. 38. See, COLLETT, Elizabeth, “The European Union’s Stockholm Program: Less Ambition on Immigration and Asylum, But More Detailed Plans”, *Migration Policy Institute*, 12 January 2010.

assistance of the EU JHA agencies³¹⁴. Whereas the Member States' views concurred to a great extent with the European Commission's opinion, its plans for the post-2014 guidelines were more ambitious³¹⁵.

The Commission's vision and priorities for the AFSJ guidelines (until 2020) were presented in two Communications issued in 2014³¹⁶. The Commission placed great emphasis on guaranteeing and monitoring the full implementation, enforcement, and coherent transposition of the existing instruments at the EU level. Specifically, the operational assistance of Frontex, Easo, and Europol to the Member States was deemed crucial to ensure an effective application of EU measures. The information exchange, mutual trust, and cooperation between the Member States, the EU Institutions, and the AFSJ agencies should be reinforced and consolidated. In this respect, the Commission stated that "the European Parliament, the Member States, the Commission, the High representative/EEAS, EU Agencies, and many others will have to join forces more strongly to be able to respond in an effective manner to a changing environment"³¹⁷.

Finally, on 26 and 27 June 2014, the European Council adopted the AFSJ Strategic Agenda for the period from 2015 to 2020³¹⁸, which was criticized for lacking added value. Compared to the Stockholm Program, the document containing the European Council's conclusions was extremely short, vague, and merely presented an overview of the AFSJ to date³¹⁹. CARRERA and GUILD claimed that the new agenda responded to the interests of the Member States and aimed to "de-Lisbonize" the more pluralistic AFSJ inter-institutional setting

³¹⁴ Council, "Letter from the LT Presidency to the incoming EL Presidency on the future development of the JHA area", doc. 17808/13, 13.12.2013.

³¹⁵ PEERS, Steve, "The next multi-year EU Justice and Home Affairs programme Views of the Commission and the Member States", *Statewatch Analysis*, 12.03.2014.

³¹⁶ Commission, "An Open and Secure Europe: Making it Happen", COM(2014) 154, 11.03.2014. Commission Communication, "The EU Justice Agenda for 2020 – Strengthening Trust, Mobility and Growth within the Union", COM(2014) 144, 11.03.2014.

³¹⁷ *Ibid.*, p. 13.

³¹⁸ European Council, "Extract from the 26-27 June 2014 European Council Conclusions concerning the area of Freedom, Security and Justice and some related horizontal issues", OJ C-240, 24.07.2014.

³¹⁹ COLLETT, Elizabeth, "The EU's Strategic Guidelines on Migration: Uncontentious Consensus, but Missed Opportunity", *Migration Policy Institute*, July 2014.

that emerged from the Lisbon Treaty”³²⁰. LÉONARD and KAUNERT asserted that the European Council’s approach was paradoxical since “at a time when AFSJ matters – such as asylum, migration, borders, terrorism, policing, and judicial cooperation – have never been so salient, the EU finds itself, for the first time ever, devoid of any significant, over-arching strategy for the development of its AFSJ”³²¹.

The Strategic Guidelines detailed three central priorities for the coming years in the AFSJ: 1) to consistently transpose, effectively implement and consolidate the legal instruments and policy measures in place; 2) to intensify operational cooperation, enhance the role of the different EU agencies and strengthen the strategic use of EU funds; and 3) to ensure the protection and promotion of fundamental rights³²².

Regarding the role that the EU decentralized agencies should play in the AFSJ, the European Council stressed the importance of Easo to promote a full, uniform, and effective implementation of the CEAS³²³. The reactivity capabilities and operational support of Frontex to Member States subject to an exceptional migratory pressure at their external borders shall be strengthened. Additionally, the European Council mentioned that in the long term, the feasibility of designing a European system of border guards should be studied³²⁴. Lastly, the new program considered the coordination role of Europol and Eurojust essential to promote judicial and police operational cooperation, so as to prevent and combat cross-border crime³²⁵.

³²⁰ CARRERA, Sergio and GUILD, Elspeth, “The European Council’s Guidelines for the Area of Freedom, Security and Justice 2020...”, *op. cit.*, p. 13.

³²¹ LÉONARD, Sarah and KAUNERT, Christian, “Beyond Stockholm: in search of a strategy for the European Union’s Area of Freedom, Security, and Justice”, *European Politics and Society*, 17(2), 2016, p. 146.

³²² European Council, “Extract from the 26-27 June 2014 European Council Conclusions concerning the area of Freedom, Security and Justice and some related horizontal issues”, OJ C-240, 24.07.2014, paras 3-4. See, Council, “Mid-term review of the JHA strategic guidelines - Information from the Presidency”, doc. 15224/17, 01.12.2017.

³²³ *Ibid*, para 7.

³²⁴ *Ibid*, para 9.

³²⁵ *Ibid*, para 10.

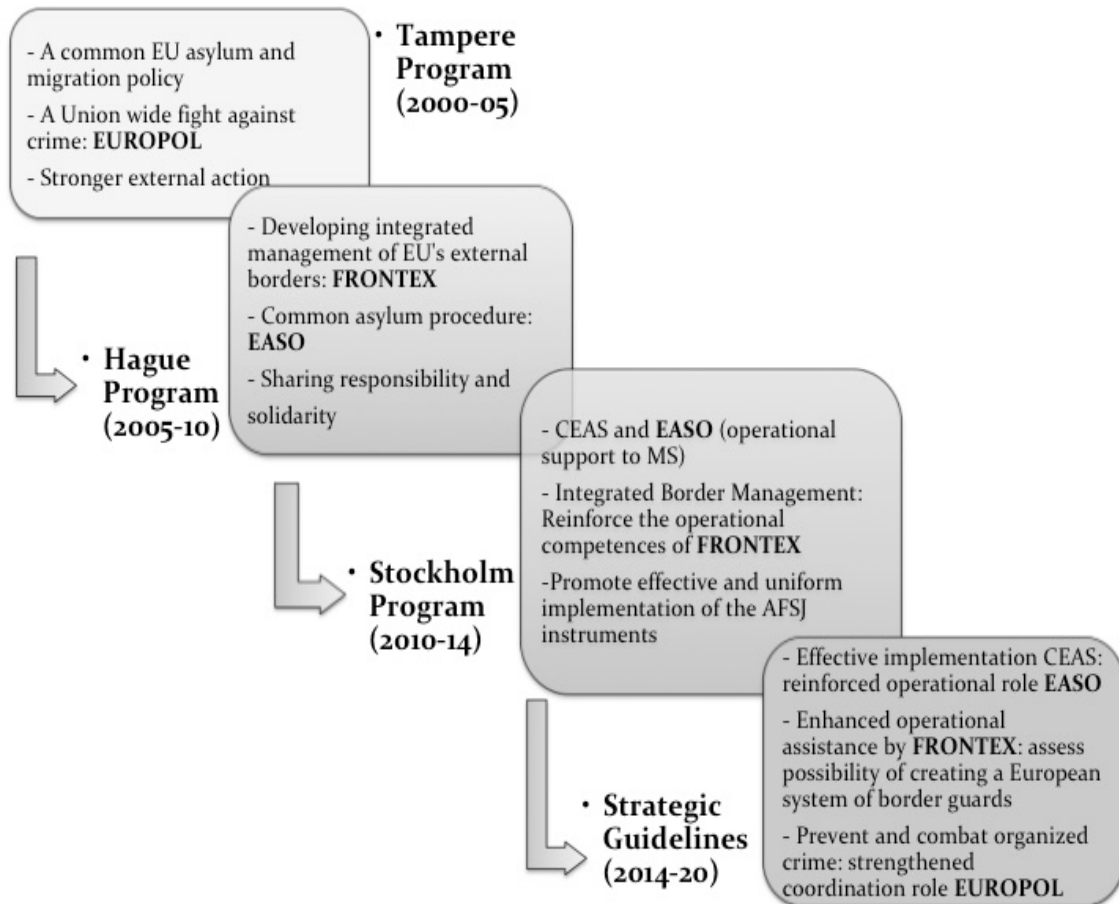


Figure 5: The development of the EU JHA Agencies in the Tampere, The Hague, Stockholm and 2014 Strategic Guidelines. Source: author's own elaboration.

3.2. *The European Agenda on Migration: Ensuring a Coherent and Effective Response to Emergencies at the AFSJ*

The 2014 European Council's Strategic Guidelines concerning the role that the EU agencies should play in the AFSJ were empty of content and merely repeated previously established objectives and priorities. In particular, the Strategic Guidelines did not introduce any new practical measures, aims, initiatives, or commitments, which highly contrasted the ambitious and comprehensive guidelines and time frames set by the Tampere, The Hague, and the Stockholm Programs. This legislative and operational planning vacuum in the AFSJ was to a certain extent filled after the European Commission adopted the European

Agendas on Security and Migration in 2015³²⁶.

The European Agenda on Migration aimed to shape an effective and balanced European migration policy. Unlike the 2014 Strategic Guidelines, the Commission included specific measures and strategic initiatives in the Agenda that needed to be adopted in the short, medium, and long-term. The purpose of the immediate actions tabled consisted in chiefly managing the exceptional influx of migrants and refugees crossing the Mediterranean. Particularly, the Agenda on Migration focused on saving lives at sea, better organizing resettlement and relocation, enhancing the external cooperation with third countries, and establishing the hotspot approach. This approach enhanced the operational assistance and inter-agency cooperation of Frontex, Easo, and Europol in the territory of Member States subject to an exceptional and sudden migratory pressure³²⁷. At the hotspots, these agencies are responsible for supporting the competent national authorities to effectively, uniformly, and flexibly manage migration flows.

The European Agenda on Migration recommended addressing the structural limitations of the EU migration policy in the medium-term. Specifically, the Agenda stated that the strategy should focus on: 1) reducing incentives for irregular migration, 2) strengthening European external border management, 3) coherently implementing the CEAS, and 4) developing a new policy on legal migration³²⁸. Lastly, completing the CEAS, designing a shared management of the European external border, and introducing a new model of legal migration constituted the long-term objectives put forward by the European Agenda on Migration³²⁹.

³²⁶ Commission, “The European Agenda on Security”, COM(2015) 185 final, 28.04.2015 and Commission, “A European Agenda on Migration”, COM(2015) 240 final, 13.05.2015.

³²⁷ Commission, “A European Agenda on Migration”, COM(2015) 240 final, 13.05.2015, p. 6.

³²⁸ *Ibid.*, p. 6. For an analysis of the extent of achievement of these objectives see, Commission, “Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Delivery of the European Agenda on Migration”, COM(2017) 558 final, 27.09.2017; Commission, “Report from the Commission to the European Parliament, the European Council and the Council Progress Report on the European Agenda on Migration”, COM(2017) 669 final, 15.11.2017 and Commission, “Communication from the Commission to the European Parliament, the European Council and the Council Progress Report on the Implementation of the European Agenda on Migration”, COM(2018) 250 final, 14.03.2018.

³²⁹ Commission, “A European Agenda on Migration”, COM(2015) 240 final, 13.05.2015, p. 17.

In spite of the increased pressure that Frontex, Easo, and Europol faced to further operationally support the Member States in uniformly and effectively applying the adopted EU instruments, the implementation deficit in the AFSJ was not overcome, but rather highlighted as a result of the “refugee crisis” from 2015 on³³⁰. Notwithstanding this implementation deficit, the 2014 European Council’s Strategic Guidelines considered the coherent and effective application of the existing EU migration, asylum, and border management measures to be a priority. However, the new Strategic Guidelines neither established specific objectives, nor suggested a plan for ensuring an effective implementation in the EU AFSJ. On the contrary, the European Agenda on Migration detailed some measures and signaled Frontex, Europol, and Easo as key actors to promote operational cooperation and assistance on the ground.

V. CONCLUSION

Institutionalization and integration in migration, asylum, and border management matters have incessantly expanded in the EU since enhanced cooperation between Member States was originally devised under the Treaty of Maastricht³³¹. Initially, the JHA policies were split between the first and the third pillars, which clearly favored the position of the Member States and limited the EU Institutions’ role and prerogatives. The former third pillar quickly revealed its limitations in ensuring an effective national implementation of the measures adopted at the EU level³³². Precisely, Europol was established under the former third pillar to facilitate the exchange of information between the competent national enforcement authorities and to support them in coordinating their police operational activities in trans-boundary crimes. Europol became the spearhead of the subsequent AFSJ *agencification* process.

The EU Institutions gradually gained relevance in matters like migration,

³³⁰ European Migration Network, “A Descriptive Analysis of the Impacts of the Stockholm Programme 2010-2013”, May 2014, p. 6.

³³¹ MONAR, Jörg, “Justice and home affairs: The Treaty of Maastricht as a decisive intergovernmental gate opener”, *Journal of European Integration*, 34(7), 2012, p. 718.

³³² LADENBURGER, Clemens, “Police and Criminal Law...”, *op. cit.*, p. 22.

asylum, and border management, which previously fell exclusively under the Member States' scope of action. The Tampere, Hague, and Stockholm Programs were also key instruments in moving the strategic development and communitarization of the AFSJ forward. During this process, Frontex, Easo, and Europol progressively emerged as significant institutional players, ensuring an effective and harmonized implementation of AFSJ legislation and policies by operationally supporting and coordinating the Member States' activities.

Despite the creation and constant reinforcement of the operational mandate of Europol, Frontex, and Easo, the AFSJ still suffers from an implementation deficit, as the recent "refugee crisis" clearly revealed. Not only are the operational competences and inter-agency cooperation of Frontex, Easo, and Europol limited, but the Member States also insufficiently contribute equipment and personnel to these agencies.

Furthermore, the characteristic fragmentation of the AFSJ, resulting in overlaps and duplications among the several actors working in the AFSJ, also adds to the existing implementation deficit. Neither the current AFSJ Strategic Agenda for the 2015-2020 period, nor the 2015 European Agenda on Migration sufficiently address this issue. The former vaguely stressed that the operational role of Frontex, Easo, and Europol should be further developed, and that coherent transposition, effective implementation, and consolidation are overall priorities for the AFSJ. The European Agenda on Migration, on the other hand, centered on adopting crisis management measures to ensure swift operational support to national authorities facing an extraordinary migratory pressure.

CHAPTER 3. Frontex, Easo, and Europol as EU Decentralized Operational Agencies: Classification, Conferral of Powers, and Governance

The previous chapter analyzed the institutional and contextual framework under which Frontex, Easo, and Europol were established. It was concluded that these agencies are called to play a key role in ensuring a coherent cooperation between the Member States and promoting an effective implementation of the AFSJ's goals. However, *agencification* was not a trend exclusively limited to the AFSJ, but rather took place in almost every European policy area³³³.

The increasing importance of the decentralized agencies in EU administrative law and governance is reflected in the Treaty of Lisbon. Specifically, article 263 TFEU states that the CJEU is competent to review the acts adopted by EU agencies since they may have legal effects vis-à-vis third parties. The extension of the CJEU's jurisdiction to EU agencies indicates that their acts do not escape judicial control, but rather are fully recognized in European governance and form part of the European institutional legal system³³⁴. However, the current establishment of agencies on a case-by-case basis and the inexistent criteria for choosing the agency as a model, among other potential institutional choices, has led to inconsistencies in their structures and functioning, as well as duplication

³³³ See, EGEBERG, Morten and TRONDAL, Jarle, "Researching European Union Agencies: What Have We Learnt (and Where Do We Go from Here)?", *Journal of Common Market Studies*, 55(4) 2017, pp. 1-16; EGEBERG, Morten, MARTENS, Maria and TRONDAL, Jarle, "Building Executive Power at the European Level: On the Role of European Union Agencies" in BUSUIOC, Madalina, GROENLEER, Martijn and TRONDAL, Jarle, *The Agency Phenomenon...*, *op. cit.*, pp. 28-38.

³³⁴ COMTE, Françoise, "2008 Commission Communication 'European Agencies—the Way Forward': What is the Follow-Up Since Then?", *Review of European Administrative Law*, 3(1), 2010, p. 103.

and inefficiency of their work³³⁵.

Moreover, the CJEU recently updated and relaxed its long-standing, strict Meroni non-delegation doctrine. Not only did the CJEU acknowledge the *agencification* process in its recent Short-Selling ruling, but also found the delegation of powers to EU agencies constitutional, in so far as such powers are precisely delineated and amenable to judicial review. Nonetheless, this condition is rather open, since it does not specify the degree of discretion that EU agencies may enjoy in practice.

While EU decentralized agencies are becoming the preferred institutional option to effectively and consistently ensure the implementation of constantly growing EU policies and laws, these agencies have been established and empowered in an ad-hoc basis. That is, a common legally binding framework that defined, classified, and detailed the conditions under which powers may be conferred to EU agencies was never adopted.

In the absence of such a European binding framework, this chapter firstly examines the exponential creation of decentralized agencies in the EU. Secondly, Frontex, Easo, and Europol are defined as EU decentralized agencies, and functionally and instrumentally classified as agencies with an operational nature. Thirdly, in light of the Treaties' provisions and the CJEU's non-delegation doctrine, the constitutionality and limits to the conferral of operational powers to Frontex, Easo, and Europol is analyzed. In this respect, special attention is paid to the degree of discretion that Frontex, Easo, and Europol enjoy in operationally supporting the competent national authorities to effectively and uniformly implement the AFSJ objectives. This chapter concludes by examining Frontex, Easo, and Europol's governance and administrative structure.

I. THE AD-HOC AGENCIFICATION PROCESS IN THE EU

The progressive extension of EU powers into greater policy fields required the Commission to shift its attention from policy-making to administrative, technical

³³⁵ Analytical Fiche Nr 2, "Creation of Agencies", 2010.

and implementation tasks. Without the assistance of the EU decentralized agencies, the Commission was at risk of becoming an inflexible institutional mastodon. Decentralized agencies became the preferred institutional option to improve the credibility, accountability, legitimacy, transparency, and visibility of EU governance, and to effectively and consistently apply growing common policies and laws. Despite the significant role of the decentralized agencies in the EU, they were established in an ad-hoc basis. That is, a common definition, binding framework, and classification of the EU decentralized agencies regulating their accountability, management, and functioning are missing. This section thus studies the establishment of EU decentralized agencies and the lack of a common legally-binding framework regulating their functioning.

1. Four Waves of the Creation of EU Decentralized Agencies

Currently, 37 decentralized agencies (also referred to as regulatory or traditional agencies) shape an important part of the administrative executive power and are pivotal institutional actors in the EU. These agencies, whose headquarters are spread throughout the Member States, assist in the development of EU policies and laws and ensure their effective and harmonized implementation. The agencies' budget represented 0.8% (1.2 billion euros) of the 2016 EU annual budget and their personnel approximately amounted to 5,500³³⁶. EU agencies liaise under the EU Agencies Network³³⁷ in order to better coordinate and achieve their objectives.

While the European Center for the Development of Vocational Training and the European Foundation for the Improvement of Living and Working

³³⁶ Definitive adoption (EU, Euratom) 2017/292 of the European Union's general budget for the financial year 2017, OJ L 51, 28.2.2017, p. 160.

³³⁷ EU Agencies Network, <https://euagencies.eu> (last accessed: 30/04/2018). See, EU Agencies Network, "The EU Agencies Working for You", 2016, https://euagencies.eu/assets/files/EU_Agencies_brochure_2016.pdf (last accessed: 30/04/2018). In this regard and for a general overview of the EU Agencies see, Deloitte, "How do EU agencies and other bodies contribute to the Europe 2020 Strategy and to the Juncker Commission Agenda?", November 2016, https://euagencies.eu/assets/files/deloitte_study_EU_agencies_contribution.pdf, (last accessed: 30/04/2018).

Conditions were the first EU agencies to be created in 1975 (the first wave of EU agency creation³³⁸), EU agencies certainly started to mushroom in the 1990's (second wave³³⁹). Their introduction in different policy sectors steadily continued ever since³⁴⁰. During the 1980's and 1990's, the European Commission was responsible for ever-growing executive, technical, and scientific tasks, which ultimately hampered the Commission's core policy-making duty.

Due to the unwillingness or incapacity of the competent national authorities to effectively and uniformly transpose, monitor, implement, and enforce the exponentially rising common legislation and policies, the Commission increasingly needed to take over these tasks. As VOS argues, the increasing European integration and the growing supra-national delegation of powers required "the implementation of Community rules and the corresponding design and approximation of administrative rules, and the management of the existing regulatory framework"³⁴¹.

Nonetheless, Member States were highly reluctant to further empower the Commission in matters such as the implementation of EU laws, which exclusively belonged to them previously. As a result, Member States provided the Commission, which represented a "symbol of the loathed Brussels Eurocracy"³⁴², with insufficient resources to successfully apply EU legislation and policies³⁴³. Furthermore, the Commission was not interested in acquiring "thankless and politically costly" implementation powers³⁴⁴. This situation thus led to a legitimacy and mismanagement crisis at the European Commission, best exemplified by the bovine spongiform encephalopathy emergency in 1996, the oil tanker Erika disaster in 1999, and finally, the Santer Commission's corruption

³³⁸ See, Appendix B: EU Decentralized Agencies.

³³⁹ See, Appendix B: EU Decentralized Agencies.

³⁴⁰ For an analysis of the first EU agencies established see, KREHER, Alexander, "Agencies in the European Community-a step towards administrative integration in Europe", *Journal of European Public Policy*, 4(2), 1997, pp. 225-245.

³⁴¹ VOS, Ellen, "Reforming the European Commission: What role to play for EU agencies", *Common Market Law Review*, 37(5), 2000, p. 1113.

³⁴² DEHOUSSE, Renaud, "Misfits: EU Law and the Transformation of European Governance", *Jean Monnet Working Paper*, 2, 2002, p. 10.

³⁴³ MAJONE, Giandomenico, "The Credibility Crisis of Community Regulation", *Journal of Common Market Studies*, 38(2), 2000, p. 276.

³⁴⁴ *Ibid.*, p. 279.

scandal in 1999.

The Prodi Commission aimed for a fresh start after the Santer's scandal and EU agencies were envisioned as a means to tackle citizen distrust and the Commission's administrative and technical burden³⁴⁵. Specifically, two of the Commission's communications, "Better Lawmaking" and "A White Paper", aimed to enhance European governance. Regarding EU Agencies, "A White Paper" stated that independent agencies would improve the implementation of EU rules across the Union, which at the same time would allow the Commission to center on its core tasks³⁴⁶. The Communication also proposed the introduction of a common system to supervise and control EU agencies³⁴⁷.

Similarly, the "Better Lawmaking" Communication stressed the importance of decentralizing the highly detailed executive functions of the Commission, giving this power to European regulatory agencies³⁴⁸. As EGEBERG and TRONDAL pointed out, "agencification of the EU administration may be regarded as a compromise between functional needs for the supply of more regulatory capacity at the EU level, on one hand, and Member States' reluctance to transfer executive authority to the Commission, on the other"³⁴⁹.

Prodi's Commission, opting for agencies as an institutional and governance solution, led to the creation of sixteen of these bodies from 1999 to 2007 (third wave of agency creation³⁵⁰). Not only did these agencies cover former first pillar policy areas, but also second pillar matters (European Institute for Security Studies, European Union Satellite Centre, and European Defense Agency) and

³⁴⁵ In this regard see, Commission, "Second Report on Reform of the Commission Analysis of current practice and proposals for tackling mismanagement, irregularities and fraud", 10.09.1999; Commission, "Reforming the Commission - White Paper", COM(2000) 200, 05.03.2000. See also, SCHÖN-QUINLIVAN, Emanuelle, "Administrative Reform in the European Commission: From Rhetoric to re-legitisation", *EU-CONSENT Wider Europe, Deeper Integration? Constructing Europe Network*, 18.10.2006; EVERSON, Michelle and VOS, Ellen, "European Agencies. What about the institutional balance?", *Maastricht Law Working Papers Series*, 4, 2014, pp. 1-18.

³⁴⁶ Commission, "European Governance: A White Paper", COM(2001) 428 final, 25.07.2001, p. 24.

³⁴⁷ *Ibid.*, p. 24.

³⁴⁸ Commission, "European Governance: Better Lawmaking", COM(2002) 275 final 05.06.2002, p. 6.

³⁴⁹ EGEBERG, Morten and TRONDAL, Jarle, "Agencification of the European Union Administration: Connecting the Dots", *TARN Working Paper*, 1, 2016, p. 1. See, ONGARO, Edoardo *et. al.*, "European Union (EU) Agencies" in VERHOEST, Koen, *et. al.* (eds.), *Government Agencies: Practices and Lessons from 30 Countries*, Basingstoke: Palgrave Macmillan, 2012, pp. 400-410.

³⁵⁰ See, Appendix B: EU Decentralized Agencies.

third pillar matters (European Police Office, European body for the enhancement of judicial co-operation, and European Police College). As VOS put it, “in the 2000s (...) the European Commission took ‘ownership’ of the agencification process as part of a more general strategy in response to the need of an open government, accountability and new forms of partnerships between the different levels of European governance being in urgent need to (re)gain trust and credibility in the aftermath of various scandals”³⁵¹.

Consequently, the establishment of EU Agencies fundamentally responded to the specific executive and implementation needs that arose, rather than formed a plan or a set of EU administrative guidelines. In this regard, the fourth wave of EU agency creation centered on the most recent EU agencies introduced. Such agencies were primarily designed as a result of the financial crisis and the increasing migratory pressure at the European external borders (e.g. European Systemic Risk Board, European Banking Authority, European Securities and Markets Authority, European Insurance and Occupational Pensions Authority, European Asylum Support Office, European Agency for the operational management of large-scale IT Systems in the AFSJ, and the European Border and Coast Guard Agency)³⁵².

2. The Lack of a Common Legally-Binding Framework for the Creation, Operation, and Governance of EU Decentralized Agencies

Of great concern is the lack of a common legal framework for EU regulatory agencies³⁵³. Whereas mandatory guidelines for the establishment and operation of EU executive agencies exist³⁵⁴, a similar document for their regulatory

³⁵¹ VOS, Ellen, “EU agencies: Features, Framework and Future”, *Maastricht Faculty of Law Working Paper*, 3, 2013, p. 5.

³⁵² See, Appendix B: EU Decentralized Agencies.

³⁵³ See, Analytical Fiche Nr 2, “Creation of Agencies”, 2010.

³⁵⁴ Commission “Decision establishing guidelines for the establishment and operation of executive agencies financed by the general budget of the Union”, C(2014) 9109 final, 02.12.2014. Council Regulation (EC) No 58/2003 of 19 December 2002 laying down the statute for executive agencies to be entrusted with certain tasks in the management of Community programmes, OJ L-11,

counterparts has not yet been adopted. Almost ten years of negotiations among the European Commission, the European Parliament, and the Council have merely led to a legally non-binding common approach adopted in 2012³⁵⁵.

Back in 2001, the Commission's communication, "A White Paper", pointed out that EU regulatory agencies should operate under a clear framework and be subject to an effective system of supervision and control³⁵⁶. Subsequently, in 2002, the Commission put forward a framework stating the conditions for the establishment, operation, and control of the EU regulatory agencies, which would enhance their coherency, transparency, effectiveness, and decision-making processes³⁵⁷. In this regard, the European Parliament called for the adoption of a common framework regulation defining the conditions for the use of regulatory agencies³⁵⁸. Along the same lines, the Council declared that the Commission's proposal for a legally binding framework for EU regulatory agencies should respect the principles of subsidiarity and proportionality and ensure "coherence, transparency, good governance, credibility and cost-efficiency, as well as the legitimacy of their executive action"³⁵⁹.

The European Commission thus started to prepare a proposal for a common binding framework for EU regulatory agencies. A "Meta-Evaluation of the Community Agency System" was firstly undertaken, which highlighted that the agencies analyzed were "making a clear contribution to the policy area concerned and reaching their set objectives to a reasonable extent"³⁶⁰. In 2005, the Commission proposed a draft of an interinstitutional agreement on the operating

16.01.2003. See, Commission, "Guidelines for the establishment and operation of executive agencies financed by the general budget of the European Communities", SEC(2006) 662 final, 31.05.2006.

³⁵⁵ Joint Statement of the European Parliament, the Council of the EU and the European Commission on decentralised agencies, 19.07.2012, http://europa.eu/european-union/sites/europaeu/files/docs/body/joint_statement_and_common_approach_2012_en.pdf, (last accessed: 30/04/2018).

³⁵⁶ Commission, "European Governance: A White Paper", COM(2001) 428 final, 25.07.2001, p. 24.

³⁵⁷ Commission, "The operating framework for the European Regulatory Agencies", COM(2002) 718 final, 11.12.2002.

³⁵⁸ Parliament, "Resolution on the communication from the Commission: The operating framework for the European regulatory agencies", P5_TA(2004)0015, 13.01.2004.

³⁵⁹ Council, "2593rd Council Meeting Environment Luxembourg", doc. 10746/04, 28.06.2004, p. 38.

³⁶⁰ Commission, "Meta-Evaluation of the Community Agency System", 15.09.2003.

framework for EU regulatory agencies³⁶¹. The agreement stated that the lack of a common framework negatively impacted EU agencies' legal certainty and coherence due to their increasing non-transparent and diffused practices³⁶². The Commission's agreement set some guidelines concerning the creation, structure, operation, evaluation, and control of EU regulatory agencies. The common framework was called to be a blueprint in promoting coherence, effectiveness, accountability, and openness of the agencies.

However, the Council rejected the proposed legal form of an Interinstitutional Agreement as the operating framework for the European regulatory agencies and did not even undertake an evaluation of the content of the text prepared by the Commission³⁶³. The European Parliament regretted the Council's position and encouraged the Commission to continue its work on the matter³⁶⁴. Additionally, the Parliament expressed its concern about the exponential creation of regulatory agencies since "there is a consequent risk of the Commission's executive role being dismantled and fragmented into a plethora of bodies that work largely in an intergovernmental manner (...)"³⁶⁵.

The Interinstitutional Agreement remained unaddressed for three years, until the Commission decided to re-launch the debate in 2008³⁶⁶. The Commission stressed that, despite the specific features of each agency, there was an urgent need to develop general rules that govern and clarify the establishment, functions, operation, and governance of the EU regulatory agencies. Particularly, the Commission considered that "a balance must be struck between the need for an approach sufficiently standardized that agencies have a coherent place in European governance – and the need to respect agencies' specific

³⁶¹ Commission, "Draft Interinstitutional Agreement on the operating framework for the European regulatory agencies", COM(2005)59 final, 25.02.2005.

³⁶² *Ibid.*, p. 9.

³⁶³ Council, "Draft Interinstitutional Agreement on the operating framework for the European regulatory agencies", doc. 9738/05, 03.06.2005.

³⁶⁴ Parliament, "Resolution on the draft interinstitutional agreement presented by the Commission on the operating framework for the European regulatory agencies", P6_TA(2005)0460, 01.12.2005.

³⁶⁵ *Ibid.*

³⁶⁶ Commission, "European agencies – The way forward", COM(2008) 135 final, 11.03.2008. For a detailed analysis of this Commission's Communication see, COMTE, Françoise, "2008 Commission Communication...", *op. cit.*, pp. 65-110.

characteristics”³⁶⁷. With this ultimate objective in mind, the Commission renounced its original Interinstitutional Agreement and proposed several measures in order to facilitate an agreement with the Council and the Parliament on a coherent vision for EU agencies. Not only did the Commission remain open to alternatives to its original Interinstitutional Agreement, but also ordered a comprehensive evaluation of the existing regulatory agencies³⁶⁸, refusing to propose a creation of new regulatory agencies until such an evaluation was concluded³⁶⁹.

Finally in 2012, the Commission, the Parliament, and the Council agreed on a non-binding Common Approach for EU regulatory agencies³⁷⁰. The Common Approach clearly aimed to limit the latest agency frenzy and emphasized the need to undertake an impact assessment before any EU regulatory agency was established. The Common Approach pointed out that agencies’ founding acts should contain either a sunset or a review clause, and the possibility of disbanding or merging existing agencies was also recognized. Moreover, the Common Approach addressed other contentious issues, such as the seat of the agencies, their structure and governance, the creation or handling of EU classified information, the agencies’ international relations, the need to draw up annual and multiannual work programs, their funding, accountability, transparency, and the participation of stakeholders.

The Commission was responsible for implementing the adopted Common Approach, and in doing so, it aimed to ensure a more balanced governance of the agencies, improve their efficiency and accountability, and promote greater

³⁶⁷ Ibid., p. 6.

³⁶⁸ Euréval, “Meta-Study on Decentralized Agencies: Cross-Cutting Analysis of Evaluation Findings”, September 2008; Ramboll, “Evaluation of the EU decentralised agencies in 2009”, December 2009.

³⁶⁹ As COMTE pointed out this moratorium was broken by the Commission after the financial crisis. COMTE, Françoise, “2008 Commission Communication...”, *op. cit.*, p. 101.

³⁷⁰ Joint Statement of the European Parliament, the Council of the EU and the European Commission on decentralised agencies, 19.07.2012. See, BERNARD, Elsa, “Accord sur les agences européennes: la montagne accouche d’une souris”, *Revue du droit de l’Union Européenne*, 3, 2012, pp. 399-446; CHAMON, Merijn, “Les agences de l’Union Européenne: Origines, état des lieux et défis”, *Cahiers de Droit Européen*, 51(1), 2015, pp. 293-318; SCHOLTEN, Miroslava, “The Newly Released ‘Common Approach’ on EU Agencies: Going Forward or Standing Still?”, *Columbia Journal of European Law*, 19(1), 2012.

coherence. Particularly interesting was the introduction of an “alert-warning system”, which empowered the Commission to warn the European Parliament and the Council if an agency’s Management Board decision breached the agency’s mandate or EU law³⁷¹.

Whereas the adoption of the Common Approach represented a step forward in providing EU regulatory agencies with a framework, it is nevertheless a political non-binding agreement, which “us[es] quite tentative language and leav[es] a number of issues unresolved or to be developed and discussed again”³⁷². To date, no further developments or negotiations have taken place and the European Commission has not adopted any other progress report on the implementation of the Common approach since 2015.

The Treaty of Lisbon does not offer any further clarification. The TFEU only refers to EU agencies indirectly, without offering a definition or stating common legal guidelines regarding their creation³⁷³. In particular, articles 15 and 16 TFEU mention “Union institutions, bodies, offices and agencies”. Article 263 TFEU denotes one of the key characteristics of EU regulatory agencies, their establishment by secondary law, when declaring that the CJEU “shall (...) review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties”.

Interestingly, the CJEU may review the legality of the agencies’ acts (article 263 TFEU), hear cases regarding the failure of the agencies to act (article 265 TFEU), and give preliminary rulings concerning the validity and interpretation of acts of the agencies (article 267 TFEU). Hence, in spite of the lack of political will at the EU level to adopt a common definition or a binding applicable legal

³⁷¹ Commission, “Roadmap on the follow-up to the Common Approach on EU decentralised agencies”, 19.12.2012, <http://bit.ly/2hv6EQ2>, (last accessed: 30/04/2018). Subsequently, two reports regarding the implementation of the Common Approach were adopted. See, Commission, “Progress report on the implementation of the Common Approach on EU decentralised agencies”, 10.12.2013, <http://bit.ly/2qFkn8y>, (last accessed: 30/04/2018) and Commission, “Progress report on the implementation of the Common Approach on EU decentralized agencies”, COM(2015) 179 final, 24.04.2015.

³⁷² SCHOLTEN, Miroslava, “The Newly Released ‘Common Approach’ ...”, *op. cit.*, p. 4.

³⁷³ See, COUZINET, Jean-François, “La Prise en Compte de l’Existence des ‘Agences’ para les Récents Traités” in MOLINIER, Joël, *Les Agences de l’Union Européenne*, Brussels: Bruylant, 2011, pp. 191-197.

strategy to harmonize the creation, role, structure, governance, resources, and accountability of the EU decentralized agencies, these bodies continue to develop as key institutional players and significantly shape EU administrative law and governance.

II. MAPPING FRONTEX, EASO, AND EUROPOL AS EU DECENTRALIZED OPERATIONAL AGENCIES

In a field of shared competences like the AFSJ, the role of Frontex, Easo, and Europol is very relevant, since the implementation of common policies shall be accompanied by close cooperation between the Member States and the EU³⁷⁴. As the European Commission states, “the establishment of agencies can make possible a pooling of powers at EU level which would be resisted if centered on the institutions themselves”³⁷⁵.

This section firstly aims to define Frontex, Easo, and Europol as EU decentralized agencies. Subsequently, the implications of Frontex and Easo, implicitly acknowledged as institutional measures in primary law, against Europol’s powers, explicitly regulated in primary law, are analyzed. This section concludes by arguing that according to a functional and instrumental classification, Frontex, Easo, and Europol are largely operational agencies, which singularize them among the rest of EU decentralized agencies and even other agencies in the AFSJ.

1. Defining Frontex, Easo, and Europol as EU Decentralized Agencies

Despite the remarkable *agencification* at the EU, a common official definition of regulatory or decentralized agencies does not yet exist. The most detailed definition can be found in the draft of the European Commission’s

³⁷⁴ Commission, “European agencies – The way forward”, COM(2008) 135 final, 11.03.2008, p. 5.

³⁷⁵ Ibid., p. 5.

interinstitutional agreement on the operating framework for EU regulatory agencies, which was never adopted. Here, the Commission defined a EU regulatory agency “as an independent legal entity created by the legislator in order to help regulate a particular sector at European level and help implement a particular Community policy (...)”³⁷⁶. Previously, in 2002, the Commission highlighted three key features that are shared by all regulatory agencies: 1) They are established by secondary legislation to perform the competences clearly specified in their constituent acts; 2) they have legal personality; 3) they enjoy a certain degree of organizational and financial autonomy³⁷⁷.

Similarly, whereas the literature has put forward numerous definitions of EU regulatory agencies, the doctrine agrees on some of their central characteristics. Specifically, agencies enjoy a certain degree of organizational and financial autonomy. They are set up by secondary legislation and conferred legal personality in order to perform a wide range of tasks, which may range from information gathering to monitoring, supervision, or decision-making. EU decentralized agencies are considered suitable instruments to effectively and uniformly apply EU laws and policies³⁷⁸.

Instead of formulating yet another definition for the analysis of Frontex, Easo, and Europol, this thesis adopts CHAMON’s clear conceptualization of EU

³⁷⁶ Commission, “Draft Interinstitutional Agreement on the Operating Framework for the European Regulatory Agencies”, COM(2005) 59 final, 25.02.2005, p. 5.

³⁷⁷ Commission, “The operating framework for the European Regulatory Agencies”, COM(2002) 718, 11.12.2002.

³⁷⁸ See, among others, BARBIERI, Dario and ONGARO, Edoardo, “Les agences de l’UE: points communs et différences avec les agences publiques agissant au niveau national”, *Revue Internationale des Sciences Administratives*, 74(3), 2008, p. 423; BUSUIOC, Madalina, *European Agencies...*, *op. cit.*, p. 21; CHITI, Edoardo, “Les Agences, l’Administration Indirecte et la Coadministration” in AUBY, Jean-Bernard and DUTHEIL DE LA ROCHÈRE, Jacqueline (eds.), *Droit Administratif Européen*, Brussels: Bruylant, 2007, p. 269; EKELUND, Helena, “Making Sense of the ‘Agency Programme’ in post-Lisbon Europe: Mapping European Agencies”, *Central European Journal of Public Policy*, 6(1), 2012, pp. 26-49; GRILLER, Stefan and ORATOR, Andreas, “Everything under control? The ‘way forward’ for European agencies in the footsteps of the Meroni doctrine”, *European Law Review*, 35(1), 2010, pp. 3-35; SANCHEZ BARRUECO, Maria Luisa, “L’Agence Européenne de Défense: Un Organe Intergouvernemental au Service d’une Institution Communautaire?”, *Revue du Droit de l’Union Européenne*, 3, 2008, p. 513; SCHOLTEN, Miroslava, *The political accountability of EU and US independent regulatory agencies*, Martinus Nijhoff Publishers, 2014, p. 42; TIMMERMAN, Peter and ANDOURA, Sami, “Governance of the EU: The reform debate on European agencies reignited”, *European Policy Institutes Network Working Paper*, 19, 2008, p. 4.

regulatory agencies as “permanent bodies, under EU public law, established by the institutions through secondary legislation and endowed with their own personality”³⁷⁹. Frontex, Easo, and Europol can be considered as EU regulatory or decentralized agencies since they are permanent bodies with their own personality and are created through secondary laws.

Frontex, Easo and Europol were introduced for an indeterminate period of time³⁸⁰, in contrast to executive agencies that the Commission creates for a set time to manage a specific EU program³⁸¹. Additionally, although Europol (along with Eurojust and the European Defense Agency) is explicitly mentioned in the Treaties, Frontex, Easo, and Europol are currently set up through EU Regulations³⁸². Lastly, these AFSJ agencies are vested legal personality and are thus capable of bearing all of the legal rights and duties that legal persons have according to a Member State’s laws³⁸³.

2. The Explicit Establishment of Europol versus the Implicit Recognition of Frontex and Easo in Primary Law

According to the principle of conferral (article 5(2) TEU), the “Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein”. Whereas article 88 TFEU explicitly refers to Europol’s mission and tasks, a similar legal basis regarding Frontex and Easo is missing in the Treaties. In fact, Europol, Eurojust, and the European Defense Agency are the only EU regulatory agencies explicitly mentioned in primary law.

³⁷⁹ CHAMON, Merijn, *Transforming the EU Administration: Legal and Political Limits to Agencification*, PhD Thesis: Universiteit Gent, 2015, p. 10.

³⁸⁰ Ibid., p. 10.

³⁸¹ The current executive agencies are: Education, Audiovisual and Culture Executive Agency, Executive Agency for Small and Medium-sized enterprises, European Research Council Executive Agency, Consumers, Health, Agriculture and Food Executive Agency, Research Executive Agency, Innovation & Networks Executive Agency.

³⁸² CHAMON, Merijn, *Transforming the EU Administration...*, *op. cit.*, p. 12.

³⁸³ Ibid., p. 13.

While the Treaties allow the EU legislator to bestow upon the Commission both implementation powers (article 291 TFEU) and the competence to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of a legislative act (article 290 TFEU)³⁸⁴, primary law does not authorize the Commission to sub-delegate such powers to EU agencies. Justifiably, VOS finds it striking that no reference to agencies is made in article 291 TFEU “in view of the composite character of the EU executive and the more remarkable, now that agencies do appear in the Treaties elsewhere”³⁸⁵.

Articles 290 and 291 TFEU do not explicitly exclude the delegation of competences to EU regulatory agencies and articles 263, 267, and 277 TFEU implicitly accept that some powers may be conferred to these bodies. Hence, as VOS accurately argues, this incomplete legal scenario “highlights the uncomfortable and even unconstitutional position of agencies as actors operating in the shadow of hierarchy that can adopt binding executive acts that would ultimately be at odds with the principle of conferral”³⁸⁶.

Due to the inexistence of a general section in the Treaties to establish or confer competences to EU agencies³⁸⁷, open clauses (namely, articles 352 and 114

³⁸⁴ The divide between delegated (article 290 TFEU) and implementing acts (article 291 TFEU) brought by the Treaty of Lisbon has attracted an important doctrinal attention that is beyond the scope of this thesis. In this respect see, BERGSTRÖM, Carl Fredrik and RITLENG, Dominique (eds.), *Rulemaking by the European Commission: The New System for Delegation of Powers*, Oxford University Press, 2016; CHAMON, Merijn, “Clarifying the Divide between Delegated and Implementing Acts?”, *Legal Issues of Economic Integration*, 42(2), 2015, pp. 175-189; CHRISTIANSEN, Thomas and DOBBELS, Mathias, “Non-Legislative Rule Making after the Lisbon Treaty: Implementing the New System of Comitology and Delegated Acts”, *European Law Journal*, 19(1), 2013, pp. 42-56; CRAIG, Paul, “Delegated acts, implementing acts and the new comitology regulation”, *European Law Review*, 36(5), 2011, pp. 671-687; HARDACRE, Alan and KAEDING, Michael, “Delegated & Implementing Acts The New Comitology”, *EIPA Essential Guide*, 4, 2011; HOFMANN, Herwig, “Legislation, delegation and implementation under the Treaty of Lisbon: typology meets reality”, *European Law Journal*, 15(4), 2009, pp. 482-505; MENDES, Joana, “Delegated and implementing rule making: proceduralisation and constitutional design”, *European Law Journal*, 19(1), 2013, pp. 22-41; SCHWARZE, Jurgen, “European Administrative Law in the Light of the Treaty of Lisbon”, *European Public Law*, 18(2), 2012, pp. 285-304; TOVO, Carlo, “Delegation of Legislative Powers in the EU: how EU Institutions Have Eluded the Lisbon Reform”, *European Law Review*, 42(5), 2017, pp. 677-705.

³⁸⁵ VOS, Ellen, “European Agencies and the Composite EU Executive” in EVERSON, Michelle, MONDA, Cosimo and VOS, Ellen (eds.), *op. cit.*, p. 43. See, HOFMANN, Herwig, “Seven challenges for EU administrative law”, *Review of European Administrative Law*, 2(2), 2009, pp. 45-48.

³⁸⁶ *Ibid*, p. 44.

³⁸⁷ According to SCHOLTEN, the absence of an explicit Treaty provision authorizing the creation

TFEU³⁸⁸) and sectorial provisions became the legal bases for the introduction of EU decentralized agencies. Specifically, Frontex was created in regards to articles 77(2)(b)(d) and 79(2)(c) TFEU, and Easo was established according to articles 74 and 78(1)(2) TFEU. These provisions confer the European Parliament and the Council the power to adopt measures regarding the checks of persons crossing the European external borders, the gradual establishment of an integrated management system for external borders, the management of irregular migration including removal and repatriation, and the development of a common policy on asylum, subsidiary protection, and temporary protection.

Following HOFMANN and MORINI, Frontex and Easo have not been sub-delegated implementing competences from the EU institutions, but rather, these agencies constitute specific institutional measures adopted with the aim of harmonizing the implementation tasks of the Member States³⁸⁹. That is, article 291(1) TFEU declares that Member States are primarily responsible for applying legally binding common acts in policy areas like border management, migration, and asylum. However, the EU has been empowered to adopt measures in order to ensure a uniform and effective application of common AFSJ goals. Therefore, the key question to be answered is whether the term “measures”, found in articles 74, 77, 78 and 79(2)(c) TFEU, allows for the establishment of Frontex and Easo.

The CJEU ruled in *Smoke Flavourings*, *ENISA*, and *Short-Selling* that the concept, “measures for the approximation” of article 114 TFEU, authorizes the establishment of EU regulatory agencies³⁹⁰. Article 114(1) TFEU is an open clause that has served as a legal basis for the introduction of several agencies, since it grants the European Parliament and the Council the power to adopt measures for

and delegation of competences to the EU regulatory agencies has several implications that negatively impact the legitimacy of the agencies, their organization, management, creation and accountability. SCHOLTEN, Miroslava, *The political accountability...*, *op. cit.*, p. 63.

³⁸⁸ For a detailed analysis of these open clauses as legal bases for agencies establishment see, CHAMON, Merijn, *Transforming the EU Administration...*, *op. cit.*, pp. 192-212.

³⁸⁹ HOFMANN, Herwig and MORINI, Alessandro, “Constitutional Aspects of the Pluralisation of the EU Executive through ‘Agencification’”, *University of Luxembourg Law Working Paper Series*, 1, 2012.

³⁹⁰ In this regard see, HOFMANN, Herwig and MORINI, Alessandro, “Constitutional Aspects...”, *op. cit.*, and HOFMANN, Herwig, “Agencies in the European Regulatory Union”, *TARN Working Paper*, 5, 2016, pp. 1-22.

the approximation of national laws that have the establishment and functioning of the internal market as their object. Although the CJEU has not yet assessed whether the term “measures”, found in articles 74, 77, 78 and 79(2)(c) TFEU, authorize the establishment of Frontex and Easo, the Court’s reasoning, in regards to article 114 TFEU, may be applied by analogy to Frontex and Easo.

The CJEU, in *Smoke Flavourings*, noted that “by the expression ‘measures for the approximation’ (...) the authors of the Treaty intended to confer on the Community legislature a discretion (...) as regards the harmonization technique most appropriate for achieving the desired result (...)”³⁹¹ and such “discretion may be used in particular to choose the most appropriate harmonization technique (...)”³⁹². Subsequently, the Court in *ENISA* considered that “the legislature may deem it necessary to provide for the establishment of a Community body responsible for contributing to the implementation of a process of harmonization (...)”³⁹³. Specifically, the CJEU found that the creation of an agency was an appropriate measure to prevent “the emergence of disparities likely to create obstacles to the smooth functioning of the internal market”³⁹⁴. Finally, the Court upheld its position in *Short-Selling*, stating that “the EU legislature, in its choice of method of harmonization and, taking account of the discretion it enjoys with regard to the measures provided for under Article 114 TFEU, may delegate to a Union body, office or agency powers for the implementation of the harmonization sought”³⁹⁵.

Consequently, it can be said that the Treaties implicitly authorize the establishment of decentralized agencies. Frontex and Easo constitute one of the “measures” that may be adopted to effectively and uniformly implement a

³⁹¹ Judgment of the Court (Grand Chamber) of 6 December 2005, “United Kingdom v Parliament and Council”, Case C-66/04, ECLI:EU:C:2005:743, para 45.

³⁹² *Ibid.*, para 46.

³⁹³ Judgment of the Court (Grand Chamber) of 2 May 2006, “United Kingdom v Parliament and Council”, Case C-217/04, ECLI:EU:C:2006:279, para 44.

³⁹⁴ *Ibid.*, para 62.

³⁹⁵ Judgment of the Court (Grand Chamber), 22 January 2014, “United Kingdom v Parliament and Council”, Case C- 270/12, ECLI:EU:C:2014:18, para 105. In this regard see, CHAMON, Merijn, “The empowerment of agencies under the Meroni Doctrine and Article 114 TFEU: comment on United Kingdom v. Parliament and Council (short-selling) and the proposed Single Resolution Mechanism”, *European Law Review*, 39(3), 2014, pp. 380-403; VAN CLEYNENBREUGEL, Pieter, “Meroni circumvented...”, *op. cit.*, pp. 64-88.

common border management, migratory and asylum system at the EU level. Nevertheless, it has to be borne in mind that the competences conferred by the Member States to the EU, in matters that do not fall within its exclusive competence, are governed by the subsidiarity and proportionality principles (article 5 TEU)³⁹⁶. These principles respectively imply that Frontex, Easo, and Europol may only act if and in so far that the Member States cannot sufficiently and effectively achieve their tasks, and that these AFSJ agencies' powers do not exceed what is necessary to achieve the objectives of the Treaties.

However, as CHAMON points out in regards to the EU decentralized agencies, the principles of subsidiarity and proportionality “have [not] truly governed the EU legislator’s actions”³⁹⁷. This also holds true for Frontex, Easo, and Europol. In their European Commission’s legislative proposals, it is simply stated that these AFSJ agencies respect the principles of proportionality and subsidiarity³⁹⁸. Regarding the latter, it is specified that in light of the transnational nature of matters like border management, asylum, or cross-border crime, national administrations are not qualified to individually develop a comprehensive and integrated policy. A EU agency is thus better positioned to enhance operational cooperation among the competent national authorities and reduce the differences and divergences between the application of national legislation³⁹⁹.

Concerning the principle of proportionality, the Commission indicates that the Regulations of Frontex, Easo, and Europol are confined to the minimum

³⁹⁶ For a detailed analysis of the limits to *agencification* flowing from the principles of subsidiarity and proportionality see, *Transforming the EU Administration...*, *op. cit.*, pp. 217-238.

³⁹⁷ *Ibid.*, p. 238.

³⁹⁸ See, Commission, “Proposal for a Council Regulation establishing a European Agency for the Management of Operational Co-operation at the External Borders”, COM(2003) 687 final, 20.11.2003, p. 9; Commission, “Proposal for a Regulation of the European Parliament and of the Council establishing a European Asylum Support Office”, COM(2009) 66 final, 18.02.2009, p. 4; Commission, “Proposal for a Council Decision establishing the European Police Office (EUROPOL)”, COM(2006) 817 final, 20.12.2006, p. 7.

³⁹⁹ While the Commission insufficiently assessed the reasons and advantages of establishing Frontex and Europol as EU regulatory agencies, the Easo’s Impact Assessment explored in greater detail why an agency was the most suitable institutional choice, Commission, “Impact Assessment Accompanying the Proposal for a Regulation of the European Parliament and of the Council establishing an European Asylum Support Office”, SEC(2009) 153, 18.02.2009, pp. 23-29. In this respect see, Euréval, “Meta-Study...”, *op. cit.* pp. 26-30, 85-86; Ramboll, “Evaluation of the EU decentralised agencies in 2009”, Volume II, December 2009, pp. 11-17.

required, and do not go beyond what is necessary to achieve their objectives. The Commission emphasizes that these agencies do not have any decision-making powers and do not replace the national administrations⁴⁰⁰. That is, Frontex, Easo, and Europol are established to assist the Member States in their implementation activities, and further national action is not prevented.

3. The Functional and Instrumental Classification of Frontex, Easo, and Europol: Their Operational Nature as a Distinctive Feature

Since the 2012 Common Approach, as studied above, does not include a single classification of EU regulatory agencies, the Commission⁴⁰¹ and the literature have put several taxonomies forward. EU law essentially distinguishes between executive and regulatory agencies. Executive agencies are established for a limited time and are closely controlled (on the basis of the Regulation No 58/2003 of 19 December 2002) by the Commission in order to handle and apply a specific EU program⁴⁰². Conversely, EU regulatory agencies are indefinitely established on a case-by-case basis, develop wider tasks, are more independent from the Commission, and are spread across the EU.

Nonetheless, the term “regulatory” has generally been considered misleading, since these agencies are not delegated the competence to adopt legally binding rules. In this regard, the Commission urged that “a distinction must be made between ‘regulatory’ activities and the adoption of legal rules (...)”, and that, in spite of their name, these bodies do not “necessarily have the power to enact

⁴⁰⁰ Commission, “Proposal for a Council Regulation establishing a European Agency for the Management of Operational Co-operation at the External Borders”, COM(2003) 687 final, 20.11.2003, p. 9; Commission, “Proposal for a Regulation of the European Parliament and of the Council establishing a European Asylum Support Office”, COM(2009) 66 final, 18.02.2009, p. 4; Commission, “Proposal for a Council Decision establishing the European Police Office (EUROPOL)”, COM(2006) 817 final, 20.12.2006, p. 7.

⁴⁰¹ For an analysis of the definition and classification of EU regulatory agencies put forward by the Commission and its influence in the establishment of a common framework see, MOLINIER, Joël, “L’Élaboration d’un Cadre Commun aux Agences de L’Union” in MOLINIER, Joël, *Les Agences de l’Union Européenne*, Brussels: Bruylant, 2011, pp. 221-245.

⁴⁰² See, FUENTETAJA PASTOR, Jesús Ángel, “Las Agencias Ejecutivas...”, *op. cit.*, pp. 123-159.

binding legal norms”⁴⁰³. EU regulatory agencies may only take individual decisions in clear-cut matters under distinctly stated conditions.

Another distinguishing characteristic of EU regulatory agencies, in comparison to their executive counterparts, is that they have been conferred very diverse tasks. EU regulatory agencies may adopt individual decisions with direct effect on third parties, assist the Commission and the Member States (i.e. applying common standards, providing technical or scientific guidance, issuing inspection and monitoring reports, etc.), and facilitate national cooperation and coordination to exchange information and effectively implement EU policies and laws.

In light of the wide range of functions vested in EU regulatory agencies and with the aim to effectively catalogue Frontex, Easo, and Europol’s activities, the classification of the EU decentralized agencies according to their functions is complemented in this thesis by an instrumental taxonomy. The following paragraphs firstly set out a functional categorization based on the model developed by the European Commission in its 2008 communication, entitled “European agencies – The way forward”⁴⁰⁴. Next, the degree of the prerogatives conferred to Frontex, Easo, and Europol to conduct their activities is examined.

3.1. *Functional Classification: Frontex, Easo, and Europol as Agencies that Develop Operational Tasks*

In the Commission’s 2008 communication entitled “European agencies – The way forward”, the EU regulatory agencies’ functions are subdivided into five categories⁴⁰⁵. The first group refers to agencies that may adopt decisions with

⁴⁰³ Commission, “Draft Interinstitutional Agreement on the Operating Framework for the European Regulatory Agencies”, COM(2005) 59 final, 25.02.2005, p. 4.

⁴⁰⁴ Commission, “European agencies – The way forward”, COM(2008) 135 final, 11.03.2008.

⁴⁰⁵ Ibid., p. 7. The specialized literature regarding EU regulatory agencies have developed several functional classifications. See, among others, CRAIG, Paul, *EU Administrative Law*, Oxford University Press, 2012, pp. 140-180; GERADIN, Damien and PETIT, Nicolas, “The Development of Agencies at EU and National Levels: Conceptual Analysis and Proposals for Reform”, *Jean Monnet Working Paper*, 1, 2004, pp. 1-64; TIMMERMAN, Peter and ANDOURA, Sami, “Governance of the EU...”, *op. cit.*, p. 10; VAN OOIK, Ronald, “The growing importance of agencies in the EU: shifting governance and the institutional balance” in CURTIN, Deirdre and WESSEL, Ramses A. (eds.),

legal effects on third parties in a specific policy area (e.g. Community Plant Variety Office, the European Union Intellectual Property Office). The literature unanimously acknowledges the existence of these agencies. BUSUIOC, for instance, refers to these bodies as decision-making agencies and clarifies that their decisions do not present *erga omnes* effects, but rather, apply general rules to specific situations⁴⁰⁶. BUSUIOC differentiates, under the category of decision-making agencies, those that possess a strong recommendatory power (“quasi-regulatory”) when supporting the Commission (e.g. European Aviation Safety, European Food Safety Authority or European Maritime Safety Agency)⁴⁰⁷. None of the current AFSJ agencies hold decision-making powers.

The second group consists of EU agencies responsible for providing technical and scientific assistance to the Commission and the Member States (e.g. European Food Safety Authority, European Medicine Agency). The literature tends to classify these agencies under the previous group (decision-making agencies) or the following group (operational agencies), since they develop a wide range of functions that may fit under more than one category.

The third group put forward by the Commission in its 2008 communication comprises those agencies that develop operational tasks in the field. This category is particularly interesting for our study. CHITI specifies that these regulatory agencies are conferred instrumental functions in order to advise or support the European institutions or the Member States⁴⁰⁸. In this regard, CHAMON notes that only two agencies are in charge of assisting the EU institutions (European Food Safety Authority and European Medicine Agency), with the remainder of agencies supporting the Member States in effectively and

Good governance and the European Union: reflections on concepts, institutions and substance, Antwerp: Intersentia, 2005, pp. 139-145; VÍRGALA FORURIA, Eduardo, *Las Agencias Regulatoras de la UE...*, *op. cit.*; VOS, Ellen, “Agencies and the European Union” in ZWART, Tom and VERHEY, Luc, *Agencies in European and Comparative Law*, Antwerp: Intersentia, 2003, p. 119. In this regard and for a detailed analysis of the functional classification of EU regulatory agencies by the doctrine see, CHAMON, Merijn, *Transforming the EU Administration...*, *op. cit.*, p. 32.

⁴⁰⁶ BUSUIOC, Madalina, *European Agencies...*, *op. cit.*, p. 40.

⁴⁰⁷ *Ibid.*, p. 41. See, among others, CHITI, Edoardo, “An Important Part of the EU’s Institutional Machinery...”, *op. cit.*, p. 1404; CHAMON, Merijn, *Transforming the EU Administration...*, *op. cit.*, p. 32.

⁴⁰⁸ CHITI, Edoardo, “An Important Part of the EU’s Institutional Machinery...”, *op. cit.*, p. 1403.

uniformly applying EU law and policy (i.e. by providing comparable information, operational support, training to the competent national authorities and/or adopting soft law)⁴⁰⁹. Precisely, Frontex, Easo, and Europol have been conferred significant and distinguishing operational powers and are mandated to assist the competent national administrations in implementing the AFSJ goals⁴¹⁰.

Fourthly, the European Commission's functional classification referred to decentralized agencies in charge of gathering, analyzing, and forwarding objective, reliable, and comparable information (e.g. EMCDDA, FRA). This is also a category of agencies widely recognized in the literature⁴¹¹. Interestingly, CHAMON specifies that "if EU agencies provide information to the EU institutions, they partake in policy formulation [and] if EU agencies provide information to the Member States they are typically involved in policy implementation"⁴¹².

The last group suggested by the Commission comprises those EU agencies mandated to provide services to other agencies and institutions (e.g. Translation Centre for the Bodies of the European Union, EU-Lisa). VOS refers to this category as management agencies that are in charge of "specific services and/or specific measures to implement Community regimes or programs"⁴¹³.

The previous functional classification of EU regulatory agencies shows that some agencies have been delegated powers that do not strictly fall within the

⁴⁰⁹ CHAMON, Merijn, *Transforming the EU Administration...*, *op. cit.*, p. 32.

⁴¹⁰ See, BIGO, Didier, *et. al.*, "Mapping the Field of the EU Internal Security Agencies" in BIGO, Didier (ed.), *The Field of the EU Internal Security Agencies*, Centre d'études sur les conflits/l'Harmattan, 2007, pp. 5-66; BUSUIOC, Madalina, *European Agencies...*, *op. cit.*, p. 39; CARRERA, Sergio, DEN HERTOOG, Leonhard and PARKIN, Joanna, "The peculiar nature of EU Home Affairs agencies...", *op. cit.*, pp. 337-358; JORDANA, Mirentxu, "El control de la Comisión y el Consejo a las agencias del Espacio de Libertad, Seguridad y Justicia" in BLASI CASAGRAN, Cristina and ILLAMOLA DAUSA, Illamola (eds.), *El control de las agencias del Espacio de Libertad, Seguridad y Justicia: contrapeso necesario a su autonomía*, Madrid: Marcial Pons, 2016, pp. 21-46; PI LLORENS, Montserrat, "El nuevo mapa...", *op. cit.*, pp. 77-117; KAUNERT, Christian, LÉONARD, Sarah and OCCHIPINTI, John (eds.), *Justice and Home Affairs Agencies in the European Union*, London: Routledge, 2015; RIJPMMA, Jorrit, "Institutions and Agencies...", *op. cit.*, pp. 54-76; SANTOS VARA, Juan, "The EU's Agencies...", *op. cit.* pp. 445-455.

⁴¹¹ BUSUIOC, Madalina, *European...*, *op. cit.*, p. 38; CHITI, Edoardo, "An Important Part of the EU's Institutional Machinery...", *op. cit.*, p. 1403; VOS, Ellen, "Agencies and the European Union", *op. cit.*, p. 119.

⁴¹² CHAMON, Merijn, *Transforming the EU Administration...*, *op. cit.*, p. 31.

⁴¹³ VOS, Ellen, "Agencies and the European Union", *op. cit.*, p. 119. See, CHAMON, Merijn, *Transforming the EU Administration...*, *op. cit.*, p. 30.

scope of just one category⁴⁴⁴. Put differently, the tasks that the EU decentralized agencies undertake are becoming increasingly complex and interlinked. Whereas an official classification at the EU level is missing and the literature does not always agree in grouping the agencies under certain functions, a functional approach still proves useful to better understand and systematize their tasks.

Following a functional classification, several EU decentralized agencies have a direct or indirect mandate in the AFSJ. While Frontex, Easo, EU-Lisa, and to a certain extent, Europol conduct their activities within the field of migration, border management, and asylum, activities in the area of police and judicial cooperation are developed by Europol, Eurojust and Cepol (see figure 6). Additionally, the FRA, the EMCDDA, and the EIGE contribute to the achievement of the AFSJ's objectives in a tangential way. The FRA, the EMCDDA, and the EIGE are information agencies, while CEPOL and EU-Lisa fit best under the management agencies category. However, the operational nature of Frontex, Easo, and Europol is a singularity, which no other AFSJ agency has apart from Eurojust⁴⁴⁵. That is, out of the nine agencies that operate in the AFSJ, only Frontex, Easo, Europol, and Eurojust may conduct operational powers.

⁴⁴⁴ According to CRAIG, “we should not allow the desire for ‘order’ to lead to the imposition of a taxonomic Procrustean frame that forces agencies into categories that are ill-fitting”. It is necessary to strike a balance between a too general classification that may group together agencies that are considerably diverse and a very specific category that may downplay commonalities at the expense of irrelevant differences. CRAIG, Paul, *EU Administrative Law*, *op. cit.*, p. 148. See also, CHAMON, Merijn, *Transforming the EU Administration...*, *op. cit.*, p. 31.

⁴⁴⁵ PI LLORENS, Montserrat, “El nuevo mapa...”, *op. cit.*, p. 85.

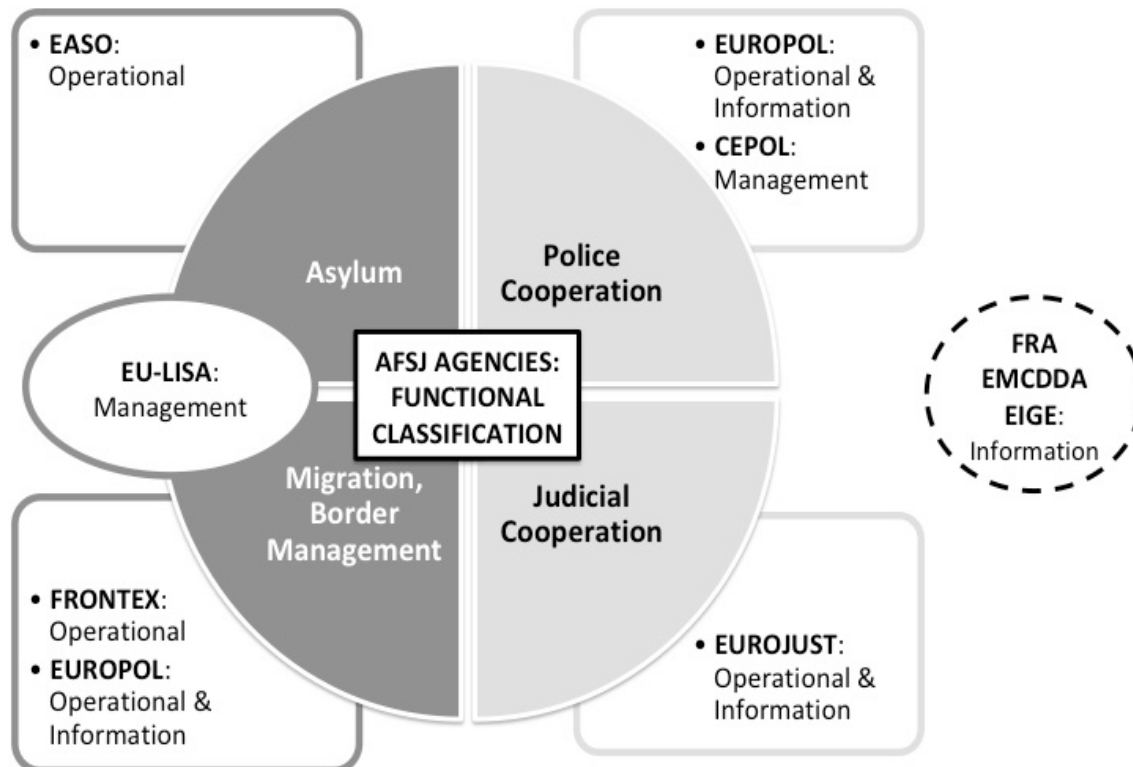


Figure 6: Functional Classification of the EU AFSJ Agencies. Source: Author's own elaboration.

3.2. Instrumental Classification: Frontex, Easo, and Europol as Agencies that Hold Operational Powers

In order to better understand the nature of the activities of Frontex, Easo, and Europol, and to complement the previous functional taxonomy, an instrumental classification is used here. In this regard, GERADIN and PETIT proposed a classification of the EU decentralized agencies based on “the intensity of the prerogatives entrusted to the agencies for carrying out their missions”⁴¹⁶. According to this criterion, three types of agencies can be distinguished: executive, decision-making, and regulatory agencies⁴¹⁷. Although decision-making agencies are empowered to adopt binding decisions to third parties, executive agencies lack this function. Regulatory agencies are those that may adopt *erga omnes* acts.

⁴¹⁶ GERADIN, Damien and PETIT, Nicolas, “The Development of Agencies at EU and National Levels: Conceptual Analysis and Proposals for Reform”, *Jean Monnet Working Paper*, 1, 2004, p. 48.

⁴¹⁷ *Ibid.*, p. 48.

Following this classification, GRILLER and ORATOR proposed a further elaborated instrumental criteria encompassing: “(1) ordinary agencies without decision-making powers; 2) pre-decision making agencies with ‘de facto’ decision-making powers; 3) genuine decision-making agencies; and, as a theoretical fourth type, 4) rulemaking agencies”⁴¹⁸. Hence, the “executive agencies” category originally introduced by GERADIN and PETIT was split into “ordinary” and “pre-decision making” agencies. Ordinary agencies are those that conduct managerial tasks, play an observatory role, or undertake cooperation missions; pre-decision making agencies adopt non-binding decisions that may have a binding-like impact on the European Commission.

However, Frontex, Easo, and Europol’s operational prerogatives do not strictly fall under any of the previous instrumental categories. In this respect, CHAMON suggested further differentiating within the category of those agencies that do not hold decision-making, but operational powers⁴¹⁹. The operational powers delegated to EU regulatory agencies may thus include facilitating the exchange of information between Member States to enable subsequent operational activities, training national competent authorities, coordinating and/or organizing joint operations, launching operations, and conducting monitoring and inspection activities⁴²⁰.

According to RIJPMA, the competences conferred to Frontex, Easo, and Europol fall into two categories: regulatory and operational⁴²¹. On the one hand, these agencies provide the Member States and the European Commission with technical and informational support to effectively achieve the AFSJ’s goals. On the other hand, they operationally assist the competent national administrations (i.e. coordinating joint operations or deploying support teams in the territory of the Member States).

While Frontex, Easo, and Europol develop classical regulatory competences bestowed upon many other decentralized agencies (e.g. gathering and

⁴¹⁸ GRILLER, Stefan and ORATOR, Andreas, “Everything under control?...”, *op. cit.*, p. 13.

⁴¹⁹ CHAMON, Merijn, *Transforming the EU Administration...*, *op. cit.*, p. 35.

⁴²⁰ *Ibid.*, p. 35.

⁴²¹ RIJPMA, Jorrit, “Hybrid agencification...”, *op. cit.*, p. 90.

exchanging information, providing training courses or issuing risk analysis and situational reports), the operational powers and work conducted on the ground clearly distinguish them. Not only does “the network structure these agencies forces Member States to coordinate the activities of their competent authorities and to establish single national contact points for their dealings with the agencies”, but also “joint operations may involve the deployment of public officials exercising executive powers outside their own Member State in the framework of Joint Investigation Teams (JITs), European Asylum Emergency Teams or European Border Guard Teams”⁴²².

The more detailed instrumental classification put forward by BIGO *et al.* is here followed. This taxonomy subdivides the degree of operational (“intervention”) powers that may be conferred to the EU AFSJ agencies into five levels: “1) full-fledged and autonomous capacities of intervention (...); 2) full-fledged capacities of intervention on case by case requests by an external authority (...); 3) delegated capacities of intervention by coordination (...); 4) delegated capacities of intervention without decision-making prerogatives (...); 5) no operational competencies whatsoever”⁴²³. Frontex, Easo, and Europol’s implementation powers can certainly be located under the fourth group, however their classification into the second or third categories is debatable. As it is analyzed in the next section, conferring Frontex, Easo, and Europol fully autonomous implementation or enforcement competences contravenes the Treaties and the CJEU’s non-delegation doctrine. However, the recently amended mandates of these AFSJ agencies reinforce the idea that they are evolving from mere coordinators into initiators, with a wider margin of discretion in regards to their operational and monitoring activities⁴²⁴.

⁴²² RIJPMA, Jorrit, “Institutions and Agencies...”, *op. cit.*, pp. 64-65.

⁴²³ See, BIGO, Didier, *et al.*, “Mapping the Field...”, *op. cit.*, p. 34.

⁴²⁴ See, BALDACCINI, Anneliese, “Extraterritorial Border Controls in the EU...”, *op. cit.*, pp. 225-251; CARRERA, Sergio, DEN HERTOOG, Leonhard and PARKIN, Joanna, “The peculiar nature of EU Home Affairs agencies...”, *op. cit.*, pp. 337-358; LUCHTMAN, Michiel and VERVAELE, John, “European Agencies for Criminal...”, *op. cit.*, pp. 132-150; RIJPMA, Jorrit, “Frontex and the European System of Border Guards: the Future of European Border Management” in FLETCHER, Maria, HERLIN-KARNELL, Ester and MATERA, Claudio (Eds.), *The European Union as an Area of Freedom, Security and Justice*, London: Routledge, 2017, pp. 217-245; SCHOLTEN, Miroslava, “Mind the trend...”, *op. cit.*, pp. 1-19.

III. THE OPERATIONAL TASKS OF FRONTEX, EASO AND EUROPOL IN LIGHT OF THE CJEU'S NON-DELEGATION DOCTRINE

Institutional balance is a EU principle amply considered as a limit to the establishment and delegation of powers to agencies. According to article 13(2) TEU, “each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them”⁴²⁵. In this respect, two landmark cases, *Meroni*⁴²⁶ (1958) and *Romano*⁴²⁷ (1981), specified under which conditions the delegation of powers is constitutional. In brief, it is stipulated that the delegation of open, discretionary, or normative functions to agencies is prohibited since the institutional balance would be upset. Recently, the *Short-Selling* case⁴²⁸ (2014) brought the old but still good law, the *Meroni* doctrine, up to date, and clarified to what extent powers may be constitutionally bestowed upon EU agencies.

This section firstly explores, in light of the Principal-Agent theory, the concept of delegation of powers and the inadequacy of this model in regards to Frontex, Easo, and Europol. Subsequently, the evolution of the CJEU's non-delegation doctrine, from *Meroni* and *Romano* to *Short Selling*, and its impact on the conferral of powers to EU agencies is analyzed. Lastly, the implications of the CJEU's non-delegation doctrine to Frontex, Easo, and Europol in the post-Lisbon era are assessed, and the degree of discretion that these bodies may enjoy in effectively and uniformly implementing the adopted AFSJ measures is examined.

⁴²⁵ See, Judgment of the Court of 22 May 1990, “European Parliament v Council of the European Communities”, Case C-70/88, ECLI:EU:C:1990:217. See also, CHAMON, Merijn, “The Institutional Balance, and Ill-Fated Principle of EU Law?”, *European Public Law*, 21(2), 2015, pp. 371-392; JACQUÉ, Jean-Paul, “The Principle of Institutional Balance”, *Common Market Law Review*, 41, 2004, pp. 383-391; EVERSON, Michelle and VOS, Ellen, “European Agencies. What about the institutional balance?”, *Maastricht Law Working Papers Series*, 4, 2014, pp. 1-18.

⁴²⁶ Judgment of the Court of 13 June 1958, “*Meroni & Co., Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community*”, Case 9-56, ECLI:EU:C:1958:7.

⁴²⁷ Judgment of the Court (First Chamber) of 14 May 1981, “*Giuseppe Romano v Institut national d'assurance maladie-invalidité*”, Case 98/80, ECLI:EU:C:1981:104.

⁴²⁸ Judgment of the Court (Grand Chamber), 22 January 2014, “*United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union*”, Case C-270/12, ECLI:EU:C:2014:18.

1. The Delegation of Powers and Unsuitability of a Principal-Agent Approach as an Explaining Model for Frontex, Easo, and Europol

The delegation of competences to EU agencies has been and continues to be a widely debated matter. The very well known definition of delegation put forward by THATCHER and SWEET STONE, subsequently adjusted by CURTIN to the institutional configuration of the EU, is followed here⁴²⁹. The term “delegation” is “an authoritative decision, formalized as a matter of public law, that a) transfers policy making authority away from the established, representative organs (those that are directly or indirectly elected, or are appointed by elected politicians) to b) a public non-majoritarian institution”⁴³⁰.

Delegation essentially implies that a “principal” bestows upon an “agent” a specific power originally allocated to it. Due to the existence of information asymmetry (“agents know more about their interests and actions than their principals do”⁴³¹) and conflicting interests (“what is optimal for the principal is not necessarily optimal for the agent”⁴³²), the Principal-Agent theory mainly centers on handling a potential agent shirking. Although political scientists and American literature have extensively relied on the Principal-Agent theory to analyze the relation between the U.S. Congress and regulatory agencies, this theory is considered ill-suited to explain the delegation of powers to EU

⁴²⁹ “We define delegation as an authoritative decision, formalised as a matter of public law, that (a) transfers policy making authority away from established, representative organs (those that are directly elected, or are managed directly by elected politicians), to (b) a non-majoritarian institution, whether public or private”; THATCHER, Mark and SWEET, Alec Stone, “Theory and practice of delegation to non-majoritarian institutions”, *West European Politics*, 25(1), 2002, p. 3. See also, THATCHER, Mark, “The creation of European regulatory agencies...”, *op. cit.*, pp. 790-809.

⁴³⁰ CURTIN, Deirdre, “Delegation to EU non-majoritarian agencies and emerging practices of public accountability” in GERADIN, Damien, et al. (ed.), *Regulation through agencies in the EU: a new paradigm of European governance*, Cheltenham: Edward Elgar Publishing, 2005, p. 90. See, POLLACK, Mark, *The engines of European integration: delegation, agency, and agenda setting in the EU*, Oxford: Oxford University Press, 2003.

⁴³¹ TALLBERG, Jonas, *European Governance and Supranational Institutions: Making States Comply*, London: Routledge, 2003, p. 19.

⁴³² *Ibid.*, p. 19.

decentralized agencies⁴³³.

According to DEHOUSSE, the Principal-Agent model does not take into account one of the most relevant peculiarities of the EU setting, the multiplicity of principals (i.e. Member States, the Council, the European Commission, the European Parliament), which shapes the politics of agency creation⁴³⁴. In this regard, HOFMANN and MORINI argue that “the multiple-principal construction is a direct result of competing interests about the level on which to place implementing powers and the devices to control them”⁴³⁵. CURTIN also emphasized the inadequacy of such a theory in assessing the delegation of tasks to EU agencies, and added that “powers are not necessarily being delegated by the EU legislative power [and] the tasks being ‘delegated’ may be those of the Member States, not of the formal principals”⁴³⁶.

The Principal-Agent model particularly falls short of analyzing the delegation of operational powers to agencies like Frontex, Easo, and Europol⁴³⁷. These agencies operate in an intricate competence scenario, characterized by the Member States’ reluctance to delegate powers closely linked to their national sovereignty and the need to cooperate to effectively manage supranational

⁴³³ See, KASSIM, Hussein and MENON, Anand, “The principal-agent approach and the study of the European Union: promise unfulfilled?”, *Journal of European Public Policy*, 10(1), 2003, pp. 121-139; MAGGETTI, Martino and PAPADOPOULOS, Yannis, “The Principal-Agent Framework and Independent Regulatory Agencies”, *Political Studies Review*, 2016, pp. 1-12; MAJONE, Giandomenico, “The new European agencies: regulation by information”, *Journal of European Public Policy*, 4(2), 1997, pp. 262-275; THATCHER, Mark, “Delegation to independent regulatory agencies: Pressures, functions and contextual mediation”, *West European Politics*, 25(1), 2002, pp. 125-147.

⁴³⁴ DEHOUSSE, Renaud, “Delegation of powers in the European Union: The need for a multi-principals model”, *West European Politics*, 31(4), 2008, pp. 789-805. However, the President and the Congress are the main two principals of the U.S. federal agencies. See, SAURER, Johannes, “The Accountability of Supranational Administration...”, *op. cit.*, pp. 429-488. See also the very interesting approach of RIPOLL SERVENT who argues that “although Frontex and Easo should operate as trustees – to prevent co-operation from breaking down – they have not been provided with enough autonomy, which exposes them to capture by particular interests. The reforms show that EU agencies are likely to be used as proxies by a group of strong Member States to monitor and intervene in weaker Member States”, RIPOLL SERVENT, Ariadna, “A new form of delegation in EU asylum: Agencies as proxies of strong regulators”, *Journal of Common Market Studies*, 56(1), 2018, pp. 83-100.

⁴³⁵ HOFMANN, Herwig and MORINI, Alessandro, “Constitutional Aspects...”, *op. cit.*, p. 33.

⁴³⁶ CURTIN, Deirdre, “Holding (Quasi-) Autonomous...”, *op. cit.*, p. 528.

⁴³⁷ See, GUILD, Elspeth, *et. al.*, “Implementation of the EU Charter...”, *op. cit.*, p. 90. See also, TRAUNER, Florian, “The European Parliament and agency control in the Area of Freedom, Security and Justice”, *West European Politics*, 35(4), 2012, pp. 784-802.

matters such as migration, asylum, and border management. As CARRAPIÇO and TRAUNER accurately note, “the acknowledgement of this strategic uncertainty is however central in a policy domain such JHA, where Member States have always been divided over the extent to which EU JHA policies should be an ‘add on’ to national policies, as well as the extent to which these policies should replace national action”⁴³⁸.

Precisely, the competence over these matters is shared between the EU and the Member States (article 4(2)(j) TFEU)⁴³⁹. Frontex, Easo, and Europol are in charge of assisting the Member States with the effective implementation of AFSJ measures, a competence that is ultimately the exclusive responsibility of the competent national authorities. Frontex, Easo, and Europol have not been vested tasks allocated to the formal principals (Council or Commission), but rather, those of the Member States⁴⁴⁰.

The powers of Frontex and Easo, according to RIJPMA, present a hybrid or dual nature; “on the one hand, [they are] endowed with the type of tasks that would normally be delegated to an EU agency, namely assisting the Commission and the Member States in the implementation of an EU policy (...). On the other hand, [they have] an important ‘operational’ role (...)”⁴⁴¹. The hybridity of these AFSJ agencies’ powers is essential in order to identify and determine the principals’ degree of participation and influence. Member States may be regarded as Frontex, Easo, and Europol’s leading principals when the agencies provide the competent national authorities with operational assistance⁴⁴².

⁴³⁸ CARRAPIÇO, Helena and TRAUNER, Florian, “Europol and its influence on EU policy-making on organized crime: analyzing governance dynamics and opportunities”, *Perspectives on European Politics and Society*, 14(3), 2013, p. 359.

⁴³⁹ See, NEFRAMI, Eleftheria, “Division of competences between the European Union and its Member States concerning immigration”, *Study for the European Parliament LIBE Committee*, PE 453.178, 2011.

⁴⁴⁰ CURTIN, Deirdre, “Holding (Quasi-) Autonomous...”, *op. cit.*, p. 528. It cannot be ignored either “the actual degree of Europeanisation (and in some cases ‘codification’, e.g. SBC) which has been already achieved so far in the areas of migration, borders and asylum law, and the role that the European Commission and the European Parliament have acquired in their level of authority and accountability”, GUILD, Elspeth, *et. al.*, “Implementation of the EU Charter...”, *op. cit.*, p. 90.

⁴⁴¹ RIJPMA, Jorrit, “Hybrid agencification...”, *op. cit.*, p. 90.

⁴⁴² Most of the tasks that Frontex conducts are addressed to the Member States. See, article 8 Regulation (EU) 2016/1624. Similarly although to a lesser extent Easo’s activities aim to facilitate, coordinate and strengthen practical cooperation among Member States. See, article 2 Regulation

Lastly, regarding the inadequacy of the Principal-Agent model in analyzing the delegation of tasks to the AFSJ agencies, POLLAK and SLOMINSKI went one step further and ruled out its application to EU operational agencies like Frontex, Easo, and Europol. They claimed that the “complementary powers [of Frontex] (...) are (...) new forms of authority which cannot be derived from existing ones” and “their establishment cannot be regarded as a delegation of authority from the Council or the member states (...), because neither of these potential principals has the power of transgovernmental coordination and assistance in the field of border management (...)”⁴⁴³.

While it is true that the Principal-Agent framework insufficiently explains the horse-trading that goes on between the Member States and the EU in delegating tasks to Frontex, Easo, and Europol, it is a useful model to “understand the relationship between EU member states as key principals and an agent such as [Frontex, Easo and] Europol”, as well as to identify certain issues that may arise when operational tasks are conferred⁴⁴⁴. According to DEHOUSSE, a key issue that can be identified when functions are bestowed upon EU decentralized agencies is “the emergence of a variant of ‘political drift’ in which agencies are somehow ‘captured’ by one of their institutional rivals in the leadership contest”⁴⁴⁵.

The tug of war and mistrust between EU principals, which is even more remarkable in sensitive matters such as migration, asylum, and border management, has led to weak agencies⁴⁴⁶. The operational powers conferred to Frontex, Easo, and Europol are rather weak when compared to their national counterparts or the U.S. agencies. None of these EU AFSJ agencies have been delegated rule-making, enforcement, or adjudication competences. Frontex,

(EU) No 439/2010. Lastly, regarding Europol’s operational tasks see, articles 3 and 4 Regulation (EU) 2016/794.

⁴⁴³ POLLAK, Johannes and SLOMINSKI, Peter, “Experimentalist but not accountable governance?...”, *op. cit.*, p. 905.

⁴⁴⁴ CARRAPIÇO, Helena and TRAUNER, Florian, “Europol and its influence...”, *op. cit.*, p. 359.

⁴⁴⁵ DEHOUSSE, Renaud, “The Politics of Delegation in the European Union” in RITLENG, Dominique (ed.), *Independence and Legitimacy in the Institutional System of the European Union*, Oxford: Oxford University Press, 2016, p. 72.

⁴⁴⁶ *Ibid.*, p. 75.

Easo, and Europol's scope of action is especially limited since Member States regard any empowerment or invasion of their core national prerogatives with suspicion.

2. From the Stringency of “Meroni” and “Romano” to the Leniency of “Short Selling”: The CJEU’s Non-Delegation Doctrine

MAJONE explained that EU agencies have not been conferred broader tasks since the Treaties did not explicitly regulate the creation of agencies, and the Court of Justice only allowed the delegation of powers under strict conditions⁴⁴⁷. Member States considered the delegation of rule-making and enforcement powers to autonomous bodies to be “too intrusive since it would alter the delicate balance of power which has presided over the growth of Community competences”⁴⁴⁸.

The Court of Justice determined in the Meroni doctrine that only clearly defined executive powers subject to strict supervision could be delegated. Ever since, this ruling has prevented the conferral of rule-making, enforcement, and adjudication tasks to EU agencies⁴⁴⁹. Nevertheless, the CJEU’s non-delegation doctrine has been modulated over the years. Not only did the EU agencies’ growing powers further strain the initial Meroni requirements, but the Court also leniently interpreted them in the recent Short Selling case. The evolution of the CJEU’s Meroni doctrine and its impact on the conferral of operational powers to Frontex, Easo, and Europol are examined below.

⁴⁴⁷ MAJONE, Giandomenico, “The new European agencies...”, *op. cit.*, p. 263.

⁴⁴⁸ *Ibid.*, p. 263.

⁴⁴⁹ Meroni is still good law and has repeatedly been applied by the CJEU in its case law. See, Judgment of the Court (First Chamber) of 26 May 2005, “Tralli v ECB”, C-301/02 P, ECLI:EU:C:2005:306; Judgment of the Court (Grand Chamber) of 12 July 2005, “Alliance for Natural Health and Others”, joined cases C-154/04 and C-155/04, ECLI:EU:C:2005:449; Judgment of the Court (Grand Chamber), 22 January 2014, “United Kingdom v Parliament and Council”, Case C- 270/12, ECLI:EU:C:2014:18.

2.1. *Meroni & Co., Industrie Metallurgiche, SpA v. High Authority of the European Coal and Steel Community (1958)*

Meroni (1958) did not concern a delegation of tasks to agencies, but rather to private law bodies, which according to the applicant (an Italian steel company named Meroni) was contrary to the European Coal and Steel Community Treaty. The Court of Justice found that the delegation of powers under the Treaty was possible, provided that certain conditions were observed. The delegating authority shall take an express, not presumed, decision that transfers powers, which cannot be different from those that the delegating authority received under the Treaty⁴⁵⁰. Additionally, the Court declared the delegation of discretionary powers unlawful, and specified that only clearly defined executive powers subject to strict review and supervision of the High Authority could be delegated⁴⁵¹. According to the Court, conferring “a discretionary power, by entrusting it to bodies other than those which the Treaty has established to effect and supervise the exercise of such power each within the limits of its own authority, would render that guarantee [the balance of powers] ineffective”⁴⁵²

Whereas the Court did not explicitly address the delegation of powers to EU agencies in Meroni, the literature⁴⁵³, the EU institutions⁴⁵⁴, and the Court of

⁴⁵⁰ Judgment of the Court of 13 June 1958, “Meroni & Co., Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community”, Case 9-56, ECLI:EU:C:1958:7, para 150.

⁴⁵¹ Ibid., para 152.

⁴⁵² Ibid., para 152.

⁴⁵³ EVERSON, Michelle, “Independent agencies...”, *op. cit.*, pp. 180-204; GERADIN, Damien, “The development of European regulatory agencies: what the EU should learn from American experience”, *Columbia Journal of European Law*, 11, 2004, pp. 1-52; LENAERTS, Koen, “Regulating the Regulatory Process: delegation of powers in the European Community”, *European Law Review*, 18(1), 1993, pp. 23-49; MAJONE, Giandomenico, “Delegation of regulatory powers in a mixed polity”, *European Law Journal*, 8(3), 2002, pp. 319-339; YATAGANAS, Xénophon, “Delegation of regulatory authority in the European Union: the relevance of the American model of independent agencies”, *Jean Monnet Working Paper*, 3, 2001, pp. 1-73.

⁴⁵⁴ See, among others, Commission, “European Governance: A White Paper”, COM(2001) 428 final, 25.07.2001, p. 24; Commission, “Draft Interinstitutional Agreement on the Operating Framework for the European Regulatory Agencies”, COM(2005) 59 final, 25.02.2005, p. 5; Commission, “European agencies – The way forward”, COM(2008) 135 final, 11.03.2008, p. 5; Parliament, “Report on a strategy for the future settlement of the institutional aspects of Regulatory Agencies (2008/2103(INI))”, 17.09.2008; Analytical Fiche Nr 2, “Creation of Agencies”,

Justice⁴⁵⁵ acknowledged that the ruling represented a legal limitation for bestowing general rulemaking, enforcement, and adjudication competences upon EU decentralized agencies. The literature has widely discussed the implications and to what extent (if any) Meroni's conditions limit the delegation of powers to EU agencies⁴⁵⁶. Particular attention has been paid to the association made by the Court between the delegation of discretionary powers and the contravention of the balance of powers (now institutional balance)⁴⁵⁷.

Some authors have proposed a relaxation of the strict non-delegation doctrine in regards to EU agencies, since institutional balance is a principle that evolves over time⁴⁵⁸. According to CHAMON, in Meroni "the Court did not express a concern about the effect on the inter-institutional relations by referring to the 'balance of powers', but a concern regarding the Treaty's system of judicial protection"⁴⁵⁹. GRILLER and ORATOR also stressed that "the underlying

2010, <http://bit.ly/2rJ8RJI>, (last accessed: 30/04/2018). In this regard see, CHAMON, Merijn, *Transforming the EU Administration...*, *op. cit.*, pp. 276-282.

⁴⁵⁵ While the Court has considered Meroni as a legal limitation to delegation of discretionary powers in several cases (e.g. Judgment of the Court (First Chamber) of 26 May 2005, "Tralli v ECB", C-301/02 P, ECLI:EU:C:2005:306; Judgment of the Court (Grand Chamber) of 12 July 2005, "Alliance for Natural Health and Others", joined cases C-154/04 and C-155/04, ECLI:EU:C:2005:449; Judgment of the Court (Grand Chamber), 22 January 2014, "United Kingdom v Parliament and Council", Case C- 270/12, ECLI:EU:C:2014:18), only the Short Selling case (Judgment of the Court (Grand Chamber), 22 January 2014, "United Kingdom v Parliament and Council", Case C- 270/12, ECLI:EU:C:2014:18) specifically addressed the application of the Meroni doctrine to EU agencies. See, CHAMON, Merijn, *Transforming the EU Administration...*, *op. cit.*, pp. 282-300.

⁴⁵⁶ This is beyond the scope of this study. In this respect see, among others, CHAMON, Merijn, "EU agencies: does the Meroni Doctrine make sense", *Maastricht Journal of European and Comparative Law*, 17, 2010, pp. 281-305; CHAMON, Merijn, "EU agencies between Meroni and Romano or the devil and the deep blue sea", *Common Market Law Review*, 48, 2011, pp. 1055-1075; CHITI, Edoardo, "Beyond Meroni: The Community Legitimacy of the Provisions Establishing the European Agencies" in DELLA CANANEA, Giacinto (ed.), *European Regulatory Agencies*, Paris: Rive Droite, 2005, pp. 75-84; CHITI, Edoardo, "Important Part of the EU's Institutional Machinery...", *op. cit.*, pp. 1395-1427; GRILLER, Stefan and ORATOR, Andreas, "Everything under control?...", *op. cit.*, pp. 3-35; MAJONE, Giandomenico, "The rise of the regulatory state...", *op. cit.*, pp. 77-101; SCHNEIDER, Jens-Peter, "A Common Framework for Decentralized EU Agencies and the Meroni Doctrine", *Administrative Law Review*, 61, 2009, pp. 29-44.

⁴⁵⁷ See, CRAIG, Paul, *EU Administrative Law...*, *op. cit.*, p. 154; SCHÜTZE, Robert, "Delegated' Legislation in the (new) European Union: A Constitutional Analysis", *The Modern Law Review*, 74(5), 2011, p. 674; VOS, Ellen, "Agencies and the European Union" ..., *op. cit.*, p. 131.

⁴⁵⁸ JACQUÉ, Jean-Paul, "The Principle of Institutional Balance" ..., *op. cit.*, pp. 383-391. See, CHITI, Edoardo, "Important Part of the EU's Institutional Machinery...", *op. cit.*, p. 1423; VAN OOIK, Ronald, "The growing importance of agencies in the EU...", *op. cit.*, pp. 150-152.

⁴⁵⁹ CHAMON, Merijn, "EU agencies between Meroni and Romano...", *op. cit.*, p. 1059. See, CHAMON, Merijn, "EU agencies: does the Meroni Doctrine...", *op. cit.*, pp. 281-305.

rationale of the Meroni doctrine could be preserved by a less rigid set of criteria”, taking into account that the current article 263 TFEU guarantees the judicial review of the acts of the agencies intended to produce legal effects vis-à-vis third parties⁴⁶⁰. Despite the institutional balance remaining an unsettled issue within the literature, it is necessary to bear in mind, as CHAMON accurately notes, the different “factual and legal contexts in which the Brussels Agencies in Meroni and the current day EU agencies operate”⁴⁶¹. Otherwise, “simply transposing an unadapted *Meroni* doctrine to EU agencies would result in the conclusion that the current *agencification* is in breach with this doctrine (...)”⁴⁶².

2.2. *Giuseppe Romano v. Institut national d'assurance maladie-invalidité (1981)*

In May 1981, almost twenty-five years after Meroni, the Court of Justice heard a case regarding the delegation of competences to an auxiliary body of the Commission (the Administrative Commission on Social Security of Migrant Workers), created under secondary law. Mr. Romano was entitled to receive a pension both in Italy and in Belgium, yet the National Sickness and Invalidity Insurance Institution reduced his Belgian portion according to an Administrative Commission’s calculation of the exchange rate applicable (a power that was originally conferred to the Administrative Commission in a Regulation of the Council).

Article 155 of the Treaty Establishing the European Economic Community (EEC) (now articles 290 and 291 TFEU) allowed the Commission to exercise the powers conferred to it by the Council for the implementation of the rules laid down by the latter. Nevertheless, the Court held that “a body such as the Administrative Commission may not be empowered by the Council to adopt acts

⁴⁶⁰ GRILLER, Stefan and ORATOR, Andreas, “Everything under control?...”, *op. cit.*, p. 27.

⁴⁶¹ CHAMON, Merijn, “EU agencies between Meroni and Romano...”, *op. cit.*, p. 1059.

⁴⁶² *Ibid.*, p. 1058.

having the force of law”⁴⁶³. Moreover, the Court of Justice stated that it was only competent to give preliminary rulings and review the legality of acts of the Council and the Commission (articles 173 and 177 Treaty establishing the EEC - now Articles 263 and 267 TFEU)⁴⁶⁴. In other words, the Court held that not only did primary law prohibit a body like the Administrative Commission from adopting legally binding decisions (article 155 EEC), but its actions also escaped judicial review (articles 173 and 177 EEC).

Despite the relevance of *Romano* for the study of EU agencies, almost all of the literature’s attention has focused on *Meroni*, as CHAMON pointed out⁴⁶⁵. While neither *Romano* nor *Meroni* explicitly addressed a delegation of powers to EU agencies, *Romano* grounds better relate to such a scenario. In *Romano*, the Council bestowed some of its competences upon an auxiliary body of the Commission established under secondary law, while in *Meroni*, the High Authority (predecessor to the European Commission) delegated powers to private law bodies⁴⁶⁶.

Since the acts of the EU decentralized agencies under the Treaty of Lisbon are currently reviewable by the CJEU, one of the arguments raised in *Romano* no longer seems to stand. However, primary law does not at all mention that EU agencies may be created and conferred competences. Article 291 TFEU only states that the Commission, and in duly specified cases, the Council, may be delegated powers for the issue of implementing acts. As HOFMANN argues, “with the absence of express reference to the delegation of powers to agencies, the Treaty of Lisbon (...) reiterates the effect the *Meroni* doctrine has in written primary law”⁴⁶⁷. The non-delegation doctrine is thus still alive to fill the empty constitutional and institutional space left by articles 290 and 291 TFEU.

⁴⁶³ Judgment of the Court (First Chamber) of 14 May 1981, “Giuseppe Romano v Institut national d’assurance maladie-invalidité”, Case 98/80, ECLI:EU:C:1981:104, para 20.

⁴⁶⁴ *Ibid.*, para 20.

⁴⁶⁵ CHAMON, Merijn, “EU agencies between *Meroni* and *Romano*...”, *op. cit.*, p. 1060.

⁴⁶⁶ *Ibid.*, p. 1060. See, GRILLER, Stefan and ORATOR, Andreas, “Everything under control?...”, *op. cit.*, p. 19.

⁴⁶⁷ HOFMANN, Herwig, “Seven challenges...”, *op. cit.*, p. 47. See, CHAMON, Merijn, “EU agencies between *Meroni* and *Romano*...”, *op. cit.*, p. 1075; VOS, Ellen, “European Agencies and the Composite EU Executive”..., *op. cit.*, p. 43.

2.3. *UK v. European Parliament and Council of the EU (Short Selling-ESMA Case, 2012)*

The exponential creation and empowerment of EU agencies have strained the Meroni doctrine. SCHOLTEN and VAN RIJSBERGEN actually consider that “EU agencies have become the recipients of discretionary powers along with the power to issue legally binding decisions”⁴⁶⁸. Specifically, they argue that the establishment and delegation of regulatory and supervisory tasks to the European Banking Authority (EBA), the European Securities and Markets Authority (ESMA), and the European Insurance and Occupational Pensions Authority (EIOPA) are contrary to the initial CJEU’s non-delegation doctrine. On the one hand, Romano’s logic is contravened since the competent national authorities shall respect the decisions of the three European supervisory authorities. On the other hand, the delegation of discretionary powers contradicts Meroni’s ruling⁴⁶⁹.

The eagerly awaited CJEU’s Short Selling judgment finally shed some light on determining the constitutionality of EU agencies, as well as establishing to what extent these bodies may assist the EU institutions and the Member States in implementing policies and making decisions. For the first time, the CJEU explicitly assessed the legality of the delegation of powers to EU agencies. The Court was required to determine whether, and to what extent, the broad regulatory and supervisory competences⁴⁷⁰ delegated to ESMA observed the long-

⁴⁶⁸ SCHOLTEN, Miroslava and VAN RIJSBERGEN, Marloes, “Limits of Agencification...”, *op. cit.*, p. 1239.

⁴⁶⁹ *Ibid.*, p. 1239.

⁴⁷⁰ ESMA may develop draft regulatory technical standards that are submitted to the Commission for endorsement (article 10(1) ESMA Regulation). Moreover, ESMA on its own initiative may investigate the alleged breach or non-application of Union law and address a recommendation to the competent authority concerned setting out the action necessary to comply with Union law. ESMA may even adopt an individual decision addressed to a financial market participant requiring the necessary action to comply with its obligations under Union law including the cessation of any practice (article 17 ESMA Regulation). Lastly, ESMA may also adopt individual decisions regarding emergency situations (article 18 ESMA Regulation); Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC, OJ L-331, 15.12.2010. See, ADAMSKI, Dariusz, “The ESMA doctrine: A constitutional revolution and the economics of

standing Meroni and Romano doctrine. Particularly, the UK government challenged article 28 of the ESMA Regulation, arguing that the agency's competence to prohibit short selling agreements is a very broad, discretionary, and quasi-legislative measure of general application, which not only contravenes Meroni and Romano, but also articles 290 and 291 TFEU. The CJEU, rejecting all UK government's arguments, concluded that the delegation in place shall not be regarded as illegal because the powers conferred to ESMA in article 28 are subject to several restrictive conditions of application.

Firstly, the CJEU referred to the factual differences between Meroni and the case at hand, stressing that the bodies in Meroni were entities governed by private law and were conferred a wide margin of discretion. ESMA, however, is a EU entity established by the legislature, whose delegated powers are circumscribed by various conditions and criteria that limit its discretion. According to the Court, the powers available to ESMA under article 28 comply with the requirements set by Meroni, since they are "precisely delineated and amenable to judicial review in the light of the objectives established by the delegating authority"⁴⁷¹. Secondly, the CJEU overruled Romano⁴⁷² and indicated that articles 263 and 277 TFEU now expressly permit EU bodies like the agencies to adopt measures of general application. Lastly, the UK government's plea, arguing that articles 290 and 291 TFEU constitute a single legal framework that exclusively authorizes the delegation of certain powers to the Commission, was rejected. According to the Court, "while the treaties do not contain any provision to the effect that powers may be conferred on a Union body, office or agency, a

delegation", *European Law Review* 6, 2014, pp. 819-825; VAN RIJSBERGEN, Marloes, "On the Enforceability of EU Agencies' Soft Law at the National Level: The Case of the European Securities and Markets Authority", *Utrecht Law Review*, 10(5), 2014, pp. 116-131. See also, MOLONEY, Niamh, "The European Securities and Markets Authority and institutional design for the EU financial market—a tale of two competences: Part (i) rule-making", *European Business Organization Law Review*, 12(1), 2011, pp. 41-86; SCHAMMO, Pierre, "The European Securities and Markets Authority...", *op. cit.*, pp. 1879-1914.

⁴⁷¹ Judgment of the Court (Grand Chamber), 22 January 2014, "United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union", Case C-270/12, ECLI:EU:C:2014:18, para 53.

⁴⁷² In this regard, the CJEU stated that "it cannot be inferred from Romano that the delegation of powers to a body such as ESMA is governed by conditions other than those set out in Meroni v High Authority", Case C-270/12, para 66.

number of provisions in the FEU Treaty [articles 263, 265 and 267] none the less presuppose that such a possibility exists”⁴⁷³.

Obviously, the Short Selling judgment attracted a great deal of literature attention⁴⁷⁴. SCHOLTEN and VAN RIJSBERGEN pointed out that whereas the CJEU “deduces from Article 263 and 277 TFEU an implied power to empower agencies with powers to issue measures of general application”⁴⁷⁵, judicial reviewability “does not address the question of how much discretion such powers may entail”⁴⁷⁶. That said, the Court updated and relaxed its initial Meroni doctrine by no longer confining delegation to “clearly defined executive powers”⁴⁷⁷, but rather powers “precisely delineated and amenable to judicial review in the light of the objectives established by the delegating authority”⁴⁷⁸. Hence, “now only imprecise, vague determination of delegated powers may contravene the Meroni doctrine (...)”⁴⁷⁹.

The CJEU, in Short Selling, validated the ongoing *agencification* in spite of the absence of a legal provision in the Treaties explicitly authorizing the delegation of implementing powers to EU agencies. Importantly, in regards to the delegation

⁴⁷³ Case C-270/12, para 79.

⁴⁷⁴ See, among others, ALBERTI, Jacopo, “Delegation of powers to EU Agencies after the Short Selling Ruling”, *Il Diritto dell’Unione Europea*, 2, 2015, pp. 451-492; CHAMON, Merijn, “The empowerment of agencies under the Meroni Doctrine...”, *op. cit.*, pp. 380-403; DI NOIA, Carmine and GARGANTINI, Matteo, “Unleashing the European securities and markets authority: Governance and accountability after the ECJ decision on the short selling regulation (Case C-270/12)”, *European Business Organization Law Review*, 15(1), 2014, pp. 1-57; MARJOSOLA, Heikki, “Bridging the constitutional gap in EU executive rule-making: the court of justice approves legislative conferral of intervention powers to European securities markets authority: Court of Justice of the European Union (Grand Chamber) judgment of 22 January 2014, case C-270/12, UK v. Parliament and Council (Grand Chamber)”, *European Constitutional Law Review*, 10(3), 2015, pp. 500-527; SCHAMMO, Pierre, “The European Securities and Markets Authority...”, *op. cit.*, pp. 1879-1913; SCHOLTEN, Mira and VAN RIJSBERGEN, Marloes, “The ESMA-short selling case: Erecting a new delegation doctrine in the EU upon the Meroni-Romano remnants”, *Legal Issues of Economic Integration*, 41(4), 2014, pp. 389-405; SIMONCINI, Marta, “Legal boundaries of European Supervisory Authorities in the financial markets: Tensions in the development of true regulatory agencies”, *Yearbook of European Law*, 34(1), 2015, pp. 319-350.

⁴⁷⁵ SCHOLTEN, Miroslava and VAN RIJSBERGEN, Marloes, “Limits of Agencification...”, *op. cit.*, p. 1248.

⁴⁷⁶ *Ibid.*, p. 1248.

⁴⁷⁷ Judgment of the Court of 13 June 1958, “Meroni & Co., Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community”, Case 9-56, ECLI:EU:C:1958:7, para 150.

⁴⁷⁸ Judgment of the Court (Grand Chamber), 22 January 2014, “United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union”, Case C-270/12, ECLI:EU:C:2014:18, para 53.

⁴⁷⁹ ADAMSKI, Dariusz, “The ESMA doctrine...”, *op. cit.*, p. 827.

of powers established in articles 290 and 291 TFEU, the Court and the Advocate General took a different approach. In relation to article 290 TFEU, AG Jääskinen upheld Romano's prohibition of vesting agencies legislative or quasi-legislative powers, and considered that only the Commission could be the recipient of Article 290 TFEU delegated powers⁴⁸⁰. AG Jääskinen argued that while EU agencies are not explicitly mentioned in article 291 TFEU, "fundamental constitutional principles do not (...) prevent the legislator from conferring such powers on agencies as a midway solution between vesting implementing authority in either the Commission or the Council, on the one hand, or leaving it to the Member States, on the other"⁴⁸¹.

The CJEU, however, did not dwell on articles 290 and 291 TFEU, and instead designed a parallel delegation system⁴⁸². The Court stated that the possibility of delegating powers to EU agencies is implicit in articles 263, 265, and 267 TFEU⁴⁸³, and that the conditions set in articles 290 and 291 TFEU do not apply to EU agencies, which are nonetheless bound by the Meroni principle, which inhibits agencies from making policy decisions. In other words, and as RITLENG clarifies, "the very same teleological reasons that support subjecting Article 291 implementing acts to the respect of the reserved legislative sphere militate in favor of forbidding the conferral of the power to regulate the essential elements of an area on European agencies"⁴⁸⁴.

Consequently, Short Selling represents the up-to-date non-delegation doctrine in the post-Lisbon era, which permits a far-reaching delegation of powers (legally binding and of general application) to EU agencies, provided that their exercise is detailed, circumscribed by conditions that limit the agency's

⁴⁸⁰ Opinion of Advocate General Jääskinen of 12 September 2013, Case C-270/12, ECLI:EU:C:2013:562, paras 84-85.

⁴⁸¹ Ibid., para 86.

⁴⁸² BERGSTRÖM, Carl Fredrik, "Shaping the new system for delegation of powers to EU agencies: United Kingdom v. European Parliament and Council (Short selling)", *Common Market Law Review*, 52(1), 2015, p. 236.

⁴⁸³ Case C-270/12, para 80.

⁴⁸⁴ RITLENG, Dominique, "The Reserved Domain of the Legislature: The Notion of 'Essential Elements of an Area'" in BERGSTRÖM, Carl and RITLENG, Dominique (Eds.), *Rulemaking by the European Commission: The New System for Delegation of Powers*, Oxford: Oxford University Press, 2016, p. 148.

discretion, and subject to judicial review. The core of the Meroni doctrine (i.e. wide discretionary powers whose exercise entails a policy choice shall not be delegated) still survives as a parallel delegation system to articles 290 and 291 TFEU. However, Meroni's delegation conditionality has been significantly strained and one may expect that it will be further relaxed in the future to better accommodate the ever-expanding competences of the EU decentralized agencies.

3. The Impact of the Lightened CJEU's Non-Delegation Doctrine on the Conferral of Operational Powers to Frontex, Easo, and Europol

In the absence of explicit provisions in primary law that address the establishment and delegation of tasks to EU decentralized agencies, the CJEU's non-delegation doctrine shapes the degree of powers that can be bestowed upon EU agencies, particularly those that operate in the internal market. However, as analyzed in the previous chapter, since the Treaty of Amsterdam entered into force, EU decentralized agencies started to become key institutional players in other policy matters like the AFSJ.

The functions of Frontex, Easo, and Europol are no longer limited to operationally supporting and coordinating the competent national authorities' implementation responsibilities. The latest legislative revisions of these AFSJ agencies aimed to both strengthen their position from the Member States and to overcome the implementation deficit of EU border management, asylum, and police cooperation measures. Frontex, Easo, and Europol now conduct significant operational activities, deploy support teams in the territory of the Member States, and may play a supervisory role⁴⁸⁵.

The impact of the Meroni doctrine and specifically, the implications of the Short Selling ruling in the expanding operational role that Frontex, Easo, and Europol play in the AFSJ, shall be analyzed. As RIJPMMA rightly warns, while the application by analogy of the recent CJEU's wide interpretation of its initial strict

⁴⁸⁵ See Chapter 4.

Meroni conditions to agencies like Frontex, Easo, or Europol might be quite tempting, consideration must be given to “fundamental difference[s] between the regulatory powers of an agency in the internal market and operational policing powers in the AFSJ”⁴⁸⁶. The following paragraphs analyze to what extent the expansion of the operational powers and discretionality conferred to Frontex, Easo, and Europol may sit uncomfortably with a CJEU’s non-delegation doctrine that frowns upon EU agencies making political choices.

3.1. *A Stringent Application of the Current CJEU’s Non-Delegation Doctrine to Frontex, Easo, and Europol*

In *Short Selling*, the CJEU disregarded whether the tasks bestowed upon EU agencies constitute a delegation or a conferral of powers⁴⁸⁷. Using both of these terms interchangeably is not trivial, especially when AFSJ agencies are studied, since the main recipients of their operational tasks are the competent national administrations. In this regard, DEHOUSSE argued that the concept of delegation is quite ill-suited to describe a situation in which powers are transferred from the national to the EU level, referring to this process as “Europeanization”⁴⁸⁸. HOFMANN and MORINI explained the direct delegation of Member States’ implementing powers to agencies following a *qui potest plus, potest minus* approach to article 291 TFEU. They stated that “if Member States under Article 291(1) TFEU can maintain full implementing powers, they also may pool some of these in specific legal bodies”⁴⁸⁹.

However, in *Short Selling*, the CJEU finally designed a parallel delegation system to articles 290 and 291 TFEU. The Court neither described the vertical conferral of powers as “Europeanization”, nor understood that article 291 TFEU may implicitly allow the conferral of powers to EU agencies. The CJEU in *Short Selling* thus eluded to drawing a distinction between “delegation” and “conferral”

⁴⁸⁶ RIJPMMA, Jorrit, “Frontex and the European System of Border Guards...”, *op. cit.*, p. 20.

⁴⁸⁷ See, SCHOLTEN, Miroslava and VAN RIJSBERGEN, Marloes, “The ESMA-short selling case...”, *op. cit.*, p. 401.

⁴⁸⁸ DEHOUSSE, Renaud, “Misfits...”, *op. cit.*, p. 13.

⁴⁸⁹ HOFMANN, Herwig and MORINI, Alessandro, “Constitutional Aspects...”, *op. cit.*, p. 22.

by broadly interpreting Meroni as a prohibition to vest EU agencies with discretionary powers whose exercise entails a policy choice.

Particularly, the CJEU did not uphold Meroni's *nemo plus iuris transferre potest quam ipse habet* principle, which states that the delegating authority cannot confer more powers than it possesses. Nevertheless, as CHAMON notes, "if this rule had been retained by the Court, it would have stumbled upon the problem of ESMA's powers not being originally vested in the EU legislator"⁴⁹⁰. Conversely, AG Jääskinen did distinguish between the delegation and conferral of powers and considered that "ESMA's powers under Article 28 of Regulation No 236/2012 have not been conferred on it by an Article 291(4) 'implementing' act that was passed by the Commission or the Council, but directly from the EU legislature through an Article 289(3) TFEU legislative act"⁴⁹¹.

Whereas AG Jääskinen pointed out that the direct conferral of powers to an agency by the EU legislature cannot be subject to the restrictions set out in Meroni, he considered that Meroni's prohibition to delegate broad and/or arbitrary implementing powers remains a relevant condition to assess the legality of agencies under EU constitutional law⁴⁹². Precisely, the CJEU stressed that the powers delegated to ESMA complied with the requirements established in Meroni, since they were strictly delineated and amenable to judicial review. In this regard, the CJEU analyzed the various conditions confining the measures that the ESMA can adopt.

The limitations set in article 28(2) and (3) Regulation No 236/2012 of ESMA are of particular interest for our study since the CJEU found the subsidiary character of ESMA's powers to be sufficiently delimited. The key question here is whether the operational tasks of Frontex, Easo, and Europol are conditioned and delimited to the same extent as ESMA's powers. Article 28(2) Regulation No 236/2012 of ESMA states the subsidiary nature of the measures to be adopted by ESMA, stipulating that they "are subject to the condition that either no

⁴⁹⁰ CHAMON, Merijn, "The empowerment of agencies...", *op. cit.*, p. 397.

⁴⁹¹ Opinion of Advocate General Jääskinen of 12 September 2013, Case C-270/12, ECLI:EU:C:2013:562, para 90.

⁴⁹² *Ibid.*, para 92.

competent national authority has taken measures to address the threat or one or more of those authorities have taken measures which have proven not to address the threat adequately”⁴⁹³. In a similar vein, article 28(3) indicates that “ESMA is required to take into account (...) the extent to which the measure significantly addresses the threat to the orderly functioning and integrity of financial markets or (...) significantly improves the ability of the competent national authorities to monitor the threat in question (...)”⁴⁹⁴.

As RIJPMA notes, a full transfer of powers to Frontex would “be difficult in view of the Court’s emphasis on the subsidiary nature of ESMA’s powers in the ESMA case”⁴⁹⁵. However, in our view, vesting Frontex, Easo, and Europol with precisely defined operational tasks should thus be deemed constitutional and in conformity with the Meroni doctrine. That is, in transboundary policy matters like border management, asylum, and police cooperation, and when the competent national administrations do not or cannot effectively and uniformly apply the adopted EU measures, Frontex, Easo, and Europol should operationally act.

The EU legislature shall abstain from conferring discretionary competences to Frontex, Easo, and Europol, and/or empowering them to make policy decisions. Yet, this requirement remains rather vague since it does not specify the degree of discretion that these AFSJ agencies should enjoy in practice or the exact limits that their operational tasks are subject to. Unless a legal framework detailing the conditions to empower EU decentralized agencies is adopted, it can be expected that the CJEU will need to keep assessing and clarifying the constitutionality of the specific powers conferred to each EU agency.

Until the CJEU hears a case regarding the legality of the extended operational functions bestowed upon Frontex, Easo, and Europol, it can be argued that these AFSJ agencies are likely to be subject to a more stringent application of the recently updated non-delegation doctrine⁴⁹⁶. Following the CJEU’s case C-355/10

⁴⁹³ Case C-270/12, ECLI:EU:C:2013:562 , para 46.

⁴⁹⁴ Case C-270/12, ECLI:EU:C:2013:562 , para 47.

⁴⁹⁵ RIJPMA, “Frontex and the European System of Border Guards...”, *op. cit.*, p. 20.

⁴⁹⁶ *Ibid.*

concerning the annulment of the Council Decision 2010/252/EU, which supplemented the Schengen Borders Code in regards to the surveillance of the sea external borders in the context of operational cooperation coordinated by Frontex⁴⁹⁷, it can be said that the powers conferred to Frontex, Easo, and Europol fall within the scope of a distinctive domain.

Border management, asylum, and police cooperation are areas in which any conferral of powers shall be strictly limited. According to the AG Mengozzi, in the case C-355/10, “the limits of the implementing powers must be defined above all by reference to the characteristics of the policy in question and the greater or lesser latitude enjoyed by the Commission in implementing it”⁴⁹⁸. The CJEU equally noted the necessity of taking into account “the characteristics and particularities of the domain concerned”⁴⁹⁹. Specifically, it was held that the adoption of rules on the conferral of enforcement powers to border guards is a matter reserved to the EU legislator, since political choices shall be made by the border guards. The Court stressed that such public authority competences may interfere with national sovereign rights and the fundamental rights of the individuals⁵⁰⁰.

Whereas the CJEU’s judgment regarding the annulment of the Council Decision 2010/252/EU did not concern the conferral of operational powers to Frontex (the case focused on clarifying the elements of a domain that must be classified as essential and therefore regulated by law), the Court acknowledged the special sensitivity and contentiousness of AFSJ matters in comparison to

⁴⁹⁷ Judgment of the Court (Grand Chamber) of 5 September 2012, “European Parliament v Council of the European Union”, Case C-355/10, ECLI:EU:C:2012:516. See, ACOSTA SÁNCHEZ, Miguel A. and GONZÁLEZ GARCÍA, Inmaculada, “TJUE – Sentencia de 05.09. 2012, Parlamento c. Consejo–C-355/10: Vigilancia de fronteras marítimas y elementos esenciales en los actos de ejecución”, *Revista de Derecho Comunitario Europeo*, 47, 2014, pp. 267-284; CHAMON, Merijn, “How the Concept of Essential Elements of a Legislative Act Continues to Elude the Court, Parliament v. Council”, *Common Market Law Review*, 50, 2013, pp. 849-860; DEN HEIJER, Maarten and TAUSCHINSKY, Eljalil, “Where Human Rights Meet Administrative Law: Essential Elements and Limits to Delegation: European Court of Justice, Grand Chamber C-355/10: European Parliament v. Council of the European Union”, *European Constitutional Law Review*, 9(3), 2013, pp. 513-533. See, Judgment of the Court (Fourth Chamber) of 10 September 2015, “European Parliament v Council of the European Union”, Case C-363/14, ECLI:EU:C:2015:579.

⁴⁹⁸ Opinion of Advocate General Mengozzi delivered on 17 April 2012, Case C- 355/10, “European Parliament v Council of the European Union”, ECLI:EU:C:2012:207, para 29.

⁴⁹⁹ Case C-355/10, ECLI:EU:C:2012:516, para 68.

⁵⁰⁰ *Ibid*, paras 76 y 77.

other EU policy domains. Indeed, Frontex, Easo, and Europol operate in a highly politicized area; their activities may give rise to national sovereignty concerns and fundamental rights implications, which in our view should reasonably lead to a narrower interpretation by the CJEU of its recently updated non-delegation doctrine.

3.2. *Primary Law Limits the Powers to be Conferred to Frontex, Easo, and Europol*

According to a strict application of the Meroni doctrine, it can be argued that Frontex, Easo, and Europol cannot be vested fully-fledged and autonomous operational tasks. As RIJPMMA indicated, “policing powers, which may include powers of coercion and the use of force, are factual rather than legal and involve a level of discretion that is difficult to regulate”⁵⁰¹. In this regard, several provisions in the Treaties support the assumption that AFSJ agencies cannot be conferred enforcement or executive powers.

The legal basis for establishing and further empowering Frontex, Easo, and Europol must be read in light of articles 72 and 73 TFUE. Article 72 TFEU states that the competences that the EU enjoys in the AFSJ “shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security”. In other words, the EU cannot replace the Member States’ prerogatives of coercion and “EU agencies are therefore limited to supporting actions of national authorities, except (and only) to the extent that the Treaty confers express powers to act on such agencies”⁵⁰². Relatedly, article 4(2) TEU provides that “the Union (...) shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member

⁵⁰¹ RIJPMMA, “Frontex and the European System of Border Guards...”, *op. cit.*, p. 20.

⁵⁰² PEERS, Steve, *EU Justice and Home Affairs Law: EU Criminal Law, Policing, and Civil Law*, Volume II, Oxford: Oxford University Press, 2016, p. 27.

State”⁵⁰³.

Furthermore, article 73 TFEU indicates that “it shall be open to Member States to organize between themselves and under their responsibility such forms of cooperation and coordination as they deem appropriate between the competent departments of their administrations responsible for safeguarding national security”. As MUNGIANU clearly explains “in so far as the EU limits itself to the role of coordinator without any law-enforcement power, and in so far as the Member States are free to engage in a form of cooperation among themselves. Article 73 TFEU has been respected”⁵⁰⁴. Hence, while competences are shared between the EU and the Member States in the AFSJ (Article 4(2)(j) TFEU), articles 72 and 73 TFEU limit the powers conferred to the Union in matters directly linked to Member States’ national sovereignty (article 2(6) TFEU).

Lastly, RIJPMA puts forward a comparison in regards to Europol’s explicit legal basis in the Treaties in order to shed light on the constitutional limits in conferring autonomous enforcement powers to Frontex and Easo⁵⁰⁵. According to article 88 TFEU, Europol’s mission consists in supporting and strengthening cooperation between the Member States. Europol’s main tasks are informative (collection, storage, processing, analysis, and exchange of information) and operational (coordination, organization, and implementation of investigative and operational action). Article 88(3) TFEU sets two significant limits to the operational powers to be conferred to Europol, which can also be interpretatively extended to Frontex and Easo. Any operational action by Europol must be carried out in liaison and in agreement with the authorities of the Member State or States whose territory is concerned, and the application of coercive measures shall be the exclusive responsibility of the competent national authorities. Therefore, the characteristic operational tasks conferred to Frontex, Easo, and Europol shall not encompass executive or enforcement activities, which shall exclusively remain within the remit of the competent national authorities.

⁵⁰³ Ibid., p. 29.

⁵⁰⁴ MUNGIANU, Roberta, “Frontex: Towards a...”, *op. cit.*, p. 371.

⁵⁰⁵ RIJPMA, “Frontex and the European System of Border Guards...”, *op. cit.*, p. 18.

IV. THE (NEW) ADMINISTRATIVE GOVERNANCE OF FRONTEX, EASO, AND EUROPOL

As studied in chapter 2, the entrance into force of the Treaty of Lisbon represented an institutional and legal turning point for JHA matters. The former pillar structure was abolished, the EU Institutions' powers reinforced, and the ordinary legislative procedure extended to the whole AFSJ. Additionally, the 2012 Common Approach set out several guidelines with the objective of harmonizing the EU decentralized agencies' role, structure, procedures, and accountability. Both the institutional novelties brought by the Treaty of Lisbon and the 2012 Common Approach had a significant impact on the governance provisions of Frontex, Easo, and Europol's recently amended Regulations⁵⁰⁶.

This section studies the administrative organization of Frontex, Easo, and Europol, constituting an important determinant of the degree of influence that the Member States exert in the increasing operational, monitoring, and implementation powers conferred to these AFSJ agencies. That is, the operational role of Frontex, Easo, and Europol is expanding, and thereby, the administration of migration, asylum and border management is further Europeanized. However, through the election and supervision of the Executive Directors and through the majority presence of national representatives at the Management Boards of these agencies, Member States effectively steer and control their activities.

Firstly, the twofold internal administrative configuration of Frontex, Easo, and Europol is analyzed. While the Executive Director represents and is responsible for the daily management of Frontex, Easo, and Europol, the Management Board is in charge of making the strategic decisions. Furthermore, the Consultative Forum (CF) and the Fundamental Rights Officer (FRO) of Frontex, and the CF of Easo are examined. Special attention is paid to the role of the FRO in managing the new Individual Complaint Mechanism, which allows

⁵⁰⁶ For an in depth study of all the EU JHA Agencies governance see, BUSUIOC, Madalina, "EU Justice and Home Affairs Agencies...", *op. cit.*

any individual who considers an activity of Frontex to breach a fundamental right obligation to lodge a complaint directly to the agency. Lastly, three key functions including the adoption of Frontex, Easo, and Europol's Budget, Work Program and Annual Activity Report by their respective Management Boards and Executive Directors are studied.

1. The Management Boards: Intergovernmental and *à la Carte*

1.1. Composition

The Management Board is the strategic planning body of Frontex, Easo, and Europol. The Boards are in charge of a wide range of key managerial and overseeing tasks⁵⁰⁷, which mainly include appointing and exercising disciplinary control over the agency's Executive Director and annually adopting the general budget, the Work Program, and the Activity Report⁵⁰⁸.

The 2012 Common Approach recommended that the Management Boards' composition consisted of one representative from each Member State, two representatives from the Commission, and where appropriate, stakeholder representatives and one member designated by the European Parliament. This configuration would "improve the performance of agencies' boards and reinforce their capacity to supervise the administrative, operational and budgetary management of agencies"⁵⁰⁹. However, the distinctive variable geometry in the AFSJ and the future *Brexit* have a clear influence in the composition of Frontex,

⁵⁰⁷ See, article 62 Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard, OJ L-251, 16.09.2016; article 40 Council, "Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010 – State of play and guidance for further work", doc. 10555/17, 27.06.2017; article 11 Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol), OJ L-135, 24.05.2016.

⁵⁰⁸ See, Analytical Fiche Nr 6, "Role and functioning of the Management Board", 2010.

⁵⁰⁹ Joint Statement of the European Parliament, the Council of the EU and the European Commission on Decentralized Agencies that includes in its annex the Common Approach, 19.07.2012, para 10.

Easo, and Europol's Boards⁵¹⁰.

Europol's Management Board currently comprises 27 Member States' representatives and one representative of the Commission, all with a right to vote⁵¹¹. These members shall be appointed for an extendable period of four years, taking into account their knowledge of law enforcement cooperation. Despite the British decision to secede from the EU, the United Kingdom decided to opt in to the new 2016 Europol Regulation⁵¹². Nevertheless, on 29 March 2019, the United Kingdom will no longer be able to take part in Europol's Board or have access to Europol's databases, and will also lose any representatives and positions in the agency⁵¹³ (unless all 28 EU Member States agree on an extension of the two-year deadline set by article 50 TEU).

In this regard, the arrangement recently signed between Denmark and Europol could serve as a model for the future relationship between the United Kingdom and Europol post-*Brexit*⁵¹⁴. Although Denmark fully participated in the 2009 Europol Council Decision⁵¹⁵, ever since the Treaty of Lisbon entered into force, Denmark may opt-out of all JHA legislation including the new 2016 Europol Regulation. In this regard, in a referendum held in December 2015, the

⁵¹⁰ See, ALEGRE, Susie, *et. al.*, "The implications of the United Kingdom's withdrawal from the European Union for the Area of Freedom, Security and Justice", *Study for the European Parliament LIBE Committee*, PE 596.824, December 2017, p. 24.

⁵¹¹ Europol's Management Board Membership, <https://www.europol.europa.eu/publications-documents/management-board-members>, (last accessed: 30/04/2018).

⁵¹² Home Office, "Parliament notified of Europol opt-in intention", 14.11.2016, <https://www.gov.uk/government/news/parliament-notified-of-europol-opt-in-intention>, (last accessed: 30/04/2018). See, House of Commons (European Scrutiny Committee), "Europol: Opt-in Debate", Twenty-first Report of Session 2016-17, 29.11.2016 and House of Lords (European Union Committee), "Brexit: future UK-EU security and police cooperation", 16.12.2016. See also, CARRERA, Sergio, GUILD, Elspeth and LUK, Ngo Chun, "What Does Brexit Mean for the EU's Area of Freedom, Security and Justice?", *CEPS Commentaries*, 2016, pp. 1-12; CURTIN, Deidre, "Brexit and the EU Area of Freedom, Security and Justice: Bespoke Bits and Pieces" in FABBRINI, Federico, *The Law & Politics of Brexit*, Oxford: Oxford University Press, 2017; German Bundestag (European Affairs Directorate Research Section for European Affairs), "Consequences of Brexit for the realm of justice and home affairs Scope for future EU cooperation with the United Kingdom", PE 6-3000 - 115/16, 18.08.2016; JENEY, Petra, "The European Union's Area of Freedom, Security and Justice without the United Kingdom-Legal and Practical Consequences of Brexit", *ELTE Law Journal*, 1, 2016, pp. 117-140.

⁵¹³ For a detailed analysis of the United Kingdom's participation in Europol post-Brexit see, ALEGRE, Susie, *et. al.*, "The implications of the United Kingdom's...", *op. cit.*, pp. 50-57.

⁵¹⁴ House of Commons (European Scrutiny Committee), "Europol: Agreement with Denmark", Thirty-second Report of Session 2016-17, 28.02.2017.

⁵¹⁵ Council Decision of 6 April 2009 establishing the European Police Office (Europol), OJ L-121, 15.05.2009

Danish people rejected, among other JHA measures, opting-in Europol's 2016 Regulation. The EU and Denmark, aiming to accommodate the result of the Danish referendum and the need to keep collaborating on key police matters, signed an agreement in 2017 by which Denmark cooperates as a third country with Europol⁵¹⁶.

Frontex' Management Board is in turn composed of 26 EU Member States' representatives that are signatories of the Schengen *acquis* and two representatives of the Commission, all with a right to vote⁵¹⁷. These members shall be appointed for an extendable period of four years on the basis of their degree of high-level relevant experience and expertise in the field of operational cooperation on border management and their relevant managerial, administrative, and budgetary skills. Iceland, Lichtenstein, Norway, and Switzerland shall also attend and participate in meetings with limited voting rights, in accordance to their respective arrangements.

The United Kingdom⁵¹⁸ and Ireland are invited to participate in Frontex' Management Board meetings as observers without the right to vote. Since the United Kingdom never joined the Schengen agreement, it cannot participate in Frontex' activities⁵¹⁹. Yet, article 51(1) Regulation 2016/1624 establishes that the agency "shall facilitate operational cooperation of the member states with (...) the United Kingdom in specific activities". After *Brexit*, the United Kingdom, as a non-EU, non-European Economic Area (EEA), and non-signatory of the Schengen agreements, could no longer be invited to attend Frontex' Management Board meetings. Nevertheless, Frontex may technically and operationally

⁵¹⁶ Agreement on Operational and Strategic Cooperation between the Kingdom of Denmark and the European Police Office, 29.04.2017.

⁵¹⁷ Frontex's Management Board Membership, <http://frontex.europa.eu/about-frontex/organisation/management-board/>, (last accessed: 30/04/2018).

⁵¹⁸ The relationship of the United Kingdom with Frontex may need to be re-examined post-Brexit. In this respect see, RYAN, Bernard, "The EU's Borders: Schengen, Frontex and the UK", ILPA Brexit Briefings, 19.05.2016, <https://www.freemovement.org.uk/brexit-and-borders-schengen-frontex-and-the-uk/>, (last accessed: 30/04/2018); TAYLOR, Ben, "Leaving the European Union: Frontex and UK Border Security Cooperation Within Europe", *House of Lords Library Briefing*, 25.04.2017, <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/LIF-2017-0039#fullreport>, (last accessed: 30/04/2018).

⁵¹⁹ See, Judgment of the Court (Grand Chamber) of 18 December 2007, "United Kingdom v Council", Case C-77/05, ECLI:EU:C:2007:803.

cooperate with the United Kingdom, as the agency already does with other third countries, according to article 54 Regulation 2016/1624.

Easo's Management Board currently comprises 27 Member States' representatives, two representatives of the Commission, and one representative of the United Nations High Commissioner for Refugees (UNHCR), who does not have the right to vote⁵²⁰. These members shall be appointed for an extendable period of four years in light of their knowledge in the field of asylum, and taking into account relevant managerial, administrative and budgetary skills.

Due to the opt-out granted to Denmark in the Treaties regarding these JHA matters, this Member State is not bound by Easo's Regulation or subject to its application. Rather, Easo shall facilitate operational cooperation with Denmark, and to this end, a Danish representative is invited to attend all of the meetings of the Management Board without the right to vote. Iceland, Liechtenstein, Norway, and Switzerland also participate as observers in Easo's Management Board meetings. The United Kingdom and Ireland fully participate in Easo's Board meetings since they opted in for the adoption and application of the 2010 Easo Regulation. However, the divorce of the United Kingdom from the EU will require the British representatives to leave Easo's Board and any positions within the agency. Post-*Brexit*, the relationship of the United Kingdom and Easo should be subject to the EU-UK agreement.

It can be concluded that the predominant intergovernmental character of the agencies' Management Boards aims to offset the increasing integration at the EU level of national sensitive matters, like migration, asylum, and border management⁵²¹. Put differently, the European Parliament does not have any representative in Frontex, Easo⁵²², and Europol's Boards, and the Commission

⁵²⁰ Easo's Management Board Membership, <https://www.easo.europa.eu/management-board-members>, (last accessed: 30/04/2018).

⁵²¹ See, PI LLORENS, Montserrat, "El nuevo mapa de las agencias europeas...", *op. cit.*, p. 106.

⁵²² The European Parliament proposed that the management board of the successor of Easo, the future EUAA, should be composed of "one representative from each Member State two representatives of the Commission and two representatives of the European Parliament, which shall have the right to vote". The participation of the two representatives of the European Parliament is a point that has not been agreed yet and it will be further discussed during the political trilogue for the adoption of the EUAA. See, article 39, Council, "Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and

participation is in clear minority (with only two representatives in Frontex and Easo’s Boards and just one representative in Europol’s Management Board). Member States have thus secured control (even to a greater extent in regards to former third pillar matters) over the strategic decisions that are made at the core of these AFSJ Agencies.

Agencies	COM	PARL	MS	Other	Observers
EUROPOL	1 Rep.	-	27 Rep. (Denmark no longer part of the Board; the U.K. opted in 2016 Regulation but after <i>Brexit</i> will have to leave the Board)	Executive Director (without the right to vote)	Any person whose opinion may be relevant for the Board’s discussion
FRONTEX	2 Rep.	-	26 Rep.	- Iceland, Lichtenstein, Norway & Switzerland (limited voting rights) - Executive Director (without the right to vote)	- The U.K. and Ireland (after <i>Brexit</i> , the U.K. will no longer be invited) - Any person whose opinion may be relevant for the Board’s discussion
EASO	2 Rep.	-	27 Rep. (Ireland and the U.K opted in 2010 Regulation. After <i>Brexit</i> , the U.K. will have to leave the Board)	- 1 Rep. UNHCR (without the right to vote) - Executive Director (without the right to vote)	- Iceland, Liechtenstein Norway & Switzerland - Denmark - Any person whose opinion may be relevant for the Board’s discussion

Table 2: Frontex, Easo and Europol’s Management Board Composition. Source: Author’s own elaboration.

repealing Regulation (EU) No 439/2010 – State of play and guidance for further work”, doc. 10555/17, 27.06.2017.

1.2. Working Practices

The recently adopted Regulations of the EBCG, Europol, and the future Regulation of the EUAA aim, by aligning with the 2012 Common Approach, to improve the effectiveness and working practices at their Management Boards. However, BUSUIOC found that the EU agencies' Management Boards are normally very large in size, which hinders their operability⁵²³. Additionally, some national representatives at the Boards neither actively participate in the meetings, nor have sufficient preparation and expertise. According to BUSUIOC, some Member States' representatives are more concerned about the impact that the agencies' tasks may have at the national level than the performance and strategic development of the agency at large⁵²⁴.

Frontex' external evaluation warned about the politicization and nationalization of the Management Board at the expense of the overall effectiveness of the agency⁵²⁵. Moreover, the 2015 Frontex external evaluation found that the participation of some national representatives was insufficiently active. Additionally, the large size of the Management Board, which includes not only the Member States' representatives, but also alternates and other national experts, hinders an efficient and streamlined decision making process⁵²⁶. The 2012 Europol external evaluation also stressed that the vast size of the Management Board, the lack of expertise of some of the Member States' representatives, and prioritizing the national concerns was impeding the Board to effectively focus on strategic issues⁵²⁷. Easo's external evaluation, however, indicated that "the functioning of the Management Board has improved over the

⁵²³ BUSUIOC, Madalina, *European Agencies...*, *op. cit.*, p. 26. See, Analytical Fiche Nr 5, "Composition and designation of the Management Board", 2010.

⁵²⁴ *Ibid.*, p. 26. See, JORDANA, Mirentxu, "El control de la Comisión y el Consejo...", *op. cit.*, pp. 31-34.

⁵²⁵ COWI, "External evaluation...", *op. cit.*, p. 65.

⁵²⁶ Ramboll and EurAsylum, "External Evaluation of the Agency under Art. 33 of the Frontex Regulation", 28.07.2015, p. 83.

⁵²⁷ RAND Europe, "Evaluation of the implementation of the Europol Council Decision and of Europol's activities", 2012, p. 140. See, BUSUIOC, Madalina and GROENLEER, Martijn, "Beyond design...", *op. cit.*, pp. 285-304.

years and (...) is considered to be working in line with its mission and towards the objectives outlined in the Agency's mandate"⁵²⁸.

The 2012 Common Approach put forward several recommendations, which to a great extent were followed by the recently adopted EBCG and Europol's Regulation and by the future EUAA Regulation, to improve the performance of the agencies' Management Boards and reinforce the achievement of their tasks. In this respect, the members of the Boards of these AFSJ agencies are appointed for a renewable four-year mandate, taking into account their knowledge of the agency's core business as well as relevant managerial, administrative, and budgetary skills⁵²⁹.

Furthermore, Regulation 2016/1624 on the EBCG and the future EUAA's Regulation followed the 2012 Common Approach recommendation to establish a small-sized Executive Board to enhance their efficiency and effectiveness, and to streamline decision-making processes in the agency⁵³⁰. Article 62(7) Regulation 2016/1624 on the EBCG states that "the management board *may* establish a small-sized executive board, to assist it and the executive director with regard to the preparation of the decisions, programmes and activities to be adopted by the management board and to take certain provisional, urgent decisions on behalf of the management board when necessary (...)" (emphasis added).

Equally, article 40(3) partial agreement text on the EUAA establishes that "the Management Board *may* establish a small-sized Executive Board (...) to assist it and the Executive Director (...). When necessary the Executive Board may take certain provisional, urgent decisions on behalf of the Management Board, in particular on administrative management matters" (emphasis added)⁵³¹. The EBCG and the future EUAA are thus not required to design an Executive Board, but rather, the Management Board *may* consider an option to improve the efficiency of the agency. In fact, as BUSUIOC highlights, "Europol, Frontex and

⁵²⁸ Ernst & Young, "Independent External Evaluation of Easo's activities covering the period from February 2011 to June 2014", 2015, p. 61.

⁵²⁹ Common Approach, 19.07.2012, para 10.

⁵³⁰ Ibid., para 10.

⁵³¹ Council, "Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010 – State of play and guidance for further work", doc. 10555/17, 27.06.2017.

Easo lack such structures and their board members have explicitly opposed its set up”⁵³².

Lastly, Frontex, Easo, and Europol’s Management Boards make current decisions regarding business matters with voting rights by the majority of its members, and by two-thirds majority for the appointment and dismissal of the Director, the designation of the chairperson of the Board, and the adoption of the annual budget and the Work Program⁵³³. Importantly, the EBCG Regulation and the future EUAA Regulation also provide stricter majority rules in regards to their operational tasks, and especially, when deploying EBCGT and AST in the territory of the Member States⁵³⁴.

In particular, article 20(2) Regulation 2016/1624 on the EBCG requires an absolute majority at the Management Board in regards to the profiles and the overall number of border guards and other relevant staff to be made available for the EBCGT. Article 20(4) details that the Management Board shall decide, by a three-quarter majority, on the profiles and the minimum number of border guards to be made available during rapid border interventions. In addition, article 62(1)(c) and (h) details that any decisions on the EBCG to conduct vulnerability assessments, and the profiles and minimum number of border guards to be made available for the rapid reaction pool of the EBCGT, requires respectively within the Management Board a two-thirds and three-quarters majority. Regarding the future EUAA, article 19A(6) partial agreement text signals that a three-fourths majority is required at the Management Board when deciding the profiles of experts that each Member State shall contribute to constitute the asylum intervention pool⁵³⁵.

The higher voting thresholds set within the Management Boards in regards to the operational and monitoring powers, recently conferred to the EBCG and the future EUAA, are intentional. Thereby, the Member States ensure that they have

⁵³² BUSUIOC, Madalina, “EU Justice and Home Affairs Agencies...”, *op. cit.*, p. 18.

⁵³³ Common Approach, 19.07.2012, para 13. See, article 67 Regulation 2016/1624 on the EBCG, article 44 partial agreement text on the EUAA and article 15 Regulation 2016/794 on Europol.

⁵³⁴ See Chapter 4, section II.

⁵³⁵ Council, “Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010 – State of play and guidance for further work”, doc. 10555/17, 27.06.2017.

a significant say and control over the deployment of the EBCGTs and ASTs. While the competent national authorities have agreed to make national resources and personnel available to these agencies and to operationally assist them in very sensitive and sovereign matters, the Member States monopolize and steer the strategic operational and monitoring decisions of the EBCG and the future EUAA within the Management Boards.

2. The Executive Directors of Frontex, Easo, and Europol: Caught Between the EU Institutions' Increasing Role in their Appointment and the Tight Control Exerted by the Agencies' Management Boards

The Executive Directors have a leading position in the governance, management, and day-to-day administration of the EU decentralized agencies⁵³⁶. They are in charge of managing the agencies' finances and personnel, effectively implementing the agencies' tasks and acting as their legal representatives. Among many other functions⁵³⁷, the directors of Frontex, Easo, and Europol must be completely independent and prepare and implement the multiannual programming draft, annual work programs, the consolidated annual report, and strategic decisions adopted by the Management Board.

The new Regulation of Frontex and the future Regulation of Easo strictly follow the recommended appointment procedure set out in the 2012 Common Approach⁵³⁸. In this respect, the Management Board appoints the Directors on the basis of a shortlist drawn up by the Commission, following an open and transparent selection procedure⁵³⁹. Europol's Director, however, is appointed by

⁵³⁶ See, Analytical Fiche Nr 7, "Appointment and dismissal of the Director" and Analytical Fiche Nr 8, "Tasks, duties and responsibilities of the Director", 2010; BUSUIOC, Madalina and GROENLEER, Martijn, "Wielders of supranational power? The administrative behaviour of the heads of European Union agencies" in BUSUIOC, Madalina, GROENLEER, Martijn and TRONDAL, Jarle, *The Agency Phenomenon in the European Union: Emergence, Institutionalisation and Everyday Decision-Making*, Manchester: Manchester University Press, 2012, pp. 128-150.

⁵³⁷ See, article 68 Regulation 2016/1624; article 46 partial agreement text on the EUAA; article 16 Regulation 2016/794.

⁵³⁸ Common Approach, 19.07.2012, para 16.

⁵³⁹ Article 69(1) Regulation 2016/1624 and article 45(1) partial agreement text on the EUAA.

the Council from a shortlist of candidates drawn up by a selection committee and set up by the Management Board, and is composed of members designated by the Member States and a Commission representative. The candidate selected by the Council to be Europol's Director may be invited to appear before the European Parliament, which shall subsequently provide a non-binding opinion⁵⁴⁰.

The Parliament assumes a more prominent role in the appointment of the EBCG's Executive Director and that of the future EUAA, since the Management Board is obliged to take into account the Parliament's views⁵⁴¹. According to article 69(2) Regulation 2016/1624 of the EBCG and article 45(3) partial agreement text on the EUAA, before the Director of the EBCG and that of the future EUAA is appointed, the candidates proposed shall be invited to make a statement before the Parliament and answer questions put forth by its members. Following such a statement, the Parliament shall adopt an opinion setting out its views and may indicate a preferred candidate. The EBCG and EUAA's Management Boards shall take these views into account when appointing the Executive Director. In the case that the Boards decide to appoint a candidate other than the candidate whom the Parliament indicated, the Boards must inform the Parliament and the Council in writing as to how the Parliament's opinion was taken into account.

The recently adopted Regulations of the EBCG and Europol and the future Regulation of the EUAA also follow the 2012 Common Approach recommendation regarding the renewal of their Executive Directors' mandate⁵⁴². The first term of office of the EBCG's Director and that of the future EUAA is limited to five years with a limit of four years in the case of Europol. By the end of that period, the Commission (in association with the Management Board, in the case of Europol) shall undertake an assessment of the Director's performance and the agency's future tasks and challenges. The EBCG and the EUAA's Management

⁵⁴⁰ Article 54(2) Regulation 2016/794.

⁵⁴¹ See, CARRERA, Sergio, HERNANZ, Nicholas and PARKIN, Joanna, "The 'Lisbonisation' of the European Parliament: Assessing Progress, Shortcomings and Challenges for Democratic Accountability in the Area of Freedom, Security and Justice", *Centre for European Policy Studies Liberty and Security in Europe Paper*, 58, 2013, pp. 1-44; TRAUNER, Florian, "The European Parliament...", *op. cit.*, pp. 784-802.

⁵⁴² Common Approach, 19.07.2012, para 17.

Boards, acting on a proposal from the Commission and taking into account the previous assessment, may extend the term of office of the Executive Director once, for another period of up to five years⁵⁴³. In regards to Europol, the Council is the authority, acting on a proposal from the Management Board, and is in charge of extending the term of office of the Director once and for no more than four years⁵⁴⁴. None of the Executive Directors whose term of office was extended may participate in another selection procedure for the same post at the end of the overall period.

Lastly, as the 2012 Common Approach notes, “agencies’ Directors are, first and foremost, accountable to their Management Board (...)”⁵⁴⁵. While the EBCG, the EUAA, and Europol’s Management Boards establish performance indicators, oversee the Director’s performance, and assess the annual activity, programming, financial, and management reports that they submit, the main oversight mechanism in hands of the Boards consists in removing the Director from office⁵⁴⁶. Nonetheless, as BUSUIOC and GROENLEER point out, the dismissal of a director is a rather theoretical possibility, since “other ad hoc and less disruptive strategies” are always prioritized in order “to keep the problem contained within the organization”⁵⁴⁷.

The EU Institutions may also hold Frontex, Easo, and Europol’s Executive Directors accountable. According to article 68(2) Regulation 2016/1624 of the EBCG and 46(3) partial agreement text on the future EUAA, the European Parliament and/or the Council may invite these agencies’ Executive Directors to report on the undertaking of their duties. Article 16(3) Regulation 2016/794 of Europol only mentions the Council as the EU Institution to which Europol’s director may be invited to report to.

Due to the significant responsibilities bestowed upon Frontex, Easo, and Europol’s Executive Directors, the European Institutions and the Member States

⁵⁴³ Article 69(6) Regulation 2016/1624, article 45(4) partial agreement text on the EUAA.

⁵⁴⁴ Article 54(4) Regulation 2016/794.

⁵⁴⁵ Common Approach, 19.07.2012, para 17.

⁵⁴⁶ Article 69(2) Regulation 1624/2016, article 54(7) Regulation 2016/794 and article 45(9) partial agreement text on the EUAA.

⁵⁴⁷ BUSUIOC, Madalina and GROENLEER, Martijn, “Wielders of supranational power?...”, *op. cit.*, pp. 144-145.

aim to influence their appointment. As analyzed above, the weight of the Member States in appointing the Executive Director is substantial⁵⁴⁸. Notwithstanding that the EU Institutions increasingly participate in the appointment process by proposing and being consulted, the Management Board, a predominantly intergovernmental body, makes the final decision and tightly oversees the Director.

3. Frontex and Easo's Internal Fundamental Rights Bodies: The Consultative Forum and the Fundamental Rights Officer

While Frontex, Easo, and Europol shall take into account the views of relevant stakeholders, only Frontex and Easo have formalized a relationship with several actors and bodies that participate and contribute to border management and asylum policies. Precisely, the 2012 Common Approach stated that “when relevant stakeholders are not represented in management boards, they should be involved in agencies’ internal bodies and/or advisory groups/working groups, if appropriate”⁵⁴⁹. The administrative and management structure of the current EBCG and the future EUAA is comprised not only of a Management Board and an Executive Director, but also of a CF and a FRO. This section thus analyzes the CF and FRO of the EBCG and the future EUAA. Special attention is also paid to the role that the FRO shall play in relation to the individual complaint mechanism recently designed by Regulation 2016/1624 of the EBCG.

3.1. Frontex' Consultative Forum and Fundamental Rights Officer

Regulation 2007/2004, which introduced Frontex as a EU decentralized agency, only referred to fundamental rights in point 17 of the Preamble, stating that the “regulation respects fundamental rights and observes the principles recognized in

⁵⁴⁸ PI LLORENS, Montserrat, “El nuevo mapa...”, *op. cit.*, p. 106.

⁵⁴⁹ Common Approach, 19.07.2012, para 65.

particular by the Charter of Fundamental Rights of the European Union”. Ever since, Frontex has gradually taken measures to enhance its fundamental rights compliance. In 2008, the agency signed a Working Agreement with the UNHCR to guarantee that its tasks were conducted in accordance to Member States’ international obligations⁵⁵⁰. A similar arrangement was undertaken with the FRA on 26 May 2010⁵⁵¹. However, due to the persistent criticism of Frontex’ operations regarding fundamental rights⁵⁵² and the Charter of Fundamental Rights of the EU becoming legally binding in 2009, Regulation 1168/2011, which amended and strengthened Frontex’ initial mandate, aimed to ensure that Frontex respected fundamental rights in every level of its actions. In this regard, a Fundamental Rights Strategy was introduced and a CF and FRO were designed⁵⁵³.

Right after Regulation 1168/2011 was adopted, Frontex was required to foster and implement a Fundamental Rights Strategy (article 26(1) Regulation 1168/2011)⁵⁵⁴ with the aim of preventing possible violations of fundamental rights during joint operations with Member States. The Strategy includes both an Action Plan, which details the structures, responsibilities, and resources necessary to be effectively executed⁵⁵⁵, and a Fundamental Rights Annual Progress Report, which monitors the Action Plan and its alignment with the

⁵⁵⁰ UNHCR, “UNHCR agreement with FRONTEX”, Briefing Notes, Geneva, 17.06.2008, available at <http://www.unhcr.org/4857939e2.html>, (last accessed: 30/04/2018).

⁵⁵¹ Cooperation arrangement between the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union and the European Union Agency for Fundamental Rights, 26.05.2010, available at <http://bit.ly/1JOAuYt>, (last accessed: 30/04/2018).

⁵⁵² See, among others, AAS, Katja Franko and GUNDHUS, Helene, “Policing Humanitarian Borderlands: Frontex, Human Rights and the Precariousness of Life”, *British Journal of Criminology*, 55(1), 2015, pp. 1-18; GUILD, Elspeth, *et al.*, “Implementation of the EU Charter of Fundamental Rights...” *op. cit.*; KELLER, Ska, *et al.*, “Frontex Agency: Which Guarantees for Human Rights”, Brussels, Greens/EFA in European Parliament, 2011; MARIN, Luisa, “Policing the EU’s External Borders...”, *op. cit.*, pp. 468-487; MORENO LAX, Violeta, “The EU Humanitarian Border and the Securitization of Human Rights: The ‘Rescue Through Interdiction/Rescue Without Protection’ Paradigm”, *Journal of Common Market Studies*, 56(1), 2018, pp. 119-140; RIJPMMA, Jorrit, “Frontex: successful blame shifting...”, *op. cit.*, pp. 1-6.

⁵⁵³ See, ARNAEZ, Inmaculada, “Mecanismos para el control de los Derechos Fundamentales en las actividades de Frontex” in BLASI CASAGRAN, Cristina and ILLAMOLA DAUSA, Illamola (eds.), *El control de las agencias...*, *op. cit.*, pp. 125-134.

⁵⁵⁴ Frontex, “Fundamental Rights Strategy”, 31.03.2011.

⁵⁵⁵ Frontex, “Fundamental Rights Action Plan”, 29.09.2011 (on file with the author).

Strategy⁵⁵⁶. The Action Plan is a live document that details the ongoing and future plans of Frontex in order to enhance fundamental rights.

Moreover, article 70(1) Regulation 2016/1624 currently states that a CF shall be established to assist the Executive Director and the Management Board of the EBCG in fundamental rights matters⁵⁵⁷. The CF was originally established in October 2012 and its activities started in January 2013. The CF is composed of fifteen members⁵⁵⁸, of which Easo, the FRA, and the UNHCR are mandatory members, as set by article 70(2) Regulation 2016/1624. The role of the CF is complementary, offering “strategic opinions, recommendations and a pool of information on how Frontex can structurally improve the respect and promotion of Fundamental Rights in its various activities”⁵⁵⁹.

Importantly, according to article 70(5) Regulation 2016/1624 “the consultative forum shall have effective access to all information concerning the respect for fundamental rights, including by carrying out on-the-spot visits to joint operations or rapid border interventions subject to the agreement of the host Member State, and to hotspot areas, return operations and return interventions”. However, the CF recently reported that it “continues to face challenges in being proactively and timely provided with access to the necessary information to carry out its mandate”⁵⁶⁰.

However, the CF does not handle individual complaints since it has not been granted the powers to do so, nor can it assess fundamental rights compliance in every operation of Frontex, for it lacks enough resources to systematically assess

⁵⁵⁶ Frontex, “Fundamental Rights Strategy”, para 37.

⁵⁵⁷ For a comprehensive analysis of the Consultative Forum of Frontex see, GIANNETTO, Leila, *More Than Consultation: Civil society organisations mainstreaming fundamental rights in EU border management policies: The case of Frontex and its Consultative Forum*, PhD thesis: University of Trento, 2018.

⁵⁵⁸ See, <http://frontex.europa.eu/partners/consultative-forum/members/> (last accessed: 30/04/2018).

⁵⁵⁹ Management Board Decision No 18/2012, of 26 September 2012, on the working methods of the Frontex Consultative Forum and modalities of the transmission of information to the Frontex Consultative Forum, <http://bit.ly/1Op4Sra>, (last accessed: 30/04/2018).

⁵⁶⁰ Frontex Consultative Forum on Fundamental Rights, “Fifth Annual Report, 2017”, 2018, p. 7.

each activity and document⁵⁶¹. The influence of the CF is limited in practice, since it can only pass opinions at the initiative of the Management Board or the Executive Director, or pass recommendations at the initiative of the members of the CF, which are not always considered⁵⁶². Additionally, the CF may only observe joint operations if the agency and the Member States concerned approve them⁵⁶³.

Lastly, article 71(1) Regulation 2016/1624 states that an independent FRO, appointed by the Management Board, shall report and contribute to monitor fundamental rights. The FRO was introduced on 27 September 2012 and its roles include the following: 1) providing advice on fundamental rights issues within Frontex activities; 2) maintaining and managing a record of possible fundamental rights incidents in the course of Frontex operations and pilot projects; 3) overseeing the operational activities of the agency; 4) monitoring and analyzing the implementation of a Fundamental Rights Strategy; 5) observing operations while they are taking place; 6) participating in internal Frontex discussions; 7) accessing all relevant documents, incident reports and individual complaints to prevent and react adequately to fundamental rights violations⁵⁶⁴; and 8) handling complaints received by the agency in accordance with the right to good administration⁵⁶⁵.

The key role that the FRO plays in monitoring and reporting fundamental rights incidents shall be highlighted here. Regulation 1168/2011 of Frontex initially stipulated in article 26a(1) and (3) that an effective monitoring mechanism for fundamental rights needed to be introduced. In particular, Frontex' Fundamental Rights Strategy signaled that the agency shall "put in place an effective reporting

⁵⁶¹ Frontex Consultative Forum on Fundamental Rights, "Second Annual Report, 2014", 2015, p. 10. See, Ramboll and EurAsylum, "External Evaluation of the Agency...", *op. cit.*, p. 91. See also, Frontex Consultative Forum on Fundamental Rights, "Fourth Annual Report 2016", 2017.

⁵⁶² Frontex Consultative Forum on Fundamental Rights, Work Programme for 2016, 16.11.2015, p. 4. See, Ramboll and EurAsylum, "External Evaluation of the Agency ...", *op. cit.*, p. 92. GIANNETTO, however, argues that while some limitations remain, the CF influences Frontex from within and its role is beyond the mere consultation, see GIANNETTO, Leila, *More Than Consultation...*, *op. cit.*, p. 250.

⁵⁶³ Frontex Consultative Forum on Fundamental Rights, "Annual Report 2013", 2014, p. 14.

⁵⁶⁴ *Ibid*, p. 14 and Frontex Consultative Forum on Fundamental Rights, "Second Annual Report, 2014", 2015, pp. 14-15.

⁵⁶⁵ Article 72 Regulation 2016/1624.

system to ensure that any incidents or serious risks regarding fundamental rights are immediately reported by any participating officer or Frontex staff member (...)”⁵⁶⁶. In this regard, all persons participating in the agency’s activities and joint return operations are obliged to report cases related to potential violations of fundamental rights⁵⁶⁷. This internal incident reporting system, the Serious Incident Reporting, was designed by Frontex to inform and report on serious alleged breaches of fundamental rights⁵⁶⁸.

The FRO acts as the Incident Reporting Coordinator, collecting necessary information, following-up on measures, and proposing means to address the alleged incident⁵⁶⁹. The Monitoring Mechanism for Fundamental Rights was reinforced, according to article 25(4) Regulation 2016/1624 on the EBCG, since the Executive Director has the power to “withdraw the financing of a joint operation, rapid border intervention, pilot project, migration management support team deployment, return operation, return intervention or working arrangement or suspend or terminate, in whole or in part such activities, if he or she considers that there are violations of fundamental rights or international protection obligations that are of a serious nature or are likely to persist”⁵⁷⁰. However, the European Ombudsman stated that such a decision to suspend or terminate an operation lacks precision and “involve[s] a considerable degree of discretion and rest[s] on a legal appraisal of what, in most instances, will amount to complex factual circumstances”⁵⁷¹.

⁵⁶⁶ Frontex, “Fundamental Rights Strategy”, para 17.

⁵⁶⁷ Article 22 Frontex, “Code of Conduct applicable to all persons participating in Frontex operational activities”, 2017 and article 16 Frontex, “Code of Conduct for joint Return Operations Coordinated by Frontex”, 2013. See, Article 8(6) of Directive 2008/115/EC of the European Parliament and of the Council, of 16 December 2008, on common standards and procedures in Member States for returning illegally staying third-country nationals, which states that “Member States shall provide for an effective forced-return monitoring system”. In this regard, see European Commission, “Evaluation on the application of the Return Directive (2008/115/EC), 22.10.2012, pp. 96-102.

⁵⁶⁸ PASCOUUAU, Yves and SCHUMACHER, Pascal, “Frontex and the respect of fundamental rights: from better protection to full responsibility”, *EPC Policy Brief*, 03.06.2014. See, Frontex, “General Report 2014”, p. 61.

⁵⁶⁹ Frontex, “General Report 2014”, p. 61.

⁵⁷⁰ Frontex, “General Report 2012”, p. 59.

⁵⁷¹ European Ombudsman, “Decision of the European Ombudsman closing own-initiative inquiry OI/5/2012/BEH-MHZ Frontex”, 12.11.2013, para 74.

Moreover, article 5(2) of the Code of Conduct for joint return operations states that “the competent authorities of the Member States are expected to give (...) information to the returnees about the (...) the possibility to lodge a complaint concerning alleged ill-treatment during the operation”⁵⁷². This article institutes the right of returnees to file a complaint, which goes further than merely reporting a fundamental rights violation. Nonetheless, in the European Ombudsman’s own-initiative inquiry OI/9/2014/MHZ, it was concluded that the terms regarding the right to file a complaint are not sufficiently clear and accessible⁵⁷³. Similarly, Frontex’ CF considered that the possibility for a returnee to lodge a complaint is unclear “as to when and how complaints can be made in practice, by whom and how they will be processed”⁵⁷⁴.

Hence, the FRO is in charge of recording, updating, and maintaining information on violations and providing an assessment of the impact that such incidents may have on fundamental rights during Frontex operations. In addition, she reports every two months to the CF, the Management Board, and the Executive Director about any fundamental rights violations⁵⁷⁵, and is responsible for the functioning of the individual complaint mechanism⁵⁷⁶.

It should also be noted that the FRO directly reports to the Management Board and the CF, which makes this body a purely internal and administrative mechanism lacking the power to impose legally binding obligations on Frontex⁵⁷⁷. Furthermore, the FRO’s mandate has been seriously compromised

⁵⁷² Frontex Code of Conduct for joint Return Operations, 2013.

⁵⁷³ European Ombudsman, “Decision of the European Ombudsman closing her own-initiative inquiry OI/9/2014/MHZ concerning Frontex”, 04.05.2015.

⁵⁷⁴ Frontex CF Annual Report 2013, p. 22.

⁵⁷⁵ Frontex, “General Report 2013”, pp. 41-42.

⁵⁷⁶ See, RIJPM, Jorrit, “The Proposal for a European Border and Coast Guard: Evolution or Revolution in External Border Management?”, *Study for the LIBE Committee of the European Parliament*, March 2016; VOGIATZIS, Nikos, “Frontex: Human Rights Obligations and the Role of the European Ombudsman” in KARATZOGIANNI, Athina, NGUYEN, Dennis and SERAFINELLI, Elisa (eds.), *The Digital Transformation of the Public Sphere: Conflict, Migration, Crisis and Culture in Digital Networks*, Berlin: Springer, 2016, pp. 303-318.

⁵⁷⁷ In this regard it shall be ensured that the “Fundamental Rights Officer and the Consultative Forum on Fundamental Rights report directly to the European Parliament on human rights concerns in the context of all Frontex activities and on steps taken to address these concerns”, Council of Europe (Parliamentary Assembly), “Frontex: human rights responsibilities”, Resolution 1932 (2013), 08.04.2013, para 9.2.1. See, Ramboll and EurAsylum, “External Evaluation of the Agency...”, *op. cit.*, p. 92.

due to very scarce financial resources⁵⁷⁸ and personnel⁵⁷⁹. Therefore, Regulation 2016/1624 now states that “given the increased number of its tasks, the Agency should further develop and implement a strategy to monitor and ensure the protection of fundamental rights. To that end it should provide its fundamental rights officer with adequate resources and staff corresponding to its mandate and size” (recital 48). However, the CF reported in 2018 that “Frontex maintained its reluctance to adequately capacitate the Fundamental Rights Office with the provision of sufficiently qualified staff to carry out its increased responsibilities”⁵⁸⁰.

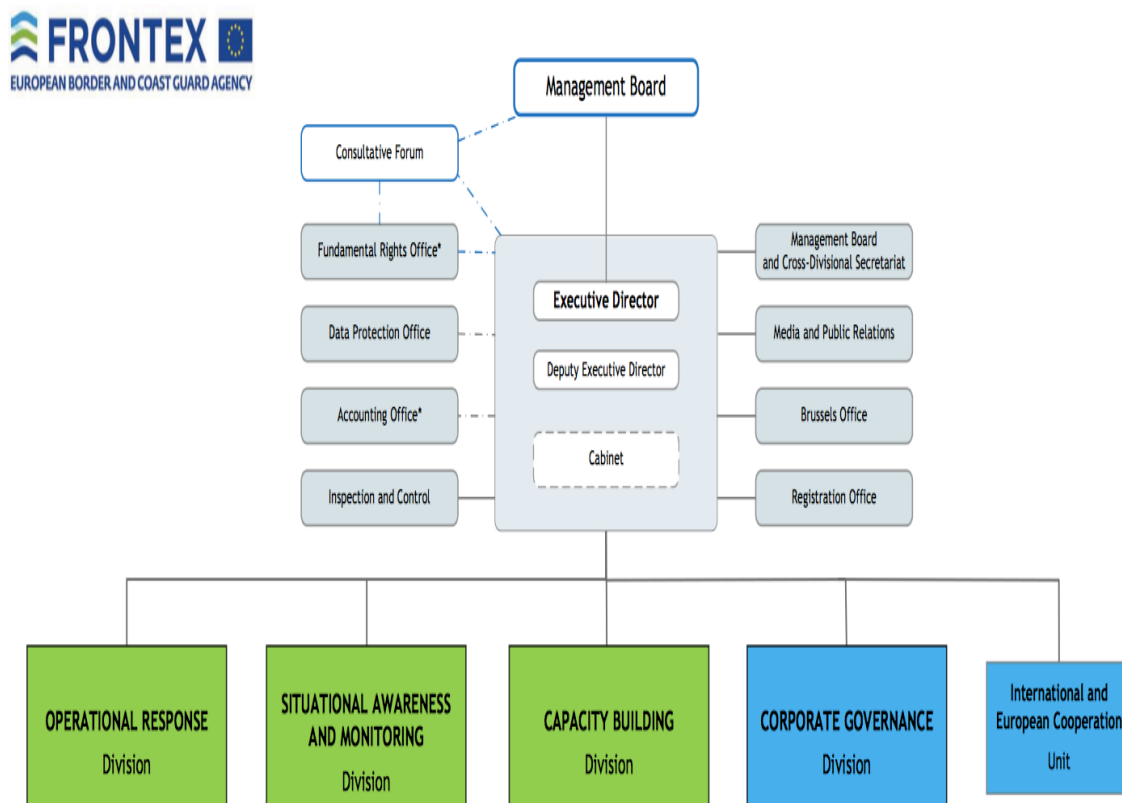


Figure 7: Frontex’ Organizational Structure. Source: Frontex.

⁵⁷⁸ Frontex, “Programme of Work 2015”, 2014, p. iii. See, Ramboll and EurAsylum, “External Evaluation of the Agency...”, *op. cit.*, p. 93.

⁵⁷⁹ Frontex Consultative Forum on Fundamental Rights, “Second Annual Report, 2014”, 2015, p. 16; Ramboll and EurAsylum, “External Evaluation of the Agency...”, *op. cit.*, p. 93.

⁵⁸⁰ Frontex Consultative Forum on Fundamental Rights, “Fifth Annual Report, 2017”, 2018, p. 5.

3.2. *The EUAA's Consultative Forum and Fundamental Rights Officer*

The future EUAA will mirror the provisions and management structures designed for the EBCG in regards to streamlining and protecting fundamental rights. While the reinforcement of fundamental rights was barely addressed by the European Commission in its proposal for a Regulation on the EUAA, the European Parliament played a significant role as co-legislator and replicated the fundamental rights provisions of the EBCG in the EUAA's text⁵⁸¹. In this regard, pursuant article 54a of the partial agreement text on the EUAA, the agency shall "establish and implement a Fundamental Rights Strategy to ensure respect for fundamental rights in all the activities of the Agency", as well as "implement a code of conduct applicable to all experts in the asylum support teams" (article 54b partial agreement text on the EUAA).

Moreover, the future Regulation on the EUAA strengthens Easo's CF, which was established in 2011. Easo's External Evaluation highlighted the significant role of CF in further involving civil society in the programming of Easo's activities⁵⁸². However, the evaluation also brought forward an internal tension between civil society delegates, who asked for additional involvement in the consultation process of the agency, and Management Board representatives, who opposed further integrating the CF in Easo's operational responsibilities⁵⁸³. In this respect, further strengthening the dialogue between Easo, NGOs, and civil society, as well as broadening the integration of the CF representatives in Easo's practical daily work, was imperative⁵⁸⁴.

Article 48 partial agreement text on the EUAA reinforces the autonomy of the

⁵⁸¹ European Parliament, "Report on the proposal for a regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010", 21.12.2016. See, European Economic and Social Committee, "Opinion: Proposal for a regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010", SOC/543-EESC-2016-02981-00-00-ac, 19.10.2016.

⁵⁸² Ernst & Young, "Independent External Evaluation...", *op. cit.*, p. 74.

⁵⁸³ *Ibid.*, p. 75.

⁵⁸⁴ *Ibid.*, p. 75.

CF since it will no longer be chaired by the Executive Director. The CF will also promote the exchange of information, assist the Executive Director and the Management Board, and ensure a close dialogue between relevant civil society organizations and competent bodies operating in the field of asylum policy⁵⁸⁵. Particularly, the CF is mandated to: 1) make suggestions to the Management Board on the annual and multi-annual programming; 2) provide feedback to the Management Board and suggest measures as a follow-up to the annual report on the situation of asylum in the EU; and 3) communicate to the Executive Director and the Management Board regarding conclusions and recommendations of conferences, seminars and meetings, as well as on findings from studies or field work carried out by any of the member organizations or bodies of the CF⁵⁸⁶.

In spite of the European Commission not having designed a FRO in its proposal for a Regulation on the EUAA, the European Parliament put forward the creation of a FRO. According to article 47a partial agreement text on the EUAA, “a Fundamental Rights Officer shall be appointed by the Management Board from a selection of candidates proposed by the Executive Director”. The EUAA’s future FRO is intended to develop the same activities as the EBCG’s FRO. Specifically, the EUAA’s FRO will be in charge of independently ensuring the agency’s compliance with fundamental rights, implementing the complaints mechanism, accessing all information concerning the respect for fundamental rights in relation to all the activities of the agency, and organizing visits where the agency is carrying out operational activities (article 47a partial agreement text on the EUAA).

⁵⁸⁵ See, <https://www.easo.europa.eu/easo-consultative-forum>, (last accessed: 30/04/2018).

⁵⁸⁶ See, Easo, “Consultative Forum Operational Plan”, 2012.

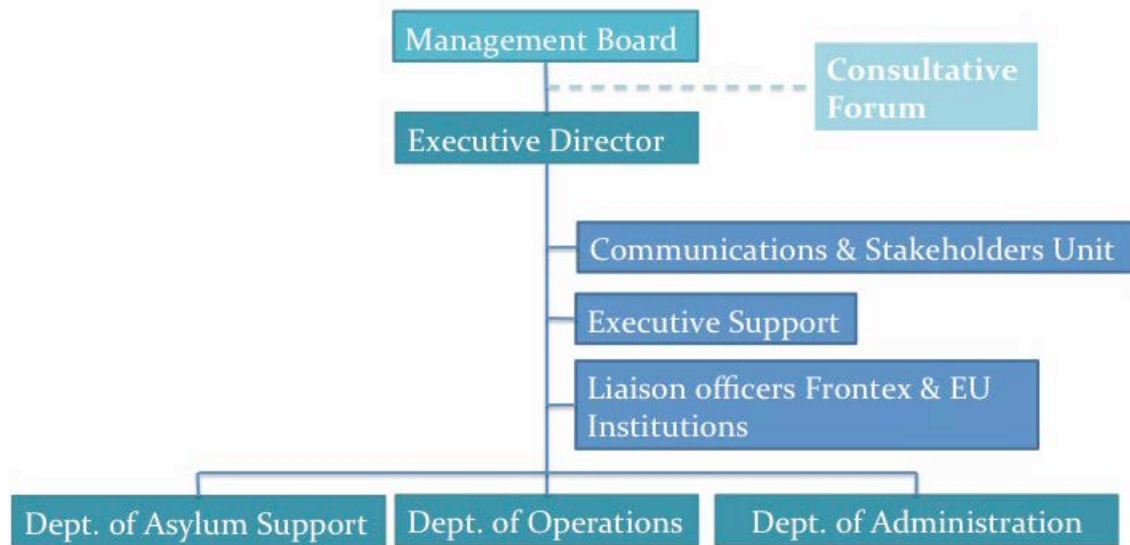


Figure 8: Easo's Organization Structure. Source: Easo.

3.3. The EBCG and EUAA's Individual Complaint Mechanism

The current Regulation 2016/1624 of the EBCG recognized that the expansion of the agency's tasks needed to be accompanied by the necessary guarantees of fundamental rights (recital 14)⁵⁸⁷. In this regard, article 72 Regulation 2016/1624 introduces a complaint mechanism, allowing any individual who considers an activity of the EBCG to have breached a fundamental right obligation, to lodge a complaint directly to the agency. The FRO is in charge of managing this new individual complaint mechanism⁵⁸⁸.

During the legislative adoption of the future EUAA, the European Parliament proposed the establishment of a complaint mechanism for the future EUAA. Pursuant article 48a of the partial agreement text on the EUAA, the agency shall "take the necessary measures to set up a complaints mechanism (...) to ensure the respect for fundamental rights in all the activities of the Agency". Since the proposed complaint mechanism for the EUAA is strictly based on the EBCG's

⁵⁸⁷ In this regard, see the non-exhaustive list of fundamental rights that may be breached during an operation of the EBCG, <http://frontex.europa.eu/assets/Complaint/Appendix - List of FR in Charter.pdf>, (last accessed: 30/04/2018).

⁵⁸⁸ For a detailed analysis of the characteristics and functioning of complaint mechanisms in border management matters see, CARRERA, Sergio and STEFAN, Marco, "Complaint Mechanisms in Border Management and Expulsion Operations in Europe: Effective Remedies for Victims of Human Rights Violations?", *Centre for European Policy Studies*, 2018.

complaint mechanism, and the Regulation on the EUAA is still under negotiation, this section centers on analyzing the functioning of the already established EBCG's complaint mechanism.

3.3.1 The Creation of an Individual Complaint Mechanism

As examined above, while the internal mechanisms initially established by Frontex to promote the protection of fundamental rights have focused mainly on reporting, individuals were not guaranteed the right to address the agency directly, except in the case of joint return operations⁵⁸⁹. The European Ombudsman recommended that Frontex create an individual complaint mechanism, allowing aggrieved individuals to address the agency. In spite of Frontex' initial rejection of the European Ombudsman's recommendation, Regulation 2016/1624 finally incorporated the individual complaint mechanism.

In her own initiative inquiry⁵⁹⁰, the European Ombudsman recommended that Frontex develop a complaint mechanism within the FRO, which should be open to those directly affected by violations of fundamental rights and those aware of such violations who may wish to complain for the public interest. However, this recommendation was not implemented by Frontex, on the basis that article 26a(3) of Regulation 1168/2011 did not grant the FRO the power to carry out an individual complaint mechanism. The Ombudsman thus prepared a special report to assess its feasibility⁵⁹¹.

Frontex originally responded to the European Ombudsman, stating that despite Frontex not having the power to design a complaint mechanism within the FRO mandate, internal means to report potential violations of fundamental rights were already in place⁵⁹². However, the European Ombudsman considered

⁵⁸⁹ Frontex, Code of Conduct for joint Return Operations, article 5(2).

⁵⁹⁰ European Ombudsman, "Decision of the European Ombudsman closing own-initiative inquiry OI/5/2012/BEH-MHZ concerning Frontex", 12.11.2013.

⁵⁹¹ European Ombudsman, "Special Report of the European Ombudsman in own-initiative inquiry OI/5/2012/BEH-MHZ concerning Frontex", 12.11.2013.

⁵⁹² *Ibid.*, paras 16-18.

that the internal reporting procedures of Frontex needed to be complemented by an individual complaint mechanism to ensure the protection of fundamental rights⁵⁹³, since monitoring mechanisms and complaint instruments complement each other and are not mutually exclusive.

Moreover, Frontex suggested that the complainants could always seek judicial redress with the competent authorities, namely national or EU courts, since the agency does not have an executive nature and thus cannot handle individual complaints⁵⁹⁴. While the Ombudsman agreed that national and EU courts may be competent to deal with individual complaints, she found it unlikely that the persons affected by Frontex' operations would seek judicial redress due to the difficulties that these proceedings entail, namely limited access to legal representation, costs, restrictive rules of standing, and time⁵⁹⁵. In the own words of the Ombudsman, "persons affected by a Frontex operation are typically under stress and vulnerable and it cannot possibly be expected from them to investigate what is undoubtedly a complex allocation of responsibility"⁵⁹⁶.

Frontex also explained that its responsibility is restricted since Member States exclusively hold enforcement powers for the control and surveillance of external borders⁵⁹⁷. According to the agency, the Member States are the only actors that may affect an individual's fundamental rights when participating in an operation coordinated by Frontex. However, the European Ombudsman once again disagreed with Frontex' statement about not having responsibility in border control operations. The Ombudsman considered that there was at least a shared responsibility between the Member States and the agency⁵⁹⁸.

⁵⁹³ Ibid., para 23.

⁵⁹⁴ Ibid., para 31.

⁵⁹⁵ Ibid., para 41.

⁵⁹⁶ Ibid., para 37.

⁵⁹⁷ Ibid., summary.

⁵⁹⁸ "Whereas even today Frontex coordination activity cannot in practice be dissociated from the Member State activity carried out under its coordination, so that Frontex (and thereby the EU through it) could also have a direct or indirect impact on individuals' rights and trigger, at the very least, the EU's extra-contractual responsibility (see Court of Justice Judgment T-341/07, Sison III)", Parliament, "Resolution on the Special Report of the European Ombudsman in own-initiative inquiry OI/5/2012/BEH-MHZ concerning Frontex", 2014/2215(INI), 02.12.2015, para C.

The recommendation of the European Ombudsman to introduce an individual complaint mechanism within the FRO, despite Frontex' initial rejection, was widely backed. Not only did Frontex' CF support this recommendation⁵⁹⁹, but the European Parliament also considered it necessary to design such a mechanism. In the Resolution of 2 December 2015, the Parliament established that there were no legal obstacles in Frontex' Regulation to introduce a complaint mechanism within the mandate of the FRO, which would comply with the principle of good administration and reinforce the execution of the agency's Fundamental Rights Strategy⁶⁰⁰.

In this Resolution, the European Parliament stressed that the complaint procedure should not only be developed, but also effectively executed if implemented. Specifically, the Parliament recommended that both individuals and officers involved in Frontex' operations should be aware that those persons whose fundamental rights may be affected by the agency have the right to file a complaint⁶⁰¹.

Additionally, the Parliament considered that if a complaint was lodged, the FRO should follow up by requesting feedback from the respective Member State or Frontex. Should no feedback be provided by the Member States, the FRO would send a letter of warning, stating the possible action that Frontex may take⁶⁰². In the case of Frontex not providing feedback, the FRO should provide a justification and contact details to the complainant regarding the responsible national authority which the complaint could be referred to⁶⁰³. The effectiveness of the complaint mechanism lies, as the European Parliament rightly pointed out, in the individuals being correctly informed of its existence, and in the Member States or the agency, as appropriate, explaining the reasons for considering the complaint as inadmissible in a well-founded manner.

⁵⁹⁹ Frontex, CF Annual Report 2014, p. 38.

⁶⁰⁰ Parliament, "Resolution on the Special Report of the European Ombudsman in own-initiative inquiry OI/5/2012/BEH-MHZ concerning Frontex", 2014/2215(INI), 02.12.2015, para 6.

⁶⁰¹ *Ibid.*, para 28.

⁶⁰² *Ibid.*, para 21.

⁶⁰³ *Ibid.*, para 22.

The proposal of the Commission, establishing a EBCG, took into account both the report of the European Ombudsman and the Parliament's Resolution⁶⁰⁴. The Commission clarified that the complaint mechanism should have an administrative character since the EBCG is not competent to investigate its own violations of fundamental rights⁶⁰⁵. For the same reason, the future EUAA's individual complaint mechanism will not be able to receive complaints that challenge any decision adopted by national authorities regarding an individual's application for international protection (article 48a(3) partial agreement text on the EUAA).

3.3.2 The Functioning of the EBCG's Individual Complaint Mechanism

With the aim of better studying the complaint mechanism, its functioning will be divided into three consecutive phases (see figure 9): 1) presentation, registration, admission, and referral of the complaint to the agency or to the Member State as appropriate; 2) follow-up of the complaint accepted; and 3) results and monitoring of the agency or the concerned national authority to a specific complaint.

⁶⁰⁴ Commission, "Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC", COM(2015) 671 final, 15.12.2015, recital 8.

⁶⁰⁵ Ibid., recital 12.

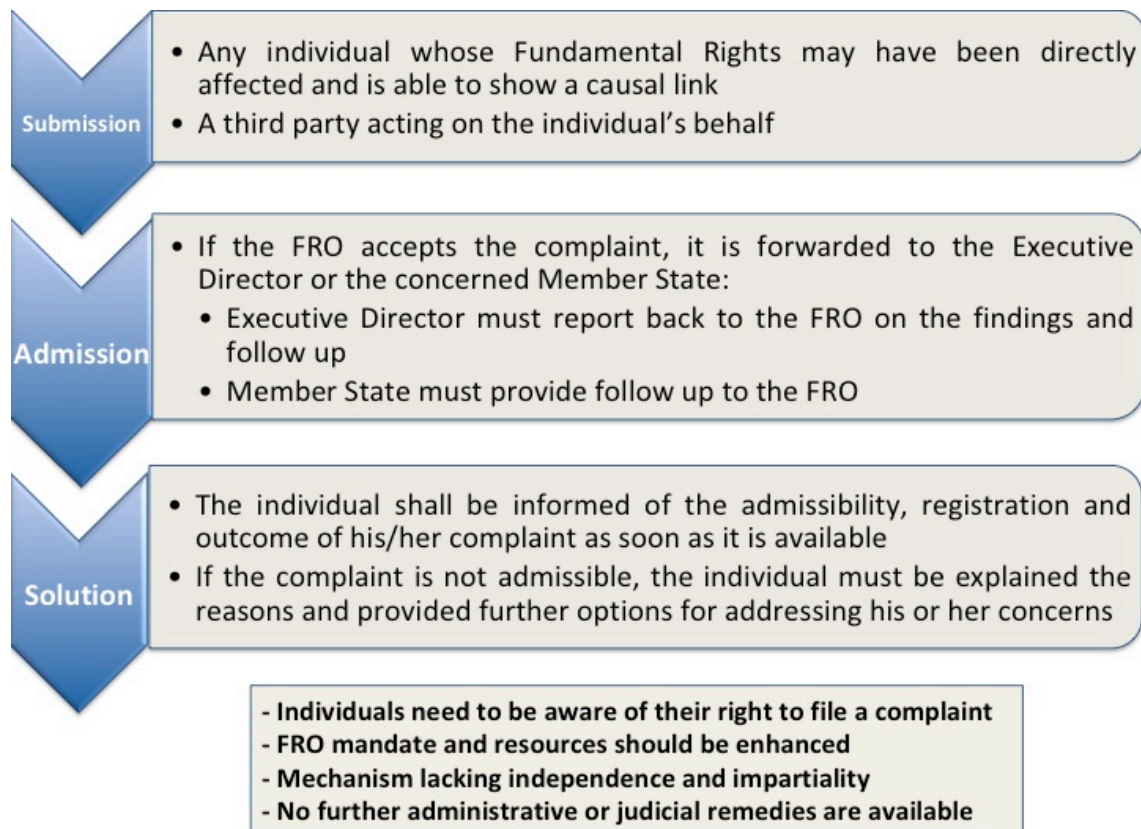


Figure 9: Phases of the Individual Complaint Mechanism. Source: Author's own elaboration.

Regarding the first phase, article 72(2) Regulation 2016/1624 declares that “any person who is directly affected by the actions of staff involved in a joint operation, pilot project, rapid border intervention, migration management support team deployment, return operation or return intervention and who considers him or herself to have been the subject of a breach of his or her fundamental rights due to those actions, or any party representing such a person, may submit a complaint in writing to the Agency”.

Complainants must be directly affected by the actions of personnel involved in the specific operation and demonstrate a causal link between such actions and the violation of a particular fundamental right. Specifically, article 5 of the agency's Rules on the Complaints Mechanism states that any complaint shall be made in writing (preferably through the form created for that purpose)⁶⁰⁶, and

⁶⁰⁶ Frontex, “Annex 2: Complaint Form for potential violations of fundamental rights”, <http://bit.ly/2po1ocV>, (last accessed: 30/04/2018).

shall describe in sufficient detail the concrete action of the agency that has violated the complainant's fundamental rights⁶⁰⁷. Article 8 goes on to say that the complaint must be filed within one year from the date on which the alleged violation of the fundamental right occurred or the complainant was informed or learnt about such violation.

The FRO is responsible for examining the admissibility of the complaints lodged, registering the admissible complaints, and sending them to the EBCG's Executive Director or to the concerned Member State as appropriate (article 72(4) Regulation 2016/1624). Article 72(5) Regulation 2016/1624 points out that "if a complaint is admissible, complainants shall be informed that a complaint has been registered, that an assessment has been initiated and that a response may be expected as soon as it becomes available. (...) If a complaint is not admissible, complainants shall be informed of the reasons and, if possible, provided with further options for addressing their concerns". However, it would have been more convenient to set a deadline to inform the complainant about the admissibility or rejection of her complaint, since the current indeterminacy may result in excessively long periods of time, and may mitigate the effectiveness of the individual complaints mechanism in the long term.

The second phase of the complaint mechanism involves an appropriate follow-up of the complaint by the EBCG's Director or the concerned Member State, depending on whether the complaint relates respectively to a staff member of the agency or to one of the national border guards. On the one hand, article 72(6) Regulation 2016/1624 indicates that "the executive director shall ensure appropriate follow-up, in consultation with the fundamental rights officer, including disciplinary measures as necessary (...)". On the other, article 72(7) states that "the home Member State shall ensure appropriate follow-up, including disciplinary measures as necessary or other measures in accordance with national law (...)". According to article 10(6) of the Agency's Rules on the Complaints Mechanism, "the Executive Director shall report back to the FRO on the findings

⁶⁰⁷ Frontex, "Annex 1: The Agency's Rules on the Complaints Mechanism", <http://bit.ly/2F93BoP>, (last accessed: 30/04/2018).

and follow-up made by the agency within six months of the date of such follow-up”.

If a concerned Member State is willing to collaborate with the EBCG to clarify a complaint lodged, a structured dialogue will be established between such Member State and the FRO. For instance, a complaint concerning a potential violation of the right of asylum by the Polish authorities at Terespol led to a significant exchange of communications between the Polish authorities and the EBCG’s FRO. According to the complaint declared admissible on 8 June 2017, in this railway border crossing point, third-country nationals were being rejected and sent back to Belarus while attempting to file applications for international protection. On 7 September 2017, the Director of the Control Department of the Polish Border Guard argued that the actions of the officers of the border guards in Terespol were justified and compatible with the applicable legislation⁶⁰⁸.

However, on 12 October 2017, the FRO replied to the Director of the Control Department of the Polish Border Guard, reasoning that some allegations of the complainant were not fully answered and some additional follow up and documentary evidence were deemed necessary. On 1 December 2017, the competent Polish authorities further detailed and explained the circumstances and actions adopted in relation to the border check and access to refugee procedures of the complainant. Nonetheless, the complaint submitted continued to be regarded as unfounded, and therefore no further action was foreseen⁶⁰⁹.

Given the administrative nature of the complaint mechanism, if the Member State does not adequately follow up on the complaint, the FRO lacks the powers to impose any measure. Article 11(3) of the rules on the complaints mechanism merely indicates that “the agency follows up the matter if no report is received from the Member State”. Additionally, Regulation 2016/1624 ambiguously signals that “the Agency shall follow-up the matter if no report is received from the relevant Member State” (Article 72(7)), and that it “may request that the Member

⁶⁰⁸ European Border and Coast Guard, Complaint CMP-2017-00011, 25.05.2017 (on file with the author).

⁶⁰⁹ Ibid.

State remove that border guard or seconded national expert immediately from the activity of the Agency or the rapid reaction pool” (article 72(8)).

The EBCG fully depends on the willingness of the concerned Member State to follow up on a complaint declared admissible by the FRO and to remove a border guard involved in a violation of fundamental rights⁶¹⁰. This situation was clearly highlighted in a complaint that the FRO received on 4 January 2017, concerning the breach of the fundamental right to asylum. In this case, ten irregular migrants were returned to Turkey from Greece during an operation coordinated by the EBCG⁶¹¹. These third-country nationals alleged that they were not given access to the asylum procedure, that their claims for international protection were not fully and duly examined, and that the EBCG failed to assess whether their forced return took place in accordance with European human rights law.

On 15 February 2017, the FRO declared such a complaint admissible. After several requests that aimed to identify the specific authority in charge of receiving complaints, the Hellenic police was contacted on 2 May 2017. On 15 September 2017, the FRO sent a first reminder to the Greek authorities to let them know that no communication was received on the follow up and findings conducted. Similar reminders were sent by the FRO on 16 October, 27 October, and 22 January 2018. Finally, on 13 February 2018, the EBCG’s Executive Director addressed the competent Greek authorities, expressing that the FRO had not received any feedback and that the deadline of six months set on the agency’s rules had expired, which ultimately “jeopardizes the effectiveness of the complaints mechanism and the principle of good administration and due diligence that should be observed”. The EBCG’s Executive Director concluded this letter by compelling the Hellenic authorities to send a specific report on the follow up and findings of the investigation undertaken as soon as possible⁶¹².

In the case of a Member State that systematically refuses to collaborate with the EBCG in investigating a complaint declared admissible, the FRO could

⁶¹⁰ CARRERA, Sergio and FERRARA, Steffan, “Complaint Mechanisms...”, *op. cit.*, p. 26.

⁶¹¹ European Border and Coast Guard, Complaint CMP-2017-00001, 04.01.2017 (on file with the author).

⁶¹² *Ibid.*

request that the Executive Director trigger article 25(4) Regulation 2016/1624. According to this provision, “the executive director shall, after consulting the fundamental rights officer and informing the Member State concerned, withdraw the financing of a joint operation, rapid border intervention, pilot project, migration management support team deployment, return operation, return intervention or working arrangement or suspend or terminate, in whole or in part such activities, if he or she considers that there are violations of fundamental rights or international protection obligations that are of a serious nature or are likely to persist (...)”.

However, the Executive Director has recently shown his unwillingness to trigger article 25(4) Regulation 2016/1624. In November 2016, the EBCG’s CF, backed by the FRO⁶¹³, recommended that the agency’s director suspend operational support at the Hungarian-Serbian border until migrants arriving at the border were duly registered, were not summarily returned to Serbia, were given access to an individual procedure and asylum, and that instances of police abuse and violence were investigated in an independent and impartial manner⁶¹⁴.

On February 2017 and March 2017, the EBCG’s Executive Director refused to take action pursuant article 25(4) Regulation 2016/1624 and to suspend the operational activities at the Hungarian and Serbian Border⁶¹⁵. The Director considered that the alleged cases of illegitimate use of force by Hungarian police, if confirmed, did not occur within the operational activities coordinated by the agency, and that the presence of the agency could actively contribute to minimize any possible risk. Such a refusal was, nonetheless, not based on clear

⁶¹³ FRO Observations regarding the Situation at the Hungarian-Serbian Border, 2016, 14.10.2016 (on file with the author), FRO Field Visit to Hungary 13-15 March 2017, 28.03.2017 (on file with the author) and Recommendation by the Consultative Forum to the Executive Director and Management Board of the European Border and Coast Guard Agency (Frontex), 10.11.2016 (on file with the author).

⁶¹⁴ Frontex Consultative Forum on Fundamental Rights, “Recommendation by the Consultative Forum to the Executive Director and Management Board of the European Border and Coast Guard Agency (Frontex)”, 10.11.2016, (on file with the author).

⁶¹⁵ Frontex, “Recommendation on Frontex activities at the Hungarian-Serbian Border”, 01.02.2017 and Frontex, “Frontex Executive Director to the Chair of the Consultative Forum”, 07.03.2017, (on file with the author).

evidence, and the concerns expressed by the CF and the FRO were insufficiently addressed.

The final phase of the individual complaint mechanism encompasses the follow-up and findings in respect to the complaints lodged and considered admissible. Article 72(9) Regulation 2016/1624 stresses that the FRO “shall report to the executive director and to the management board as to the Agency’s and Member States’ findings and follow-up made in response to complaints. The Agency shall include information on the complaints mechanism in its annual report”. Article 14(1) of the agency’s rules on the complaint mechanism details that the EBCG shall include “information on the complaints mechanism in its annual report, including the amount of complaints received, the amount of admissible complaints, the types of fundamental rights violations involved, the agency activity concerned, the finding made on the complaint (if known), and the follow-up made (if known)”.

The complaints lodged to the EBCG are not publicly available, but access is granted on a case-by-case basis upon submitting a request to the agency for access to documents⁶¹⁶. Publicizing the complaints is an essential task, since it would facilitate future complainants in assessing the effectiveness of the mechanism, would put pressure on the agency to more effectively mainstream fundamental rights, and would encourage the agency to adjust its actions in the future. Hence, the findings and follow-up of the complaints submitted should also be forwarded by the FRO to the CF, the European Ombudsman, and the European Parliament’s LIBE Committee.

The main issue with the individual complaint mechanism designed is based on its lack of independence and impartiality⁶¹⁷. Specifically, the Executive Director, who is in charge of reporting back to the FRO about the measures to be

⁶¹⁶ This thesis analyzed in total nineteen complaints that were lodged since the EBCG was established in September 2016 until February 2018 (the only two complaints lodged in 2016 were declared inadmissible, five out of the fifteen complaints lodged in 2017 were admissible, and the two first complaints of 2018 were inadmissible). See, Appendix A: Public Access to Documents.

⁶¹⁷ PEERS, Steve, “The Reform of Frontex: Saving Schengen at Refugee’s Expense?”, *Statewatch*, 281, 2016. See also, CARRERA, Sergio, *et al.*, “The EU’s Response to the Refugee Crisis...” *op. cit.*, pp. 10-12 and GUILD, *et al.*, “What is happening to the Schengen borders?”, *CEPS Paper in Liberty and Security in Europe*, 86, 2015, pp. 18-21.

taken regarding an admitted complaint, is not independent from the agency. Rather, the Director is appointed by the Management Board, which is composed of one representative from each Member State and two representatives from the Commission. In this regard, the mandate of the FRO should be enhanced, since she does not have the power to suggest operational improvements to existing processes, to implement a plan to execute the measures adopted by the EBCG or Member States, or to impose any sanctions against the agency.

Had the FRO been provided with the function to compensate individuals for damages, the complaint mechanism would have been effectively enhanced. In this respect, the FRO could have been directly allocated a special budget to compensate an aggrieved complainant whose fundamental rights were found to be violated, or to finance other remedies. The FRO could have at least been granted, jointly with the Executive Director, the power to terminate, suspend, or withdraw financial support if an operation of the agency did not comply with fundamental rights.

Lastly, no reference is made to a remedy within the EBCG if the complainant is not satisfied with the reply, or if the measures adopted by the agency or the concerned Member State are not executed or implemented effectively. In this regard, offering the individual the option to file a complaint of maladministration against the agency at the European Ombudsman would more effectively ensure the complainant's rights. For instance, the European Investment Bank, which has a complaint mechanism in place, signed a memorandum of understanding with the European Ombudsman, who committed to use her own initiative power systematically to handle complaints filed against the Bank by non-eligible complainants (individuals who are not citizens of the Union or do not reside in a Member State of the EU)⁶¹⁸.

⁶¹⁸ European Investment Bank, "Complaints Mechanism Principles, Terms of Reference and Rules of Procedure", 31.10.2012 and Memorandum of Understanding Between the European Ombudsman and the European Investment Bank concerning information on the Bank's policies, standards and procedures and the handling of complaints, including complaints from non-citizens and non-residents of the European Union, 09.07.2008.

4. The Practical Interaction Between the Management Board and the Executive Director: Adoption of the Work Program, the Annual Report and the Budget of Frontex, Easo, and Europol

Whereas the Management Boards are responsible for numerous organizational and supervisory functions, two in particular stand out: appointing and overseeing the Executive Director, which has already been examined above, and adopting the general budget, the Work Program, and the Activity Report of the agencies. The Executive Directors, in turn, are in charge of preparing and implementing the multiannual programming draft, the annual Work Programs, the consolidated Annual Report, and the agencies' budget. This section studies the budgetary, programming, and annual reporting tasks that the Executive Director and the Management Board are assigned.

4.1. Adoption of the Work Program and the Annual Activity Report

The Work Program and the Annual Activity Report are strategic documents issued by the agencies in which the activities to be developed and the impact of the agency's work are set out. The Work Program gathers the agencies' objectives for the coming year and the annual Activity Report assesses the achievement of the activities conducted during the preceding year. That is, while the multi-annual and yearly Work Programs facilitate the delineation of the agencies' medium-term objectives and design their future activities, the Annual Activity Report aides them in assessing to what extent the Work Program was successfully and effectively implemented.

By 30 November of each year, based on a draft proposed by the Executive Director, the Management Boards of Frontex, Easo, and Europol shall adopt a

document containing the multi-annual and annual programming⁶¹⁹. The Executive Director is in charge of implementing the multiannual program and the annual work programs, and reporting to the Management Board on their implementation. The multiannual program consists of the overall strategic programming in the medium and long-term, including objectives, expected results, and performance indicators⁶²⁰. The multiannual program defines the strategic areas of intervention of Frontex, Easo, and Europol, and the steps to be followed in order to effectively achieve the objectives put forward⁶²¹. The multiannual programs are implemented through annual work programs, which contain detailed objectives, expected results, activities to be financed, and performance indicators.

Furthermore, the Executive Director annually prepares an Activity Report on the activities conducted by Frontex, Easo, and Europol, which is submitted to the Management Board⁶²². The Board is then responsible for adopting the Annual Activity Report and forwarding it to the European Parliament, the Council, the Commission, and the Court of Auditors⁶²³. This report shall contain information on the implementation of the Work Program, budget, and resources of the agency. Additionally, the Annual Activity Report covers information regarding Frontex, Easo, and Europol's work and achievements, a comprehensive analysis of their core operational activities, and an evaluation of the results of the activities conducted throughout the previous year. Both the work programs and the annual activity reports are public documents and can be found on the websites of Frontex, Easo, and Europol.

⁶¹⁹ Article 12 Regulation 2016/794, article 64 Regulation 2016/1624 and article 41 partial agreement text on the EUAA. See, Analytical Fiche Nr 13, "Annual Work Programme" and Analytical Fiche Nr 14, "Multiannual Programming", 2010.

⁶²⁰ See, Common Approach, 19.07.2012, para 31.

⁶²¹ *Ibid.*, para 29.

⁶²² Article 16(5)(g) Regulation 2016/794, article 68(3)(d) Regulation 2016/1624 and article 46(5) partial agreement text on the EUAA.

⁶²³ Article 11(1)(c) Regulation 2016/794, article 62(2)(i) Regulation 2016/1624 and article 40(1)(c) partial agreement text on the EUAA.

4.2. Adoption of the Annual Budget

The Management Boards and the Executive Directors of Frontex, Easo, and Europol are in charge of adopting and implementing the annual budget of the agency⁶²⁴. Each year, the Executive Director is in charge of drawing up a provisional draft statement of estimates of the agency's revenue and expenditure for the following financial year and sends it to the Management Board. Subsequently, the Management Board adopts a provisional draft estimate of Frontex, Easo, and Europol's revenue and expenditure for the following financial year, and sends it to the Commission. The Commission then enters into the draft general budget of the EU the estimates it considers necessary for the establishment plan and the amount of the subsidy to be charged to the general budget. In accordance with article 314 TFEU, the budgetary authority shall authorize the appropriations for the contribution to Frontex, Easo, and Europol and shall adopt its establishment plan. Lastly, the Management Board adopts Frontex, Easo, and Europol's budget, which becomes final following the adoption of the general budget of the EU.

Regarding the implementation and control of Frontex, Easo, and Europol's budget, the Executive Director is responsible for implementing the budget and sending all information relevant to the findings of evaluation procedures to the budgetary authority⁶²⁵. Specifically, Frontex, Easo, and Europol's accounting officer shall send the provisional accounts for the financial year to the Commission and to the Court of Auditors by 1 March of the following financial year. Frontex, Easo, and Europol are also required to send a report on the budgetary and financial management to the European Parliament, the Council, and the Court of Auditors by 31 March.

Upon receipt of the Court of Auditors' observations, Frontex, Easo, and Europol's accounting officer shall draw up these agencies' final accounts and the

⁶²⁴ Article 58 Regulation 2016/794; article 75 Regulation 2016/1624 and article 50 partial agreement text on the EUAA. See, Analytical Fiche Nr 20, "Funding and budget revenues of agencies" and Analytical Fiche Nr 22, "Budgetary procedure – Role of the three Institutions, 2010.

⁶²⁵ Articles 59 and 60 Regulation 2016/794; article 76 Regulation 2016/1624 and article 51 partial agreement text on the EUAA.

Executive Director shall submit them to the Management Board for an opinion. The Executive Director shall then send the final accounts, together with the Management Board's opinion, to the Parliament, the Council, the Commission, and the Court of Auditors. Finally, the Executive Director is in charge of sending the Court of Auditors a reply to its observations by 30 September of the next year, and submitting any information required for the application of the discharge procedure to the Parliament⁶²⁶.

On average, the annual budgets of Frontex, Easo, and Europol have continuously and considerably expanded to primarily cover staff remuneration, administrative and infrastructure expenses, and operating expenditure. Two tendencies can be clearly identified in the evolution of these agencies' annual budgets. On the one hand, Frontex and Europol experimented expenditure cuts as a consequence of the financial crisis (from years 2011 to 2014, see figures 10 and 11). While Easo's budget kept growing during such years (see figure 12), it did so in an insignificant manner for an agency in its establishment phase, which is characterized by a sustained and significant financial expansion. Nonetheless, Europol, and especially Frontex and Easo, experimented a boost in their budgets from 2015, when the financial crisis concluded and the refugee crisis commenced.

On the other hand, these agencies have seen their budgets notably expanded each time their legal mandates were amended. In this regard, Frontex was established in 2004 and its mandate was amended and strengthened in 2007 (see figure 11), when the RABITs were created and the powers of guest officers regulated; in 2011, when Frontex tasks and structures were revisited (see figure 11); and in 2016, when the EBCG was introduced (see figure 11). Europol officially started its operations in 1999 (see figure 10), and in 2010 became a full EU agency, with its mandate amended again in 2016 (see figure 10). Easo was created in 2010 and in 2016 the European Commission put forward the EUAA Regulation (see figure 12).

⁶²⁶ In this regard see, Analytical Fiche Nr 28, "Discharge", 2010; BUSUIOC, Madalina, *European Agencies...*, *op. cit.*, pp. 178-186; GROENLEER, Martijn, *The Autonomy of European Union Agencies...*, *op. cit.*, p. 132 and SCHOLTEN, Miroslava, "What If the European Parliament Says 'No'?: The Strength of European Parliament's Discharge Power", *SSRN*, 2011, pp. 1-21.

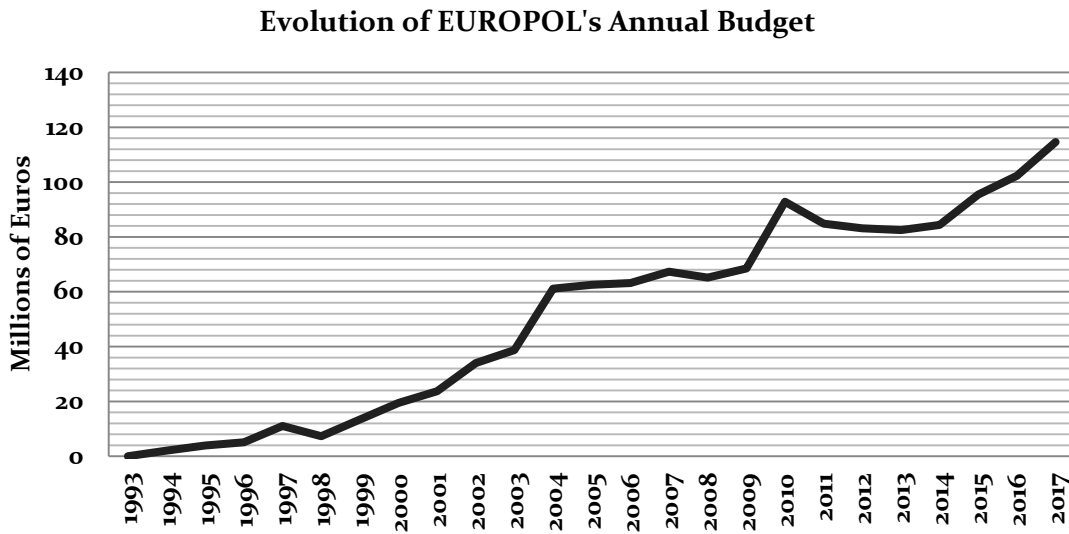


Figure 10: Evolution of Europol's Annual Budget. Source: Author's own elaboration based on the Annual Activity Reports of Europol.

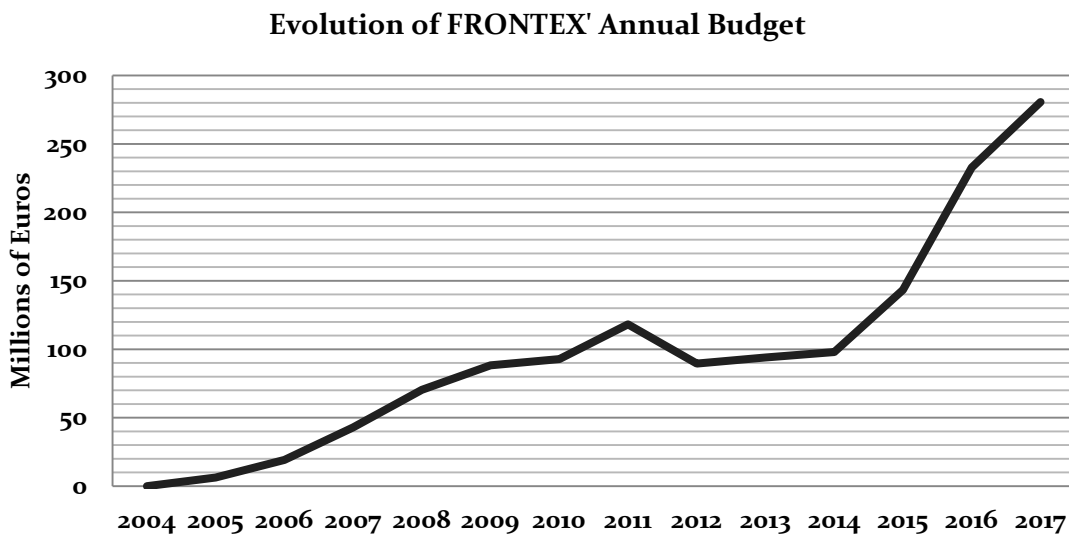


Figure 11: Evolution of Frontex' Annual Budget. Source: Author's own elaboration based on the Annual Activity Reports of Frontex.

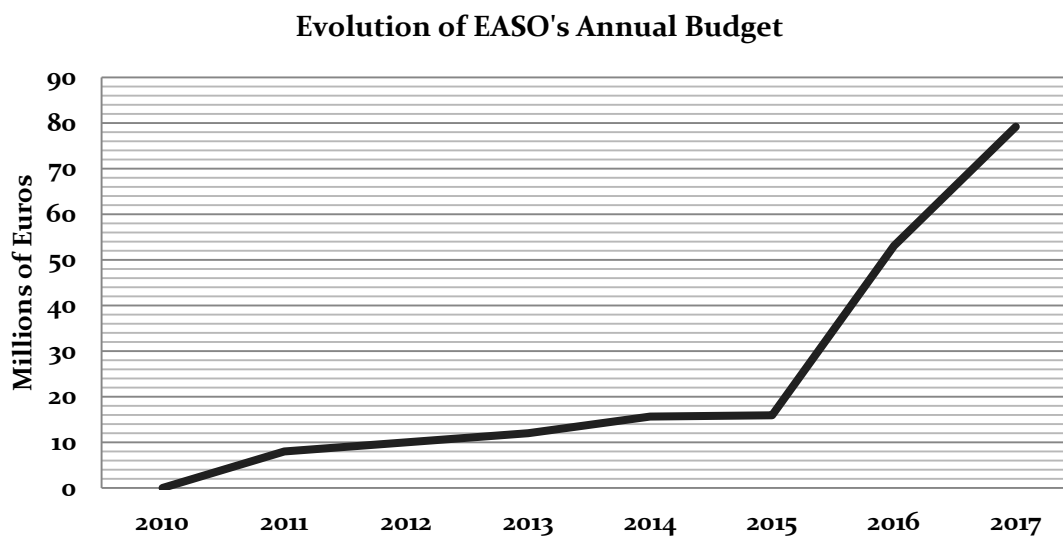


Figure 12: Evolution of Easo's Annual Budget. Source: Author's own elaboration based on the Annual Activity Reports of Easo.

V. CONCLUSION

Frontex, Easo, and Europol have not been conferred quasi-regulatory powers like other EU decentralized agencies but are functionally and instrumentally characterized by their own operational nature. These AFSJ agencies largely gear their assistance to the Member States rather than to the EU institutions, and play a strategic operational role in policy areas closely linked to the core of national sovereignty.

Member States generally look favorably upon the establishment of Frontex, Easo, and Europol since they were established to function more as operational structures of cooperation and coordination than as bodies with autonomous operational powers. Nevertheless, while the Member States acknowledged the need to broaden their collaboration through the operational empowerment of Frontex, Easo, and Europol to effectively manage transboundary policy matters like migration, asylum, and border protection, they ensured that they would keep these agencies' Management Boards and Directors under tight control.

The *agencification* of the AFSJ is now an unrelenting process, which the CJEU has recently and indirectly endorsed and invigorated. Not only are the initial Meroni non-delegation requirements now more leniently applied, but the

boundaries of the operational and implementation powers conferred to Frontex, Easo, and Europol are also expanding. In this regard, in the absence of a common legally binding framework or an explicit provision in the Treaties regarding the establishment and conferral of powers to EU decentralized agencies, it can be anticipated that their operational, monitoring, and implementation powers will progressively stretch.

Until the CJEU specifically clarifies the degree of operational discretion that Frontex, Easo, and Europol enjoy, it must be borne in mind that their activities may give rise to national sovereignty concerns and fundamental rights implications, which may reasonably entail a narrower application of the updated non-delegation doctrine and exclude the conferral of fully-fledged and autonomous operational powers.

CHAPTER 4. The Growing Operational Role of Frontex, Easo, and Europol and the Impact of their Activities on the Ground

In the previous chapter, it was stressed that Frontex, Easo, and Europol are EU decentralized agencies that have distinctively been conferred operational tasks in sensitive policy fields. However, these powers are not absolute, but rather institutionally and constitutionally limited. Firstly, Frontex, Easo, and Europol work in a policy area in which the Member States exclusively hold rule making, enforcement, and coercive competences. In particular, articles 72, 73, and 88 TFEU indicate that Frontex, Easo, and Europol shall not be conferred autonomous operational tasks or replace Member States' exclusive prerogatives of coercion.

While the Meroni doctrine has recently been strained, the core of this CJEU's doctrine (wide discretionary powers whose exercise entails a policy choice shall not be delegated) is still considered good law. In this regard, the sensitivity of the matters in which Frontex, Easo, and Europol develop their tasks reasonably requires a narrower interpretation of the recent CJEU's "Short-Selling" ruling. Lastly, while Frontex, Easo, and Europol have an increasing operational impact on national sensitive matters like migration, asylum, and border management, the Member States ensure the control of these AFSJ agencies' Management Boards, and ultimately steer their strategic operational and implementation tasks.

This chapter delves into the operational functions formally conferred to Frontex, Easo, and Europol in their Regulations and the activities they undertake in practice on the ground, and analyzes to what extent a gap exists between the two. That is, the evolution of the *de iure* and *de facto* operational tasks of these

agencies is examined in depth. The aim thus consists in analyzing to what extent the tasks of Frontex, Easo, and Europol are moving from merely providing the competent national authorities with technical assistance to developing powers with a significant operational nature.

The latest legislative revisions of Frontex, Easo, and Europol, which primarily aim to reinforce their operational position and autonomy from the Member States, are also studied. Specifically, the recently adopted Regulation establishing the EBCG and the proposal for transforming Easo into a EUAA not only strengthen their operational role and cooperation on the ground in situations requiring urgent action, but also introduce a monitoring task to guarantee that the functioning of the Schengen space and the CEAS are not jeopardized by specific actions or omissions of the Member States. Europol is also beginning to develop an unprecedented presence on the ground and increasingly support the Member States in their national illegal migrant smuggling investigations. This chapter also pays special attention to these operational novelties of the EBCG, the future EUAA, and Europol.

I. THE INITIAL OPERATIONAL SUPPORT AND TECHNICAL ASSISTANCE OF FRONTEX, EASO, AND EUROPOL

This section analyzes the emerging operational role of Frontex, Easo, and Europol. In particular, the framework within which these agencies developed their increasing operational tasks and assistance on the ground is examined⁶²⁷. The reader will notice that this research devotes more significant scrutiny to the operational powers conferred to Frontex, rather than to Europol or to Easo, since Frontex has been subject to further academic interest and more documents have been disseminated by the agency. Conversely, the obscurity of Europol's operational functions, which can essentially be documented through the agency's own press releases and annual activity reports, as well as through the recent creation of Easo, noticeably reduces the amount of evidence available.

⁶²⁷ See, Appendix C: Evolution of the Legal Mandates of Frontex, Easo and Europol.

1. The Nascent Operational Activities of Europol

As studied in chapter 2, the very first reference to the operational role of Europol dates back to the Treaty of Amsterdam. Article 30(2) TEU stated that the Council shall enable Europol to facilitate the coordination of specific investigative actions by the competent authorities of the Member States, including operational actions of joint teams comprising representatives of Europol in a support capacity. In addition, article 30(2) TEU indicated that the Council shall adopt measures allowing Europol to ask the national enforcement authorities to coordinate their investigations, and develop expertise to be put at the disposal of the Member States⁶²⁸. The Tampere Program in 1999 further detailed that the office “should be strengthened by means of receiving operational data from Member States and authorizing it to ask Member States to initiate, conduct or coordinate investigations or to create joint investigative teams (...)”⁶²⁹. Europol was thus allowed to facilitate and coordinate investigative and operational actions to assist the national enforcement authorities in their own investigations.

In 2005, The Hague Program took to deepening police cooperation by focusing not only on Europol’s intelligence exchange, but also on operational and strategic analysis⁶³⁰. The Hague Program promoted the reinforcement of Europol’s operational support and its participation in the JITs. This section exclusively explores the operational and strategic tools that the Hague Program brought to Europol, as Europol’s participation in the JITs is studied further below⁶³¹.

In regards to Europol’s intelligence exchange, the Information System⁶³², the Secure Information Exchange Network Application⁶³³, the Analysis System⁶³⁴,

⁶²⁸ See, SANTOS VARA, Juan, “El desarrollo de las competencias...”, *op. cit.*, pp. 141-179.

⁶²⁹ European Council, Tampere Presidency Conclusions, 15-16 October 1999, para 45.

⁶³⁰ See, European Council, “The Hague Programme: Strengthening Freedom, Security and Justice in the European Union”, OJ C-53, 03.03.2005, pp. 9-10.

⁶³¹ See chapter 4, section II.1.

⁶³² The Europol’s Information System is a database whose aim is to assist Member States and Europol’s partners in combating all forms of serious international crime and terrorism.

⁶³³ The Secure Information Exchange Network Application is the secure information exchange

and the Platform for Experts⁶³⁵ represented the central instruments used by Europol to assist the Member States in sharing relevant information and intelligence regarding serious transnational crimes⁶³⁶. Concerning operational analysis, the Analysis Work Files were the main tool available to Europol to assist with, remotely from the office premises or in the field, the investigations conducted in the Member States⁶³⁷. The Analysis Work Files were a central information point designed to allow an enforcement authority of a Member State to benefit from intelligence obtained by another national authority, ultimately generating a circular flow of data.

Europol's Strategic analysis was further enhanced in the 2005 Action Plan implementing the Hague Program, which designed the OCTA and replaced the former Organized Crime Report⁶³⁸. According to the 2006 OCTA annual report, this product "will help decision makers identify strategic priority areas in the fight against serious and organized crime and to initiate an intelligence process to define operational targets". In particular, the OCTA was called to streamline law enforcement activities, close the gap between strategic findings and operational activities, and identify the highest priorities and transform them into more detailed operational recommendations⁶³⁹.

In June 2006, the Council mandated the commencement of "work in order to consider whether and how to replace by 1 January 2008, or as soon as possible

application by which the Member States, other law enforcement cooperation partners and Europol communicate.

⁶³⁴ The Analysis System provides instruments to assist intelligence analysis within the framework of Analytical Work Files and for other analysis tasks such as the Organized Crime Threat Assessment.

⁶³⁵ The Platform for Experts aims to be a secure environment for law enforcement specialists, enabling them to share knowledge, best practices and non-personal data on crime.

⁶³⁶ See, House of Lords (European Union Committee), "EUROPOL: coordinating the fight...", *op. cit.*, pp. 29-32.

⁶³⁷ Europol, "The European Investigator: Targeting Criminals Across Borders", 2011, p. 8. See, House of Lords (European Union Committee), "EUROPOL: coordinating the fight...", *op. cit.*, pp. 32-35.

⁶³⁸ Council and Commission Action Plan implementing the Hague Programme on strengthening freedom, security and justice in the European Union, OJ C-198, 12.08.2005, p. 13.

⁶³⁹ Europol, "EU Organized Crime Threat Assessment 2006", 2007, p. 4. For a critical view of the OCTA see, House of Lords (European Union Committee), "EUROPOL: coordinating the fight...", *op. cit.*, pp. 28-29.

thereafter, the Europol Convention by a Council Decision”⁶⁴⁰. On 6 April 2009, the JHA Council agreed with the Commission’s proposal to replace Europol’s Convention by a Council Decision⁶⁴¹. The new legal framework of Europol entered into force on 1 January 2010. Despite the legal reform, Europol continued to essentially be in charge of supporting the competent national police authorities in the crimes stated in the Council Decision’s annex.

Illegal migrant smuggling and trafficking of human beings are two crimes that are of particular interest for this study, which centers on examining the evolution of operational powers bestowed upon Frontex, Easo, and Europol in migration, asylum and border management matters. According to the annex of Europol’s Council Decision, illegal migrant smuggling encompasses those “activities intended deliberately to facilitate, for financial gain, the entry into, residence or employment in the territory of the Member States, contrary to the rules and conditions applicable in the Member States”⁶⁴². Trafficking in human beings refers to the “recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation”⁶⁴³.

Whereas Europol was not conferred executive or enforcement powers regarding illegal migrant smuggling and trafficking in human beings crimes, the Council Decision establishing Europol tasked the Office with certain vaguely defined operational prerogatives⁶⁴⁴. Article 5(1) letters (c) and (d) stated that Europol shall aid investigations in the Member States and ask the competent

⁶⁴⁰ Council, “Council Conclusions on the Future of Europol”, doc. 9670/2/06, 06.06.2006, p. 3, conclusion 3.

⁶⁴¹ Council Decision of 6 April 2009 establishing the European Police Office (Europol), OJ L-121, 15.05.2009, pp. 37-66.

⁶⁴² Annex letter b of Council Decision of 6 April 2009 establishing Europol.

⁶⁴³ Annex letter c of Council Decision of 6 April 2009 establishing Europol.

⁶⁴⁴ See, BRUGGEMAN, Willy, “What are the Options for Improving Democratic Control of Europol and for Providing it with Adequate Operational Capabilities?”, *European Parliament Briefing Paper*, 16.02.2006.

authorities of the Member States concerned to initiate, conduct, or coordinate investigations. Furthermore, article 5(3) indicated that Europol shall provide advice on investigations as well as strategic intelligence to assist and promote the efficient and effective use of the resources available at the national and Union level for operational activities and the support of such activities. The Council Decision, nonetheless, remained silent in regards to what degree Europol should “aid” or “provide advice” in national investigations.

The Treaty of Lisbon, which entered into force eight months after the Council Decision to establish Europol was adopted, did not clarify Europol’s operational role either⁶⁴⁵. Article 88(2)(b) TFEU only points out that Europol’s tasks include “the coordination, organization and implementation of investigative and operational action carried out jointly with the Member States’ competent authorities or in the context of joint investigative teams”. Yet, it is stressed that any operational activity undertaken by Europol must be previously agreed upon by the concerned Member State, which holds an exclusive competence to apply coercive measures.

Due to the lack of any specific reference to the operational role of Europol in its 2009 Council Decision, combined with the ambiguity of article 88(2)(b) TFEU, every annual review and activity report issued by Europol from 2009 to 2014 are here analyzed. The objective is to identify examples of specific operational assistance that Europol provided in practice to the Member States in the areas of illegal migrant smuggling and trafficking of human beings. This research focuses on the 2009 to 2014 timeframe due to the fact that there were considerable increases in Europol’s operational assistance since 2009⁶⁴⁶. 2015 marked the beginning of the EU refugee crisis, the adoption of the European Agenda on Migration, and the reinforcement of Europol activities in regards to migrant smuggling and trafficking of human beings, which will be further considered in this chapter, under section III. 1.

From 2009 to 2014, Europol’s operational role in cross-border crimes

⁶⁴⁵ See, DAVIES, Bleddyn, “Delegation and Accountability...”, *op. cit.*, pp. 325-240.

⁶⁴⁶ Europol, “2010 Annual Activity Report”, 2011, p. 5.

concerning migrant smuggling and trafficking under the 2009 Council Decision framework namely consisted in providing on-the-spot assistance to the competent national law enforcement authorities. Firstly, Europol could deploy mobile offices during operations to provide the agency's analysts, experts operating on the ground, and national investigators with real-time access to Europol's databases and analytical tools. Secondly, in most of the operations, Europol could provide a secure venue and a coordination center, where operational issues were discussed with the national authorities. Europol experts contributed with technical know-how and operational analyses, assisted throughout the investigation, prepared intelligence reports, and facilitated the exchange of information⁶⁴⁷. Lastly, Europol's experts were present in the field by providing operational analysis, crosschecking data held in the agency's databases⁶⁴⁸, creating synergies among the competent law enforcement agencies⁶⁴⁹, and supporting arrests and house searches⁶⁵⁰.

The previous findings were confirmed by the 2012 external evaluation of Europol, which deemed the mobile offices, forensic analysis, and the Universal Forensic Extraction Devices examples of Europol's increasingly operational activities. Regarding mobile offices, Europol could deploy analysts, specialists, and an operational center in the territory of the Member States with the aim of directly assisting an ongoing investigation. Additionally, Europol could send on-the-spot support to Member States' investigations through forensic analysis. The Universal Forensic Extraction Device, which extracted data from electronic devices, was used out in the field as a standalone mobile forensic device⁶⁵¹. The external evaluation of Europol also pointed out that a majority of the liaison officers interviewed recognized the gradual operational role of the agency⁶⁵² and a rising demand for the agency's operational analysis and technical operational

⁶⁴⁷ Europol, "2011 General Report on Europol Activities", 2012, p. 40.

⁶⁴⁸ Europol, "2012 General Report on Europol Activities", 2013, p. 35.

⁶⁴⁹ Europol, "2009 General Report on Europol Activities", 2010, p. 27.

⁶⁵⁰ Europol, "2010 Annual Activity Report", 2011, p. 7.

⁶⁵¹ Rand Europe, "Evaluation of the implementation of the Europol Council Decision and of Europol's activities", 2012, p. 74.

⁶⁵² *Ibid.*, p. 33.

coordination⁶⁵³.

Hence, although Europol's primary role under the 2009 Council Decision was still to primarily function as an information and analytical hub, the office was progressively "granted operational powers, enabling it to request Member States to initiate criminal investigations and to support the preparation and facilitate the coordination and implementation of investigative and operational actions of the Member States"⁶⁵⁴.

2. The Technical Assistance and Operational Support of Frontex

This section centers on studying Frontex' operational support. The role of the agency in implementing the Joint Operations and Joint Return Operations that it organizes and coordinates are firstly analyzed. Moreover, the dependency of Frontex on the resources made available by the Member States to effectively implement such Joint Operations is examined. Before Frontex' operational assistance is studied, this section starts by giving a brief overview of the agency's capacity building tasks. Particularly, the risk analysis and training activities that Frontex organizes are also explored, since they are especially relevant and have a clear impact on the subsequent effective development of Frontex' operational mandate. During the first years since Frontex' establishment in 2004, its activities centered on capacity building rather than on providing operational support to the Member States.

⁶⁵³ Ibid., p. 33. See, Europol, "Annual Activity Report 2010", 2011, p. 2. See also, Europol, "2011 General Report on Europol Activities", 2012, pp. 37-40.

⁶⁵⁴ GUILD, Elspeth, *et. al.*, "Implementation of the EU Charter...", *op. cit.*, p. 29. See, BUSUIOC, Madalina, CURTIN, Deirdre and GROENLEER, Martijn, "Agency growth between autonomy and accountability: The European Police Office as a 'living institution", *Journal of European Public Policy*, 18(6), 2011, p. 858; CARRERA, Sergio, DEN HERTOOG, Leonhard and PARKIN, Joanna, "The peculiar nature...", *op. cit.*, p. 340; DE MOOR, Alexandra, and VERMEUELEN, Gert, "The Europol Council Decision...", *op. cit.*, pp. 1089-1121; OCCHIPINTI, John "Still moving toward a European FBI? Re-examining the politics of EU police cooperation", *Intelligence and National Security*, 30(2-3), 2015, pp. 234-258. See also, MITSILEGAS, Valsamis, "Police Co-operation: What are the Main Obstacles to Police Cooperation in the EU?", *European Parliament Briefing Paper*, 14.02.2006.



Figure 13: Frontex' Tasks. Source: Author's own elaboration.

2.1. Capacity Building Tasks

Frontex is in charge of conducting a specific risk analysis before any Joint Operation is put forward. Article 4 Regulation 2007/2004 declared that the agency shall develop and apply a common integrated risk analysis model as well as prepare both general and tailored risk analyses. Since Frontex' inception, risk analyses have represented a key activity to establish its priorities, arrange its forthcoming operational activities, and assess the Member States' border management situation.

Specifically, Frontex' Risk Analysis Unit is responsible for identifying threats, assessing the need for Joint Operations, analyzing potential vulnerabilities, enhancing border management capabilities, and establishing a common picture of the situation in irregular migration and cross-border criminal activities⁶⁵⁵. In order to effectively carry out its work, the Risk Analysis Unit starts by collecting information from a wide range of sources, such as Member States, EU bodies, third countries, and international organizations. Subsequently, the data collected is analyzed and the information gathered is exchanged and distributed, namely through the agency's annual risk analysis, quarterly reports, and special risk

⁶⁵⁵ House of Lords (European Union Committee), "Frontex: the EU external borders agency", 9th Report of Session 2007-08, 05.03.2008, p. 26.

analyses⁶⁵⁶.

Every Joint Operation or Rapid Border Intervention of Frontex must be preceded by an exhaustive, reliable, and up-to-date risk analysis. These analyses facilitate Frontex in determining where the operation should be launched, the most appropriate technical equipment should be deployed, and the duration and focus of the operation⁶⁵⁷. In the course of a Joint Operation or Rapid Border Intervention, the Member States' officials made available to Frontex shall report back, through the coordination centers and the assistance of the intelligence officer appointed, on any factor affecting a particular operation⁶⁵⁸. Once the operation has concluded, the Risk Analysis Unit is in charge of issuing a report, evaluating the results achieved.

Of particular interest is the operational support that the Frontex Risk Analysis Unit provides before, during, and after a joint operation or rapid border intervention takes place⁶⁵⁹. As BALDACCINI pointed out, the "agency's operational activities are planned on the basis of these risk analyses, not on the basis of Member States political considerations"⁶⁶⁰. This is an expression of Frontex' operational autonomy, since the agency "effectively initiates the coordination that it engages in, and that its responsibilities derive from its planning and coordinating role"⁶⁶¹.

Frontex also designed a Situation Center to effectively manage the immense amount of information and data that it handles. According to Frontex' website, the Center provides a constantly updated picture of the EU external borders and migration situation, acts as a central point of contact and information access for all of the agency stakeholders, and is a vital part of Frontex' rapid-response

⁶⁵⁶ For a detailed analysis of Frontex' risk analysis task see, HORII, Satoko, "The effect of Frontex's risk analysis on the European border controls", *European Politics and Society*, 17(2), 2016, pp. 242-258; NEAL, Andrew, "Securitization and risk at the EU border...", *op. cit.*, pp. 333-356 and PAUL, Regine, "Harmonisation by risk analysis? Frontex and the risk-based governance of European border control", *Journal of European Integration*, 39(6), 2017, pp. 1-18.

⁶⁵⁷ See, Frontex Operational Analysis, <http://frontex.europa.eu/intelligence/operational-analysis/>, (last accessed: 30/04/2018).

⁶⁵⁸ HORII, Satoko, "The effect of Frontex's...", *op. cit.*, p. 248.

⁶⁵⁹ Ramboll and EurAsylum, "External Evaluation of the Agency under Art. 33 of the Frontex Regulation Final Report", 28.07.2015, p. 32.

⁶⁶⁰ BALDACCINI, Anneliese, "Extraterritorial border controls...", *op. cit.*, p. 234.

⁶⁶¹ *Ibid.*, p. 234.

mechanism in the event that a Member State is subject to a sudden and exceptional migratory pressure in its external borders⁶⁶². Frontex' Situation Center was launched in 2008 as an independent unit in charge of channeling and managing all incoming and outgoing formal information, and guaranteeing the availability, confidentiality, and integrity of information exchange⁶⁶³.

In regards to training, article 5 Regulation 2007/2004 of Frontex stated that the agency shall establish and develop a common core curriculum for border guards, provide training to national border guard instructors at the European level, and offer additional training courses and seminars on subjects related to the control and surveillance of external borders and the return of third country nationals.

Training is also a task that further enriched Frontex' operational role. Article 36 of the recently adopted Regulation 2016/1624 on the EBCG stresses that training is especially relevant, since the EBCGT, which are deployed in the Joint Operations, Pilot Projects, and Rapid Border Interventions, shall receive specialized profile training⁶⁶⁴. That is, depending on the specific tasks and powers to be developed by the deployed border officials, advanced training will range from debriefing or screening techniques, to land, sea and air border surveillance practices and exercises⁶⁶⁵. Great attention is thus paid to guarantee that every participating border official in the agency's operations has a basic knowledge of EU and International law, search and rescue, fundamental rights, and access to international protection⁶⁶⁶.

⁶⁶² See, Frontex Information Management, <http://frontex.europa.eu/intelligence/information-management/>, (last accessed: 30/04/2018).

⁶⁶³ Frontex, "General Report 2008", 25.04.2008, p. 18.

⁶⁶⁴ See, Frontex, "Training Principles", <http://frontex.europa.eu/training/principles/>, (last accessed: 30/04/2018).

⁶⁶⁵ See, Frontex, "Pre-Deployment Training", <http://frontex.europa.eu/training/pre-deployment-training/>, (last accessed: 30/04/2018).

⁶⁶⁶ For a detailed study of Frontex training tasks see, "Training Strategy", 2015, http://frontex.europa.eu/assets/Publications/Training/Training_Strategy_2015.pdf, (last accessed: 30/04/2018); Frontex, "Training Needs Assessment: 2016 Report", 2016, http://frontex.europa.eu/assets/Publications/Training/Training_Needs_Assesment_2016_report.pdf, (last accessed: 30/04/2018); Frontex, "Training Portfolio 2017", 31.05.2017, http://frontex.europa.eu/assets/Publications/Training/2017_Training_portfolio.pdf, (last accessed: 30/04/2018) and Frontex, "Common Core Curriculum: For border and coast guard basic training in the EU", 31.07.2017. See also, HORII, Satoko, "It is about more than just training: The

2.2. Operational Support Tasks

This section focuses on studying the significant operational role that Frontex has progressively developed since its establishment in 2004. Special attention is paid to both the implementation of Joint Operations and Joint Return Operations organized by the agency. There are three types of borders (air, sea and land) and several Joint Operations per border, per year. Hence, the biggest and most important operations of Frontex, per each border per year, were selected for this research in order to best illustrate the evolution of the operational tasks of Frontex from 2006 to 2016⁶⁶⁷. The key characteristics shared between the Joint Operations and the Joint Return Operations in regards to the operational role that Frontex plays in its implementation are studied here as an integrated and coherent whole.

Frontex' operational nature is best reflected in the role that the agency plays in coordinating and organizing Joint Operations and Pilot Projects to enhance the integrated management of the the Member States' external borders. In accordance with article 3(1) Regulation 2007/2004 of Frontex, the agency shall evaluate, approve, and coordinate proposals for Joint Operations and Pilot Projects made by the Member States. More importantly, Frontex was conferred the power to, in agreement with the Member State(s) concerned, launch initiatives for Joint Operations and Pilot Projects.

A succinct and preliminary conceptual distinction between Joint Operations,

effect of Frontex border guard training”, *Refugee Survey Quarterly*, 31(4), 2012, pp. 158-177; LÉONARD, Sarah, “EU border security and migration into the European Union: Frontex and securitisation through practices”, *European Security*, 19(2), 2010, pp. 231-254; MARENIN, Otwin, Challenges for integrated border management in the European Union, *Geneva Centre for the Democratic Control of Armed Forces (DCAF)*, 17, 2010, pp. 101-103.

⁶⁶⁷ Specifically, these are the Operational Plans and Evaluation Reports that were requested to Frontex (see, Appendix A Public Access to Documents): 1) 2006, Amazon I (air), Poseidon (land), Poseidon (sea); 2) 2007, Amazon III (air), Poseidon (land), Poseidon (sea); 3) 2008, Hammer (air), Poseidon (land and sea); 4) 2009, Hammer (air), Saturn and Poseidon (land and sea); 5) 2010, Hubble (air), Poseidon (sea), Poseidon (land); 6) 2011, Hammer (air), Poseidon (sea), Hermes (sea), Poseidon (land); 7) 2012, Focal Points (air), Poseidon (sea), Poseidon (land); 8) 2013, Focal Points (air), Poseidon (sea), Poseidon (land); 9) 2014, Pegasus (air), Poseidon (sea), Hermes (sea), Poseidon (land); 10) 2015, Alexis I (air), Pegasus (air), Poseidon (sea), Triton (sea), Poseidon Rapid (sea), FOA (land), 11) 2016, Alexis (air), Pegasus (air), Poseidon (sea), Triton (sea), FOA (land).

Pilot Projects, and Focal Points is deemed here necessary. While Joint Operations are the main operational instrument of Frontex in assisting the competent sea, air, and land national border authorities, Pilot Projects are small scale and first time operations that may eventually become fully-fledged Joint Operations, depending on their success⁶⁶⁸. Besides, Frontex may support the Member States by coordinating Focal Points, which constitute strategic and vulnerable border crossings points where a long-term exchange of border guards is designed and operational activities coordinated⁶⁶⁹. For the sake of clarity, no distinction will be made between Joint Operations, Pilot Projects, and Focal Points in the following paragraphs and we will refer to all three as Joint Operations.

Article 3(1) Regulation 2007/2004 did not specify how a Joint Operation needed to be prepared, adopted, conducted or concluded. This extremely concise legal provision soon proved to be insufficient to effectively streamline Frontex' operational coordination. Precisely, the Impact Assessment for the amendment of Frontex Regulation 2007/2004 pointed out that the agency was taking “a different role during different operations, depending on ad hoc arrangements”. That is, the legal basis establishing Frontex did not detail what the agency could or should do to ensure that the Operational Plan adopted for each operation was agreed and properly implemented⁶⁷⁰. Until Regulation 1168/2011 was adopted, Frontex *de facto* was in charge of coordinating the Joint Operations. Frontex was responsible for co-initiating a specific operation and designing an Operational Plan⁶⁷¹.

Article 3(a)(3) Regulation 1168/2011, amending Frontex, finally stipulated that during Joint Operations the agency shall be in charge of ensuring the operational

⁶⁶⁸ COWI, “External evaluation of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union”, 15.01.2009, p. 34. See, LIPICS, László, “Focal points on the external borders of Schengen”, *International Journal of Security, Strategic, Defense Studies and Military Technology*, 9(2), 2010, pp. 229-239.

⁶⁶⁹ Frontex, “General Report 2013”, 2014, p. 19. See, Frontex, “Operational Plan – Focal Points 2012 Air”, 21.02.2012, (on file with the author).

⁶⁷⁰ Impact Assessment accompanying Regulation No 2007/2004, SEC(2010) 149, 24.02.2010, p. 13.

⁶⁷¹ See, among other joint operations, Frontex, “Draft Operational Plan – Joint Operation Hubble 2010”, 17.05.2010; Frontex, “Operational Plan – Joint Operation Poseidon 2010, Land”, 03.03.2010 (on file with the author); Frontex, “Operational Plan – Joint Operation Hammer 2011”, September 2011 (on file with the author); Frontex, “Operational Plan – Joint Operation Poseidon 2011 Sea”, 2011 (on file with the author).

implementation of all organizational aspects. The Executive Director shall firstly draw up an Operational Plan for Joint Operations. Subsequently, the Director and the host Member State shall agree on the Operational Plan, detailing namely the organizational aspects, foreseeable duration, geographical area, description of tasks and special instructions for the guest officers, composition of teams of guest officers, command and control provisions, and technical equipment to be deployed (article 3(a)(1) Regulation 1168/2011). The following paragraphs focus on exploring the increasing autonomy and operational role bestowed upon Frontex in coordinating land, sea, and air Joint Operations at the European external borders.

2.2.1. The Role of Frontex in Implementing Joint Operations

Before a Joint Operation is launched, Frontex interacts with its network of national contact persons within the Member States to informally assess the potential threats and vulnerabilities at the external borders⁶⁷². At this stage, the concerned Member State may decide to request that Frontex initiates a joint operation if the agency has not yet done so. The Risk Analysis Unit of Frontex firstly examines the specific migratory pressure that the competent national authorities are facing, as well as their capabilities to effectively cope with such pressure. As soon as the initiation of an operation is decided, Frontex' Executive Director is in charge of drawing up an Operational Plan.

The Operational Plans thoroughly describe the objectives and organizational aspects of every land, sea, and air operation coordinated by Frontex⁶⁷³. Every

⁶⁷² Unisys, "Study on Conferring executive powers on Border Officers Operating at the External borders of the EU", April 2006, p. 92. See, COWI, "External evaluation of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union", 15.01.2009, p. 34.

⁶⁷³ In particular Frontex 2015 External Evaluation indicates that the operational plans include the yearly "operational aims, objectives and concept; a detailed implementation plan; the coordination structure; details about cooperation with third countries, other EU bodies and international organizations; details about command, control, communication and reporting; organization arrangements and logistics; evaluation; and financial provisions"; Ramboll and EurAsylum, "External Evaluation of the Agency under Art. 33 of the Frontex Regulation Final

Operational Plan is divided into a main part and annexes, containing very detailed, specific, comprehensive information and a description of the implementation of the particular operation. Moreover, the land, sea, and air Handbooks include general guidelines relevant for the Operational Plans, as appropriate. The Operational Plans, their Evaluation Reports, and the Handbooks are not publicly available documents, and Frontex only discloses them on a case-by-case basis⁶⁷⁴. Even those documents that are finally released by the agency include large sections have been removed. According to Frontex, the black out content falls under the exception of public interest provision, as stipulated in Regulation 1049/2001⁶⁷⁵.

Every Operational Plan and Handbook analyzed here stress that the responsibility for the control of the external borders and the operational command of the aerial, maritime, and terrestrial assets remains respectively with the host and the participating Member States. Frontex is, in turn, competent to facilitate and render more effective the implementation of the EU measures adopted in regards to the management of the external borders of the Union⁶⁷⁶.

Moreover, every plan examined includes a description and assessment of the situation at the external borders of the Member State concerned, the specific period and geographical areas of implementation, and the mission and objectives of the particular operation. Largely, the key mission of the plans consists in implementing coordinated operational activities at the external sea, land, or air borders to control irregular migration flows to the territory of the Member State⁶⁷⁷.

Report”, Annex: Case Study Report of Poseidon Land Operation, 28.07.2015, p. 5 (on file with the author).

⁶⁷⁴ See, Appendix A Public Access to Documents.

⁶⁷⁵ Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L-145, 31.05.2001, pp. 43-48.

⁶⁷⁶ See, Frontex, “Handbook to the Operational Plan – Joint Maritime Operations”, 2014, p. 12; Frontex, “Handbook to the Operational Plan – Air Border Joint Operations”, 2014, p. 13 and Frontex, “Handbook to the Operational Plan – Joint Land Borders Operations”, 2014, p. 12.

⁶⁷⁷ Among others, Frontex, “Joint Operation EPN Triton 2016”, 2016, p. 5; Frontex, “Joint Operation Alexis I 2015”, 2015, p. 4; Frontex, “Joint Operation EPN Poseidon Sea 2015”, 2015, p. 5; Frontex, “Joint Operation Pegasus 2014”, 2014, p. 4; Frontex, “Joint Operation Hammer 2011”, 2011, p. 4. See, Ramboll and EurAsylum, “External Evaluation of the Agency under Art. 33 of the

The main operational objectives of the Joint Operations are: 1) the enhancement of border security by carrying out maritime border surveillance, countering and preventing cross border criminality, supporting the national authorities in disclosing cases of smuggling and trafficking, and/or identifying the migrants intercepted or rescued; 2) the assistance in search and rescue operations; 3) the enhancement of operational cooperation between national authorities of the host Member State, other EU agencies, international organizations, and third countries; and 4) the exchange of information and the identification of potential risks and threats⁶⁷⁸.

Once the Joint Operation reaches its date of conclusion, the initial set period can be extended, provided the situation at the external borders of the host Member State requires so and/or the risk assessments conducted by Frontex provide so. Once an operation concludes definitively, an evaluation report of the operation shall be adopted. According to the Evaluation Reports analyzed in this research, the objectives proposed in the Operational Plans are implemented by combining several operational activities, most prominently, the deployment of technical and human resources and the undertaking of debriefing, screening, fingerprinting, and registration activities⁶⁷⁹.

Specifically, Frontex contributes to the effective and uniform implementation of the goals established in the Operational Plans by providing support to the competent national authorities⁶⁸⁰. Frontex coordinates the search and rescue activities and assists in debriefing, identifying, and registering rescued or intercepted migrants. In this regard, the agency deploys joint debriefing teams,

Frontex Regulation Final Report”, Annex: Case Study Report of Poseidon Land Operation, 28.07.2015, p. 9 (on file with the author).

⁶⁷⁸ Among others, Frontex, “Focal Points 2012 Air”, 2012, p. 6; Frontex, “Joint Operation EPN Triton 2016”, 2016, p. 6; Frontex, “Joint Operation Alexis I 2015”, 2015, p. 5; Frontex, “Joint Operation EPN Poseidon Sea 2015”, 2015, p. 6; Frontex, “Joint Operation Pegasus 2014”, 2014, p. 5; Frontex, “Joint Operation Hammer 2011”, 2011, p. 4.

⁶⁷⁹ Frontex, “Evaluation Report – LBS JO Flexible Operational Activities 2015”, 2015, pp. 13-30; Frontex, “Evaluation Report – JO EPN Poseidon Sea 2015”, 2015, pp. 12-28; Frontex, “Evaluation Report – JO EPN Triton 2015”, 2015, pp. 9-22; Frontex, “Evaluation Report – Joint Operation Pegasus 2014”, 2014, pp. 7-14; Frontex, “Evaluation Report – Joint Operation Focal Points 2013 Air”, 2013, pp. 6-13.

⁶⁸⁰ See, Ramboll and EurAsylum, “External Evaluation of the Agency under Art. 33 of the Frontex Regulation Final Report”, Annex: Case Study Report of Poseidon Land Operation, 28.07.2015, p. 15 (on file with the author).

screening and fingerprinting experts, and advanced level document officers⁶⁸¹. Lastly, Frontex is also expected to deliver tailored operational support and capacity building, with the aim of strengthening Member States' operational capabilities, addressing perceived vulnerabilities or needs, ensuring an effective and efficient operational response to perceived vulnerabilities, and increasing the response capacity of the competent national border authorities in emergency situations⁶⁸².

The tactical command of the land and sea joint operations corresponds to the International Coordination Center (ICC), which is located in the territory of the Member State hosting the particular joint operation. The Air Joint Operations are, however, centrally coordinated from the headquarters of Frontex in Warsaw. The ICC shall ensure that the operational activities are implemented as put forward in the agreed Operational Plan⁶⁸³.

The ICC is managed and led by an officer, the ICC Coordinator, who is a national authority appointed by the host Member State. The ICC Coordinator chairs the Joint Coordinating Board, which is responsible for the daily administration of the particular Joint Operation⁶⁸⁴. The participating states in the operation may deploy Liaison Officers to the ICC, with the aim of coordinating and ensuring that the activities put forward in the Operational Plan are

⁶⁸¹ Frontex, "Evaluation Report – LBS JO Flexible Operational Activities 2015", 2015, pp. 13-30; Frontex, "Evaluation Report – JO EPN Poseidon Sea 2015", 2015, pp. 12-28; Frontex, "Evaluation Report – JO EPN Triton 2015", 2015, pp. 9-22; Frontex, "Evaluation Report – Joint Operation Pegasus 2014", 2014, pp. 7-14; Frontex, "Evaluation Report – Joint Operation Focal Points 2013 Air", pp. 6-13. See, Balkanalysis, "Safeguarding Europe's Southern Borders: Interview with Klaus Roesler, Director of Frontex Operations Division", <http://bit.ly/2hYn6Gn>, (last accessed: 30/04/2018).

⁶⁸² Frontex, "Evaluation Report – LBS JO Flexible Operational Activities 2015", 2015, pp. 13-30; Frontex, "Evaluation Report – JO EPN Poseidon Sea 2015", 2015, pp. 12-28; Frontex, "Evaluation Report – JO EPN Triton 2015", 2015, pp. 9-22; Frontex, "Evaluation Report – Joint Operation Pegasus 2014", 2014, pp. 7-14; Frontex, "Evaluation Report – Joint Operation Focal Points 2013 Air", 2013, pp. 6-13.

⁶⁸³ See, Ramboll and EurAsylum, "External Evaluation of the Agency under Art. 33 of the Frontex Regulation Final Report", Annex: Case Study Report of Poseidon Land Operation, 28.07.2015, p. 6 (on file with the author) and Balkanalysis, "Safeguarding Europe's Southern Borders: Interview with Klaus Roesler, Director of Frontex Operations Division", <http://bit.ly/2hYn6Gn>, (last accessed: 30/04/2018).

⁶⁸⁴ Frontex, "Handbook to the Operational Plan –Maritime", 13.02.2014, p. 27 and Frontex, "Handbook to the Operational Plan –Land", 2014, p. 27.

effectively conducted⁶⁸⁵.

Frontex is also present in the Joint Coordinating Board, with its own Operational Coordinator who is permanently deployed and works closely with the ICC Coordinator of the concerned Member State. Frontex' Operational Coordinator is usually assisted by a Support Officer, who acts as the agency representative, ensures the efficient implementation of the operational activities, and monitors the proper implementation of the specific joint operation⁶⁸⁶.

The Intelligence Officers and the National Officials make up the Joint Coordinating Board group. The National Officials are appointed by the participating States and work closely with the ICC Coordinator in coordinating the actions of their respective national aerial, terrestrial, and/or maritime assets made available to the Joint Operation⁶⁸⁷. The intelligence Officers are nominated by the host Member State authorities to gather and share relevant operational and intelligence information with the Joint Coordinating Board⁶⁸⁸.

Importantly, Frontex' Operational Coordinator conducts activities that may not be characterized as merely supportive or technical. Frontex' Operational Coordinator is namely in charge of: 1) monitoring and facilitating the correct implementation of the operational activities as defined in the Operational Plan; 2) initiating adjustments of the operational concept and working procedures when justified by updated threat, risk assessments, and operational needs; 3) being present at the Joint Coordinating Board meetings, monitoring the work in the ICC, and giving adequate advice to the ICC coordinator; 4) monitoring the operational situation to ensure the efficient implementation and promoting the further development of the organization and operational issues; 5) monitoring and facilitating information gathering, sharing, and the dissemination process;

⁶⁸⁵ Frontex, "Handbook to the Operational Plan –Land", 2014, p. 30 and Frontex, "Handbook to the Operational Plan –Maritime", 13.02.2014, p. 32.

⁶⁸⁶ Frontex, "Handbook to the Operational Plan –Maritime", 13.02.2014, p. 33; Frontex, "Handbook to the Operational Plan – Air", 2014, p. 26 and Frontex, "Handbook to the Operational Plan – Land", 2014, p. 31.

⁶⁸⁷ Frontex, "Handbook to the Operational Plan –Maritime", 13.02.2014, p. 28 and Frontex, "Handbook to the Operational Plan –Land", 2014, p. 27.

⁶⁸⁸ Frontex, "Handbook to the Operational Plan –Maritime", 13.02.2014, p. 29 and Frontex, "Handbook to the Operational Plan –Land", 2014, p. 30.

and 6) providing Frontex with daily situation reports from the operational area and specific reports on cases which need immediate attention, further reporting, and handling⁶⁸⁹.

For the management and coordination of every Joint Operation, Frontex also deploys an operational team, which is led by an Operational Manager in the territory of the host Member State. The Operational Manager, with the assistance of specialized staff from the relevant Frontex units, coordinates and undertakes important operational tasks. In particular, the Operational Manager coordinates the planning, implementation, reporting, and evaluation of the operational activities. Additionally, the Operational Manager elaborates Frontex' financial contribution, implements the operational activities of the agency in a flexible manner, follows the developments of the concerned operation, and proposes updating the Operational Plan accordingly⁶⁹⁰.

Therefore, Frontex is not a passive spectator during the Joint Operations that it organizes and coordinates. The agency closely manages the operational implementation of the activities and owns the operation in practice. Although the national ICC Coordinator of the host Member State is formally the authority commanding the concerned Joint Operation, the close cooperation between the ICC Coordinator and Frontex' Operational Coordinator and Manager, combined with the lack of transparency surrounding the Joint Operations coordinated by Frontex, makes it difficult to draw clear limits between their functions.

⁶⁸⁹ Frontex, "Handbook to the Operational Plan – Maritime", 13.02.2014, p. 34; Frontex, "Handbook to the Operational Plan – Air", 2014, p. 28 and Frontex, "Handbook to the Operational Plan – Land", 2014, p. 32.

⁶⁹⁰ Frontex, "Handbook to the Operational Plan – Maritime", 13.02.2014, p. 33; Frontex, "Handbook to the Operational Plan – Air", 2014, p. 26 and Frontex, "Handbook to the Operational Plan – Land", 2014, p. 31.

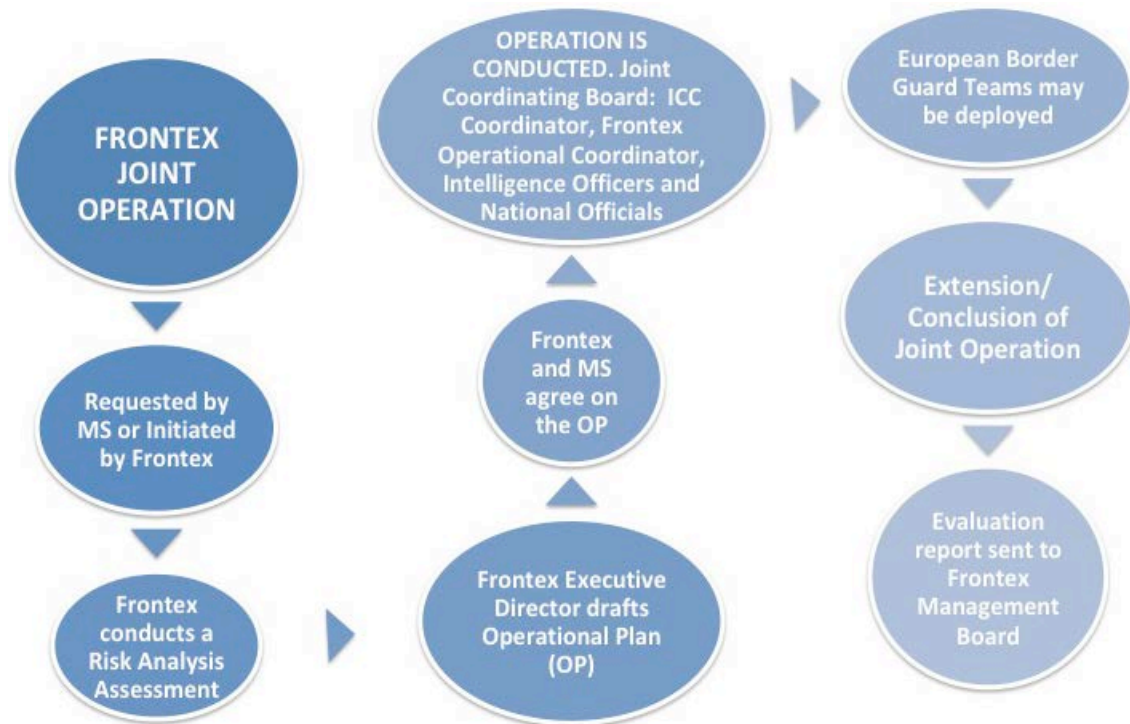


Figure 14: Joint Operations organized and coordinated by Frontex. Source: Author's own elaboration.

2.2.2. The Role of Frontex in Implementing Joint Return Operations

Article 9 Regulation 2007/2004, establishing Frontex, merely indicated that the agency shall provide the necessary assistance for organizing Joint Return Operations of Member States and identify best practices on the acquisition of travel documents and the removal of illegally present third-country nationals. The assistance of Frontex centered on coordinating, co-financing, being present, and providing practical advice on the return flights run by the Member States. As the 2009 External Evaluation of Frontex highlighted, “the Agency has been instrumental in establishing, developing and offering Joint Return Operations and in harmonizing return procedures”⁶⁹¹.

The specific involvement and the extent of Frontex’ assistance in Joint Return Operations is difficult to be determined. Precisely, the impact assessment

⁶⁹¹ COWI, “External evaluation of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union”, 15.01.2009, p. 59.

accompanying Regulation 1168/2011 emphasized that “the Agency has already, and successfully, taken on a ‘coordinating’ role” due to the growing discrepancy between Frontex’ legal basis and its “de facto” return activities⁶⁹². Whereas the impact assessment did not explain what the “coordination role” of Frontex in Joint Return Operations specifically entailed, it clarified that the Member States were asking Frontex for a greater degree of operational involvement in national return activities, which Regulation 2007/2004, establishing Frontex, did not explicitly authorize.

Article 9(1) Regulation 1168/2011 further detailed and strengthened the agency’s operational role in return activities by indicating that at the request of the Member States, Frontex shall ensure the coordination and finance or co-finance the joint return operations. In this regard, Frontex shall draw up a rolling operational plan to provide the requesting Member States with the necessary operational support, including technical equipment. Frontex was thus mandated to assist the competent national authorities in organizing Joint Return Operations, without entering into the merits of the particular return decision. Once the irregular migrants are identified, registered and are in possession of the necessary travel documents for their voluntary or forced return, Frontex begins to coordinate and finance the specific joint return operation.

The Handbook in the Return Operations Sector of Frontex thoroughly describes the role of Frontex and the Member States in return operations. The Handbook signals that the national authorities are responsible for all return related decisions and activities, and Frontex shall only support them by enhancing their return capacity building, effectively implementing their screening activity, and coordinating the concerned operation⁶⁹³. The Member States may require Frontex’ support, assistance, and advice in one or more of the following areas of return: 1) exchange of knowledge and experience; 2) screening of interviews to determine the migrant’s nationality and proceed to her national registration; 3) training of national border guards in common return principles;

⁶⁹² Impact Assessment accompanying the Proposal for a Regulation No 2007/2004, SEC(2010) 149, 24.02.2010, p. 16.

⁶⁹³ Frontex, “Handbook to the Operational Plan: Operations – Return Operations Sector”, 2014.

4) enhancement of the Member States' return capacity building; 5) acquisition of travel documents; 6) readmission of agreements and cooperation with third countries; and 7) effective execution of the removal of the irregular migrant (e.g. national charter operations or repatriations on regular commercial flights)⁶⁹⁴.

In 2015, the year before the adoption of Regulation 2016/1624 on the EBCG, the number of returnees, in the context of Frontex operations, reached the level of 3,565, which were returned on 66 joint return flights. However, these figures stand in contrast to the vague wording of article 9(1) of Frontex Regulation 1168/2011, which stipulated that the agency shall provide the necessary assistance and ensure the coordination or the organization of Joint Return Operations of the Member States. In this regard, the European Ombudsman accurately highlighted that what the assisting and coordinating roles of Frontex in Joint Return Operations actually implied was not well-defined, since the agency's operational role was clearly not limited to pure coordination⁶⁹⁵.

2.3. The Dependence of Frontex on the Member States' Resources

Pursuant article 7 Regulation 2007/2004, establishing Frontex, the agency "shall set up and keep centralized records of technical equipment for control and surveillance of external borders belonging to Member States, which they, on a voluntary basis and upon request from another Member State, are willing to put at the disposal of that Member State for a temporary period following a needs and risks analysis carried out by the Agency". Moreover, article 8(3) Regulation 2007/2004 very succinctly mentioned that "the Agency may acquire technical equipment for control and surveillance of external borders to be used by its experts".

In 2007, Frontex finalized the creation of a Centralized Records of Available

⁶⁹⁴ In regards to returns of irregular migrants on flights see, Frontex, "Guide for Joint Return Operations by Air coordinated by Frontex", 12.05.2016.

⁶⁹⁵ European Ombudsman, "Decision of the European Ombudsman closing her own-initiative inquiry OI/9/2014/MHZ concerning Frontex", 04.05.2015.

Technical Equipment (CRATE), which comprised a list of technical equipment that remained the property of the contributing Member State and that was available at any time in order to reduce the agency's necessity of *ad hoc* requests for technical assets⁶⁹⁶. Frontex was in charge of managing the CRATE and authorizing a Member State's request for technical equipment for a temporary period⁶⁹⁷.

However, the voluntary character of the CRATE and the completely insufficient and imbalanced national contributions ultimately hampered Frontex' operations and a genuine solidarity among the Member States. In this regard, the European Commission, in the Impact Assessment accompanying Regulation 1168/2011 of Frontex, suggested designing a Technical Equipment Pool (TEP), with compulsory contributions of equipment by Member States, and introducing a further detailed framework for the acquisition or leasing of technical equipment by Frontex⁶⁹⁸.

Article 7 Regulation 1168/2011 regulated the two previous suggestions of the Commission to a certain extent. Article 7(3) stated that Member States were required, unless faced with an exceptional situation substantially affecting the discharge of national tasks, to contribute to the technical equipment pool, in line with the annual commitments agreed upon by Frontex and the competent national authorities. According to article 7(1), Frontex may acquire or lease its own technical equipment to be deployed during joint operations, pilot projects, rapid interventions, joint return operations, or technical assistance projects. In the event that Frontex decided to purchase or lease major technical equipment (e.g. open sea and coastal patrol vessels or vehicles), the agency shall agree with one Member State to register such equipment.

In 2011, the TEP, which replaced the previous CRATE database, constituted (together with the EBGTs) the primary source of operational resources for Frontex coordinated activities. The main novelty that the establishment of the

⁶⁹⁶ Frontex, "Annual Report 2006", 2006, p. 23.

⁶⁹⁷ Commission, "Report on the evaluation and future development of the FRONTEX Agency", SEC(2008) 148, 13.02.2008, p. 52.

⁶⁹⁸ Impact Assessment accompanying the Proposal for a Regulation No 2007/2004, SEC(2010) 149, 24.02.2010, p. 22.

TEP brought was its binding character. An overall minimum number of technical equipment was needed at all times to be available for the agency. Every year, a minimum number of required technical equipment is put forward, and the Member States shall make such equipment available⁶⁹⁹. The technical equipment made available to Frontex includes offshore patrol vessels, coastal patrol vessels, coastal patrol boats, fast boats, fixed wing aircraft, helicopters, thermo vision vehicles, mobile laboratories, heart beat and CO₂ detectors, hand held surveillance equipment, and dogs⁷⁰⁰.

Although the resources of Frontex essentially consist of equipment owned by the Member States, the TEP can also be complemented with Frontex' own assets. In this regard, until 2014, Frontex had only signed one contract to provide a comprehensive package of aerial border surveillance services (consisting of 120 flying hours, a mobile ground station, and the deployment of equipment and personnel) at the border between Bulgaria and Turkey within the Joint Operation Poseidon⁷⁰¹.

In 2015, Frontex concluded a framework contract for the acquisition of aerial surveillance services, assets, and expert support for Frontex-coordinated joint operations, with the objective of developing Frontex' own operational capacity, compensating the Member States' insufficient cooperation with the agency, and streamlining Frontex' operational role in emergency situations at the EU external borders⁷⁰². In 2015, Frontex also launched a pilot project, whereby it leased 12 vehicles to be used for operational activities in Hungary, Greece, and Bulgaria, rented 12 Mobile Field Offices for the purposes of screening, debriefing, and

⁶⁹⁹ According to 2015 Frontex External Evaluation the technical equipment made available did not always cover the requirements set by the Agency, Ramboll and EurAsylum, "External Evaluation of the Agency under Art. 33 of the Frontex Regulation Final Report", 28.07.2015, p. 34.

⁷⁰⁰ Frontex, "Annual Information on the Commitments of the Member States to the European Border Guard Teams and the Technical Equipment Pool: Report 2013", 11.03.2013.

⁷⁰¹ Frontex, "Annual Information on the Commitments of the Member States to the European Border Guard Teams and the Technical Equipment Pool: Report 2015", 2016, p. 14.

⁷⁰² Frontex, "General Report 2015", 2016, p. 24. See, Frontex, "Annual Information on the Commitments of the Member States to the European Border Guard Teams and the Technical Equipment Pool: Report 2016", 2017, pp. 23-24.

registering migrants⁷⁰³, and bought 12 Mobile Field Offices, 10 Fingerprint Scanning Devices and 4 Night Vision Goggles⁷⁰⁴.

Hence, until the adoption of Regulation 2016/1624 on the EBCG, the TEP was largely comprised of equipment owned by the Member States, and symbolically, by Frontex' own equipment. This was the case, since purchasing or leasing equipment required a large budget that Frontex did not have at that time, but more importantly, because the agency needed to formally agree with one Member State to register its own equipment. The Member States, nonetheless, viewed the registration of technical equipment that was not under their direct control with suspicion⁷⁰⁵.

In spite of Frontex' lack of success in purchasing or leasing its own equipment, the agency ended up managing a minimum number of technical equipment made available to the agency by the Member States. Particularly, in 2015, a year before the EBCG was established, Frontex was in charge of a TEP of 29 offshore patrol vessels, 65 coastal patrol vessels, 273 coastal patrol boats, 36 fixed wing aircrafts, 52 helicopters, 39 thermo-vision vehicles, 1 mobile radar unit, 110 patrol cars, 13 mobile laboratories, 54 CO₂ detectors, 95 handheld surveillance equipment, and 43 service dogs (see figure 15)⁷⁰⁶.

⁷⁰³ Ibid., p. 25.

⁷⁰⁴ Frontex, "Annual Information on the Commitments of the Member States to the European Border Guard Teams and the Technical Equipment Pool: Report 2016", 2017, p. 13.

⁷⁰⁵ Unisys, "Study on the feasibility of the creation of a European System of Border Guards to control the external borders of the Union", 16.06.2014, p. 99.

⁷⁰⁶ Frontex, "Annual Information on the Commitments of the Member States to the European Border Guard Teams and the Technical Equipment Pool: Report 2016", 2017, p. 29. See, JONES, Chris, "Border guards...", *op. cit.*

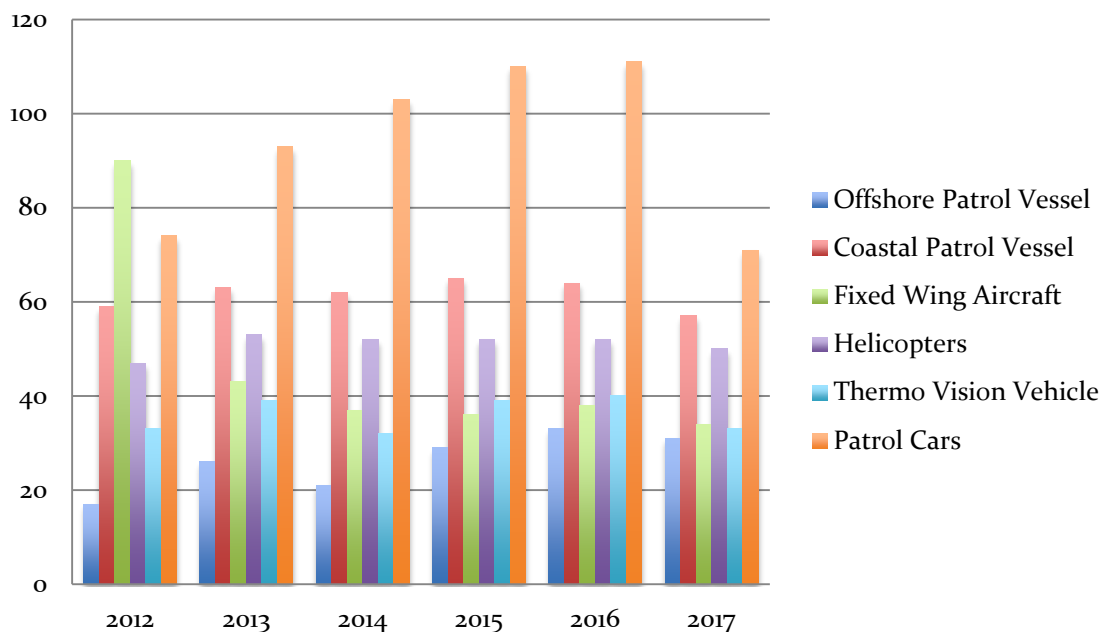


Figure 15: Evolution of the total number of assets registered in the TEP by type of equipment. Source: Author’s own elaboration on the basis of 2018, 2017, 2016, 2015, 2014 and 2013 Reports of Frontex on the Commitments of the Member States to the EBGTs and the TEP.

3. The Technical Assistance and Operational Tasks of Easo

The Regulation establishing Easo was adopted in May 2009 but the agency did not officially start operations until June 2011. Soon after, the agency coined its motto: “support is our mission”. Precisely, Easo’s activities and mandate could be divided into four categories: permanent support, information and analysis support, third-country support, and special and emergency support (see figure 16)⁷⁰⁷.

Prior to providing any kind of assistance, Easo manages an Early Warning and Preparedness System, allowing the agency to establish a situational picture on migration, asylum influxes, trends, and potential risks scenarios. The information that Easo gathers may offer an evidence base for the future support activities of

⁷⁰⁷ COMTE, Françoise, “A new agency...”, *op. cit.*, pp. 373-405; HORSTHEMKE, Lana and VOGT, Friederike, “The Role of Easo in the European Asylum System” in MRATSCHKOWSKI, Anna (ed.), *Asylum Related Organisations in Europe*, Baden: Nomos, 2017, pp. 21-52.

the agency, and may feed into asylum policy-making and response preparation⁷⁰⁸.

In 2013, the Dublin III Regulation and the Directive on “Common Procedures for Granting and Withdrawing International Protection” further extended Easo’s operational role. The Directive stated on the ninth recital that the resources of Easo should be mobilized in order to provide adequate support to Member States’ in implementing the CEAS, and in particular, to those Member States faced with specific and disproportionate pressure on their asylum systems⁷⁰⁹. The Dublin III Regulation stressed that Easo should provide solidarity measures, such as the deployment of AST, to assist those national asylum authorities under extraordinary and urgent pressure⁷¹⁰. The Dublin III Regulation specified that Easo shall contribute to the mechanism for early warning, preparedness, and crisis management.

Pursuant article 33(1) Dublin III Regulation, the information gathered by Easo shall assist the Commission in drawing up a preventative action plan. Such a plan would only be adopted if the application of the Regulation were jeopardized, due to either a substantiated risk of particular pressure being placed on a Member State’s asylum system, or due to problems in the functioning of the asylum system of a concerned Member State⁷¹¹. Easo has thus been mandated to inform and advise the European Commission and to operationally assist the Member

⁷⁰⁸ Easo, “Easo Single Programming Document: Multiannual Programming 2017-2019 and Work Programme 2017”, 2016, p. 27; Commission, “Commission Staff Working Document on the internal Evaluation of the European Asylum Support Office (Easo)”, SWD(2014) 122 final, 27.03.2014, p. 16.

⁷⁰⁹ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), OJ L-180, 29.06.2013, pp. 60-95.

⁷¹⁰ Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), OJ L- 180, 29.06.2013, Recital 8, pp. 31-59.

⁷¹¹ Ibid. See, SCIPIONI, Marco, “De Novo Bodies and EU Integration: What is the Story behind EU Agencies’ Expansion?”, *Journal of Common Market Studies*, 2017, p. 7. In regards to the revision of the Dublin regime see, CHETAIL, Vincent, DE BRUYCKER, Philippe and MAIANI, Francesco (eds.), *Reforming the Common European Asylum System: The New European Refugee Law*, The Netherlands: Brill, 2016; HRUSCHKA, Constantin, “The (reformed) Dublin III Regulation—a tool for enhanced effectiveness and higher standards of protection?”, *ERA Forum*, 15(4), 2014, pp. 469-483; MITSILEGAS, Valsamis, “Solidarity and Trust in the Common European Asylum System”, *Comparative Migration Studies*, 2(2), 2014, pp. 181-202; PEERS, Steve, et al. (eds.), *EU Immigration and Asylum Law (Text and Commentary): Volume 3: EU Asylum Law*, The Netherlands: Brill, 2015.

States in drafting a preventive and/or a crisis management action plan.

While Easo’s core operational role lies in the special and emergency support that it provides to the competent national authorities subject to specific and extraordinary pressure on their asylum and reception systems, the agency’s information and analysis and third-country and permanent support are briefly examined in turn to get an overall picture of Easo’s ultimate mission: the effective and harmonized implementation of the CEAS.

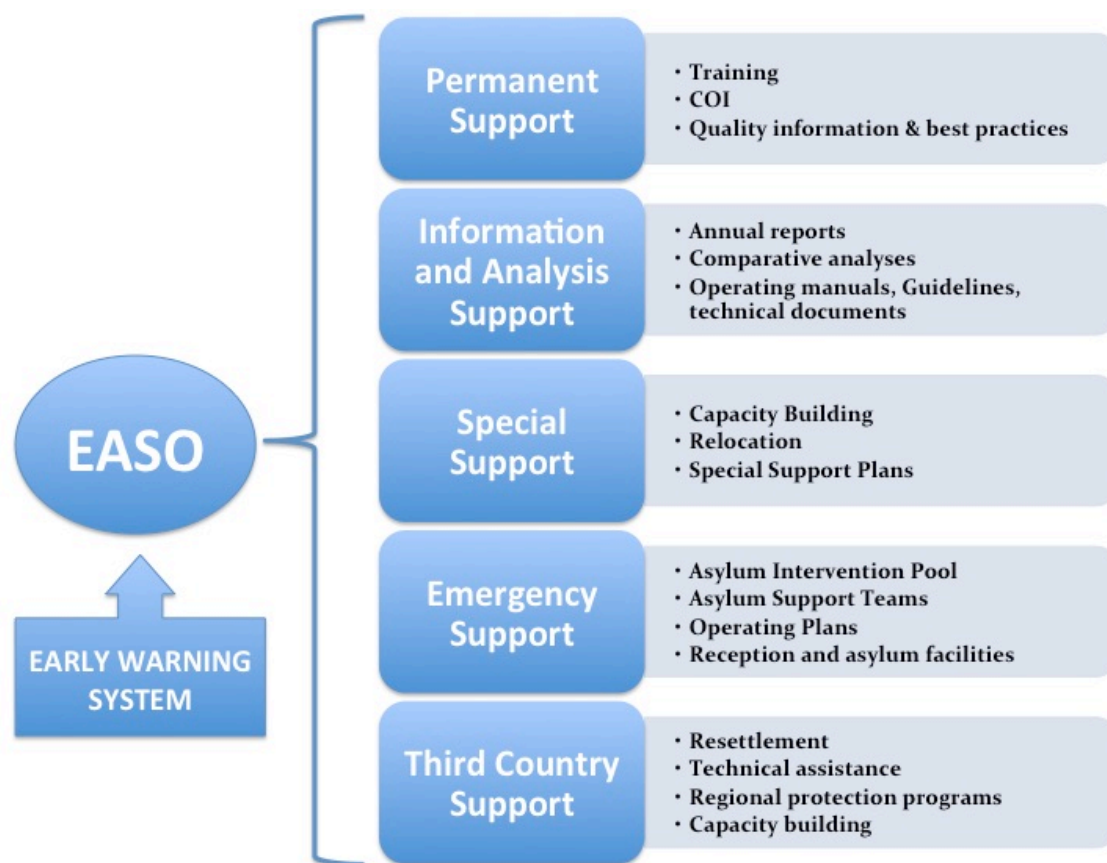


Figure 16: Easo Support Tasks. Source: Author’s own elaboration.

3.1. *Information, Third-Country, and Permanent Support of Easo*

Easo’s permanent support consists in encouraging, coordinating, and deepening practical cooperation among the competent national asylum authorities through the establishment of common training, the organization and promotion of activities regarding the Country of Origin Information (COI), and the exchange

of quality information and best practices. Training aims to improve and harmonize quality and asylum practices throughout the EU (article 6 Regulation 439/2010 of Easo)⁷¹². For its part, the COI's main objective is to "increase the convergence of COI among different Member States thereby increasing the probability that an asylum application has the same chances to be recognized or rejected regardless of the Member State where it is lodged"⁷¹³. The agency's activities on quality focus on facilitating the exchange of information among Member States, enhancing the quality of the asylum procedure, harmonizing the asylum practices in specific fields of the asylum procedure, and allowing for the identification and exchange of good practices, practical tools, and mechanisms⁷¹⁴.

In regards to information and analysis support, Easo provides scientific and technical support with asylum policy and legislation matters. Pursuant article 9(1) Regulation 439/2010, the agency, in order to be able to assess the needs of Member States subject to particular pressure, shall gather relevant information for the identification, preparation, and formulation of emergency measures to cope with such pressure. Additionally, Easo produces annual reports on the situation of asylum in the EU (article 12(1) Regulation 439/2010)⁷¹⁵, comparative analyses, operating manuals, guidelines, and technical documents (article 12(2) Regulation 439/2010). Easo also organizes, coordinates, and promotes the exchange of information between Member States, and between the Commission and the Member States, and gathers information on national asylum process and law (article 11 Regulation 439/2010).

Article 7 and article 49(2) Regulation 439/2010 refer to the agency's third-country support. In this respect, Easo shall coordinate the exchange of information and assist in (i.e. partnering with third countries to reach common solutions, adopting regional protection programs, and providing capacity

⁷¹² See, <https://www.easo.europa.eu/training-quality/training> (last accessed: 30/04/2018).

⁷¹³ Commission, "Commission Staff Working Document on the internal Evaluation of the European Asylum Support Office (Easo)", SWD(2014) 122 final, 27.3.2014, p. 9. See, <https://www.easo.europa.eu/country-origin-information> (last accessed: 30/04/2018).

⁷¹⁴ Ibid., p. 25. See, <https://www.easo.europa.eu/training-quality/asylum-processes-quality>, (last accessed: 30/04/2018).

⁷¹⁵ See, <https://www.easo.europa.eu/annual-report>, (last accessed: 30/04/2018).

building) the implementation of the external dimension of the CEAS⁷¹⁶. Moreover, the agency shall coordinate the exchange of information and other actions concerning resettlement taken by the Member States, and operationally cooperate with third countries by providing them technical assistance, in agreement with the European Commission, to implement regional protection programs.

3.2. The Special and Emergency Operational Support of Easo

Having examined Easo's permanent, information and analysis, and third-country support, the following paragraphs study the operational tasks conferred to the agency in Regulation 439/2010. All Special Support and Operating Plans adopted by Easo since its establishment are here analyzed. Unlike Frontex' Operational Plans which are only disclosed on a case-by-case basis, Easo's Special Support and Operating Plans are publicly available on the agency's website⁷¹⁷.

Several provisions in Regulation 439/2010 refer to Easo's operational powers. Article 2(2) states that the agency, drawing upon all useful resources at its disposal, shall provide effective operational support to Member States subject to particular pressure on their asylum and reception systems. Article 5 indicates that Easo shall promote, facilitate, and coordinate the exchange of information and other activities related to relocation within the Union. Significantly, article 10 details the support that the agency shall coordinate in order to assist the competent national authorities subject to particular pressure on their asylum systems.

Easo is mandated to: 1) facilitate an initial analysis of asylum applications under examination by the Member States; 2) guarantee that appropriate reception facilities (e.g. emergency accommodation, transport, and medical assistance) are made available by the Member States subject to particular

⁷¹⁶ Easo, "Easo External Action Strategy", November 2013. See, <https://www.easo.europa.eu/external-dimension>, (last accessed: 30/04/2018).

⁷¹⁷ Easo, "Archive of Operations", <https://www.easo.europa.eu/archive-of-operations>, (last accessed: 30/04/2018).

pressure; and 3) deploy, at the request of the national asylum authorities concerned, ASTs to provide on the ground expertise regarding interpreting services, information on countries of origin, and knowledge of the handling and management of asylum cases.

Easo's operational role primarily covers two categories of assistance: special and emergency support. Special support consists of tailor-made assistance and measures, which could be operational or not, with the aim of improving the uniform and effective implementation of the CEAS. Depending on the specific needs of the requesting Member State, the measures to be developed by Easo range from capacity building to facilitation and coordination of relocation, and from specific assistance to special quality control tools⁷¹⁸. Particularly noteworthy are Easo's special support activities regarding the intra-EU relocation of international protection applicants. In this case, Easo is in charge of providing relevant information, pre-identifying the eligible applicants, and assisting the registration of applications and the preparation of decisions to relocate⁷¹⁹.

The special support activities of Easo are triggered when a Member State sends a written request to Easo explaining the specific needs that its national asylum system is facing. As soon as Easo's Executive Director receives the request, she decides whether the support requested by the Member State should be granted or not. This decision is adopted, taking into account the information provided by the requesting Member State, as well as the information independently gathered by the agency.

If a positive decision is made by the Executive Director, Easo and the Member State are required to agree on the objectives, the methodology, the activities, and the expected results, which the Special Support Plan encompasses⁷²⁰. Easo is then responsible for designing this Special Support Plan in cooperation with the concerned Member State, which details the conditions of Easo's participation in targeted support measures.

⁷¹⁸ Easo, "Special Support Plan Swedish Migration Board", 21.12.2012, p. 1.

⁷¹⁹ Easo, "Consolidated Annual Activity Report of Easo 2016", 2017, p. 20. See, <https://www.easo.europa.eu/about-relocation>, (last accessed: 30/04/2018).

⁷²⁰ Easo, "Special Support Plan to Italy", 04.06.2013, p. 22.

The second kind of operational support that Easo undertakes is emergency support. The agency is mandated to manage and assist the competent national authorities subject to particular pressure on their asylum and reception systems by facilitating an initial analysis of asylum applications, ensuring that appropriate reception facilities are available in the Member States subject to particular pressure, and by deploying ASTs⁷²¹. Consequently, a Member State that is experiencing an extraordinary and sudden pressure in its asylum systems and requires operational assistance may address Easo's Executive Director in writing, detailing the areas where increased capacity is urgently needed. Before such operational assistance is provided, informal consultations can also take place between Easo and the requesting Member State, during which Easo's Head of the Center for Operational Support advises the concerned Member State on the legal and practical steps to request emergency support⁷²².

When Easo receives the concerned Member State's request, the Executive Office notifies the Head of the Center for Operational Support, who is in charge of initiating the drafting of a rapid Early Warning and Preparedness report analysis. Afterwards, Easo's Executive Director decides, given the particular circumstances that the requesting Member State is facing, whether to render the emergency support requested⁷²³. The Director bases her decision on: the outcome of the Rapid Early Warning and Preparedness System's report analysis, the description of the situation by the requesting Member State, the objectives of the request for deployment and estimated deployment requirements, the general advice of the Head of the Center for Operational Support, and the information gathered during the informal consultations⁷²⁴.

If Easo's Executive Director confirms that such assistance is desirable, the Director and the Member State concerned must then agree on an Operating Plan (article 18 Regulation 439/2010). The Operating Plan establishes priority areas for

⁷²¹ Commission, "Commission Staff Working Document on the internal Evaluation of the European Asylum Support Office (Easo)", SWD(2014) 122 final, 27.03.2014, p. 18.

⁷²² Easo, "Procedure for Internal Coordination of the Implementation of Operating Plans, Special Support Plans and/or Hotspot (Relocation) Operating Plans", May 2016, p. 4.

⁷²³ *Ibid.*, p. 4.

⁷²⁴ *Ibid.*, p. 4.

action, designs a framework to build capability within the Member State's asylum system, and details the support that the ASTs need to provide. Particularly, article 18 Regulation 439/2010, in regards to the deployment of the AST, states that the Operating Plan shall specify their operational objective, tasks, composition, and forecast duration and geographical area of their deployment. Easo's ASTs are studied in depth in the following section, which undertakes a comparative analysis of the EBGTs of Frontex, the ASTs of Easo, and the participation of Europol in the JITs⁷²⁵.



Figure 17: Easo Emergency Support. Source: Author's own elaboration.

Every Operating Plan analyzed here describes the areas for action concerning the management of the asylum decision-making procedure, the screening or registration of asylum applications, and the provision of adequate reception conditions. Furthermore, the Operating Plans provide a framework for the deployment of ASTs, and aim to increase expertise for running first reception and screening facilities, structure the asylum procedure for enhanced capability, implement efficient asylum procedures, and enhance operational capacity to

⁷²⁵ See Chapter 4, section II.

tackle the identified needs and the urgent situation with respect to asylum⁷²⁶.

Both the Special Support Plans and the Operating Plans are implemented through the adoption of a Working Arrangement. This document summarizes crucial operational information in order to ensure an efficient implementation of the activities of the Special Support and Operating Plans⁷²⁷. A Working Arrangement shall include the name and contact details of the persons appointed by Easo and the concerned Member State. Moreover, the Working Arrangement shall streamline the chain of responsibilities, clarify the role of the counterparts, and detail the schedule and achievement of the objectives set out in the plans⁷²⁸.

II. THE OPERATIONAL TASKS THAT FRONTEX, EASO, AND EUROPOL CONDUCT ON THE GROUND: BEYOND TECHNICAL COORDINATION AND OPERATIONAL ASSISTANCE?

The most distinctive feature of Frontex, Easo, and Europol is their operational character, and in particular, the possibility to directly assist the Member States on the ground by deploying EBGTs, ASTs, and participating in JITs, respectively. Whereas none of these AFSJ agencies are competent to conduct fully-fledged enforcement or coercive tasks, they provide considerable operational support to the competent national border, asylum, and law enforcement authorities. This section analyzes the operational tasks that Frontex, Easo, and Europol develop in the territory of the Member States through the EBGTs, ASTs, and JITs, as well as the impact that the deployment of these teams has on the effective and uniform implementation of border management, migration, and asylum measures adopted at the EU level.

⁷²⁶ Easo, “Operating Plan for the Deployment of Asylum Support Teams to Greece”, 01.04. 2011; Easo, “Operating Plan for the Deployment of Asylum Support Teams to Luxembourg”, 26.01.2012; Easo, “Operating Plan to Bulgaria”, 17.10.2013; Easo, “Special Operating Plan to Greece”, 2016 and Easo, “Operating Plan to Italy”, 2016.

⁷²⁷ Easo, “Procedure for Internal Coordination of the Implementation of Operating Plans, Special Support Plans and/or Hotspot (Relocation) Operating Plans”, May 2016, p. 5.

⁷²⁸ *Ibid.*, p. 5.

1. Europol's Participation in JITs and the Deployment of Frontex' EBGs and Easo's ASTs

A JIT is an investigation team established in accordance to an agreement between two or more Member States with the aim of effectively achieving a specific objective during a set period of time, regarding criminal investigations in one or more of the involved States⁷²⁹. Since 2007, Europol may directly participate in the JITs in a support capacity by exchanging and coordinating information and providing legal advice and analytical, investigative, forensic, and expertise and/or financial assistance. Additionally, Europol shall ensure the efficiency and operational capacity of the JITs and the overall success of the investigation.

Concurrently, in 2007, Frontex' RABITs were introduced. According to Regulation 863/2007, the RABITs were mandated, in exceptional and urgent situations at the external borders of the Member States, to provide rapid operational assistance for a limited period of time in the territory of the requesting national authority. Subsequently, Regulation 1168/2011 transformed the RABITs into the EBGs, which Frontex could deploy not only in rapid border interventions, but also in Joint Operations and Pilot Projects.

In a similar vein, article 13 Regulation 439/2010 of Easo indicates that the agency may deploy ASTs in order to provide emergency operational support to those Member States facing a sudden and extraordinary pressure on their asylum and reception systems⁷³⁰. In such a case, asylum experts are quickly mobilized in the territory of such Member State, where the teams are responsible for providing expertise and technical and operational assistance to the competent national asylum authorities.

Having defined the JITs, ASTs, and EBGs, the establishment and the legal framework governing these measures are examined in turn. As early as 2005, the Hague Program stressed that "police cooperation (...) is made more efficient and

⁷²⁹ Council, "Joint Investigation Teams Manual", doc. 15790/1/11, 04.11.2011, p. 2. See, Council, "Joint Investigation Teams Practical Guide", doc. 6128/1/17, 14.02.2017, p. 4.

⁷³⁰ Article 13 Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office, OJ L-132, 29.05.2010, pp. 11-28. See, COMTE, Françoise, "A new agency...", *op. cit.*, p. 401.

effective (...) by facilitating cooperation on specified themes between the Member States concerned, where appropriate by establishing joint investigation teams and, where necessary, supported by Europol (...)”⁷³¹. The Hague Agenda encouraged Europol to participate and promote the use of JITs and the Member States to appoint at least one national expert in the JITs⁷³².

The national experts in the JITs are mandated to enhance the “use of joint investigation teams by developing the capacities to identify the reason behind the limited use of such teams by Member States and to overcome existing obstacles”⁷³³. The national experts keep close contact with Europol, with the aim of facilitating the involvement of the agency in the JITs⁷³⁴. In this regard, an informal National Experts Network of JITs was designed⁷³⁵ and Europol began organizing an annual meeting with these national experts⁷³⁶. During the second meeting, it was already recommended that Europol be informed about any JIT project, and the guide on EU Member States’ legislation on the JITs⁷³⁷, jointly written by Europol and Eurojust⁷³⁸, was highly welcomed.

Notwithstanding these significant developments, Europol’s officials were allowed to take part in the JITs only after the Second Protocol, which amended

⁷³¹ European Council, “The Hague Programme: Strengthening Freedom, Security and Justice in the European Union”, OJ C-53, 03.03.2005, p. 10. Additionally, the program “Prevention of and Fight against Crime” was signed between Eurojust, Europol and the Commission in order to obtain Community funding to finance JITs until 2010; see, Council, “Annual Report to the Council on co-operation between Eurojust and Europol for 2007 (Point 2.3 of the Hague Programme)”, doc. 16760/08, 04.12.2008, p. 3.

⁷³² Ibid., p. 9. Previously, the Council recommended Europol and Eurojust representatives to be associated with the work of JITs as far as possible (Council, “Declaration in Combating Terrorism”, doc. 7906/04, 29.03.2004, p. 6).

⁷³³ Council, “Conclusions of the first meeting of the national experts on Joint Investigation Teams”, doc. 15227/05, 02.12.2005, p. 2.

⁷³⁴ See all the tasks and principles ruling the establishment of the national experts, Council, “Joint Investigation Teams – Proposal for designation of national experts”, doc. 11037/05, 08.07.2005, pp. 5-6.

⁷³⁵ Since January 2011 the structure of the JITs network is more formal since a Secretariat was created. Eurojust, which hosts the Secretariat, is officially in charge of promoting the operations of the JITs Network and assists the National Experts in their work.

⁷³⁶ Council, “Annual Report to the Council on co-operation between Eurojust and Europol for 2005 and 2006 (Point 2.3 of the Hague Programme)”, doc. 17069/06, 21.12.2006, p. 3.

⁷³⁷ Council, “Joint Investigation Teams Manual”, doc. 15790/1/11, 04.11.2011. In this respect, see Council, “Joint Investigation Teams Practical Guide”, doc. 11501/16, 26.07.2016.

⁷³⁸ Council, “Conclusions of the second meeting of the national experts on Joint Investigation Teams”, doc. 15023/06, 21.11.2006, p. 6.

the Europol Convention, entered into force on 29 March 2007⁷³⁹. Ever since, Europol has been allowed to assist in every activity, to exchange information with the members of the JITs, and at the request of one or more Member States, to participate in the establishment of a specific JIT. Per the Europol Convention, Europol officials were authorized to support the national law enforcement authorities in all of their activities, excluding the participation of Europol staff in the implementation of any coercive measure.

In 2007, the first amendment of Regulation 2007/2004 of Frontex was also adopted. Regulation 863/2007, designing the RABITs, aimed to tackle two functioning issues that were undermining Frontex' effective operational assistance. On the one hand, the border guards that the Member States were providing to Frontex, were only made available on an *ad hoc* basis for each particular operation⁷⁴⁰. On the other hand, and according to Frontex' Legal Adviser, Mr. Vuorensola, in his explanation to the House of Lords in 2008, "all the powers that our guest officers in joint operations had were based on the national law of the host Member State, and the possibility of that national law to delegate executive powers to foreigners doing the job, which is usually reserved only to their own national border guards: checking persons, asking for identification and doing other border controlling tasks"⁷⁴¹.

Regulation 863/2007 thus constituted a significant point of departure for Frontex in guaranteeing a mandatory minimum number of border guards (the Rapid Pool) to be made available for immediate deployment (article 4(2) Regulation 863/2007) in rapid and emergency scenarios at the external borders (article 1(1) Regulation 863/2007)⁷⁴². In this regard, Mr. Vuorensola highlighted

⁷³⁹ Protocol amending the Convention on the establishment of a European Police Office (Europol Convention) and the Protocol on the privileges and immunities of Europol, the members of its organs, the deputy directors and the employees of Europol, OJ L-312, 16.12.2002, pp. 2-7.

⁷⁴⁰ Impact Assessment accompanying the Proposal for a Regulation amending Council Regulation (EC) No 2007/2004, SEC(2010) 149, 24.02.2010, p. 13.

⁷⁴¹ House of Lords (European Union Committee), "Frontex: the EU external borders agency", 9th Report of Session 2007-08, 05.03.2008, p. 41. See, COWI, "External evaluation of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union", 15.01.2009, p. 36.

⁷⁴² See, BURRIDGE, Andrew, "The 'Added Value' of RABITs: Frontex, Emergency Measures and Integrated Border Management at the External Borders of the European Union", *Consortium for*

that Regulation 863/2007 implied that enforcement and border management powers “could now be exercised as a matter of Community law, and they included the right to carry a service weapon and to use it in self-defense (...)”⁷⁴³.

Pursuant article 6 Regulation 863/2007, members of the teams deployed in a rapid border intervention shall have the capacity to perform all tasks and exercise all powers for border checks or border surveillance, including the use force, service weapons, ammunition, and equipment. However, these enforcement powers may only be conducted under the instructions and in the presence of border guards of the host Member State, with the consent of the home and the host Member State, and in accordance with the national law of the host Member State.

Following the RABITs model, article 13(1) Regulation 439/2010 on Easo states that the agency may deploy ASTs to support those Member States subject to an exceptional pressure in their asylum and reception systems. In particular, the requesting Member State shall provide a description of the situation, indicate the objectives of the request for deployment, and specify the estimated deployment requirements. To meet the request of the concerned Member State, Easo may deploy an AST in the territory of that Member State, on the basis of an operating plan and for a limited period of time (article 13(2) Regulation 439/2010). The particular composition of the AST would depend on the specific circumstances that the national asylum and reception systems are facing at the time.

Both the operational powers of Frontex and Europol on the ground were further strengthened in Regulation 1168/2011 and the Council Decision of 6 April 2009, respectively. Firstly, the European Commission put forward the possibility of Europol not only participating JITs, but also requesting the Member States to conduct or coordinate investigations⁷⁴⁴. However, the Commission’s initial proposal was considerably watered down during the legislative process, and the

Comparative Research on Regional Integration and Social Cohesion Working Papers, 1, 2012, p. 15; CARRERA, Sergio, “The EU border management strategy...”, *op. cit.*, p. 10.

⁷⁴³ House of Lords (European Union Committee), “Frontex: the EU external borders agency”, 9th Report of Session 2007–08, 05.03.2008, p. 41.

⁷⁴⁴ Commission, “Proposal for a Council Decision establishing the European Police Office (EUROPOL)”, COM(2006) 817 final, 20.12.2006, p. 5.

Member States were finally the only authorities responsible for initiating JITs. Instead, Europol was allowed to suggest that the Member States may set up JITs in specific cases⁷⁴⁵. Specifically, article 7(1) Council Decision of 6 April 2009 indicated that “Member States shall deal with any request by Europol to initiate, conduct or coordinate investigations in specific cases and shall give such requests due consideration”. Furthermore, article 7(1) stipulated that the competent national law enforcement authorities shall inform Europol whether the investigation requested will be initiated or not, and inform Europol of their decision and of the reasons therefor.

Whereas the impact of the Council Decision of 6 April 2009 was rather limited in regards to Europol’s operational role in the JITs, Frontex’ Regulation 1168/2011 represented a significant step forward in the agency’s operational activities on the ground⁷⁴⁶. Pursuant article 3(1b) Regulation 1168/2011, Frontex shall constitute a pool of border guards for possible deployment during joint operations and pilot projects. The contribution to the pool of border guards by the Member States was set as mandatory, unless the competent national authorities were experiencing an exceptional situation substantially affecting the discharge of national tasks (article 3b(2)). Importantly, article 3b(3) Regulation 1168/2011 stated that the agency shall also contribute to the EBGTs with competent border guards previously seconded by the Member States as national experts. That is, for a period of up to six months, Frontex was competent to decide where and for how long these seconded guest officers would be deployed.

To conclude, the legal provisions of Frontex, Easo, and Europol neither provide a comprehensive framework detailing the extent of the powers conferred to the EBGTs, ASTs, or the participation of Europol in the JITs, nor offer a clear account of the operational measures that the deployed officials may conduct on the ground. The operational powers of Europol officials in the JITs are

⁷⁴⁵ Article 5(1)(d) Council Decision of 6 April 2009 establishing the European Police Office (Europol), OJ L-121, 15.05.2009, pp. 37-66. See, House of Lords (European Union Committee), “EUROPOL: coordinating the fight against serious and organized crime”, 29th Report of Session 2007–08, 12.11.2008, p. 36.

⁷⁴⁶ URREA CORRES, Mariola, “External Border Control as A Security Tool: An Approach to the New Frontex Legal Framework”, *Journal of the Higher School of National Defense Studies*, 2012, pp. 147-163.

ambiguous, since it is unclear as to what extent Europol may support or attend the operations developed by the competent national enforcement authorities⁷⁴⁷. Nevertheless, as DE MOOR reasoned, Europol's presence and assistance to the Member States might prove beneficial, since the agency holds a "unique background knowledge and expertise about specific criminal phenomena which they can offer to the police officers in the field"⁷⁴⁸.

Furthermore, the key objective of Regulation 1168/2011 was to tackle the constant dependence of Frontex on the Member States' willingness to contribute to the agency's operations. In this respect, Member States were required to make their border guards available for every operation and the pool of Seconded Guest Officers, provided the discharge of their national tasks was not seriously affected. However, the specific operational powers and the limits of the EBGTs' action on the ground lacked precision. Similarly, Regulation 439/2010 of Easo ambiguously and openly refers to the operational powers of the ASTs.

2. The Functioning of the JITs, EBGTs, and ASTs

2.1. The Participation of Europol in the JITs

Article 6 Council Decision of 6 April 2009, establishing Europol, regulated the participation of Europol in the JITs. While the recently adopted Regulation 2016/794 on Europol is examined in the next section⁷⁴⁹, it shall be mentioned here that the provisions regarding the participation of Europol in the JITs have experienced slight changes in the recently adopted legal framework⁷⁵⁰. If the Member States agree to Europol's staff participation in a JIT, they may be deployed on the spot in order to assist in all activities and exchange information with all members of the JIT.

⁷⁴⁷ DE BUCK, Bart, "Joint Investigation Teams...", *op. cit.*, p. 261.

⁷⁴⁸ DE MOOR, Alexandra, "The role of Europol...", *op. cit.*, p. 344. See also, House of Lords (European Union Committee), "Europol's Role in Fighting Crime", 5th Report of Session 2002-03, 28.01.2003, p. 12 and RIJKEN, Conny, "Joint Investigation Teams...", *op. cit.*, p. 105.

⁷⁴⁹ See chapter 4, section III.1.

⁷⁵⁰ See, article 5 Regulation (EU) 2016/794.

Europol's website indicates that the agency has contributed to successes in a range of crime areas, including migrant smuggling and human trafficking, and may support JITs in several ways, such as liaising directly with JIT members, providing members with information that Europol maintains, offering analytical and logistical support and technical and forensic expertise, and supporting the secure exchange of information⁷⁵¹.

Although article 6(1) Council Decision of 6 April 2009 stressed that Europol officials shall not participate in the taking of any coercive measures, nothing was indicated about Europol's experts being deployed on the ground to support the national authorities in their undertaking of enforcement tasks. In this regard, the JITs Practical Guide signals that "participating Europol staff can (...) be present during operational activities of the joint investigation team, in order to render on-the-spot advice and assistance to the members of the team who execute coercive measures (...)"⁷⁵². Moreover, the participation of Europol in a JIT shall be established in an arrangement between the Executive Director of the agency and the Member States participating in the team (article 6(2) Council Decision of 6 April 2009). The Management Board of Europol shall determine the conditions under which Europol staff is placed at the disposal of the JIT (article 6(3) Council Decision of 6 April 2009).

The JITs' Practical Guide details the tasks that Europol may develop during the set-up, operational, and closure phases of the JITs. In the set-up phase, Europol may identify appropriate support and contribute to the drafting of the JIT agreement and the Operational Action Plan⁷⁵³. Subsequently, during the operational phase, Europol may provide the Member States with quick access to relevant information available in States other than that in which the JIT operates, facilitate the exchange of information between participants through a dedicated secure network, and offer logistic, analytical, and forensic support⁷⁵⁴. Notably, the JITs' Practical Guide declares that in this operational stage, Europol tends to

⁷⁵¹ Europol, "Joint Investigation Teams -JITs", <https://www.europol.europa.eu/activities-services/joint-investigation-teams> (last accessed: 30/04/2018).

⁷⁵² Council, "Joint Investigation Teams Practical Guide", doc. 6128/1/17, 14.02.2017, p. 35.

⁷⁵³ *Ibid.*, p. 23.

⁷⁵⁴ *Ibid.*, p. 23.

provide on-the-spot support by deploying analysts and specialists to support ongoing investigations and operations in Member States and third States⁷⁵⁵. Lastly, during the closure and follow-up phase of the JITs, Europol may help with the evaluation of the JITs⁷⁵⁶.

2.2. *Frontex: From the RABITs to the EBGTs*

2.2.1. Frontex' Operational Role in Deploying RABITs

Regulation 863/2007 paved the way for the extension of the operational assistance of Frontex on the ground through the deployment of staff in the territory of the Member States. The scope of Regulation 863/2007 was ambitious but balanced, so as to attract the attention of the Member States, which were ultimately responsible for triggering the initiation of a RABIT when subject to an extraordinary and specific migratory influx. In this regard, it was the responsibility of the Member States to control the external borders, and Frontex' role centered on temporarily assisting them by deploying personnel.

The RABIT was a measure that a Member State could request and to which Frontex' Executive Director, based on the information provided by the requesting Member State and the own risk assessment conducted by the agency, shall reply in less than five days communicating whether the rapid operation would be launched. If so, Frontex was the agency in charge of drafting an Operational Plan, appointing and establishing the teams, and finally, deploying them to assist the host Member State in managing their external borders⁷⁵⁷.

During a RABIT, Frontex' aims included assisting the concerned Member State in the overall management of its external borders by providing resources and optimizing their tactical use, as well as improving its border surveillance and

⁷⁵⁵ Ibid., p. 24.

⁷⁵⁶ Ibid., p. 24.

⁷⁵⁷ See, BURRIDGE, Andrew, "The 'Added Value' of RABITs...", *op. cit.*; CARRERA, Sergio and GUILD, Elspeth, "Assistance to Greece's Border with Turkey: Revealing the Deficiencies of Europe's Dublin Asylum System", *CEPS Paper in Liberty and Security in Europe*, 2010, pp. 1-19; RIJPMMA, Jorrit, "Building Borders: The Regulatory Framework for the Management of the External Borders of the European Union", PhD Thesis: European University Institute, 2009, pp. 279-285.

reception capacity. Moreover, the objectives of the deployment of a RABIT were to enhance a coordinated border control, improve the quality of border checks (e.g. better detection of facilitators, forged documents or hidden persons), systematically gather information, maintain awareness, and build capacity to implement activities⁷⁵⁸. A Command Officer and a Coordinating Officer were in charge of achieving these objectives and running the RABITs.

On the one hand, the host Member State was to appoint a Command Officer who would be operationally in charge and give instructions to the deployed teams. On the other hand, Frontex' Executive Director was to assign an expert the duty of being a Coordinating Officer, who would act on behalf of the agency (article 8g(1) Regulation 863/2007). Frontex' Coordinating Officer served as an interface for the agency, the host Member State, and the members of the teams deployed (article 8g(2) Regulation 863/2007). Specifically, the role of the Coordinating Officer includes supporting the teams on all issues related to the conditions of their deployment, monitoring the correct implementation of the adopted Operational Plan, and reporting to Frontex (article 8g(2) Regulation 863/2007).

However, due to the ambiguity of these provisions, it is worth further considering the specific operational role that Frontex played in practice in regards to the deployment of a RABIT. Greater attention is given here to the *de facto* operational and coordination role of Frontex through the analysis of the first deployment of a RABIT. While Regulation 863/2007 was adopted on 11 July 2007 establishing the RABITs, the first RABIT was not deployed until 2 November 2010. Upon receipt of Greece's formal request, on 25 October 2010, Frontex' Executive Director decided to deploy the RABITs from November 2010 to March 2011 at the border between Greece and Turkey⁷⁵⁹. For the analysis of this Frontex rapid operation, a request for access to documents was filed to the agency, which partially disclosed (large parts were actually blanked out) the Operational Plan, its annexes and evaluation.

⁷⁵⁸ Frontex, "RABIT Operation 2010 – Operational Plan", 29.10.2010, p. 6 (on file with the author).

⁷⁵⁹ Frontex, "RABIT Operation 2010 - Evaluation Report", 2011, p. 6, (on file with the author).

The Operational Plan of the 2010 RABIT operation distinguished the responsibilities of the host Member State, the home Member States, and the coordination role of Frontex. The host Member State was namely in charge of conducting, leading, commanding, and controlling the overall border surveillance measures strengthened by the RABIT operation, in addition to carrying out effective border control at the Greek external borders, guaranteeing the proper implementation of the RABIT operation in collaboration with Frontex, and handling the identified persons in need of protection⁷⁶⁰. The home Member States were mainly responsible for ensuring the deployment of skilled and equipped experts and technical means ready to operate⁷⁶¹.

The role of Frontex consisted in: 1) developing the organizational structure for coordinated implementation of the operation; 2) coordinating the host Member State activities in the implementation of the operation; 3) coordinating and facilitating the sharing of relevant information; 4) monitoring the development of irregular migration patterns; 5) allocating Frontex' resources; 6) contributing to the development of capacity of Hellenic Police in terms of the management of irregular migrants; and 7) facilitating practical arrangements in regards to the preparation and implementation of the RABIT Operation⁷⁶².

Hence, from the disclosed sections of the 2010 RABIT Operational Plan, it can be concluded that Frontex merely coordinated the implementation of the RABIT operation and facilitated the operational cooperation between the Member States, since the teams deployed were under the full command and control of the Greek authorities. However, the Evaluation Report of the RABIT Operation hints that Frontex' operational role was *de facto* more significant than what the Operational Plan made it seem.

The Evaluation Report pointed out that "Frontex-coordinated activities successfully contributed to effective border control including screening and debriefing activities; they provided a situational development that supported subsequent measures falling under the national competence and responsibility of

⁷⁶⁰ Frontex, "RABIT Operation 2010 – Operational Plan", p. 8.

⁷⁶¹ Ibid., p. 9.

⁷⁶² Ibid., p. 9.

a range of Greek authorities with the aim of achieving sustainability”⁷⁶³. However, the experts from the RABIT did not always undertake the screening and interview tasks under the supervision of the competent national authorities. In particular, Human Rights Watch documented that during the first RABIT in Greece, some border screening interviews were conducted exclusively by Frontex agents, since the Greek authorities were not present and relied exclusively on the agency to make the nationality determinations⁷⁶⁴. The non-governmental organization also pointed out that “even though Frontex is not formally a decision maker, in practice it appears that guest officers deployed with Frontex were indeed making de facto decisions on the ground in Evros as they were involved in extensive activities, including the apprehension of migrants and in making nationality-determination recommendations that were, in effect, rubberstamped by the Greek authorities”⁷⁶⁵.

While the activities of the teams deployed shall take place in the presence of the national border guards and in accordance to the national law of the host Member State, the teams were authorized to carry their service weapons, ammunition, and equipment, and to use force if necessary. CARRERA and GUILD precisely pointed out that a key issue regarding the RABITs was “the high degree of ambiguity characterizing the responsibilities of the guest border guards from other EU member states, Frontex personnel and the receiving member state’s authorities and their respective responsibility”⁷⁶⁶.

2.2.2. Frontex’ Operational Role in Deploying EBGs

In 2011, the operational powers of Frontex were further expanded. Regulation 1168/2011 designed the EBGs, which could be deployed in the territory of the Member States in joint operations, pilot projects, and rapid interventions. Pursuant article 3b(1) Regulation 1168/2011, the profiles and the overall number of

⁷⁶³ Frontex, “RABIT Operation 2010 – Evaluation Report”, p. 8.

⁷⁶⁴ Human Rights Watch, “The EU’s Dirty Hands Frontex Involvement in Ill-Treatment of Migrant Detainees in Greece”, 2011, p. 45.

⁷⁶⁵ *Ibid.*, p. 38.

⁷⁶⁶ CARRERA, Sergio and GUILD, Elspeth, “Assistance to Greece’s Border...”, *op. cit.*, p. 7.

border guards to be made available for the EBGTs shall be decided by an absolute majority of the members of the Management Board with a right to vote.

The Member States shall contribute to the EBGTs through a national pool by nominating border guards or other relevant staff⁷⁶⁷. The following paragraphs examine the role of Frontex' Coordinating Officer and the specific profiles and activities undertaken by the debriefing, screening and interview experts. Additionally, the establishment of the Seconded Guest Officers, with the aim of better understanding the increasing operational powers conferred to Frontex on the ground, is also studied.

Firstly, the Coordinating Officer is an official who is appointed and acts on behalf of Frontex in every Joint Operation where members of the EBGTs are deployed. The Coordinating Officer shall foster cooperation and coordination among host and home Member States, and guarantee a constructive presence during the joint operation when operational needs occur (article 3b(5) Regulation 1168/2011). In particular, Frontex' Coordinating Officer is mandated to monitor the correct implementation of the Operational Plan, provide assistance, on behalf of the agency, on all issues relating to the conditions of their deployment, and report to the agency on all aspects of the deployment of the teams⁷⁶⁸.

Secondly, the Management Board Decision 38/2016 of Frontex detailed the profiles of border guards to be made available to the EBGTs. In regards to Frontex' operational tasks, the debriefing, screening, and interview experts deserve particular consideration, since they have a direct contact with the migrants arriving at the external borders⁷⁶⁹. Debriefing experts are officials responsible for conducting debriefing interviews in order to collect information for risk analysis purposes, which is ultimately used for raising operational

⁷⁶⁷ See, Frontex, "Code of Conduct Applicable to all Persons Participating in Frontex Operational Activities", 2017.

⁷⁶⁸ Frontex, "Handbook to the Operational Plan – Joint Maritime Operations", 2014, pp. 33; Frontex, "Handbook to the Operational Plan – Air Border Joint Operations", 2014, p. 28 and Frontex, "Handbook to the Operational Plan – Joint Land Borders Operations", 2014, p. 32.

⁷⁶⁹ In this regard see also the profiles of First-Line Officers who carry out first line border checks at border crossing points; Second-Line Officers; Advanced-Level Document Officers who carry thorough examinations of a broad range of travel related documents; Border Surveillance Officers who undertake border surveillance related tasks at the EU external land or maritime border; Registration and Fingerprinting Officers and European Coast Guard Functions Officers.

awareness, facilitating operational decision-making, and supporting national operational measures⁷⁷⁰. Debriefing experts produce intelligence about the COI and the reason that third-country nationals enter irregularly in the EU, as well as the routes, the modus operandi, and the degree of involvement of the facilitators.

Screening experts interview and assess the nationality of an irregular migrant, with the objective of registering and/or returning the third country national to her country of origin, as appropriate, in accordance with the concerned national procedure⁷⁷¹. Screening experts perform screening interviews at the request of the host Member State and in close cooperation with a national screening expert. Interview experts are in charge of interviewing a person at a border crossing point to collect information for risk analysis purposes⁷⁷².

The obscurity surrounding the operational assistance, degree of involvement, and autonomy of Frontex, in regards to the debriefing, screening, and interview experts, is alarming. Intriguingly, every Operational Plan examined in this thesis, in addition to the Air, Land, and Sea Handbooks of Frontex' Joint Operations, blanked out the sections regarding the debriefing, screening, and interview experts. Frontex claimed that these operational sections contain detailed and sensitive information about the organization and its operational activities, implying that the disclosure of such information would not only harm the performance of future operational tasks of the agency, but also public interest in regards to public security⁷⁷³.

Furthermore, the establishment of SGOs was the most significant innovation brought about by Regulation 1168/2011 in regards to Frontex' increasing autonomous operational role. Pursuant article 3b(3) Regulation 1168/2011, Frontex shall contribute to the EBGTs with competent border guards previously seconded by the Member States as national experts. The maximum duration of such

⁷⁷⁰ Frontex Management Board Decision 38/2016 of 23 November 2016 adopting the profiles and the overall number of border guards and other relevant staff to be made available to the European Border and Coast Guard teams, p. 3 (on file with the author).

⁷⁷¹ *Ibid.*, p. 5.

⁷⁷² *Ibid.*, p. 6.

⁷⁷³ See, Frontex, "Handbook to the Operational Plan – Joint Maritime Operations", 2014, pp. 17-24; Frontex, "Handbook to the Operational Plan – Air Border Joint Operations", 2014, pp. 16-20 and Frontex, "Handbook to the Operational Plan – Joint Land Borders Operations", 2014, pp. 16-23.

secondments shall not exceed six months in a 12-month period. Therefore, Frontex has SGOs at its own disposal. That is, the agency is competent to determine where and for how long these officers will be deployed.

The Frontex General Report 2013 stressed that “unlike regular Guest Officers, SGOs can be deployed to multiple locations and operations during their six-month deployment period, without the express consent of their national authority being required”⁷⁷⁴. Due to the higher level of availability of SGOs and the ease of managing their administrative deployment, Frontex generally resorts to its own SGOs to fill in the operational gaps of the operations that the agency coordinates ⁷⁷⁵.

The SGO mechanism was officially launched in 2012 (Management Board Decision 25/2012⁷⁷⁶) after a pilot phase, which tested and defined all practicalities for the effective implementation of the SGOs mechanism⁷⁷⁷. Subsequently, in 2013, there was a first call for the secondment of SGOs, which resulted in 50 selected officers. In 2014, 76 SGOs were selected and 57 were finally deployed⁷⁷⁸. The total numbers of SGOs deployed in 2015, 2016, and 2017 were 81, 70, and 88, respectively⁷⁷⁹. These SGOs are deployed namely as Support Officers, Screening

⁷⁷⁴ Frontex, “General Report 2013”, 2014, p. 31.

⁷⁷⁵ Frontex, “Annual Information on the Commitments of the Member States to the European Border Guard Teams and the Technical Equipment Pool – Report 2014”, 19.03.2014, p. 11.

⁷⁷⁶ Frontex, Management Board Decision No 25/2012 of 28 November 2012 laying down rules on the secondment of national experts with the tasks and powers of the guest officers to Frontex, (on file with the author). See, Frontex, Management Board Decision 27/2017 of 27 September 2017 laying down rules on the secondment of national experts with the tasks and powers of the members of the teams to Frontex, (on file with the author).

⁷⁷⁷ Frontex, “General Report 2012”, 2013, p. 16 and Frontex, “General Report 2013”, 2014, p. 31. See the discussions that took place in 2012 between Frontex and the Member States in order to implement the SGOs: Frontex, 13rd Meeting of the Pooled Resources Network and 1st SGO Workshop, 28-30 March 2012; Frontex, 14th Meeting of the Pooled Resources Network, 26/27 June 2012; Frontex, 15th Meeting of the Pooled Resources Network, 4-6 September 2012; Frontex, 16th Meeting of the Pooled Resources Network, 13 December 2012 and 17th Meeting of the Pooled Resources Network, 26-27 June 2013.

⁷⁷⁸ Frontex, “General Report 2014”, 2015, p. 25 and Frontex, “Annual Information on the Commitments of the Member States to the European Border Guard Teams and the Technical Equipment Pool – Report 2014”, 19.03.2014, p. 11.

⁷⁷⁹ Frontex, “Annual Information on the Commitments of the Member States to the European Border Guard Teams and the Technical Equipment Pool – Report 2015”, 2016, p. 8; Frontex, “Annual Information on the Commitments of the Member States to the European Border Guard Teams and the Technical Equipment Pool – Report 2016”, 2017, p. 12; Frontex, “Annual Information on the Commitments and Deployments of the Member States to the European

Experts, Debriefing Experts, Second Line Airport Officers, and Advanced-Level Documents Officers (see figure 18).

It should be borne in mind, however, that the exercise of the SGOs' tasks and powers should be subject to the same legal framework as the guest officers made available by the Member States (recital 14 Regulation 1168/2011). That is, whereas the introduction of the SGOs signified a step towards a future establishment of a European Corps of Border Guards⁷⁸⁰, Frontex was not given autonomous enforcement and genuine executive powers. Formally, the SGOs may only perform operational tasks and exercise powers under instructions from, and in the presence of, the host Member State's border guards, and in accordance with the agreed Operational Plan.

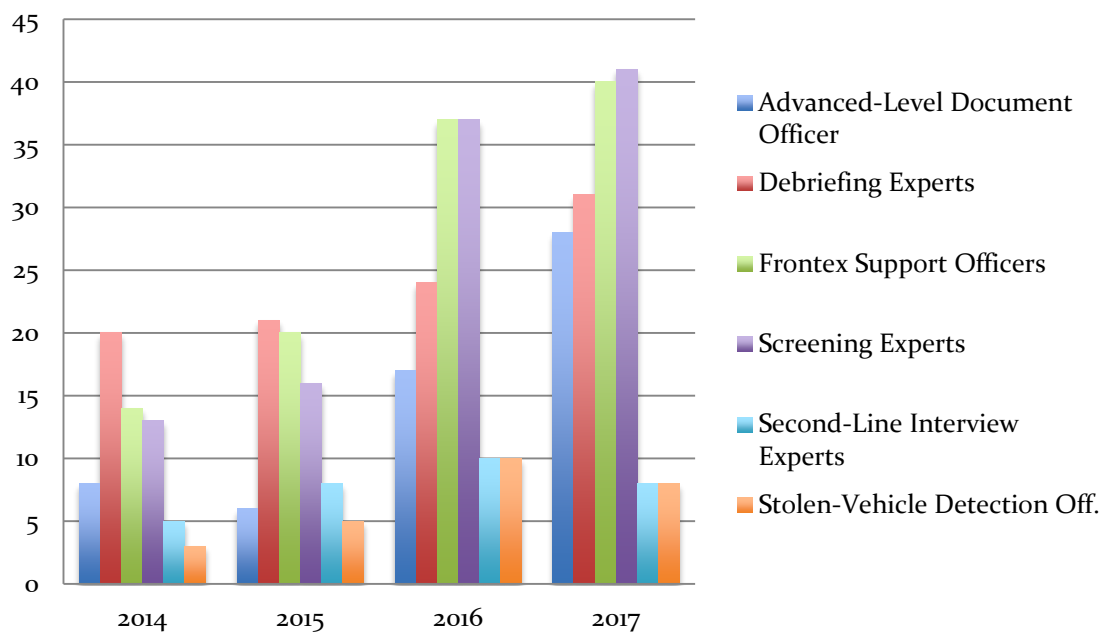


Figure 18: Total number of Frontex' Seconded Guest Officers deployments by profile and year. Source: Author's own elaboration on the basis of 2018, 2017, 2016, and 2015 Reports of Frontex on the Commitments of the Member States to the European Border and Coast Guard Teams.

Border Guard Teams and the Technical Equipment Pool – Report on the Operational Resources in 2017”, 2018, p. 16.

⁷⁸⁰ RIJPM, Jorrit, “Frontex and the European System of Border Guards...”, *op. cit.*, p. 4.

2.3. The Operational Support of Easo through the Deployment of ASTs

Upon request, a Member State subject to particular pressure may request that Easo deploy an AST. Once the requesting Member State has provided the agency with a description of the situation of its asylum and reception systems, indicated the objectives of the request for deployment of an AST, and detailed the estimated deployment requirements, Easo may deploy, for a limited time and on the basis of an Operating Plan, an AST in the territory of the requesting Member State (article 13 Regulation 439/2010).

Easo, together with the Member State concerned, shall draft an Operating Plan, provided that Easo's Executive Director finally decides to render the requested support. In regards to the ASTs, the Operating Plan shall namely include: a detailed description of the situation on the ground, the *modus operandi* and objectives of the deployment, the forecasted duration of the AST's deployment, the geographical area where the AST is to be deployed, a description of the tasks and instructions for members of the ASTs, and the composition of the teams (article 18 Regulation 439/2010).

In accordance with article 16 of Easo Regulation, the ASTs are composed of experts proposed by the Member States and selected and deployed by the agency. As provided by Regulation 1168/2011 of Frontex regarding the EBGTs, Member States are obliged to make the appointed experts available for deployment at Easo's call, unless they are faced with a situation substantially affecting the discharge of their national duties (article 16(1) Regulation 439/2010). These experts are to be deployed in the host Member State and shall be under the supervision of Easo's Plan Coordinator⁷⁸ⁱ. The Plan Coordinator shall be available for the duration of the AST mission in the concerned Member State. The Plan Coordinator is responsible for coordinating and overseeing the support functions and activities of the deployed officials, as well as acting as an interface between

⁷⁸ⁱ Easo, "Procedure for Internal Coordination of the Implementation of Operating Plans, Special Support Plans and/or Hotspot (Relocation) Operating Plans", 2016, p. 6 (on file with the author).

the agency and the national authorities⁷⁸².

Before any national expert is deployed through the ASTs, an Asylum Intervention Pool (AIP) shall be established. Pursuant article 15(1) Regulation 439/2010, the profiles and the overall number of experts to be made available for the AIP shall be decided by three quarters of the members with voting rights of Easo's Management Board. The AIP enables the agency to: swiftly respond to the Member States' requests for assistance, coordinate timely operational support, facilitate the participation and keep open communication lines with the National Contact Points (officials designated by each Member State for communication with Easo regarding the ASTs) on all matters pertaining to experts deployed in operational support activities, and provide assistance on all issues relating to the experts' deployment⁷⁸³.

On 4 February 2011, Easo began managing an AIP containing data on the availability and profiles of national experts who can be made available to join the ASTs, as well as a brief description of each of these profiles⁷⁸⁴. In order to deploy national experts via the ASTs, Easo initiates a call to the Member States for experts. The call for experts details the profiles and the characteristics of the specific mission, describes the tasks to be conducted, and specifies the knowledge, experience, and skills required for each expert⁷⁸⁵. Once Easo receives the nominations of the Member States, the agency is responsible for selecting the experts based on their CVs and expertise against the deliverables included in the ASTs⁷⁸⁶. In the event that the nominations are insufficient or not suitable for the specific tasks to be conducted during the AST, Easo may re-launch a call for experts. The Administrative Officer in the Easo Center for Operational Support is

⁷⁸² See, Easo, "Operating Plan for the Deployment of Asylum Support Teams to Luxembourg", 26.01.2012, p. 8.

⁷⁸³ Ernst and Young, "Independent External Evaluation of Easo's activities covering the period from February 2011 to June 2014", December 2015, p. 33. See, <https://www.easo.europa.eu/operational-support/asylum-intervention-pool> (last accessed: 30/04/2018).

⁷⁸⁴ Easo, "Procedure for the Selection of A.I.P. Experts Deployed in Operational Support Activities, 2016, p. 3 (on file with the author).

⁷⁸⁵ Ibid., p. 7.

⁷⁸⁶ Ibid., p. 8.

in charge of updating and managing the AIP database⁷⁸⁷.

Once a selection of experts has been made, Easo's Plan Coordinator in the Center of Operational Support informs the National Contact Points and the members of the ASTs of the requirements of their mission, the schedule, and practical information in the territory of the host Member State. Before the ASTs are deployed, Easo's Operating Plan Coordinator shall inform the members of the ASTs of the deliverables to be achieved during the mission⁷⁸⁸. Easo's Code of Conduct applies while the experts develop their tasks⁷⁸⁹. While the members of the ASTs are deployed in the host Member State, they shall report regularly to Easo's Operating Plan Coordinator on the situation regarding the implementation of the tasks assigned to the team and on the deliverables of the mission. Lastly, as soon as the deployment concludes, all members of the ASTs shall present the deliverables (i.e. Activity Report and annexes) to the Measure Coordinator in the host Member State and the Plan Coordinator in Easo's Center for Operational Support⁷⁹⁰.

The experts deployed as part of the ASTs are in charge of contributing to operations related to information provision, the application of the Dublin system, and the relocation procedure. Additionally, these experts support the competent national authorities in examining, registering, and conducting a personal interview of applications for international protection, as well as in implementing the admissibility procedure and the detection of possible document fraud and COI⁷⁹¹.

Easo's Operating Plans examined in this research outline a significant operational role bestowed upon the ASTs. In particular, these teams deployed in the territory of the requesting Member State are tasked with: 1) informing and assisting in the identification and initial registration of third country nationals; 2)

⁷⁸⁷ Ibid., p. 4.

⁷⁸⁸ Easo, "Procedure for Internal Coordination of the Implementation of Operating Plans, Special Support Plans and/or Hotspot (Relocation) Operating Plans", 2016, p. 8 (on file with the author).

⁷⁸⁹ See, Easo, "Code of Conduct for persons participating in Easo operational support activities", 2016.

⁷⁹⁰ Easo, "Procedure for the Selection of A.I.P. Experts Deployed in Operational Support Activities", 2016, p. 9.

⁷⁹¹ Ibid., p. 6.

providing operational support to design asylum processes; 3) optimizing and advising on the identification, screening, and preregistration of mixed migration flows; 4) supporting with the preparation of the asylum files in the reception centers by collecting COI, providing expert advice, and preparing the ground for legal checks; 5) technically backing the competent national authorities during the personal interview of asylum seekers and drafting a decision; 6) facilitating the management of the backlog of asylum cases and quality management of the asylum decision making procedure; and 7) providing suitable reception conditions⁷⁹².

Hence, whereas the deployment of the ASTs shall be agreed upon by the requesting Member States, which retain autonomy and control of their asylum systems, Easo is in charge of providing quick and flexible operational emergency support in regards to activities closely related to the national sovereignty of the State.

III. THE REINFORCED MANDATE OF EUROPOL AND THE ESTABLISHMENT OF THE EBCG AND THE EUAA: A TURNING POINT IN THESE AGENCIES' OPERATIONAL AND IMPLEMENTATION ROLE?

Under the new legal frameworks of the agencies under study, the Member States' sovereign and enforcement powers in the AFSJ remain formally untouched, but with one key difference: Member States are now required to align with the guidelines and strategy set by the EBCG, the EUAA, and to a limited extent, Europol. This section starts off analyzing Regulation 2016/794 of Europol, the establishment of the Europol Migrant Smuggling Center (EMSC), and the operational novelties that the new legal framework and the Center have brought about in regards to the trafficking of human beings and illegal migrant

⁷⁹² Easo, "Operating Plan for the Deployment of Asylum Support Teams to Greece", 01.04.2011, pp. 23-35; Easo, "Operating Plan to Bulgaria", 17.10.2013, pp. 6-8. See, Easo, "Operating Plan - Phase II for the Deployment of Asylum Support Teams to Greece", 2013; Easo, "Operating Plan to Italy", 2016; Easo, "Special Operating Plan to Greece", 2016.

smuggling. Subsequently, it is examined to what extent Regulation 2016/1624, establishing the EBCG, and the partially agreed text on the EUAA expand the powers of Frontex and Easo, respectively. Specifically, the new monitoring, intervention, and greater operational role on the ground of the EBCG and the future EUAA is explored. This section concludes by studying the growing impact that Europol, the EBCG, and the EUAA have in administratively guaranteeing an effective and uniform implementation of EU law at the national level, as well as their role in steering and shaping EU migration, border management, and asylum policies.

1. Regulation 2016/794 of Europol and the Establishment of the Migrant Smuggling Center

In 2013, in light of the Treaty of Lisbon, the Stockholm Program, and the Common Approach to EU decentralized agencies, the European Commission proposed the adoption of a Regulation on the European Union Agency for Law Enforcement Cooperation and Training. Specifically, article 88 TFEU states that Europol shall be governed by a regulation to be adopted by the ordinary legislative procedure. The Stockholm Program stressed that Europol should become a hub for information exchange between law enforcement authorities of the Member States, as well as a service provider and a platform for law enforcement services. The Common Approach established that merging agencies should be considered in order to promote synergies avoid overlapping tasks⁷⁹³.

The Commission strongly argued that merging Europol and Cepol into a single agency would generate significant synergies and efficiency gains, avoid duplication of support functions, and enhance the operational and training functions of the agencies⁷⁹⁴. However, both the European Parliament and the

⁷⁹³ Commission, "Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Law Enforcement Cooperation and Training (Europol) and repealing Decisions 2009/371/JHA and 2005/681/JHA", COM(2013) 173 final, 27.03.2013, p. 2. See, Commission, "Impact Assessment on adapting the European police Office's legal framework with the Lisbon Treaty", SWD(2013) 98 final, part 1, 27.03.2013.

⁷⁹⁴ See, Commission, "Impact Assessment on merging the European Police College (Cepol) and

Council decided not to endorse the Commission's proposal, which was also highly unwelcomed by the Member States, on the basis that each agency should continue to have its own distinctive tasks⁷⁹⁵.

The new legal basis for Europol was adopted in May 2016 and did not enter into force until May 2017⁷⁹⁶. Despite the high expectations surrounding the new legal framework of Europol, Regulation 2016/794 centers on designing a significant data protection regime and improving the agency's governance, parliamentary scrutiny, and analytical capabilities, which are matters that go beyond the scope of this research⁷⁹⁷. Europol's mission remains unchanged and consists in supporting and strengthening the Member States' actions and their mutual cooperation, with the objective of preventing and combating serious crime affecting two or more Member States, terrorism, and forms of crime which affect a common interest covered by a Union policy (article 3(1) Regulation 2016/794).

Operationally, Europol may participate in JITs and coordinate, organize, and implement investigative and operational actions in order to support the national enforcement authorities (article 4(1)(c) and (d) Regulation 2016/794). Europol is

the European Police Office (Europol) and implementing a European police training scheme for law enforcement officials", SWD(2013) 98 final, part 2, 27.03.2013.

⁷⁹⁵ See chapter 5, section I. See also, Initiative of Belgium, Bulgaria, the Czech Republic, Germany, Estonia, Greece, Spain, France, Croatia, Italy, Cyprus, Latvia, Lithuania, Luxembourg, Hungary, Malta, The Netherlands, Austria, Poland, Portugal, Romania, Slovenia, Slovakia, Finland and Sweden for a Regulation of the European Parliament and of the Council amending Decision 2005/681/JHA establishing the European Police College (Cepol), OJ C-361, 11.12.2013, p. 4 and Regulation (EU) No 543/2014 of the European Parliament and of the Council of 15 May 2014 amending Council Decision 2005/681/JHA establishing the European Police College (Cepol), OJ L-163, 29.05.2014, p. 5, which was finally replaced by Regulation (EU) 2015/2219 of the European Parliament and of the Council of 25 November 2015 on the European Union Agency for Law Enforcement Training (CEPOL) and replacing and repealing Council Decision 2005/681/JHA, OJ L-319, 04.12.2015, pp. 1-20.

⁷⁹⁶ Regulation (EU) 2016/794.

⁷⁹⁷ See, BLASI CASAGRAN, Cristina, "El Reglamento de Europol: un nuevo marco jurídico para el intercambio de datos policiales en la Unión Europea", *Revista General de Derecho Europeo*, 40, 2016, pp. 202-221; COUDERT, Fanny, "The Europol Regulation and Purpose Limitation: From the 'Silo-Based Approach' to ... What Exactly?", *European Data Protection Law Review*, 3(3), 2017, pp. 313-324; GOIZUETA VÉRTIZ, Juana, "La cooperación policial en el seno de Europol: el principio de disponibilidad y la confidencialidad de la información", *Revista Española de Derecho Constitucional*, 110, 2017, pp. 75-103; PEERS, Steve, "The reform of Europol: modern EU agency, or intergovernmental dinosaur?", *EU Law Analysis Blog*, 18.06.2014, <http://eulawanalysis.blogspot.nl/2014/06/the-reform-of-europol-modern-eu-agency.html> (last accessed: 30/04/2018).

not authorized to apply coercive measures to conduct any of its operational tasks (article 4(5) Regulation 2016/794). In regards to the JITs, article 5(1) of Regulation 2016/794 states that “Europol staff may participate in the activities of joint investigation teams dealing with crime falling within Europol’s objectives”. Although the agency no longer needs the authorization of the concerned Member States to take part in a JIT, Europol remains unable to independently initiate a JIT, and may only propose such a measure and take actions to assist the competent national authorities in setting up the team (article 5(5) Regulation 2016/794).

Article 6 Regulation 2016/794 states that Europol is authorized to request that the competent authorities of the Member States initiate, conduct, or coordinate a criminal investigation. In the case that the concerned Member State decides not to accede to such a request, the competent national authority is required to inform Europol of the reasons for their decision within one month of receipt of the request (article 6(3) Regulation 2016/794). Regulation 2016/794 confers an emerging operational role to Europol, establishing that the agency may coordinate, organize, and implement investigative and operational actions to support the Member States. Once again, these constitute vague tasks, which are not further detailed in the new Regulation and will be subject to interpretation by Europol.

Since Regulation 2016/794 entered into force on 1 May 2017, Europol has participated in several JITs regarding trafficking of human beings and illegal migrant smuggling⁷⁹⁸. For instance, Europol coordinated an investigation in 2018 regarding an organized criminal group that was illegally transporting migrants from Afghanistan, Iraq, Pakistan, and Syria to the EU through the Balkan route. The Austrian and Romanian law enforcement authorities conducted this investigation, under the coordination of Europol, which facilitated the arrest of 10

⁷⁹⁸ See, Europol, “11 Arrests and 9 Victims Safeguarded in Operation Against Sexual exploitation of Women”, 10.12.2017, <https://bit.ly/2I2UhZc> (last accessed 30/04/2018); Europol, “Human Trafficking Ring Taken Down by Spanish and Bulgarian Authorities”, 04.07.2017, <https://bit.ly/2K59SUM> (last accessed 30/04/2018); Europol, “Human Trafficking Ring Dismantled by Romania and the UK with Europol Support”, 22.06.2017, <https://bit.ly/2jMzIII> (last accessed 30/04/2018).

suspects, the search of 19 premises in Romania and 5 premises and a vehicle in Austria, and the seizure of cash, documents and mobile phones⁷⁹⁹.

Europol also took part in a JIT that dismantled a migrant smuggling network, which transported around 400 migrants, in specially-adapted vehicles through various EU Member States, in more than 48 illegal journeys. Participating law enforcement authorities (in Belgium, Bulgaria, France, The Netherlands, and the UK) subsequently conducted 42 searches across Europe and arrested 26 individuals. Europol facilitated the investigation's information exchange, provided extensive analytical support, deployed its mobile offices to Belgium and the UK, and analyzed, exchanged, and immediately cross-checked the information gathered against the agency's databases⁸⁰⁰.

One of the measures introduced by Regulation 2016/794 of Europol is the development of centers of specialized expertise. These centers aim to coordinate, organize, and implement investigative and operational actions to assist the Member States in combating transnational crime and terrorism. In particular, article 4(1)(l) Regulation 2016/794 states that Europol shall “develop Union centers of specialized expertise for combating certain types of crime falling within the scope of Europol's objectives (...)”. The agency's Management Board, upon a proposal of the Executive Director, decides on the establishment of these centers (article 11(1)(s) Regulation 2016/794). Europol has introduced, thus far, three centers of specialized expertise: European Cybercrime Center (EC₃), European Migrant Smuggling Center (EMSC), and European Counter Terrorism Center (ECTC).

In the aftermath of the “refugee crisis”, one of the goals of the 2015 European Agenda on Migration was the fight against smugglers and traffickers. According to Europol, more than one million irregular migrants reached Europe in 2015, and at least, 90% of these irregular migrants resorted to facilitation services provided

⁷⁹⁹ Europol, “Thousands of Euros for a Life-Threatening Journey to the EU: Migrant Smugglers Arrested in Austria and Romania”, 10.04.2018, <https://bit.ly/2wsg2fy> (last accessed 30/04/2018).

⁸⁰⁰ Europol, “Major International Operation Dismantles Migrant Smuggling Network”, 26.10.2017, <https://bit.ly/2gDhEbz> (last accessed 30/04/2018).

by criminal groups⁸⁰¹. In March 2015, Europol had already launched a Joint Operational Team (JOT) to combat irregular migration and tackle the smugglers operating in the Mediterranean (MARE). In this regard, the European Commission indicated that “Europol will immediately strengthen its recently established joint maritime information operation (JOT MARE) – and its focal point on migrant smuggling”⁸⁰². The JOT-MARE was mandated to undertake coordinated and intelligence-driven actions against the facilitators, identify concrete investigative leads, support Member States in initiating new investigations, and ensure an intensified exchange of intelligence with Frontex, Interpol, and the national experts seconded to the Team⁸⁰³.

A few days after the European Agenda on Migration was presented in May 2015, the Commission published the EU Action Plan against migrant smuggling (2015-2020), which recommended strengthening Europol’s Focal Point on migrant smuggling and its JOT-MARE. The Commission proposed that “within the framework of JOT MARE, an ad hoc operational team should be deployed to enhance the information collection and operational capabilities”⁸⁰⁴. In parallel, the European Parliament and the Council also stressed that the Member States needed to closely work with Europol to tackle and disrupt the criminal smuggling and trafficking networks⁸⁰⁵.

Finally, on 22 February 2016, Europol launched the EMSC. This center incorporated the JOT-MARE and was modeled along the lines of the EC₃ and the ECTC. The EMSC aims to proactively support EU Member States in dismantling criminal networks involved in organized migrant smuggling, and to become a

⁸⁰¹ Europol, “Migrant Smuggling in the EU”, 2016, <https://www.europol.europa.eu/publications-documents/migrant-smuggling-in-eu> (last accessed: 30/04/2018).

⁸⁰² Commission, “A European Agenda on Migration”, COM(2015) 240 final, 13.05.2015, p. 3.

⁸⁰³ Europol, “Joint Operational Team Launched to Combat Irregular Migration in the Mediterranean”, 17.03.2015, <http://bit.ly/2zdUj7f> (last accessed 15/03/2018). See, Europol, “Hit on Migrant Smuggling and Human Trafficking Ring Operating via the Mediterranean”, 03.11.2015, <http://bit.ly/2A9oL3e> (last accessed 15/03/2018).

⁸⁰⁴ Commission, “EU Action Plan against migrant smuggling (2015-2020)”, COM(2015) 285 final, 27.05.2015, p. 5.

⁸⁰⁵ See, Parliament, “Resolution on the latest tragedies in the Mediterranean and EU migration and asylum policies”, 2015/2660(RSP), 29.04.2015; Parliament, “Resolution on migration and refugees in Europe”, 2015/2833(RSP), 10.09.2015; Parliament, “Resolution on the situation in the Mediterranean and the need for a holistic EU approach to migration”, 2015/2095(INI), 12.04.2016; Council, “Conclusions on migrant smuggling”, doc. 6995/16, 10.03.2016.

single entry point for inter-agency cooperation on smuggling⁸⁰⁶. According to the first EMSC Activity Report, the leading role of the Center, to coordinate and assist in cross-border anti-smuggling operations, required close coordination with partner agencies (namely Eurojust and Frontex).

Not only does the EMSC provide operational support on the ground, but in the virtual world as well, by combating constantly expanding migrant smuggling content on-line⁸⁰⁷. The EMSC works to prevent document and identity fraud and aims to stop the facilitators from fully enjoying the profits of their criminal enterprises⁸⁰⁸. Specifically, the assistance of the EMSC is divided into five main areas for action (see figure 19): 1) Operational support, coordination and expertise; 2) Strategic support to EU Member States and partners; 3) Platform for EU Member States and partners; 4) Support to the European Union Regional Task Force (EURTF) and Hotspots; and 5) Deployments on-the-spot via Europol Mobile Investigation Teams (EMIST) and Europol Mobile Analysis Teams (EMAST).

⁸⁰⁶ Europol, “Europol Launches the European Migrant Smuggling Centre”, 22.02.2016, <http://bit.ly/2eL3W87> (last accessed 15/03/2018).

⁸⁰⁷ BLASI CASAGRAN, Cristina, “El papel de Europol en la lucha contra el tráfico de migrantes y la trata de seres humanos”, *Revista de Derecho Comunitario Europeo*, 59, 2018, p. 352.

⁸⁰⁸ Europol, “European Migrant Smuggling Center – First Year Activity Report”, 24.02.2017 and Europol, “Two Years of EMSC Activity Report Jan 2017-Jan 2018”, 20.04.2018.

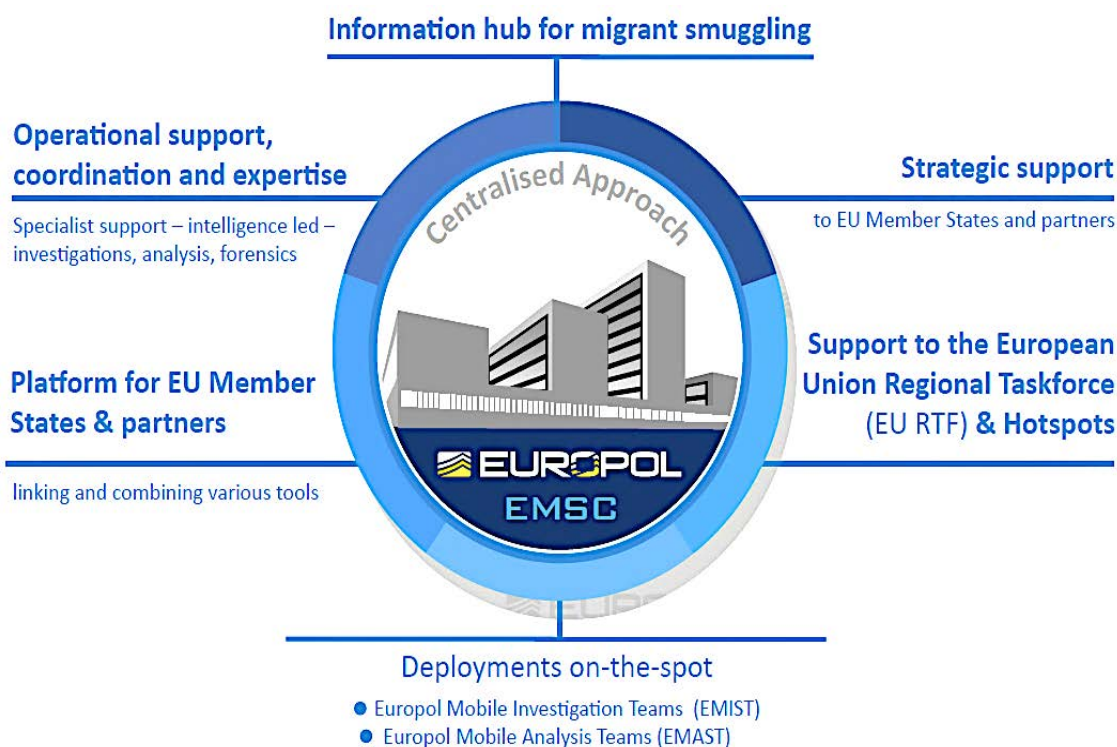


Figure 19: Europol Migrant Smuggling Center. Source: Europol EMSC Infographic.

Of particular significance is the possibility that the EMSC may deploy specialized investigative and analytical teams in the territory of the requesting Member State that requires assistance in dismantling the smuggling networks. On a smaller scale, the EMIST and the EMAST follow the same operational structure as Frontex’ EBGTs and Easo’s ASTs. The Europol specialists and analysts deployed are in charge of enhancing the operational analysis and investigations of the Member States by providing a complete picture and systematic and real-time information exchange in regards to migrant smuggling.

Moreover, the conclusions of the 12th Annual Meeting of National Experts on Joint Investigation Teams signaled that “Guest Officers have also been deployed in different hotspots by Europol since March 2016 to perform secondary security checks and support Greek authorities”⁸⁰⁹. The incipient operational support of Europol on the ground aims to provide specialized forensic and technical assistance to the concerned Member States. According to Europol 2017 Working

⁸⁰⁹ Council, “Conclusions of the Twelfth Annual Meeting of National Experts on Joint Investigation Teams (JITs) 15 and 16 June 2016, Eurojust, The Hague”, doc. 12887/16, 05.10.2016, p. 3.

Program, “based on the assessment of MS [Member States] needs, Europol’s response could include short and long-term deployments of Europol experts (...), forming a situation center to coordinate a response to major security events and crises, creating a task force or supporting the formation of multi-national teams to intensify efforts and achieve immediate operational results in areas demanding attention”⁸¹⁰.

A few months after the EMSC was launched in 2016, the first major operation took place. The EMSC contributed to the dismantling of an organized crime group based in Slovakia that was recruiting migrants from asylum reception centers in Hungary and then smuggling them into Germany. Europol deployed an EMIST to assist Slovakia. The operation concluded with the arrest of seven suspects and the seizure of communication and other electronic devices⁸¹¹. Furthermore, in 2016, the EMSC also cooperated with Europol’s Joint Operational Office established in Vienna. The deployed staff of Europol was mandated to support regional operational investigations, which aimed to tackle the smuggling and trafficking networks operating in the Western-Balkan and Central Mediterranean routes⁸¹².

Lastly, in November 2016, Spanish and Polish police authorities, in conjunction with Europol, cooperated in dismantling an organization that was smuggling Ukrainian citizens into the United Kingdom and Ireland. In particular, the EMSC was in charge of “providing analytical and operational support, delivering cross-match and operational analysis reports, facilitating information exchange among the Member States involved, as well as hosting an operational meeting at Europol’s headquarters which resulted in mirroring investigations being launched in Belgium and Ireland”⁸¹³. As of September 2017, the EMSC had supported 68 investigations against criminal networks in 2017 and 93 in 2016, 3 JITS in 2017 and 2 in 2016, and had identified and monitored 830 vessels that may

⁸¹⁰ Europol, “Europol Programming Document 2017-2019”, 17.01.2017, p. 12.

⁸¹¹ Europol, “Europol Supports Hungarian-Slovakian Team in Dismantling Migrant Smuggling Network”, 02.06.2016, <http://bit.ly/2qNFmWb> (last accessed 15/03/2018).

⁸¹² Europol, “Joint Operational Office Opened in Vienna”, 04.05.2016, <http://bit.ly/2zz78h9> (last accessed 15/03/2018). See, Council, “EU Policy Cycle: Monitoring of the Operational Action Plans 2016 - Priority "Illegal Immigration”, doc. 15212/16, 06.12.2016.

⁸¹³ Europol, “Europol Review 2016-2017”, p. 21.

have been involved in illegal migrant smuggling⁸¹⁴.

2. Regulation 2016/1624: From Frontex to the European Border and Coast Guard

While the European Council welcomed the creation of Frontex in 2005, it stressed that the European Commission should assess the establishment of a European system of border guards⁸¹⁵. In 2010, the Stockholm Program also invited the Commission to initiate “a debate on the long-term development of Frontex [that] should include (...) the feasibility of the creation of a European system of border guards”⁸¹⁶. The Treaty of Lisbon invigorated this debate, leaving a wide margin of appreciation regarding the model to be implemented to manage the European external borders. Article 77 TFEU openly states that an integrated system of external borders should be progressively established.

In June 2013, the European Commission ordered a study from “Unisys” in order to examine the feasibility of introducing a European System of Border Guards. The study, which was published on 16 June 2014, put forward a model, divided into three subsequent phases, to gradually achieve an integrated management of the European external borders. On the one hand, the model sought to accommodate the position of Frontex, the Commission, and a large number of members of the European Parliament⁸¹⁷ that advocated for a greater delegation of powers to the EU. On the other hand, the Member States

⁸¹⁴ Commission, “Communication on the Delivery of the European Agenda on Migration”, COM(2017) 558 final, 27.09.2017, p. 7

⁸¹⁵ European Council, “The Hague Programme: Strengthening Freedom, Security and Justice in the European Union”, OJ C-53, 03.03.2005, p. 6.

⁸¹⁶ European Council, “The Stockholm Programme – An open and secure Europe serving and protecting the citizens”, 04.05.2010, p. 56. The 2015 external evaluation of Frontex also signaled that any future revision of the mandate of the agency should address the feasibility of creating a European Border Guard System. See, Ramboll and Eurasyllum, “External Evaluation of the Agency under Art. 33 of the Frontex Regulation”, 2015, p. 101.

⁸¹⁷ The European Parliament has been favorable on strengthening Frontex’ powers and mandate. See, Parliament, “Resolution on the mid-term review of the Stockholm Programme”, 2013/2024(INI), 02.04.2014, para 80; Parliament, “Resolution on the situation in the Mediterranean and the need for a holistic EU approach to migration”, 2015/2095(INI), 12.04.2016 paras 70-72; Parliament, “Resolution on the Special Report of the European Ombudsman in own-initiative inquiry OI/5/2012/BEH-MHZ concerning Frontex”, 2014/2215(INI), 02.12.2015.

prioritized a more moderate integration of border management matters⁸¹⁸.

According to the study conducted by “Unisys”, the first phase (until 2020) for the development of a European System of Border Guards should consist in deepening and developing Frontex’ powers and structure to the fullest. The agency should continue to support the work of national authorities without being delegated new competences.

The second phase, however, could encompass a transferral of executive powers to Frontex but only in the so-called hotspots (geographical areas subject to a disproportionate migratory pressure). That is, while the daily management of the borders would continue to be the responsibility of the Member States, the hotspots’ operations would be the exclusive function of the agency, which would act through its own border guards and equipment⁸¹⁹.

As early as 2030 (phase three), the “Unisys” study envisaged a EU decentralized agency that would be completely centralized and in charge of the supranational management of the European external borders. Due to the executive and decision-making powers of this new “EU federal agency”, a reform of the current Treaties and the internal legislation of some Member States is deemed necessary by the “Unisys” study.

Although the recently adopted Regulation 2016/1624 misleadingly refers to a “European Border and Coast Guard”⁸²⁰, this “new Frontex” is not a fully-fledged European Border Corps⁸²¹. The European Commissioner, Dimitris Avramopoulos, referred to the new agency as “a fully-fledged European Border and Coast Guard

⁸¹⁸ Unisys, “Study on the feasibility of the creation of a European System of Border Guards to control the external borders of the Union”, 16.06.2014, p. 21. See, Council, “Report of the Conference ‘The Feasibility of a European System of Border Guards: A practitioner’s perspective’ organised by Frontex and ERA”, doc. 5496/14, 27.01.2014.

⁸¹⁹ Commission, “A European Agenda on Migration”, COM(2015) 240 final, 13.05.2015, p. 7.

⁸²⁰ CARRERA, Sergio and DEN HERTOOG, Leonard, “A European Border and Coast Guard: What’s in a Name?”, *CEPS Paper in Liberty and Security in Europe*, 88, 2016, pp. 1-22.

⁸²¹ ACOSTA SÁNCHEZ, Miguel Ángel, “La nueva Guardia Europea de Fronteras y Costas una necesaria evolución de FRONTEX”, *Boletín Instituto Español de Estudios Estratégicos*, 4, 2016, pp. 466-482; SANTOS VARA, “La transformación de Frontex en la Agencia Europea de la Guardia de Fronteras y Costas: ¿hacia una centralización en la gestión de las fronteras?”, *Revista de Derecho Comunitario Europeo*, 59, 2018, pp. 143-186; SOLER GARCÍA, Carolina, “La Guardia Europea de Fronteras y Costas: ¿un avance respecto a Frontex? Una valoración provisional”, *Revista Electrónica de Estudios Internacionales*, 34, 2017, pp. 1-44.

system”⁸²². However, Regulation 2016/1624 has not created a federal agency with centralized and enforcement powers in the management and surveillance of the European borders. The EBCG, despite its new fancy name, will continue to operate in a decentralized border management system. As CARRERA and DEN HERTOOG highlighted, the EBCG could be better defined as a Frontex+⁸²³ or, according to DE BRUYCKER, a mere legal fiction, made up of the sum of the new agency and the national authorities that remain in charge of the management of the external borders⁸²⁴.

The EBCG has not been conferred exclusive and executive powers in the management of the external borders, as was proposed by “Unisys” in its third and final phase of Frontex’ development. The recently established EBCG could be better situated between the first and second phases of the “Unisys” model, since the technical and operational tasks originally conferred to Frontex have been significantly broadened yet the Member States continue to exclusively conduct executive and coercive activities at their external borders. In this regard, article 5 Regulation 2016/1624 states that the Member States are responsible for the management of their section of the external borders, and the EBCG’s mandate is limited to supporting the application of EU border management measures by strengthening, evaluating, and coordinating the actions of the national competent authorities.

Whereas Frontex had not fully explored the tasks and every operational possibility that Regulations 863/2007 and 1168/2011 offered, on 15 December 2015 the Commission proposed the creation of the EBCG⁸²⁵. The Commission stressed that “the sheer scale of the mixed migratory flows which have crossed the external borders of the European Union and the consequent secondary movements, demonstrated that existing structures at Union and Member State

⁸²² European Commission, “Securing Europe’s external borders: Launch of the European Border and Coast Guard Agency”, 06.10.2016, http://europa.eu/rapid/press-release_IP-16-3281_en.htm, (last accessed 23/04/2018).

⁸²³ Ibid.

⁸²⁴ DE BRUYCKER, Philippe, “The European Border and Coast Guard...”, *op. cit.*, pp. 559-569.

⁸²⁵ See, External Evaluation of the Agency under art. 33 of the Frontex Regulation Final report 28.07.2015; Frontex Management Board Decision No 40/2015 adopting recommendations of the Management Board following the evaluation of Frontex (art. 33) 20.10.2015.

level are inadequate to address the challenges arising from such a large influx”⁸²⁶. The Commission considered that the control of the European external borders and the maintenance of security within the Schengen area required, in accordance with the principles of solidarity and responsibility, the progressive development of an integrated system of management of the external borders.

Regulation 2016/1624 aims to develop a EU integrated management of the external borders by addressing both the existing deficiencies at the national level and responding effectively to exceptional and sudden migratory flows. To achieve these ambitious objectives, Regulation 2016/1624 indicates that the EBCG shall: 1) monitor the effective management of the external borders; 2) provide reinforced technical and operational assistance to Member States through joint operations and rapid border interventions; 3) ensure the practical implementation of EU border management measures in situations requiring urgent action at the external borders; 4) provide technical and operational support in search and rescue operations; and 5) organize, coordinate and carry out return activities. This section analyzes in detail the new operational powers conferred to the new EBCG by Regulation 2016/1624.

2.1. *The EBCG's Monitoring Role*

Article 3(2) Regulation 2016/1624 confers a monitoring role to the EBCG in order to guarantee a common strategy for the management of the European external borders. While Frontex also conducted supervisory activities to a certain extent, the EBCG may now deploy its own liaison officers in the Member States with the aim of fostering cooperation and dialogue between the agency and the competent national authorities (article 12(3) Regulation 2016/1624). The EBCG liaison officers, who are deployed on the basis of a risk analysis carried out by the agency, should regularly inform the agency's Executive Director about the situation at the external borders and assess the capacity of the concerned

⁸²⁶ Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC, COM(2015) 671 final, 15.12.2015, p. 2.

Member State to effectively manage its borders (article 12(3)(h) Regulation 2016/1624).

According to the EBCG Management Board Decision 14/2017, the Executive Director of the agency is in charge of appointing the members of the temporary staff of the EBCG to be deployed as Liaison Officers. Frontex' Liaison Officers are namely responsible for: 1) acting as an interface and facilitating the cooperation between the EBCG and all Member States' authorities; 2) supporting the collection of information and best practices; 3) monitoring the measures taken by the Member State at its border sections to which a high impact level has been attributed; 4) contributing to promoting the application of the Union *acquis*; 5) reporting regularly to the Executive Director on the situation at the external borders, on the capacity of the Member States concerned to deal effectively with the situation at the external borders, and on the execution of return and pre-return activities; and 6) monitoring and reporting on the measures taken by the Member States with regard to a situation requiring urgent action at the external borders⁸²⁷.

The information that the liaison officers gather contributes and facilitates the preparation of the EBCG's vulnerability assessments. At least once a year, the agency shall monitor and assess the availability of the technical equipment, systems, capabilities, resources, infrastructure, and adequately skilled and trained staff of Member States for border control. In turn, Member States are required to collaborate with the EBCG in elaborating the vulnerability assessment.

Pursuant article 13(1) Regulation 2016/1624, "the Agency shall, by decision of the management board based on a proposal of the executive director, establish a common vulnerability assessment methodology". This methodology consists of a baseline assessment, a simulation exercise, a simulation assessment, and the recommendations issued by the EBCG⁸²⁸. During the baseline assessment, the agency is in charge of checking for vulnerabilities and analyzing the data

⁸²⁷ Frontex, Management Board Decision 14/2017 on the deployment of Frontex Liaison Officers to Member States, 13.06.2017.

⁸²⁸ Frontex, "What is Vulnerability Assessment?", 16.10.2017, <http://bit.ly/2zsPmsr> (last accessed 15/03/2018).

gathered. Subsequently, the agency's Executive Director may decide to conduct a simulation exercise for select Member States and a stress test of the competent national authorities' preparedness to specific threats and challenges at the external borders, which may lead to additional recommendations on measures for the Member States⁸²⁹. Finally, the Member States are informed of the results of their vulnerability assessments and the EBCG's Executive Director may recommend that the concerned Member State adopt, within a certain period of time, certain measures.

The recommendatory powers conferred to the EBCG are reflected in article 13(8) Regulation 2016/1624, which signals that if the recommended measures are not implemented in a timely fashion and in an appropriate manner by the concerned Member State, the EBCG's Executive Director shall refer the matter to the Management Board and inform the Commission. The Management Board shall then make a decision, based on the original proposal of the Director, describing the necessary measures to be taken by the Member State and the time limit within which such measures shall be implemented. Importantly, article 13(8) Regulation 2016/1624 explicitly declares that the decision of the Management Board is binding on the Member State.

Regulation 2016/1624 clearly reinforces the incipient monitoring and supervisory capacity of Frontex. Currently, the EBCG's Management Board is mandated to adopt, by two-thirds majority of the members with a right to vote, binding measures, if the actions or omissions of a concerned Member State may compromise the Schengen area⁸³⁰. It remains to be seen as to the position of the national authorities within the EBCG's Management Board and whether they will adopt measures that effectively ensure that a concerned Member States tackles the vulnerabilities identified in its external borders.

⁸²⁹ Commission, "Report on the operationalisation of the European Border and Coast Guard", COM(2017) 42 final, 25.01.2017, p. 6. See, Commission, "Report on the operationalisation of the European Border and Coast Guard", COM(2017) 201 final, 02.03.2017, p. 7. See, FERRARO, Francesca and DE CAPITANI, Emilio, "The new European Border and Coast Guard: yet another 'half way' EU reform?", *ERA Forum*, 17(3), 2016, pp. 385-398.

⁸³⁰ See, Commission, "Report on the operationalisation of the European Border and Coast Guard", COM(2017) 467 final, 06.09.2017, p. 7.

Although the EBCG started to undertake vulnerability assessments a few months after Regulation 2016/1624 entered into force, the presence of liaison officers in Member States had a slow start. It was not until June 2017 that the EBCG's Management Board approved the rules that defined the role and tasks of the Liaison Officers. The European Commission has urged the agency to "step up and accelerate the work towards the deployment of liaison officers", since in September 2017, the Memorandum of Understanding with the Member States, which set out the modalities of deployment, was not adopted and the selection procedures for the recruitment of the Liaison Officers were not yet launched⁸³¹.

During 2017, the EBCG smoothly delivered baseline vulnerability assessments and issued recommendations to the Member States with concrete measures, addressing the identified vulnerabilities⁸³². In this regard, the competent national authorities were required to improve their processes of data collection, with the aim of efficiently providing complete data on their border management capacities⁸³³. Moreover, the first vulnerability assessments led to the EBCG undertaking simulation exercises in order to assess the capacities of six Member States in managing extraordinary and sudden migratory pressure at their external borders⁸³⁴. It remains to be seen how expeditiously and effectively the Member States will submit their action plans, addressing the threats identified by the EBCG and improving the effective management of the national external borders.

2.2. The EBCG's Expanded Operational Tasks

Regulation 2016/1624 bestows important operational tasks upon the EBCG. The EBCG continues to provide operational assistance to the Member States, as did Frontex, through the coordination of joint operations and rapid border interventions (article 15 Regulation 2016/1624) and through the deployment of

⁸³¹ Commission, "Fifth Report on the operationalization of the European Border and Coast Guard", COM(2017) 467 final, 06.09.2017, p. 12.

⁸³² Ibid., pp. 7-8.

⁸³³ Commission, "Fourth Report on the operationalization of the European Border and Coast Guard", COM(2017) 325 final, 13.06.2017, p. 10.

⁸³⁴ Ibid., p. 9.

teams on the ground (article 18 Regulation 2016/1624). Additionally, for the first time, Regulation 2016/1624 regulates the technical and operational capacity of the EBCG in the hotspots⁸³⁵, where the national authorities face a sudden and disproportionate migratory pressure according to the 2015 Migration Agenda⁸³⁶. In particular, pursuant article 18(2) Regulation 2016/1624, “the executive director, in coordination with other relevant Union agencies, shall assess a Member State’s request for reinforcement and the assessment of its needs for the purpose of defining a comprehensive reinforcement package consisting of various activities coordinated by the relevant Union agencies to be agreed upon by the Member State concerned”.

With the objective of reducing the dependence of the EBCG on the Member States’ technical equipment, the new article 38 Regulation 2016/1624 stipulates that the agency may finally acquire its own technical equipment. While the TEP remains the main operational resource for deployment in the EBCG’s operations under Regulation 2016/1624, the agency has set the establishment of its own operational capacity as a priority⁸³⁷. The reports of the Commission on the operationalization of the EBCG stressed that the agency is especially interested in acquiring small and medium size assets (e.g. aerial surveillance services or mobile offices). In particular, the Commission has allocated €40 million to the EBCG from 2017 to 2020 in order to acquire its own equipment⁸³⁸.

Moreover, a Rapid Reaction Equipment Pool has been designed, consisting of technical equipment to be deployed in rapid border interventions within 10 working days from the date that the Operational Plan is agreed upon by the Executive Director and the host Member State. Significantly, the EBCG may contribute to the Rapid Reaction Equipment Pool with its own resources but the Member States can no longer shirk their responsibilities by alleging that they are faced with an exceptional situation substantially affecting the discharge of

⁸³⁵ Regarding the role of Frontex in the recently established hotspots see, chapter 5, section IV.3.1.

⁸³⁶ Commission, “A European Agenda on Migration”, COM(2015) 240 final, 13.05.2015, p. 6.

⁸³⁷ Frontex, “Annual information on the Commitments of the Member States to the European Border and Coast Guard Teams and the Technical Equipment Pool – Report 2017”, 2017, p. 10.

⁸³⁸ Commission, “Report on the operationalisation of the European Border and Coast Guard”, COM(2017) 467 final, 06.09.2017, p. 4.

national tasks (article 39(7) Regulation 2016/1624).

Therefore, Regulation 2016/1624 aims to provide the EBCG with technical and human resources that are immediately and flexibly available to be deployed, with the goal of filling in the operational gaps that continuously afflicted Frontex. However, Regulation 1168/2011 of Frontex had already attempted, with little success, to increase the operational autonomy of the agency. Nevertheless, regarding the acquisition of equipment, not only did Frontex lack the operational and technical capabilities to manage its own aircrafts, vessels, and patrol vehicles, but since the lines of responsibility were not clearly spelled out, the Member States were also unwilling to register ships or aircrafts purchased and operated by the agency⁸³⁹.

Although the European Commission has a strong budgetary commitment to ensure that the EBCG acquires or leases technical resources, the new agency still lacks the necessary structures and expertise to effectively manage its own equipment. Regulation 2016/1624 does not design a clear framework of the EBCG's responsibility, and it is highly questionable if the Member States will authorize the registration of ships and aircrafts that are beyond their control.

In regards to the composition and deployment of EBCGT, the main novelty brought by the new legal framework is the Rapid Reaction Pool. In accordance with article 20(5) Regulation 2016/1624, the competent national authorities shall make available a minimum of 1,500 border guards to the EBCG for their immediate deployment in joint operations and/or rapid border interventions. As was the case with Frontex, the EBCG may contribute to the EBCGT with border guards or other relevant staff seconded by the Member States for a maximum period of twelve months or more, but not less than three months (article 20(11) Regulation 2016/1624). The EBCG is in charge of selecting the Seconded Members of Teams in accordance with the agency's operational requirements. The selected members shall be included in the EBCGT pool, deployed by the agency, and shall

⁸³⁹ House of Lords (European Union Committee), "Frontex: the EU external borders agency", 9th Report of Session 2007-08, 05.03.2008, p. 52.

undertake their duties with the interests of the EBCG in mind⁸⁴⁰.

2.3. *The EBCG's Competence to Intervene*

The new EBCG's capacity to intervene led to considerable rejection by the Member States during the negotiations of Regulation 2016/1624⁸⁴¹. Article 3(2) states that "the Agency shall, by decision of the management board based on a proposal of the executive director, establish a technical and operational strategy for European integrated border management". The national authorities in charge of border management shall conform to the strategy adopted by the EBCG (article 3(3) Regulation 2016/1624).

Member States shall abstain from conducting "any activity which could jeopardize the functioning of the Agency or the attainment of its objectives" (art. 8(2) Regulation 2016/1624). To this end, the EBCG is authorized to supervise the effective functioning of the national external borders, undertake vulnerability assessments, monitor whether a Member State is qualified to effectively implement the applicable EU legislation, and detect deficiencies in the management of the national borders.

The EBCG is thus conferred a supervisory and intervention role, which authorizes the agency to adopt quasi-binding measures for the Member States

⁸⁴⁰ Frontex, Management Board Decision 27/2017 laying down rules on the secondment of national experts with the tasks and powers of the Members of the Teams to Frontex, 27.09.2017.

⁸⁴¹ Article 18(1) of the original European Commission proposal stated that "the Commission, after consulting the Agency, may adopt a decision by means of an implementing act, identifying the measures to be implemented by the Agency and requiring the Member State concerned to cooperate with the Agency in the implementation of those measures". Given the rejection that this provision aroused among the Member States, it was decided that the Council instead of the Commission, shall be responsible for adopting implementing acts. Regarding the rejection of some Member States see, AVRAMIDIS, Alastair, "EU Border Force Plan Faces Resistance from Governments", Reuters, 13.12.2015, <http://reut.rs/1jWwau>; DE LA BAUME, Maia, "Countries Balk at EU Border Force Proposal", Politico, 15.12.2015, <http://politi.co/1mmOyhj>; GARCÍA MARTÍNEZ, Laura, "Fernández Díaz ve con 'reservas' un cuerpo europeo de fronteras que España no necesita 'para nada'", Europa Press, 25.01.2016, <http://bit.ly/1SeubPs>. See also, DE BRUYCKER, Philippe, "The European border and coast guard: a new model built on an old logic", *European Papers*, 1(2), 2016, p. 562; RIJPMA, Jorrit, "The proposal...", *op. cit.*, p. 18; ROSENFELDT, Herbert, "Establishing the European Border and Coast Guard: all-new or Frontex reloaded?", *EU Law Analysis*, 16.10.2016, <http://eulawanalysis.blogspot.com.es/2016/10/establishing-european-border-and-coast.html> (last accessed 15/03/2018).

and to directly intervene in the territory of the Member State if such measures are not effectively implemented (article 18 Regulation 2016/1624). In the event that a Member State neither adopts the measures recommended in its vulnerability assessment, nor requests/takes necessary actions in the face of disproportionate and sudden migratory pressure, the EBCG shall ensure a unified, rapid, and effective EU response so as not to jeopardize the functioning of the Schengen area. In this situation and according to article 19(1) Regulation 2016/1624, “the Council, on the basis of a proposal from the Commission, may adopt without delay a decision by means of an implementing act, identifying measures to mitigate those risks to be implemented by the Agency and requiring the Member State concerned to cooperate with the Agency in the implementation of those measures”.

Once the EBCG’s Management Board has adopted the decision, the agency’s Director shall determine, in agreement and jointly with the Member State concerned, “the actions to be taken for the practical execution of the measures identified in that decision” (article 19(4) Regulation 2016/1624). That is, the Member State must expressly consent and agree with the EBCG regarding the operational support that the EBCG will be providing. Only as a last resort may the European Commission authorize the re-establishment of border controls in the Schengen area, provided that the concerned Member State neither executes the decision adopted by the Council, nor agrees with the EBCG’s Operational Plan within 30 days (article 19(10) Regulation 2016/1624).

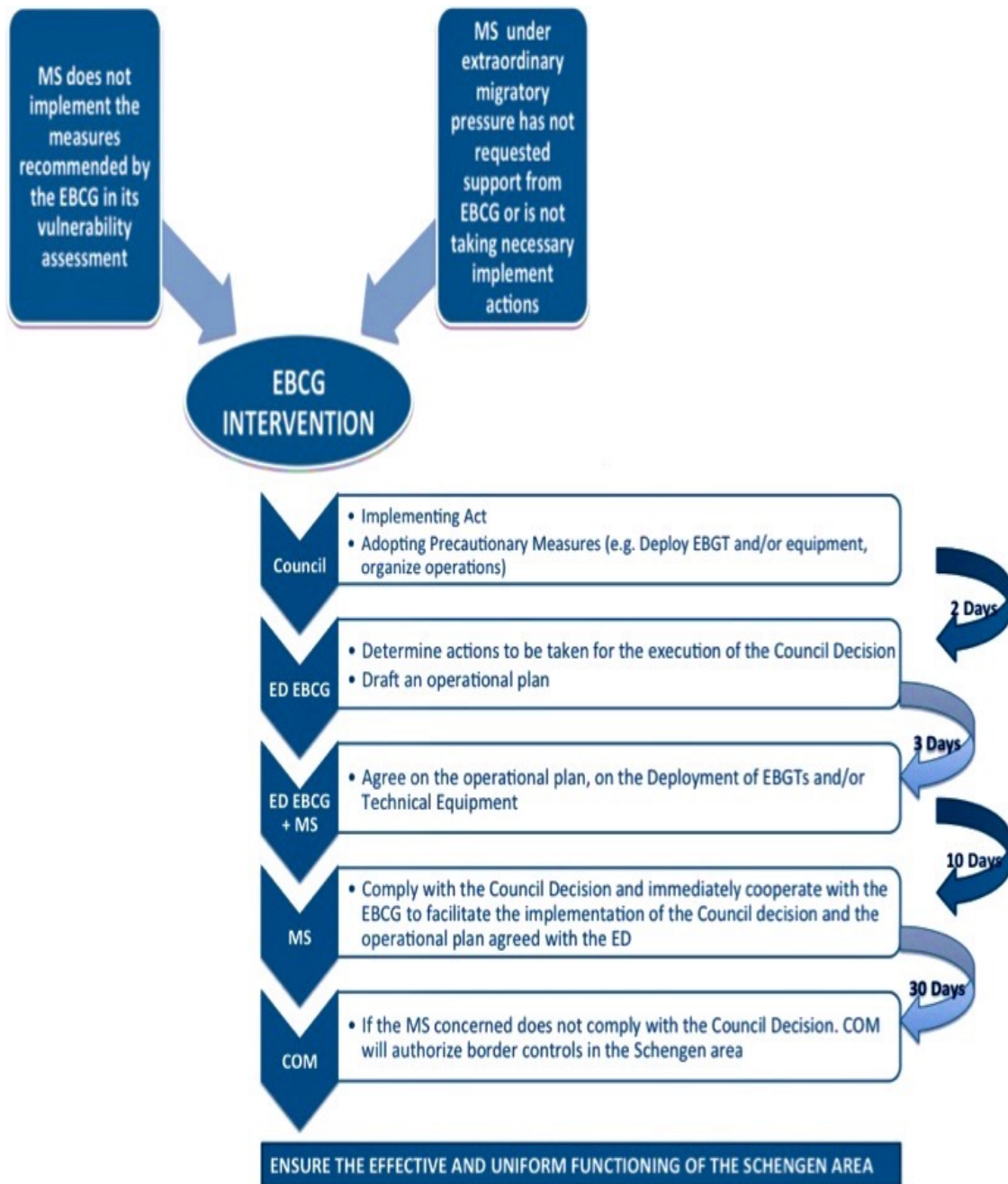


Figure 20: EBCG’s Intervention Power. Source: Author’s own elaboration.

2.4. *The EBCG’s Coast Guard Functions, Return Operations, and Relations with Third Countries*

Regulation 2016/1624 includes novelties in three very relevant and contentious areas of competence: coast guard, return, and cooperation with third

countries⁸⁴². The EBCG's coast guard function is an aspect that is regulated in a limited manner, given the Member States' reluctance to include it in Regulation 2016/1624. Article 53 indicates that the EBCG shall, in cooperation with the European Fisheries Control Agency and the European Maritime Safety Agency, "support national authorities carrying out coast guard functions at national and Union level and, where appropriate, at international level". In accordance with Regulation 656/2014, establishing rules for the surveillance of the external sea borders by Frontex⁸⁴³, the aim is to centralize, facilitate, and intensify cooperation between the numerous national authorities and the European agencies that carry out coastguard functions.

Among the several activities that involve coastguard functions (e.g. security, protection, search and rescue at sea, border control, control of fishing, customs control, police functions, and protection of the environment), the task of search and rescue to protect and save lives stands out due to the tragic situation in the Mediterranean. However, article 53 Regulation 2016/1624, which centers on European cooperation of coast guard functions, makes no reference to search and rescue to protect and save lives.

Article 8(1)(d) Regulation 2016/1624 merely states that one of the functions of the EBCG is to "assist Member States in circumstances requiring increased technical and operational assistance at the external borders by coordinating and organizing joint operations, taking into account that some situations may involve humanitarian emergencies and rescue at sea in accordance with Union and international law". As RIJPMA stresses, the absence of an explicit EBCG power in

⁸⁴² The opposition of the Member States to delegate a coastguard function to the EBCG is reflected in the outcome of the trialogue negotiations that Statewatch released. See, <http://bit.ly/2peZfGK>, (last accessed 15/03/2018).

⁸⁴³ 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, OJ L-189, 27.06.2014, pp. 93-107. See, DEL VALLE GÁLVEZ, Alejandro, "Los refugiados...", *op. cit.*, pp. 759-777; ESTEVE, Francina, "El rescate como nueva función europea en la vigilancia del Mediterráneo", *Revista CIDOB d'afers internacionals*, 111, 2015, pp. 153-172; SANTOS VARA, Juan and SANCHEZ-TABERNERO, Soledad, "In Deep Water: Toward a Greater Commitment for Human Rights in Sea Operations Coordinated by Frontex?", *European Journal of Migration and Law*, 18, 2016, pp. 65-87.

search and rescue operations is a major omission, given the tragic current situation at the Union's external borders and the fact that most maritime border control operations end up becoming rescue operations⁸⁴⁴.

In terms of return, the EBCG is in charge of coordinating and operationally assisting the Member States in returning third-country nationals, organizing its own initiative joint return operations, and financing or co-financing return operations from its budget. In particular, article 28(1) Regulation 2016/1624 states that “without entering into the merits of return decisions and in accordance with Directive 2008/115/EC, the Agency shall provide the necessary assistance and, at the request of one or several participating Member States, ensure the coordination or the organization of return operations, including through the chartering of aircraft for the purpose of such operations”. The EBCG's Executive Director is responsible for drafting a return plan that is binding on the agency and any participating Member State, and that covers all the steps for carrying out a collecting return operation (article 28(5) Regulation 2016/1624).

With the objective of further assisting and providing enhanced operational support to the requesting Member States in matters of return, the EBCG has a contingent of forced return monitors (article 29 Regulation 2016/1624), forced returns escorts (article 30 Regulation 2016/1624), and return specialists (article 31 Regulation 2016/1624). Lastly, the EBCG shall constitute tailor-made European return intervention teams to provide operational assistance and organization of return operations. Upon the request of a Member State or the EBCG's own proposal, the return intervention teams shall be deployed in the territory of a Member State that is facing a burden when returning third-country nationals (article 33 Regulation 2016/1624).

In regards to EBCG relations with third countries, the new agency shall facilitate, in line with Frontex' previous practice, technical and operational cooperation between the Member States and third countries. The EBCG is competent to sign work agreements, which shall respect EU Law, fundamental rights, and the principle of *non-refoulement*, with the authorities of third

⁸⁴⁴ RIJPMMA, Jorrit, “The proposal...”, *op. cit.*, p. 25.

countries in charge of border management⁸⁴⁵. In addition, the EBCG may deploy experts from its own staff as liaison officers in third countries. The main novelty regards circumstances requiring greater technical and operational assistance, in which the agency may conduct “actions at the external borders involving one or more Member States and a third country neighboring at least one of those Member States, subject to the agreement of that neighboring third country, including on the territory of that third country” (article 54(3) Regulation 2016/1624). This new external function raises important questions in regards to the delimitation of responsibility among the actors involved and the respect for fundamental rights, which are beyond the scope of this research⁸⁴⁶.

3. The Proposed Transformation of Easo into a European Union Agency for Asylum

Due to the unprecedented wave of asylum applications since 2015, the national asylum and reception systems were overburdened, increasingly requesting the assistance of Easo on the ground. In particular, Easo is currently openly interpreting its original legal framework and plays a key role in the Greek and Italian hotspots and in the implementation of the EU relocation program, the EU resettlement schemes, and the highly contested EU-Turkey statement. However, as was the case with Frontex, Easo was constantly confronted with the lack of a sufficient number of national experts to effectively and operationally provide the

⁸⁴⁵ These agreements signed by Frontex were widely criticized by the doctrine given its lack of transparency, difficult control and potential violation of fundamental rights. See, ABRISKETA URIARTE, Joana, “La dimensión externa del derecho de la Unión Europea en materia de refugio y asilo: un examen desde la perspectiva del non-refoulement”, *Revista de Derecho Comunitario Europeo*, 56, 2017, pp. 119-158; FINK, Melanie, “Frontex Working Arrangements: Legitimacy and Human Rights Concerns Regarding “Technical Relationships””, *Merkourios-Utrecht Journal of International and European Law*, 28(75) 2012, pp. 20-35; GARCÍA ANDRADE, Paula, “EU External Competences in the Field of Migration: How to Act Externally When Thinking Internally”, *Common Market Law Review*, 55, 2018, pp. 157-200; GARCÍA ANDRADE, Paula and MARTÍN, Iván, “EU Cooperation with Third Countries in the Field of Migration”, *Study for the European Parliament LIBE Committee*, PE 536.469, 2015; SANTOS VARA, Juan, “The External Activities of AFSJ Agencies: The Weakness of Democratic and Judicial Controls”, *European Foreign Affairs Review*, 20(1), 2015, pp. 118-136.

⁸⁴⁶ RIJPMMA, Jorrit, “The proposal...”, *op. cit.*, p. 23. See, RIJPMMA, Jorrit, “External Migration and Asylum Management: Accountability for Executive Action Outside EU-Territory”, *European Papers*, 2(2), 2017, pp. 571-596.

frontline Member States with emergency support⁸⁴⁷. It thus became increasingly necessary to broaden the initial mandate of Easo and balance its operational powers with those recently conferred to the EBCG.

The president of the European Commission, in his letter of intent accompanying the September 2015 State of the Union speech, announced that the CEAS, the Dublin System, and Easo would be comprehensively reviewed⁸⁴⁸. In April 2016, the European Commission confirmed that it was planning to amend Easo's mandate "so that it can play a new policy-implementing role and a strengthened operational role, and thereby facilitate the proper functioning of the Common European Asylum System"⁸⁴⁹. According to the Commission, the future Regulation establishing a EUAA would be along the same lines as the EBCG's legal framework. Namely, based on vulnerability assessments of the asylum situation at the Member States, the new agency would be responsible for supervising that the competent national authorities adhere to the common asylum standards and effectively implement the Dublin system and the CEAS. If the concerned Member States are subject to emergency situations or do not take necessary remedial actions to address the situation at their asylum and reception systems, the EUAA may "intervene" through enhanced and emergency support⁸⁵⁰.

The European Parliament recommended "that Easo be developed, in the long term, into a principal coordinator of the CEAS with a view to guaranteeing common application of the rules of that system; reiterates that, as the CEAS

⁸⁴⁷ Commission, "Commission Staff Working Document on the internal Evaluation of the European Asylum Support Office (Easo)", SWD(2014) 122 final, 27.03.2014, p. 7; Commission, "Second report on relocation and resettlement", COM(2016) 222 final, 12.04.2016, p. 4; Commission, "Fourth report on relocation and resettlement", COM(2016) 416 final, 15.06.2016, p. 5; MAIANI, Francesco, "The Reform of the Dublin III Regulation", *Study for the European Parliament LIBE Committee*, PE 571.360, 2016, p. 24; UNHCR, "Building on the Lessons Learned to Make the Relocation Schemes Work More Effectively", 2016, <http://www.refworld.org/docid/56a076e24.html> (last accessed 15/03/2018).

⁸⁴⁸ Commission, Letter of intent by President Juncker to the President of the European Parliament and the Council Presidency, 09.09.2015, https://ec.europa.eu/commission/sites/beta-political/files/letter-of-intent_en.pdf (last accessed 15/03/2018).

⁸⁴⁹ Commission, "Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe", COM(2016) 197 final, 06.04.2016, p. 12. See, GUILD, Elspeth and CARRERA, Sergio, "Rethinking asylum distribution in the EU: Shall we start with the facts?", *CEPS Commentary*, 17.06.2016, pp. 1-9.

⁸⁵⁰ *Ibid.*, p. 13.

becomes genuinely European, Easo needs to develop from a collection of experts from Member States into a fully-fledged Union agency providing operational support to Member States and at the external borders (...)”⁸⁵¹. The European Council and the Council also called for a reinforced role of Easo in order to promote the uniform application of the CEAS and the Council⁸⁵².

Finally, from May to July 2016, the Commission put forward a wide-ranging European Asylum package, aiming to reform the Regulations of Dublin⁸⁵³, Eurodac⁸⁵⁴, and the Reception Conditions Directive⁸⁵⁵. The European Asylum package also proposed the establishment of a common asylum procedure in the EU⁸⁵⁶, a Qualification Regulation⁸⁵⁷, a Union Resettlement Framework⁸⁵⁸, and a European Union Agency for Asylum⁸⁵⁹.

Although the Commission refers to the future EUAA as a fully-fledged agency for asylum matters in the EU, the agency is neither conferred decision-making powers regarding asylum applications, nor executive tasks on the ground. As with

⁸⁵¹ Parliament, “Resolution on the situation in the Mediterranean and the need for a holistic EU approach to migration”, 2015/2095(INI), 12.04.2016, para 68.

⁸⁵² European Council, “Conclusions 26/27 June 2014”, EUCO 79/14, 27.06.2014, para 7 and Council, “Outcome of the Council Meeting 3461st Council meeting Justice and Home Affairs”, doc. 8065/16, 21.04.2016, p. 10.

⁸⁵³ Commission, “Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)”, COM(2016) 270 final, 04.05.2016.

⁸⁵⁴ Commission, “Proposal for a Regulation of the European Parliament and of the Council on the establishment of Eurodac for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013”, COM (2016) 272 final, 04.05.2016.

⁸⁵⁵ Commission, “Proposal for a Regulation of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast)”, COM(2016) 465 final, 13.07.2016.

⁸⁵⁶ Commission, “Proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU”, COM(2016) 467 final, 13.07.2016.

⁸⁵⁷ Commission, “Proposal for a Regulation of the European Parliament and of the Council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents”, COM(2016) 466 final, 13.07.2016.

⁸⁵⁸ Commission, “Proposal for a Regulation of the European Parliament and of the Council establishing a Union Resettlement Framework and amending Regulation (EU) No 516/2014 of the European Parliament and the Council”, COM(2016) 468 final, 13.07.2016.

⁸⁵⁹ Commission, “Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010”, COM(2016) 271 final, 04.05.2016.

the mandate of Easo, the tasks to be conferred to the future EUAA are formally limited to “facilitate and improve the proper functioning of the CEAS and to assist Member States in implementing their obligations within the framework of CEAS, the European Union Agency for Asylum should provide Member States with operational and technical assistance (...)”⁸⁶⁰.

According to the Commission’s proposal for the EUAA, the mission of the new Regulation should consist in facilitating the effective and uniform implementation of the CEAS⁸⁶¹ and providing a strengthened operational support to Member States for the management of the asylum and reception systems, especially in cases of disproportionate pressure. With this mission in mind, the Commission, based on Article 78(1) and (2) of the TFEU, intends to transform Easo into an agency less dependent on the particular involvement of the Member States in the activities of the agency.

The Commission foresees very ambitious objectives for the new EUAA: “providing the necessary operational and technical assistance to Member States, increasing practical cooperation and information exchange among Member States, supporting a sustainable and fair distribution of applications for international protection, monitoring and assessing the implementation of the CEAS and the capacity of asylum and reception systems in Member States, and enabling convergence in the assessment of applications for international protection across the Union”⁸⁶². The following paragraphs analyze the operational powers that will be conferred to the future EUAA in order to achieve these objectives.

While the Council and the European Parliament reached an agreement on 28 June 2017 regarding all twelve chapters of the regulation on the future EUAA, “an overall agreement will only be possible once the linkages with the other

⁸⁶⁰ Commission, Proposal for a on the European Union Agency for Asylum, COM(2016) 271 final, 04.05.2016, Recital 16

⁸⁶¹ For a detailed analysis of the CEAS see, MAIANI, Francesco, “The Reform...”, *op. cit.*; CHETAIL, Vincent, DE BRUYCKER, Philippe, MAIANI, Francesco (eds.), *Reforming...*, *op. cit.*

⁸⁶² Commission, Proposal for a on the European Union Agency for Asylum, COM(2016) 271 final, 04.05.2016, p. 2.

legislative proposals in the CEAS package have been resolved”⁸⁶³. That is, the final adoption of the new EUAA Regulation will not take place until the whole asylum package is finalized. However, since negotiations are already well advanced, the definitive provisions of the Regulation on the EUAA will not substantially differ from the text partially agreed upon by the Council and the Parliament. This section thus studies the European Commission’s Proposal for a Regulation on the EUAA and the text partially agreed by the Council and the Parliament on 28 June 2017, which has been accessible to the public since 18 August 2017⁸⁶⁴.

3.1. The EUAA’s Monitoring Role

As examined above, the EBCG determines a technical and operational strategy for European integrated border management, to which the Member States shall conform to and abstain from conducting any activity that may jeopardize the attainment of the agency’s objectives (article 3 Regulation 2016/1624). While the EUAA is not mandated to set out a comprehensive strategy of asylum, the agency should guide the Member States on the situation in third countries of origin and

⁸⁶³ Council Press Release, “EU Agency for Asylum: Presidency and European Parliament reach a broad political agreement”, 431/17, 29.06.2017. See, Council, “Reform of the Common European Asylum System and Resettlement”, doc. 15057/1/17, 06.12.2017, p. 6. For instance, the cross-references between the future Dublin Regulation and the EUAA are constant. Specifically, article 49 Proposal for a Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) (COM(2016) 270 final, 04.05.2016) states that “the European Union Agency for Asylum shall set up and facilitate the activities of a network of the competent authorities referred to in Article 47(1), with a view to enhancing practical cooperation and information sharing on all matters related to the application of this Regulation, including the development of practical tools and guidance”.

⁸⁶⁴ Council, “Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010 – State of play and guidance for further work”, doc. 10555/17, 27.06.2017. Public access was requested to the Council to the note of 4 December 2017 from the Presidency to the Permanent on the European Union Agency for Asylum (doc. 14985/17) but such access was denied since “the note gives details of the on-going discussion and identifies sensitive issues that need to be addressed before the Council can reach an agreement. Release to the public of the information contained in this document would affect the negotiating process and diminish the chances of the Council reaching an agreement as it may put delegations under additional pressure of stakeholders”. In this regard see, Appendix A: “public access to documents”.

“ensure greater convergence and address disparities in the assessment of applications for international protection”⁸⁶⁵.

Although Easo is already responsible for gathering and analyzing information on COI (article 4 Regulation 439/2010), the EUAA shall “develop a common analysis on the situation in specific countries of origin and guidance notes to assist Member States in the assessment of relevant applications” (article 10(1) partial agreement EUAA). Importantly, as soon as the guidance notes, accompanied by the common analysis, are endorsed by the EUAA’s Management Board, the Member States will be obliged to take them into account when examining applications for international protection, without prejudice to their competence for deciding on individual applications (article 10(2a) partial agreement EUAA).

In a similar vein, the new monitoring role of the EUAA will also indirectly shape a common strategy of asylum in the EU. A key difference between Easo and the future EUAA lies in its monitoring role, in order to guarantee that the national authorities are sufficiently prepared to manage exceptional and sudden pressure in their asylum and reception systems. Should the EUAA’s information analysis raise serious concerns regarding the functioning or preparedness of a Member State’s asylum or reception systems, the agency may initiate a monitoring exercise on its own initiative or at the request of the European Commission (article 14(2) partial agreement EUAA).

The Member State concerned will receive the findings of the monitoring exercise as well as the draft recommendations of the EUAA’s Executive Director for comments. As soon as the agency takes the concerned Member State’s comments into account, the EUAA’s Management Board shall, by a decision of two-thirds of its members with a right to vote, adopt those recommendations (article 14(3a) partial agreement EUAA). As with the EBCG’s vulnerability assessments (article 13 Regulation 2016/1624), the future EUAA may be conferred a significant recommendatory power to put forward measures to be taken by the

⁸⁶⁵ Commission, Proposal for a on the European Union Agency for Asylum, COM(2016) 271 final, 04.05.2016, p. 7.

national authorities. Nevertheless, Member States will still maintain indirect control of the EUAA's recommendations through the enhanced majority that is required in the Management Board.

Moreover, whereas the Commission did not initially propose the possibility for the EUAA's Executive Director to appoint experts from the staff of the agency to be deployed as liaison officers in Member States, the provisional text agreed on 28 June 2017 indicates that liaison officers "shall foster cooperation and dialogue between the Agency and the Member States' authorities responsible for asylum and immigration and other relevant services" (article 14a(3) partial agreement EUAA). Like the EBCG's liaison officers, the EUAA liaison officers will facilitate the monitoring role of the agency by reporting regularly to the Executive Director on the situation of asylum in the concerned Member State and on its capacity to manage its asylum and reception systems effectively (article 14a(3) partial agreement EUAA).

The future EUAA will be in charge of monitoring "the operational and technical application of the CEAS in order to prevent or identify possible shortcomings in the asylum and reception systems of Member States and to assess their capacity and preparedness to manage situations of disproportionate pressure so as to enhance the efficiency of those systems" (article 13(1) partial agreement EUAA). With this aim in mind, the agency shall namely assess the national procedures for international protection, staff available, and capacity and reception conditions (i.e. infrastructure, equipment, or financial resources), on the basis of the information provided by the Member State concerned, the relevant intergovernmental organizations or bodies, and the analysis on the situation of asylum and on-site visits that the agency may undertake (article 13 (3) and (4) partial agreement EUAA). The new EUAA's monitoring task shall ultimately contribute to the effective and harmonized implementation of the CEAS by the Member States⁸⁶⁶.

⁸⁶⁶ See, UNHCR, "Comments on the European Commission proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum – COM (2016) 271", December 2016, pp. 13-14 and ECRE, "Comments on the Commission Proposal for a

3.2. *The EUAA's Greater Operational Tasks*

While the powers conferred to Frontex were progressively amended since its establishment, the future EUAA Regulation aims to strengthen the operational tasks conferred to the agency even more so than those functions initially conferred to Easo. The EUAA will be in charge of organizing and coordinating the appropriate operational support at the request of the Member States or upon the initiative of the agency in cases where the national asylum and reception systems are subject to exceptional pressure.

The operational role of the EUAA will specifically consist in: 1) assisting Member States in receiving and registering applications for international protection; 2) facilitating the examination of applications for international protection; 3) advising, assisting or coordinating the set up or the provision of reception facilities by the Member States; 4) forming part of the migration management support teams at hotspot areas; 5) supporting Member States in identifying applicants in need of special procedural guarantees, applicants with special reception needs, or other persons in a vulnerable situation, as well as in referring those persons to the competent national authorities for appropriate assistance; and 6) deploying ASTs and technical equipment (article 16(2) partial agreement EUAA).

Concerning the deployment of ASTs by the EUAA to provide operational and technical assistance, the Executive Director will be in charge of determining the composition of each team, consisting “of experts from the Agency’s own staff, experts from Member States or experts seconded by Member States to the Agency” (article 19A(1) partial agreement EUAA). Following the lead of the EBCG’s Rapid Reaction Pool, an asylum reserve pool of a minimum of 500 persons shall be made available by the Member States for their immediate deployment and shall assist those national authorities subject to extraordinary

Regulation on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010 COM(2016) 271”, July 2016, pp. 11-14.

migratory pressure (article 19A(6) partial agreement EUAA). As article 25 Regulation 2016/1624 on the EBCG provides, the EUAA's Executive Director may suspend or terminate the deployment of the ASTs if the conditions to carry out the operational and technical measures are no longer fulfilled, the operational plan is not respected, or serious breaches of fundamental rights exist (article 19(5) partial agreement EUAA).

Since the future EUAA will deploy experts from its own staff to form part of the ASTs, with the goal of reducing the dependence of the agency on the technical equipment of the Member States, the EUAA may also deploy its own equipment to the host Member State insofar as this may complement equipment already made available by the host Member State or other Union agencies (article 23(1) partial agreement EUAA). It remains to be seen whether the future agency will be allocated sufficient resources to purchase, lease, or effectively manage its own equipment.

The Executive Director, in cooperation with the host Member State, will be responsible for preparing an Operational Plan detailing the conditions for the deployment of ASTs. The Operational Plan will be binding on the EUAA, the host state, and the participating states (article 19(2) partial agreement EUAA). In addition to the organizational aspects already included in article 18 Regulation 439/2010 of Easo in regards to the Operating Plan, the EUAA's Operational Plan will set out the specific tasks and responsibilities of the ASTs in assisting the Member States and will examine the applications for international protection, as well as detail the measures for referring vulnerable persons in need of international protection to the competent national authorities for appropriate assistance (article 19(2)(i) and (l) partial agreement EUAA).

The "Union Contact Point" of Easo will also be transformed into a Coordinating Officer, with the aim of guaranteeing adequate and efficient coordination on the ground between the host Member State and the participating Member States and fostering the operational and technical assistance of the agency. Specifically, the Coordinating Officer shall monitor, report, and assist in resolving any disputes concerning the correct

implementation of the operational plan and the deployment of the ASTs (article 25 partial agreement EUAA).

Lastly, the future Regulation on the EUAA details the functions of the agency in the recently established hotspots⁸⁶⁷. Upon the request of a Member State facing an exceptional and sudden migratory pressure, the Executive Director should draw up a comprehensive reinforcement package consisting of various activities coordinated by the relevant Union agencies, and deploy ASTs as part of migration management support teams (article 21(1) partial agreement EUAA). Particularly, the EUAA will assist the competent national authorities in screening (i.e. identifying, registering, and when requested by the host Member State, fingerprinting) third-country nationals, providing the disembarked migrants in the hotspots with information regarding the procedure for international protection, registering their applications, and when requested by the host Member State, examining such applications (article 21(2) partial agreement EUAA).

3.3. *The EUAA's Competence to Intervene*

According to the Commission's proposal, the EUAA may make an emergency intervention if the functioning of the CEAS is jeopardized due to: the insufficient action of a Member State in addressing the disproportionate pressure on the asylum and reception systems in such State (article 22(1) partial agreement EUAA), the refusal of the competent national authorities to request or accept assistance from the EUAA (article 22(1) partial agreement EUAA), or the unwillingness of a Member State to comply with the Commission's recommendations to implement an action plan intended to address serious shortcomings identified during a monitoring assessment (article 14(3a) partial agreement EUAA). As was the case with the adoption of the EBCG, some Member States expressed their opposition to indirectly bestowing "intervention powers"

⁸⁶⁷ See chapter 5 section IV.3.2.

upon the future EUAA⁸⁶⁸.

The procedure set out in article 19(1) Regulation 2016/1624 of the EBCG, regarding situations at the external borders requiring urgent action, will to a more limited extent, be replicated for the EUAA. While the proposal for a Regulation on the EUAA originally stated that the Commission would be the EU institution in charge of adopting a decision by means of an implementing act to support the Member State concerned, the EUAA's provisional text states that the Council shall be the authority responsible for adopting such an implementing act.

Three days after the Council adopts its implementing act, the EUAA's Executive Director should draw up an Operational Plan and determine the details of the practical implementation of the Council decision (article 22(2) partial agreement EUAA). Subsequently, the Member State concerned will have three days to reach an agreement with the Executive Director on the Operational Plan and should immediately cooperate with the agency to facilitate the practical execution of the measures put forward (article 22(4) partial agreement EUAA). The future Regulation of the EUAA does not include a similar provision like article 19(10) Regulation 2016/1624, which indicates that if a Member State neither executes the decision adopted by the Council, nor agrees with the EBCG's Director Operational Plan within 30 days, the European Commission may authorize the re-establishment of border controls in the Schengen area.

⁸⁶⁸ Senate of the Parliament of the Czech Republic, 10th Term 515th Resolution of the Senate Delivered on the 27th session held on 24th August 2016 on the Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010, <http://bit.ly/2yUoRj2> (last accessed 20/04/2018) and Opinion of the Foreign and European Union Affairs Committee of the Senate of the Republic of Poland on the Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum repealing Regulation (EU) No 439/2010 COM(2016)271 adopted at the meeting of 28 September 2016, <http://bit.ly/2yvje6U> (last accessed 20/04/2018).

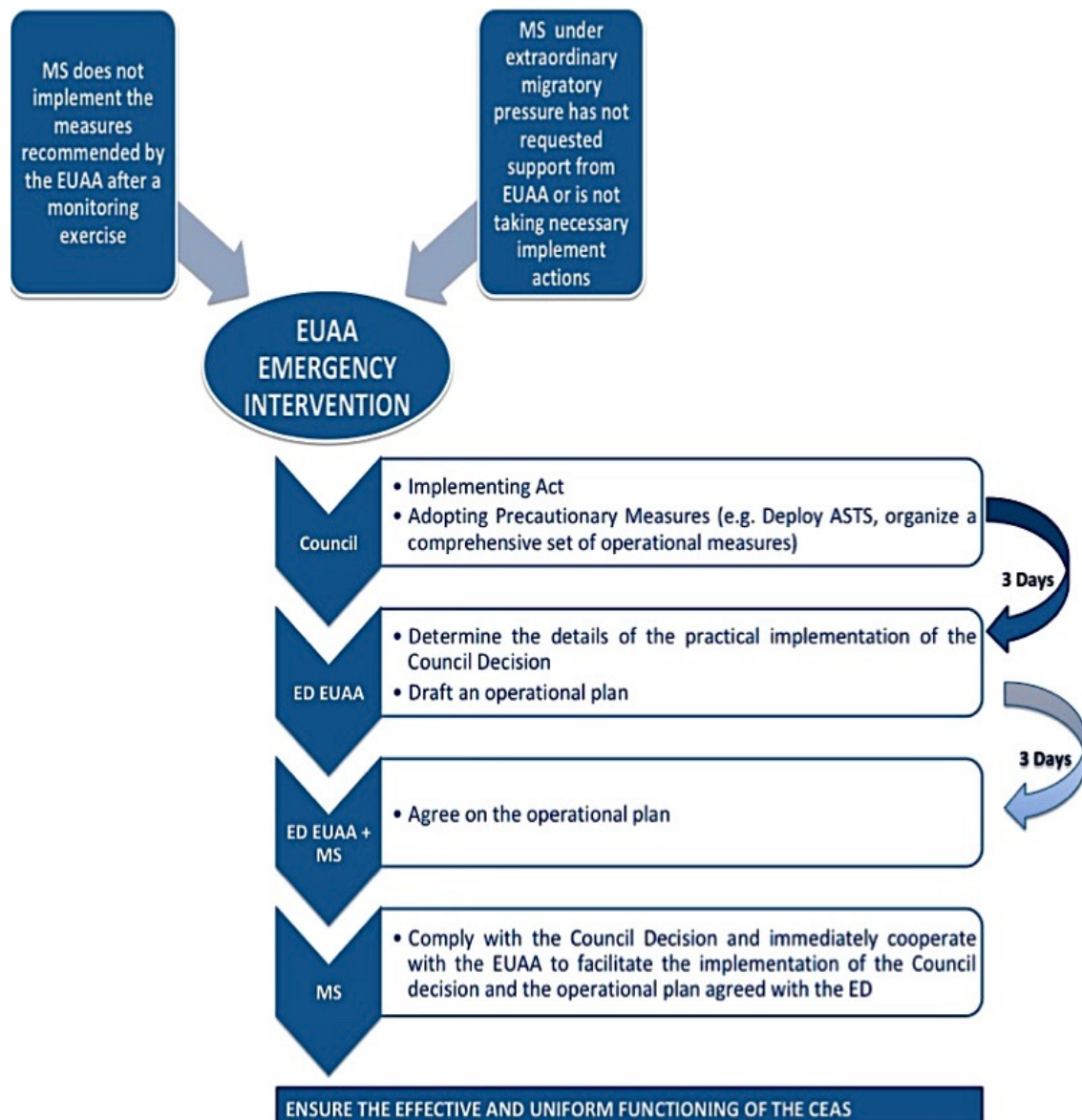


Figure 21: EUAA's Emergency Intervention. Source: Author's own elaboration.

3.4. *The EUAA's Role in Examining Applications for International Protection*

The negotiations regarding the final text of recital 46 of the EUAA's Regulation reveal the tensions for regulating and limiting the future "examination powers" of the agency. The text put forward by the European Commission for the recital 46 states that "the competence to take decisions by Member States' asylum authorities on individual applications for international protection remains with Member States".

The European Commission clearly establishes that the EUAA cannot be conferred decision-making powers. The European Parliament, however, adds that this limitation should not preclude “the joint processing of applications for individual protection by a Member State and the Agency at the request of the Agency and within the framework set out in an operational plan agreed between the host Member State and the Agency”. The Council considers that “the competence of Member States’ asylum authorities to take a decision on individual applications for international protection should remain unaffected”.

Consequently, it remains to be seen whether the EUAA will be able to jointly process applications for international protection, and if it cannot, to what extent the agency may support the processing of asylum applications. In this regard, The Hague⁸⁶⁹ and Stockholm⁸⁷⁰ programs requested that the European Commission conduct a study on the feasibility of joint processing of asylum applications in the EU.

Finally, the Commission adopted such a study in 2013, in which the concept of “joint processing” was defined as “an arrangement under which all asylum claims within the EU are processed jointly by an EU authority assuming responsibility for both preparation and decision on all cases, as well as subsequent distribution of recognized beneficiaries of international protection and return of those not in need of protection”⁸⁷¹.

The 2013 study of the European Commission on joint processing puts forward four options that progressively move from supporting the Member States in processing asylum applications to designing a centralized EU authority with decision-making powers, which would be responsible for all asylum processing. Currently, the Member States are solely competent to adopt decisions concerning the admissibility of applications for international protection, and Easo is

⁸⁶⁹ European Council, “The Hague Programme: Strengthening Freedom, Security and Justice in the European Union”, OJ C-53, 03.03.2005, p. 4.

⁸⁷⁰ European Council, “The Stockholm Programme — An open and secure Europe serving and protecting citizens”, OJ C-115, 04.05.2010, p. 32.

⁸⁷¹ Commission, “Study on the Feasibility and legal and practical implications of establishing a mechanism for the joint processing of asylum applications on the territory of the EU”, 13.02.2013, p. 114. See, Easo, “Joint Processing Pilots”, September 2015. See also, GARLICK, Madeline, *Solidarity under Strain...*, *op. cit.*, pp. 268-278.

mandated to operationally support the competent national authorities in preparing and reaching such decisions⁸⁷².

The next level of European integration would consist in introducing the mechanism of joint processing in situations where a Member State is subject to an extraordinary number of asylum applications. Joint processing teams of Easo would be deployed and make recommendations on asylum cases to the requesting Member State, which would continue to have exclusive decision-making powers⁸⁷³.

The ASTs of Easo deployed in the Greek hotspots adopt recommendations in practice on the admissibility of the international protection applications⁸⁷⁴. Such recommendations are largely rubberstamped by the Greek officials when adopting a final decision. Precisely, the future EUAA, upon the request of a concerned Member State, will formally be conferred the power to examine applications for international protection in the hotspots, as well as the task to facilitate the examination of such applications, not necessarily under the hotspot approach, by the competent national authorities.

However, the future EUAA will be very far from processing and deciding, in first instance and in appeal, every asylum application within the EU. Instead, the European Commission has opted to reinforce the operational tasks of Easo and maintain the Member States as the exclusive decision-making authorities. Centralizing the asylum decision-making process would ensure a full harmonization of the national procedures and would foster a consistent evaluation of the protection needs. Nevertheless, this option demands a “major institutional transformation” and “substantial resources” that can only be envisioned in the long-term⁸⁷⁵. In other words, the transformation of Easo into an agency with decision-making powers to process all of the applications for international protection in the EU is still a rather hypothetical scenario since the

⁸⁷² *Ibid.*, p. 114.

⁸⁷³ *Ibid.*, p. 3.

⁸⁷⁴ See, chapter V, section IV.3.2.

⁸⁷⁵ Commission, “Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe”, COM(2016) 197 final, 06.04.2016, p. 9 and Commission, “European Agenda on Migration”, COM(2015) 240 final, 13.05.2015, p. 17.

Member States' sovereignty would be challenged, a complete overhaul of Easo and all CEAS legislation would be required, and a specialized court or board would need to be created⁸⁷⁶.

Moreover, there are doubts as to whether article 78(2) TFEU is a sufficient legal basis for conferring the power to exclusively adopt binding decisions on all asylum claims to a EU authority. Pursuant article 78(2) TFEU, the EU shall ensure: "(...) common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status". On the one hand, TSOURDI believes a EU-level processing scenario, in which decisions would be made entirely by a EU authority instead of the Member States, to be legally impossible under article 78(2)(e) TFEU, "which envisages that 'a Member State' is ultimately responsible for the examination of an application"⁸⁷⁷. On the other hand, the 2013 Commission's study on the feasibility of joint processing of asylum applications in the EU considered that article 78(2) TFEU, read together with articles 78(1) and 80 TFEU, represent an adequate legal basis and open up the possibility for a completely harmonized, EU-based approach for the joint processing of asylum applications within the EU⁸⁷⁸.

IV. CONCLUSION

In spite of the pretentious character of the new names of Frontex and Easo, their original core missions remain unchanged. The Member States do not see their enforcement, decision-making, and coercive prerogatives as limited, since these agencies' operational powers have only been strengthened and provided with a novel supervisory and monitoring role to ensure the effective functioning of the Schengen space and the CEAS. Europol's operational assistance in national migrant smuggling and human trafficking investigations is also growing. Europol

⁸⁷⁶ Commission, "Study on the Feasibility and legal and practical implications of establishing a mechanism for the joint processing of asylum applications on the territory of the EU", 13.02.2013, pp. 109-110.

⁸⁷⁷ TSOURDI, Evangelia, "Bottom-up Salvation?...", *op. cit.*, p. 1012.

⁸⁷⁸ Commission, "Study on the Feasibility and legal and practical implications of establishing a mechanism for the joint processing of asylum applications on the territory of the EU", 13.02.2013, p. 75.

is beginning to develop a significant and unprecedented presence on the ground to directly and closely support the Member States in operationally dismantling migrant smuggling and trafficking of human beings organizations.

The EBCG, the future EUAA, and the reinforced Europol shall ensure an effective and uniform functioning and application of EU border management, migration, and asylum policies at the national and local level. That is, these AFSJ agencies are called to develop a more prominent and active role in policy implementation. These AFSJ agencies' are not mandated to merely providing the Member States with technical and operational assistance, but also with tasks that have a truly operational nature in practice.

The operational presence of Europol on the ground will increase the agency's capability to indirectly steer national smuggling and trafficking investigations⁸⁷⁹. In comparison to Frontex, the EBCG has been strengthened in terms of its monitoring and supervision capacity, as well as in its operational autonomy. The future EUAA will also have an indirect impact on the examination of applications of international protection. Additionally, the EUAA will provide the national asylum systems with reinforced operational and monitoring assistance, and will ultimately shape the implementation of the CEAS.

⁸⁷⁹ In this regard the second EMSC Activity Report states that “over the coming years the EMSC will continue prioritizing and further developing its operational support based on emerging threats related to migrant smuggling, in accordance with the current operational realities and requirements from the EU Member States”. Europol, “Two Years of EMSC Activity Report Jan 2017-Jan 2018”, 20.04.2018, p. 26.

CHAPTER 5. Reinforced Operational Cooperation among Frontex, Easo, and Europol: From Working Arrangements to the Introduction of the Hotspot Approach

The EBCG and the future EUAA shall guarantee and even intervene if a concerned Member State's actions and/or omissions may respectively jeopardize the effective functioning of the Schengen area or the CEAS. Europol may launch and carry out investigations and those Member States that decide not to participate are obliged to justify their reasoning. The EBCG, the EUAA, and Europol have thus been vested incipient monitoring and recommendatory powers, as well as important operational tasks to further assist the concerned Member States on the ground.

Not only are the operational and overseeing tasks of Frontex, Easo, and Europol reinforced, but their multilateral cooperation on the ground to assist the frontline Member States has also been expanded after the adoption of the hotspot approach. Gradually, these AFSJ agencies have been assigned operational tasks on closely intertwined matters, which require their coordination and cooperation to prevent overlaps, duplications, and working silos. That is, the shared policy areas in which Frontex, Easo, and Europol operate increasingly demand an efficient, transparent, and accountable inter-agency cooperation.

While Frontex, Easo, and Europol were already cooperating on a bilateral and multilateral basis before the hotspot approach was designed in 2015, the “refugee crisis” revealed the need to develop a more systematic and operational cooperation of these agencies on the territory of the Member States. Precisely, in 2015, the European Agenda on Migration introduced a system of enhanced cooperation, the hotspot approach, with the aim of facilitating rapid and

integrated intervention of EU AFSJ agencies in Member States subject to a specific and disproportionate migratory pressure at their external borders. The hotspot approach is based on articles 78(3) and 80 TFEU, which provide that if a Member State is facing a sudden and exceptional influx of migrants, the EU may adopt provisional measures in accordance with the principles of solidarity and fair sharing of responsibility.

This chapter firstly examines the concept of operational cooperation, its implications and application to Frontex, Easo, and Europol. Secondly, the evolution of the bilateral and multilateral operational cooperation between Frontex, Easo, and Europol is studied. Subsequently, the functioning and the reinforced operational cooperation in the hotspots among Frontex, Easo, and Europol are analyzed. This chapter concludes by analyzing the recently established hotspot approach, its limitations, and its impact in effectively assisting the Member States in applying migration, border management, and asylum policies.

I. INTER-AGENCY COOPERATION IN THE EU AREA OF FREEDOM, SECURITY AND JUSTICE

The administration of the AFSJ is fragmented, with several agencies vested similar tasks or in charge of assisting the Member States in regards to similar policy subjects. Such overlap and duplication is very likely to arise in fragmented policy matters like the AFSJ. For this reason, the agencies participating in the AFSJ shall cooperate, yet at the same time, preserve their uniqueness and added value.

Effective inter-agency cooperation encourages the exchange of information, best practices, resources, and synergies, as well as strengthens the capabilities, mutual understanding, and operability of each agency, leading to greater future cooperation. A consistent and well-articulated AFSJ demands complementarity between all of the institutional actors concerned, which in turn, “requires respect for each other’s mandate and expertise as well as good communication, and

coordination in case of an overlap”⁸⁸⁰. Nonetheless, inter-agency cooperation remains challenging in the AFSJ since the participating agencies need to compete to maintain control over their specific policy matters, they were created under different institutional contexts, and their legal framework, powers, and cooperation have been vaguely and flexibly defined.

The internal and horizontal cooperation among Frontex, Easo, and Europol can occur in a formal and informal manner. Regarding formal cooperation, these EU AFSJ agencies have signed bilateral memorandums of understanding to regulate and define the cooperation among them. The agreements adopted cover topics ranging from information, training, and data exchange to sharing best practices, threat assessments, risk analyses, or equipment. Additionally, Frontex, Easo, and Europol participate and cooperate in joint operations.

Informal cooperation between Frontex, Easo, and Europol is as important, if not more important, than formal cooperation. These AFSJ agencies hold meetings and conversations, share practices, exchange information, and work together to closely consider the actions, operations, and analyses that their counterparts undertake. Informal coordination, based on personal relationships of trust and mutual respect, significantly contributes and complements the agencies’ formal cooperation. Nevertheless, the main issue in relation to informal cooperation is the difficulty to track, measure, and assess its impact.

Inter-agency cooperation in migration, border management, and asylum policy matters has become a key priority at the EU level⁸⁸¹. The EU AFSJ agencies, whose tasks are closely connected, are progressively reinforcing their cooperation, or are at least ensuring that they work in a compatible manner⁸⁸². In

⁸⁸⁰ WEYEMBERG, Anne, ARMADA, Inés and BRIÈRE, Chloé, “The inter-agency cooperation...”, *op. cit.*, p. 6. See, TRAUNER, Florian, “The internal-external security nexus: more coherence under Lisbon?”, *European Union Institute for Security Studies*, 89, 2011, pp. 1-40.

⁸⁸¹ The need of cooperation and coherence between EU agencies is not exclusive of the AFSJ. See, Euréval, “Meta-study on decentralized agencies: cross-cutting analysis of evaluation findings”, September 2008, pp. 32-42; Ramboll, “Evaluation of the EU decentralized agencies in 2009 - Final Report Volume II - Conclusions at System Level”, December 2009, pp. 67-81.

⁸⁸² See, ARGOMANIZ, Javier, “A ‘Coordination Nightmare’? Institutional Coherence in European Union Counter-Terrorism” in KAUNERT, Christian, LÉONARD, Sarah and PAWLAK, Patryk, *European Homeland Security: A European Strategy in the Making?*, London: Routledge, 2012, pp. 72-94; CHRISTIANSEN, Thomas, “Intra-institutional politics and inter-institutional relations in the EU: towards coherent governance?”, *Journal of European Public Policy*, 8(5), 2001, pp. 747-769; DONAIRE VILLA, Francisco Javier, “¿De qué hablamos cuando hablamos de coordinación en el

particular, the legal instruments establishing Frontex, Easo, and Europol called for the promotion of a formal cooperation between them.

Article 13 Regulation 2007/2004 of Frontex stated that “the Agency may cooperate with Europol and the international organizations competent in matters covered by this Regulation in the framework of working arrangements concluded with those bodies, in accordance with the relevant provisions of the Treaty and the provisions on the competence of those bodies”.

Article 22(1) Council Decision of 6 April 2009 establishing Europol indicated that “in so far as it is relevant to the performance of its tasks, Europol may establish and maintain cooperative relations with the institutions, bodies, offices and agencies (...) in particular: (...) (c) the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex)”.

Lastly, article 52 Regulation 439/2010, creating Easo, pointed out that “the Support Office shall cooperate with the bodies of the Union having activities relating to its field of activity, and in particular with Frontex and FRA and with international organizations competent in matters covered by this Regulation, within the framework of working arrangements concluded with those bodies, in accordance with the TFEU and the provisions on the competence of those bodies”.

According to the Regulations establishing Frontex and Easo and the Council Decision designing Europol, these agencies are called to “cooperate”. Cooperation not only entails an informal communication among them, but also a more formalized inter-agency exchange, with the aim of effectively attaining their objectives. Nevertheless, more cooperation leads to an attenuation of these agencies’ independence, which may jeopardize their organizational uniqueness and may require them to undertake additional tasks⁸⁸³.

ámbito de la Unión Europea, y por tanto, del ELSJ?” in DONAIRE VILLA, Francisco Javier and OLESTI RAYO, Andreu, *Técnicas y ámbitos de coordinación en el Espacio de Libertad, Seguridad y Justicia*, Madrid: Marcial Pons, 2015, pp. 39-46; HERTOOG, Leonhard and STROB, Simon, “Coherence in EU External Relations: Concepts and Legal Rotting of an Ambiguous Term”, *European Foreign Affairs Review*, 18, 2013, pp. 373-388.

⁸⁸³ See, BUSUIOC, Madalina, “Friend or Foe?...” , *op. cit.*, p. 44.

Any type of inter-agency cooperation primarily aims to overcome fragmentation, duplication, and overlap. Fragmentation may take place when Frontex, Easo, and Europol are competent over a same policy area. In fact, migration, asylum, and border management are characteristically fragmented policy matters, where duplication is very likely to arise when Frontex, Easo and Europol engage in similar operational tasks or provide parallel support to the same national authorities. Under these circumstances, overlap may also occur as a result of Frontex, Easo, and Europol having related objectives, engaging in analogous activities to attain such objectives, and assisting the same Member States. Against this background, in our view, three theoretical approaches are used as potential scenarios to analyze issues that affect two policy fields simultaneously and in which two different agencies may exert their influence. As can be seen in figure 22, the first approach encompasses a lack of cooperation among agencies, with the second approach promoting inter-agency cooperation, and the third approach merging the existing agencies.

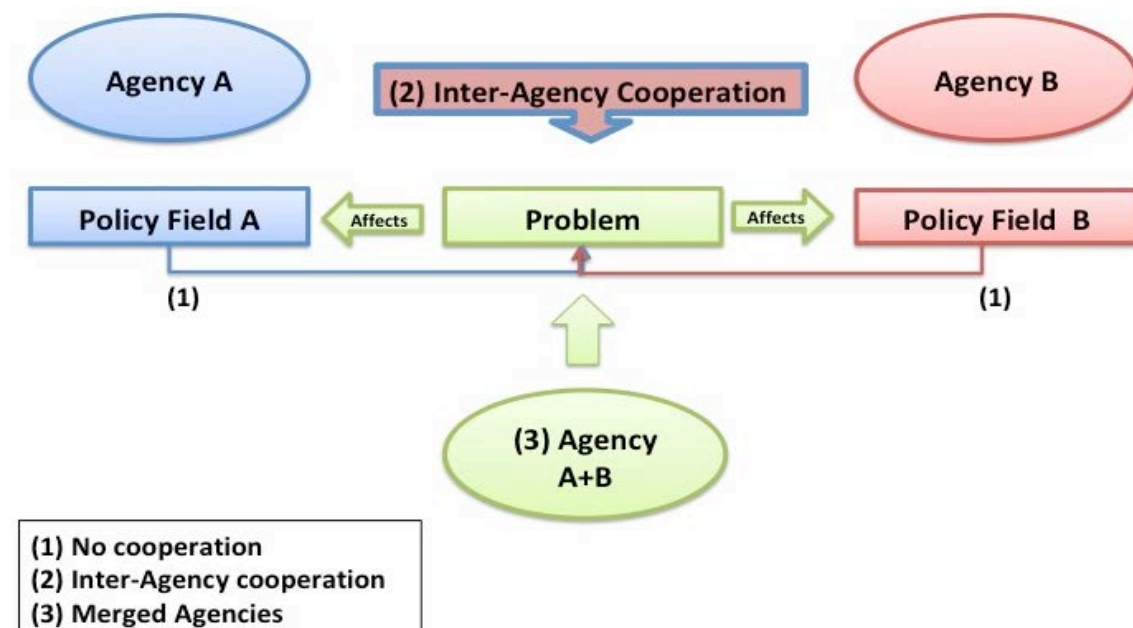


Figure 22: cooperation scenarios that may arise when an issue affects two policy fields at the same time, and in which two different agencies may exert their influence. Source: Author's own elaboration.

To illustrate these three scenarios set out in figure 22, Frontex (agency A) and Easo (agency B) can be taken as a first scenario. The objective of Frontex is to assist the competent national authorities in effectively managing their external

borders (policy field A) and Easo's goal consists in supporting the Member States in effectively and uniformly applying the CEAS (policy field B). However, Frontex and Easo may be confronted with an issue (e.g. a sudden and exceptional arrival of mixed migration flows at the external border of a Member State) that concurrently affects the mandate of both agencies. In such a situation, Frontex and Easo may separately and independently tackle the common issue. In this case, although the agencies would see their independence and authority untouched, duplication and overlap may arise. Thus, such a problem affecting Frontex and Easo may be tackled incoherently, inconsistently, and insufficiently, since the scope of the policy problem requires the interaction of both agencies.

The second scenario would consist in Frontex and Easo cooperating and exerting a greater influence over the common policy issue. Inter-agency cooperation would promote a coherent and consistent approach and encourage joint workings, since each agency exerts a coordinated degree of power over the common policy area. Overlaps and duplication may still occur under this scenario, but fragmentation should diminish, since coordination may increase the effectiveness and consistency of the agencies' action.

According to a study commissioned by the European Parliament, there are several causes hindering a fully effective inter-agency cooperation in the AFSJ: 1) these agencies were designed under different times, contexts, and decisional frameworks (i.e. Europol was negotiated and established under the Treaty of Maastricht, Frontex under the Treaty of Nice, and Easo under the current Treaty of Lisbon); 2) Frontex, Easo, and Europol are driven by different philosophies, natures, and logics; 3) these agencies present distinctive structures, resources available, and professional cultures; 4) the Regulations governing these agencies remain vague in regards to cooperation, leaving the agencies to develop their inter-agency relationships themselves⁸⁸⁴.

While inter-agency cooperation is highly desirable in fragmented policy matters like migration, asylum, and border management, the agencies involved

⁸⁸⁴ WEYEMBERG, Anne, ARMADA, Inés and BRIÈRE, Chloé, "The inter-agency cooperation and future architecture of the EU criminal justice and law enforcement area", *Study for the European Parliament LIBE Committee*, PE 510.000, 2014, pp. 8-9.

may face difficulties in achieving an effective coordination. Namely, the mandate and tasks of the agencies may present conflicting priorities and goals, or cooperation between the agencies may lead to competition to gain further control over the common policy field, which may limit the agencies' autonomy, flexibility, and functions. Hence, effective and attractive cooperation between agencies over a common policy demands a clear legal framework that provides the shared objectives of the agencies and ensures the autonomy of each agency. Otherwise, in a strong cooperation scheme, the participating agencies may become competitors to gain further influence and independence.

The third scenario depicted in figure 22 consists of the EU legislature deciding to either merge Frontex and Easo into a single agency, or to design a central department to vertically coordinate every task conferred to Frontex and Easo⁸⁸⁵. The Common Approach for EU Agencies stated that “merging agencies should be considered in cases where their respective tasks are overlapping, where synergies can be contemplated or when agencies would be more efficient if inserted in a bigger structure”⁸⁸⁶. While the creation of a single agency would obviously remove any risk of overlap or duplication, the uniqueness and added value of each agency would also disappear. In practice, the merge of agencies is a rather hypothetical scenario due to the agencies' constant rejection of such an option, and the questionable logic behind the combination of agencies with different natures of tasks.

In the AFSJ, two cases regarding the merging of EU agencies were unsuccessfully negotiated: the EIGE with the FRA, and Europol with Cypol. On

⁸⁸⁵ In this regard see, BRADY, Hugo, “Europol and the European criminal intelligence model: a non-state response to organized crime”, *Policing: A Journal of Policy and Practice*, 2(1), 2008, pp. 103-109; CARRERA, Sergio, *et al*, “The European Border and Coast Guard...”, *op. cit.*, p. 56; DEN HEIJER, Maarten, RIJPM, Jorrit, SPIJKERBOER, Thomas, “Coercion, prohibition, and great expectations: The continuing failure of the Common European Asylum System”, *Common Market Law Review*, 53(3), 2016, pp. 607-642; GOODWIN-GILL, Guy, “Refugees and Migrants at Sea: Duties of Care and Protection in the Mediterranean and the Need for International Action”, *Notes for a Presentation Jean Monnet Centre of Excellence on Migrants' Rights in the Mediterranean University of Naples 'L'Orientale*, 2015, pp. 1-16; GUILD, Elspeth, “Does the EU Need a European Migration and Protection Agency?”, *International Journal of Refugee Law*, 28(4), 2016, pp. 585-600. See also, Ramboll, “Evaluation of the EU decentralized agencies in 2009 - Final Report Volume I Synthesis and prospects”, December 2009, pp. 36-37.

⁸⁸⁶ Joint Statement of the European Parliament, the Council of the EU and the European Commission on decentralized agencies, “Annex: Common Approach”, 19.07.2012, p. 3.

the one hand, the European Commission assessed, in its Proposal for a Regulation establishing the EIGE, whether the tasks of the Institute should be included within the remit of the FRA. The Commission finally argued that the creation of a separate agency was justified due to “the advanced state of development and the specificity of gender equality policy, which goes beyond the fight against discrimination and the respect of a fundamental right”⁸⁸⁷.

On the other hand, the Commission’s proposal to merge Europol and Cepol was subject to greater public scrutiny and debate. According to the Commission, such a merge “would create important synergies and efficiency gains (...), would help identify training needs (...), duplication of support functions in the two agencies would be avoided, and resulting savings could be redeployed and invested in core operational and training functions (...)”⁸⁸⁸.

Europol and Cepol showed their opposition to being merged since they considered their missions, tasks, and mandates to be different from one another, and never viewed their cooperation as being strong enough to justify their merge⁸⁸⁹. The European Parliament also rejected the integration of Cepol into Europol, arguing that these agencies would lose their autonomy and uniqueness, and since Europol and Cepol were also conducting their tasks effectively and in close cooperation, their merge would be undesirable⁸⁹⁰.

Duplication and overlaps among Frontex, Easo, and Europol can be minimized without establishing a single entity if the mission, mandate, and tasks of these two agencies are clearly defined and distinctly delineated. In other

⁸⁸⁷ Commission, “Proposal for a Regulation of the European Parliament and of the Council establishing a European Institute for Gender Equality”, COM(2005) 81 final, 08.03.2005, p. 4. See, House of Lords (European Union Committee), “Proposed European Institute for Gender Equality”, 24th Report of Session 2005–06, 14.02.2006; House of Lords (European Union Committee), “Human rights protection in Europe: the Fundamental Rights Agency”, 29 Report of Session 2005–06, 04.04.2006, pp. 30–34.

⁸⁸⁸ Commission, “Proposal for a Regulation on the European Union Agency for Law Enforcement Cooperation and Training (Europol)”, COM(2013) 173 final, 27.03.2013, p. 4. See, Commission Staff Working Document, “Annexes to the Impact Assessment on merging the European Police College (Cepol) and the European Police Office (Europol) and implementing a European police training scheme for law enforcement officials”, SWD(2013) 98 final, 27.03.2013.

⁸⁸⁹ CEPOL Position Paper, “European Commission Package on the creation of a European Agency for Law Enforcement Cooperation and Training”, undated, <http://bit.ly/2tRAkxV> (last accessed: 30/04/2018).

⁸⁹⁰ Parliament, “Civil Liberties MEPs discuss CEPOL and Europol merger”, 07.05.2013, <http://bit.ly/2Bos8P1> (last accessed: 30/04/2018).

words, the clarification of tasks conferred to Frontex and Easo or the vesting of distinct operational powers to such agencies may effectively avoid duplication and overlaps, without having to forego the added value and characteristic nature of each agency.

II. THE BILATERAL COOPERATION AND SIGNATURE OF WORKING ARRANGEMENTS BETWEEN FRONTEX, EASO, AND EUROPOL

In 2006, the former director of Eurojust, Mr. Michael Kennedy, promoted cooperation by encouraging the existing AFSJ agencies at the time to annually meet and identify matters in which the agencies shared interests in order to avoid duplication⁸⁹¹. Previously, in 2004, the Hague Program highlighted that the EU AFSJ agencies should coordinate their operational activities in all JHA matters⁸⁹². To this end, the Council was invited to organize “a joint meeting every six months between the chairpersons of the Strategic Committee on Immigration, Frontiers and Asylum (SCIFA) and the Article 36 Committee (CATS) and representatives of the Commission, Europol, Eurojust, the EBA, the Police Chiefs’ Task Force, and the SitCEN”⁸⁹³.

Subsequently, the Stockholm Program stressed the need to enhance internal coordination in order to avoid duplication and achieve greater coherence between AFSJ policy matters, the laws adopted, and the EU agencies operating in the area⁸⁹⁴. Similarly, the current 2014 JHA Strategic Guidelines underline the importance of adopting coherent policy measures and promoting cooperation between the EU’s institutions and bodies since “success or failure in one field

⁸⁹¹ Council, “Interim report on cooperation between JHA Agencies”, doc. 5816/10, 29.01.2010, Annex I, p. 8.

⁸⁹² Council, “The Hague Programme”, OJ C-53, 03.03.2005, p. 10.

⁸⁹³ Ibid., p. 10. Two committees of the Council of the EU, CATS and CEIFA, were responsible respectively for coordinating the European policies that were part of the former third pillar and those others that were communitarized with the entry into force of the Amsterdam Treaty. In this regard see, Council, “The future of CATS - Contribution to the evaluation by COREPER”, doc. 14207/1/14 REV 1 CATS 152, 07.11.2014, p. 3 and Council, “The future of SCIFA”, doc. 17182/11, 18.11.2011.

⁸⁹⁴ European Council, “The Stockholm Programme”, OJ C-115/1, 04.05.2010, p. 6.

depends on performance in other fields as well as on synergies with related policy areas”⁸⁹⁵.

The role of the EU AFSJ agencies shall center on consistently transposing, effectively implementing, and consolidating the legal instruments and policy measures in place⁸⁹⁶. This section thus focuses on studying the bilateral operational cooperation between Frontex, Easo, and Europol. Specifically, the Working Arrangements and Cooperation Agreements signed over time between these AFSJ agencies, as well as their nature and defining features, are here analyzed (see figure 23).

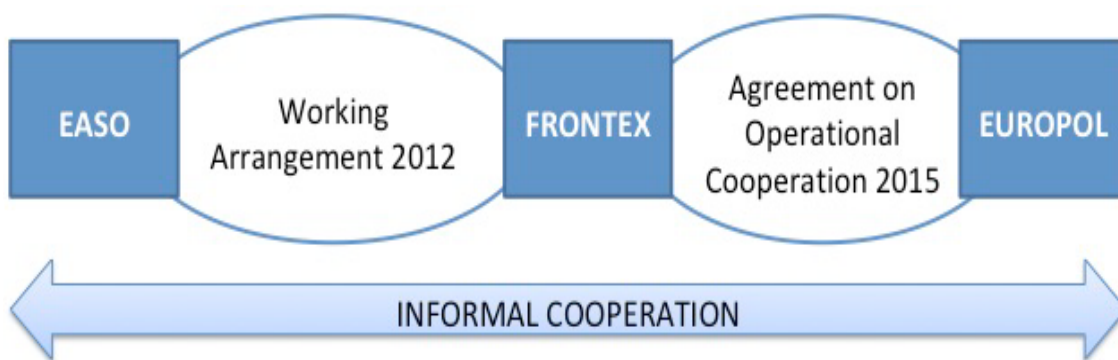


Figure 23: Bilateral Cooperation among Frontex, Easo, and Europol. Source: Author’s own elaboration.

1. Bilateral Cooperation between Frontex and Europol

Soon after Frontex became fully operational, in 2008, this agency signed an agreement with Europol to enhance the cooperation between the two agencies, particularly through the exchange of strategic and technical information regarding trafficking of human beings and illegal migrant smuggling⁸⁹⁷. Before the 2008 agreement was concluded, both agencies had already been cooperating every year at the Executive Director’s level, exchanging information and risk analyses in regards to irregular migration and cross border crimes, participating in specific joint operations, establishing a secure communication link and contact

⁸⁹⁵ European Council, “26/27 June 2014 Conclusions”, EUCO 79/14, 27.06.2014, p. 1. See, Council, “The JHA Agencies Contribution on the new multiannual Justice and Home Affairs programme”, doc. 7313/14, 10.03.2014.

⁸⁹⁶ Ibid., p. 3.

⁸⁹⁷ Article 1, Strategic Co-operation Agreement between the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union and the European Police Office, 28.03.2008.

points at the operational level, and increasing the agencies' cooperation in supporting joint security programs⁸⁹⁸.

Frontex and Europol progressively strengthened their working relations in the area of combating the facilitation of illegal migration. Frontex and Europol centered on exchanging strategic information and officers on a regular basis, participating in joint operations and pilot projects, sharing threat and risk assessments, and promoting the contribution of Frontex to Europol's OCTA and Europol to Frontex' Annual Risk Analysis⁸⁹⁹. The External Evaluation of Europol indicated that Frontex and Europol closely cooperated in joint operations at the external borders of the EU, where Europol deployed mobile teams and brought specialist equipment to collect personal data⁹⁰⁰.

The agreement signed in 2008 formalized this informal inter-agency cooperation that was taking place between Frontex and Europol. Article 4 of the agreement stated that "high level meetings between Europol and Frontex shall take place as often as necessary (...), in particular with the aim of avoiding duplication of activities and efforts" and "the competent units of Frontex and Europol shall consult each other regularly on policy issues and matters of common interest for the purpose of realizing their objectives and coordinating their respective activities". The agreement also promoted the co-organization of joint training and activities, the facilitation of mutual visits of experts, and the participation of Frontex and Europol in seminars, courses, and meetings (article 6).

The agreement signed by the agencies in 2008 essentially covered the information to be exchanged and the access of Frontex to Europol's information

⁸⁹⁸ Council, "Interim report on cooperation between JHA Agencies", doc. 5816/10, 29.01.2010, p. 5. See, Council, "Final Report on the Cooperation between JHA Agencies", doc. 8387/10, 09.04.2010.

⁸⁹⁹ Council, "Draft Scorecard - Implementation of the JHA Agencies report", doc. 5676/11, 25.01.2011, pp. 5-9; BUSUIOC, Madalina and CURTIN, Deirdre, "The EU internal security strategy, the EU policy cycle and the role of (AFSJ) agencies: promise, perils and pre-requisites", *Study for the LIBE Committee*, PE 453.185, 2011, p. 8. See, Council, "Report on the cooperation between JHA Agencies in 2010", doc. 5675/11, 25.01.2011.

⁹⁰⁰ RAND Europe, "Evaluation of the implementation of the Europol Council Decision and of Europol's activities", 2012, p. 104.

and data⁹⁰¹. In this regard, Europol's External Evaluation signaled that the main issue regarding this cooperation concerned the duplication that existed between Europol and Frontex regarding the collection and analysis of personal data⁹⁰². The external evaluation also stated that the existing bilateral cooperation and participation of Europol in Frontex' joint operations could be expanded and better coordinated, and that the methodologies employed by the agencies to produce their analytical and assessment outputs should be further harmonized⁹⁰³. In regards to the insufficient cooperation of Europol on Frontex' joint operations, the External Evaluation of Frontex recommended that the agency engage Europol more actively in such operations. The External Evaluation of Frontex also stated that Europol should earmark more resources to ensure a systematic and coordinated participation in Frontex' joint operations⁹⁰⁴.

Frontex and Europol signed a new agreement⁹⁰⁵ in 2015 which continues to center on the exchange of strategic and operational information and specialized knowledge between the agencies "in support of actions to suppress criminal activities and improve integrated border management including but not limited to Modus operandi used by criminal networks, threat assessments, risk analysis, results of strategic analysis and crime situation reports"⁹⁰⁶. Additionally, under the framework of Eurosur, adopted in 2013, Frontex and Europol shall exchange information on cross border criminal activities to develop a real time European Situational Picture⁹⁰⁷. Lastly, the agreement continues to encourage annual high-level meetings between Europol and Frontex in order to prepare, implement, and assess concrete projects or cooperation activities⁹⁰⁸.

⁹⁰¹ Article 7, Strategic Co-operation Agreement between Frontex and Europol, 28.03.2008. See, Parliament, "The EU Internal Security Strategy, The EU Policy Cycle and The Role of (AFSJ) Agencies: Promise, Perils and Pre-requisites", PE 453.185, 2011, p. 9.

⁹⁰² RAND Europe, "Evaluation of the implementation of the Europol Council Decision and of Europol's activities", 2012, p. 104.

⁹⁰³ *Ibid.*, p. 104.

⁹⁰⁴ Ramboll and EurAsylum, "External Evaluation of the Agency under Art. 33 of the Frontex Regulation Final Report", 2015, p. 58.

⁹⁰⁵ Agreement on Operational Cooperation between the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union ("FRONTEX") and the European Police Office ("EUROPOL"), 04.12.2015.

⁹⁰⁶ Article 4(4), Agreement on Operational Cooperation between Frontex and Europol, 04.12.2015.

⁹⁰⁷ *Ibid.*, article 8.

⁹⁰⁸ *Ibid.*, article 14.

2. Bilateral Cooperation between Frontex and Easo

As soon as Easo was established in 2010, Frontex started to coordinate its activities with Easo. While Frontex closely cooperated with Europol in regards to the facilitation of illegal migration and trafficking of human beings, the inter-agency relations between Europol and Easo were very limited since their mandates are more tangentially connected.

However, in 2011 the Commission highlighted the significance of ensuring that Frontex, Easo, and Europol made specific arrangements not only to coordinate their activities, but also to clearly delimit their respective roles to provide effective and rapid emergency assistance to the Member States, as well as risk analysis and early warning capacity⁹⁰⁹. Specifically, the Commission considered that Easo, in collaboration with the FRA, should cooperate with Frontex in integrating international protection and fundamental rights aspects in its operations⁹¹⁰. In a similar vein, the Council pointed out that cooperation needed to be promoted among Frontex, Easo, and Europol, with the aim of enhancing the asylum capacity in Western-Balkan countries and addressing serious crimes at the external borders and criminal offences related to irregular migration⁹¹¹.

The cooperation between Frontex and Easo focused on providing coordinated and efficient operational support to those Member States facing a sudden and extraordinary arrival of mixed migratory flows. In particular, Frontex and Easo were invited to closely cooperate at the expert and management levels “to help ensure a focused approach to asylum, border and return management” and “to

⁹⁰⁹ Commission, “Communication on enhanced intra-EU solidarity in the field of asylum: An EU agenda for better responsibility-sharing and more mutual trust”, COM(2011) 835 final, 02.12.2011, p. 4.

⁹¹⁰ Ibid., p. 4.

⁹¹¹ Council, “EU Action on Migratory Pressures – A Strategic Response”, doc. 9650/12, 10.05.2012, p. 10.

assist the Member State to ensure an efficient border control and access to the asylum procedure”⁹¹².

Besides the operational cooperation between Frontex and Easo, these agencies liaise to establish common or mixed teams of border management and asylum experts, as well as to harmonize their methodologies to better identify irregular migrants in need of international protection. Additionally, Frontex and Easo participate in each other’s CF and Management Board meetings, develop common training materials, strategies and plans, and share best practices, information, statistics, data and analyses⁹¹³.

The synergies and cooperation between Frontex and Easo, due to the complementarity of their mandates, were more prolific than between Frontex and Europol. Therefore, Frontex and Easo still needed to further coordinate their actions on the ground and harmonize their assistance to the competent national authorities, with the aim of ensuring the effective implementation of EU border management and asylum *acquis*.

The United Nations Special Rapporteur of the Human Rights of Migrants also considered that Frontex and Easo should better coordinate in the reception of migrants at the European external borders. In particular, the rapporteur exemplified the lack of effective cooperation and stated that “while Frontex screens migrants at the border, in order to establish their nationality to facilitate their expulsion, Easo is not present, and the European Union does not assist member States with the screening of migrants at the border in order to identify protection needs”⁹¹⁴.

In 2012, Frontex and Easo signed a working arrangement to establish a structured cooperation framework⁹¹⁵. The working arrangement between Frontex

⁹¹² Council, “Council Conclusions on a common framework for genuine and practical solidarity towards Member States facing particular pressures due to mixed migration flows”, doc. 7485/12, 09.03.2012, p. 10.

⁹¹³ Ernst and Young, “Independent External Evaluation of Easo’s activities covering the period from February 2011 to June 2014”, 2015, pp. 105-107.

⁹¹⁴ Human Rights Council, “Report of the 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”, A/HRC/23/46, 24.04.2013, para 45.

⁹¹⁵ Working Arrangement between the European Asylum Support Office (Easo) and the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex), 26.09.2012.

and Easo highlights that “Frontex and Easo’s mandates are fully complementary in order to establish a proper EU Inter-agency cooperation mechanism supporting from an operational and capacity building perspective the EU Migration, Asylum and Border Management Policies (...)”⁹¹⁶.

In regards to operational cooperation, the working arrangement calls upon Frontex and Easo to coordinate their operational activities when supporting Member States facing an extraordinary and specific migratory pressure at their external borders and asylum systems. Frontex and Easo should timely inform each other on their planned operations, request each other’s support in every phase of the operations, and explore the possibilities for establishing common or mixed teams from the pools with border management and asylum experts⁹¹⁷.

The remainder of the working arrangement covers matters ranging from the exchange of information, risk analyses, best practices, country of origin information, and training strategies to promote horizontal cooperation between Frontex and Easo (i.e. coordinating annual work programs, facilitating reciprocal representation in matters of common interest, participating in each other’s Consultative Forum, and cooperating with other agencies like Europol and the FRA).

3. Working Arrangements: Formal Bilateral Cooperation among Frontex, Easo, and Europol

The recently adopted Regulation 2016/1624 establishing the EBCG, the partially agreed text on the EUAA, and Regulation 2016/794 on Europol all state that the cooperation among them shall be formalized by the adoption and signature of working arrangements. The EBCG shall cooperate with Europol and Easo “within the framework of working arrangements”, which shall receive the Commission’s prior approval. The European Parliament also needs to be informed about any such arrangements (article 52 Regulation 2016/1624).

⁹¹⁶ Ibid., recital 7.

⁹¹⁷ Ibid., articles 2 and 3.

Specifically, the EBCG needs to coordinate its activities with Europol to prevent and combat crimes directly linked to unauthorized crossings of the external borders (article 8(1)(m) Regulation 2016/1624). The EBCG should coordinate with Easo regarding return operations (article 27(2)(b) Regulation 2016/1624), the development of training tools (article 36(1) Regulation 2016/1624), and the participation of the EBCG in Easo's CF (article 70(2) Regulation 2016/1624).

Similarly, article 36 of the partially agreed text on the EUAA indicates that the agency, within the framework of working arrangements, shall cooperate with the agencies, bodies, and offices of the Union that conduct functions related to the EUAA's field of activity, and in particular, with the FRA and the EBCG.

Lastly, article 23(1) of Regulation 2016/794 on Europol more vaguely states that "in so far as necessary for the performance of its tasks, Europol may establish and maintain cooperative relations with Union bodies in accordance with the objectives of those bodies (...)". To this end, Europol may conclude working arrangements with such bodies to exchange relevant information regarding the performance of Europol's tasks (article 23(4) Regulation 2016/794).

Given the significance of the working arrangements in the formal bilateral cooperation among Frontex, Easo, and Europol, these instruments, their characteristics, and nature are further analyzed here. Indeed, the working arrangements now govern any type of bilateral cooperation of Frontex, Easo, and Europol with other EU AFSJ agencies⁹¹⁸, EU Institutions⁹¹⁹, third countries⁹²⁰, and international organizations⁹²¹.

⁹¹⁸ See for instance, Cooperation Arrangement between the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union and the European Union Agency for Fundamental Rights, 26.05.2010; Working Arrangement between the European Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice and the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, 31.01.2014; Working Arrangement between the European Asylum Support Office (Easo) and the European Union Agency for Fundamental Rights (FRA), 11.06.2013; Working Arrangement between the European Asylum Support Office (Easo) and the European Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice (Eu-Lisa), 04.11.2014; Agreement Between Eurojust and Europol, 01.01.2010; Memorandum of Understanding between the European Police Office (Europol) and the European Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice (Eu-Lisa), 22.03.2016.

The working arrangements (also known as cooperation arrangements, administrative agreements, or memorandums of understanding) include broad concepts of mutual understanding and actions to be taken by each of the parties, in order to coordinately achieve common objectives. The process itself of adopting and concluding such cooperation arrangements requires the concerned agencies to be proactive in coordinating and cooperating, with the aim of strategically organizing their tasks, accomplishing shared commitments, and establishing joint goals, practices, and procedures.

The cooperation arrangements concluded by Frontex, Easo, and Europol shall be consistent with their mission, mandate, and powers. The signature of a cooperation arrangement does not exclude the need for additional agreements or plans to detail and implement the activities considered by the agencies. In fact, article 15 of the working arrangement between Frontex and Easo states that the arrangement may be complemented by a cooperation plan defining concrete activities as well as timelines for implementation⁹²². That is, the cooperation arrangement does not formalize any particular obligation to cooperate, but rather

⁹¹⁹ See for example, Frontex EU Partners, <http://frontex.europa.eu/partners/eu-partners/eu-agencies/> (last accessed: 30/04/2018); Administrative Agreement on Co-operation between the European Commission and the European Police Office, 18.02.2003; Agreement between the European Police Office (Europol) and the European Central Bank (ECB), 02.12.2014; Administrative Arrangement between the European Police Office (Europol) and the European Anti-Fraud Office (OLAF), 08.04.2004.

⁹²⁰ See for instance, Working Arrangements signed by Frontex on the establishment of Operational Cooperation with Third Countries, <http://frontex.europa.eu/partners/third-countries/> (last accessed: 30/04/2018); Agreements on Operational and Strategic Cooperation between Europol and Third Countries, <https://www.europol.europa.eu/partners-agreements/operational-agreements> (last accessed: 30/04/2018). See also, EKELUND, Helena, “Normative Power FRONTEX? Assessing Agency Cooperation with Third Countries”, *TARN Working Paper*, 15, 2017, pp. 1-19; FINK, Melanie, “Frontex Working Arrangements...”, *op. cit.*, pp. 20-35; GARCÍA ANDRADE, Paula and MARTÍN, Iván, “EU cooperation”, *op. cit.*; GARCÍA ANDRADE, Paula, “EU External Competences...”, *op. cit.*, pp. 157-200; SANTOS VARA, Juan, “The External Activities...”, *op. cit.*, pp. 118-136.

⁹²¹ See, Working Arrangement between the European Asylum Support Office (Easo) and the Office of the United Nations High Commissioner for Refugees (UNHCR), 13.12.2013; Co-operation Agreement between the United Nations Office on Drugs and Crime and the European Police Office, 16.03.2004; Frontex cooperation with international organizations, <http://frontex.europa.eu/partners/international-organisations/> (last accessed: 30/04/2018).

⁹²² See, among many others, Frontex-Easo 2017 Annual Cooperation Plan, 23.01.2017 (on file with the author); Council, “Greece’s National Action Plan on Asylum Reform and Migration Management”, doc. 15258/12, 23.10.2012; Council, “The Greek Government’s Road Map on Asylum for 2015 (follow-up to the Revised Greek Action Plan on Asylum and Migration Management)”, doc. 6817/15, 11.03.2015; Council, “Commission Staff Working Document the Assessment of the Greek Action Plan on Asylum and Migration Management”, doc. 13892/14, 07.10.2014; Council, “Frontex and Europol”, doc. 12954/09, 07.09.2009.

leaves a wide discretion to Frontex and Easo as to determine the degree and content of their bilateral relationship in practice.

The working arrangements constitute only a broad framework for bilateral cooperation between the participating agencies that prefer to informally and flexibly interact. Nonetheless, informal cooperation, while beneficial and necessary between organizations, can hardly be assessed, reviewed, tracked or monitored.

Every cooperation arrangement examined here includes at least the following information: the parties bound by the arrangement, the purpose for adopting the arrangement, a brief description of the duties and responsibilities of the agencies, the points of contact, provisions clarifying how to amend and supplement the arrangement, the date in which the arrangement becomes effective, and the termination of the agreement⁹²³.

Cooperation arrangements allocate responsibilities and functions to the participating parties to accomplish mutual goals, making cooperation and informal coordination practices available to the public, which would otherwise remain shrouded in secrecy. Therefore, EU AFSJ agencies like Frontex, Easo, and Europol conclude and sign cooperation arrangements to delimit their tasks, to better share information and practices, and to coordinate their operations in fragmented policy areas in which more than one agency is mandated to act.

The working arrangements signed by Frontex and Easo, and by Europol and Frontex stand out for their vagueness since they do not set out any specific obligation, which ultimately hinders the ability of the arrangements to effectively coordinate the tasks of the agencies. The working arrangements have a contractual, provisional, and limited nature since they can be amended at the agencies' will and are neither enforceable, nor binding⁹²⁴.

In the event that one agency believes that the other has violated a provision of the working arrangement, the former does not have a right of action against the latter. Article 18 of the working arrangement concluded by Frontex and Europol

⁹²³ Working Arrangement between Easo and Frontex, 26.09.2012, Agreement on Operational Cooperation between Frontex and Europol, 04.12.2015.

⁹²⁴ FINK, Melanie, "Frontex Working Arrangements...", *op. cit.*, p. 28.

in 2012 merely states that the parties will meet at least once a year to evaluate the overall cooperation between them, and that all disputes which may emerge in connection with the interpretation or application of the arrangement will be settled by means of consultations and negotiations between representatives of the parties⁹²⁵. Article 23 of the agreement between Frontex and Europol only adds that “in the event of serious failings of either Party to comply with the provisions of this Agreement, or a Party is of the view that such a failing may occur in the near future, either Party may suspend the application of this Agreement temporarily (...)”⁹²⁶.

The drawbacks surrounding the working arrangements decided by Frontex, Easo, and Europol are particularly meaningful when referring to policy matters like border management, asylum, or migration, which require a long-term, stable, and clearly delineated cooperation and coordination approach. The effective, daily, and complex cooperation among these agencies demands comprehensive and flexible instruments of cooperation, since the current working arrangements constitute unenforceable, unreviewable, vague, and non-binding guidelines. The formal bilateral cooperation of Frontex, Easo, and Europol thus needs to be centrally coordinated especially in those matters where agencies are reluctant to cooperate, but rather, prone to compete. Working arrangements should be, if not binding, strongly recommendatory and should set out clearly delineated objectives and procedures.

III. MULTILATERAL COOPERATION AMONG FRONTEX, EASO, AND EUROPOL

Frontex, Easo, and Europol were originally established under different Treaty frameworks and operate in a fragmented and constantly evolving field, like the AFSJ, which demands a horizontal cooperation between the agencies. These agencies’ multilateral cooperation contributes to promoting an effective, coherent, and uniform implementation of EU policies by the competent national

⁹²⁵ Working Arrangement between Easo and Frontex, 26.09.2012.

⁹²⁶ Agreement on Operational Cooperation between Frontex and Europol, 04.12.2015.

authorities.

Since the mandates of Frontex, Easo, and Europol are so closely related, they need to seek synergies, share resources and tools, and adopt consistent and mutually reinforcing operational activities, with the aim of avoiding competition, overlaps, duplications, and working inefficiencies. This section therefore studies the evolution of the multilateral cooperation between the AFSJ agencies, the role that the COSI plays in this regard, and the current operational inter-agency relations of Frontex, Easo, and Europol.

1. The Emerging Need for Multilateral Cooperation among Frontex, Easo, and Europol

Due to the proliferation of EU agencies within the AFSJ and the progressive reinforcement of their mandates, bilateral and multilateral cooperation has become a prerequisite to deliver coordinated, coherent, and consistent assistance to the Member States, as well as an effective and uniform implementation of the EU *acquis*⁹²⁷. Specifically, the 2009 evaluation of the EU decentralized agencies underlined that “with many agencies working in related areas there are naturally a significant number of interfaces between agencies that may be complementary or overlapping, coherent (even synergetic) or counterproductive”⁹²⁸.

The need for greater cooperation among the AFSJ agencies came about as a result of the intensified European integration of the AFSJ, the reinforcement of the agencies’ tasks and role in the AFSJ, and their willingness to closely cooperate⁹²⁹. However, the differences between the AFSJ agencies’ mandates and the insufficient delineation of the agencies’ tasks still gave rise to fragmentation, competition, overlaps, and duplications that complicated these agencies’

⁹²⁷ See, PI LLORENS, Montserrat, “El nuevo mapa...”, *op. cit.*, pp. 77-117.

⁹²⁸ Ramboll, “Evaluation of the EU decentralized agencies in 2009 - Final Report Volume II - Conclusions at System Level”, December 2009, p. 69.

⁹²⁹ Council, “Cooperation between JHA agencies: issues for discussion”, doc. 6127/13, 07.02.2013, p. 2. See, Council, “Cooperation between JHA Agencies 2013 – Activities and Key Findings”, doc. 17498/13, 06.12.2013.

multilateral cooperation⁹³⁰.

In the AFSJ, inter-agency cooperation has been promoted since 2006 through the annual meeting of the heads of the JHA agencies. This meeting had the objective of exchanging practices and detecting common areas of work among the AFSJ agencies⁹³¹. In 2008, the AFSJ agencies were called to improve the complementarity of their activities when preparing their annual work programs, as well as to ensure a consistent and comprehensive framework to share information and interactions with third parties⁹³². Particularly, the former Swedish Presidency required Cepol, Eurojust, Europol, and Frontex to improve their cooperation in the form of elaborating a report in which they evaluated their existing relations⁹³³. The report stated that although bilateral cooperation was already well established among the agencies, their multilateral cooperation had to be strengthened if the agencies aspired to achieve their maximum potential and operational synergies⁹³⁴.

In 2010, another report was prepared by the AFSJ agencies in regards to their bilateral and multilateral cooperation, and was provided to the Spanish Presidency. This report stressed that while bilateral cooperation continued to be reinforced and the mandates of the agencies distinctively delineated and specified, multilateral cooperation still needed to be improved since none of the EU AFSJ agencies could fully realize their potential without the support of the other agencies and the Member States⁹³⁵.

The report recommended the establishment of a common sphere of governance among the AFSJ Agencies, the design of a coordinated approach

⁹³⁰ Council, "Cooperation between JHA Agencies: Information Exchange", doc. 5797/14, 28.01.2014, p. 2. Precisely, it has been argued that "the legislative texts that establish the Agencies are proposed and negotiated in fora that rarely have to consider the texts of the other Agencies in detail and that follow the logic of the individual proposal before them. (...) In addition, the relationships between the JHA Agencies reflect the relationships between the different 'corresponding' authorities at national level", see Council, "Cooperation between JHA agencies: issues for discussion", doc. 6127/13, 07.02.2013, p. 2.

⁹³¹ Council, "Interim Report on Cooperation between JHA Agencies", doc. 5816/10, 29.01.2010.

⁹³² Council, "Summary of discussions of the meeting of the JHA Agencies (18 June 2008)", doc. 11843/09, 09.07.2009.

⁹³³ Council, "Final Report on the cooperation between JHA Agencies doc. 8387/10, 09.04.2010, annex, pp. 2-3.

⁹³⁴ *Ibid.*, pp. 2-3.

⁹³⁵ *Ibid.*

regarding EU institutional affairs and external relations, the sharing of efforts in the field of research and development, the conducting of joint efforts in the field of training, the raising of awareness regarding the work of the agencies, and the demonstration of effective inter-agency cooperation through targeted training and awareness activities⁹³⁶.

Following the adoption of the report, the AFSJ agencies decided to use a draft scorecard with the objective of tracking the implementation of the bilateral and multilateral measures agreed upon⁹³⁷. In this regard, the report especially welcomed the more systematic approach towards inter-agency cooperation, as reflected in the agencies jointly agreeing on their activities, monitoring their cooperation with a scorecard, organizing regular Heads of Agencies Meetings, ensuring consistency and continuity of the agencies' work, and providing the COSI with regular updates on the implementation progress of their cooperation⁹³⁸.

2. The COSI's Role in Promoting the Multilateral Operational Cooperation of the EU AFSJ Agencies

In regards to the promotion of a comprehensive and horizontal operational cooperation, the role of the COSI is especially remarkable. Article 71 TFEU states that “a standing committee shall be set up within the Council in order to ensure that operational cooperation on internal security is promoted and strengthened within the Union”. Pursuant article 71 TFEU, the Council Decision of 25 February 2010 set up and defined the tasks of the COSI⁹³⁹. The mission of the COSI, according to article 2 of the Council Decision, consists in facilitating, promoting, and strengthening coordination of the operational actions of the competent national authorities in the field of internal security.

Without prejudice to the mandate of the EU AFSJ agencies, the COSI is

⁹³⁶ Ibid.

⁹³⁷ Council, “Report on the Cooperation between JHA Agencies in 2010”, doc. 5675/11, 25.01.2011.

⁹³⁸ Ibid., p. 6.

⁹³⁹ Council Decision of 25 February 2010 on setting up the Standing Committee on operational cooperation on internal security (2010/131/EU), OJ L-52, 03.03.2010, p. 50.

responsible for facilitating and ensuring effective operational cooperation and coordination (article 3(1) Council Decision of 25 February 2010), ensuring consistency of action by the AFSJ agencies (article 5(2) Council Decision of 25 February 2010), and evaluating the direction and efficiency of operational cooperation. The COSI is also in charge of identifying possible shortcomings or failures and adopting appropriate concrete recommendations to address them (article 3(2) Council Decision of 25 February 2010).

Among other duties, the COSI shall encourage operational cooperation and facilitate coordination among the AFSJ agencies in the field of internal security. In this respect, the COSI should “consider in detail the current structures and tasks of the JHA Agencies in order to identify the obstacles to more effective operational co-operation, the areas of fragmentation and overlap, and to propose actions to facilitate and to enhance co-operation and operational efficiency”⁹⁴⁰.

The idea of establishing a *Comité de Securite Interieure* dates back to 2003, when foreign ministers, de Villepin and Palacio, put forward a proposal on “Strengthening Operational Police Cooperation” in the context of discussions taking place at the time regarding the Convention on the Future of Europe and the drafting of a Constitution for the EU⁹⁴¹. According to the original proposal, the COSI would have been in charge of promoting and coordinating bilateral and multilateral police cooperation operations, and guaranteeing security at the Union’s external borders. For this purpose, the COSI would have assessed the security at the borders, provided joint training, deployed police units, and in the case of a crisis at the borders of the Union and at the request of the Council, would have planned, managed, and controlled an intervention operation⁹⁴². Nonetheless, this ambitious proposal of the COSI, which would have directly impacted the Member States’ sovereignty, was finally watered down, merely encouraging the operational cooperation and coordination of the national

⁹⁴⁰ Council, “Cooperation between JHA agencies: issues for discussion”, doc. 6127/13, 07.02.2013, p. 3.

⁹⁴¹ NIEMEIER, Michael and WIEGAND, Marc André, “Europol and the Architecture of Internal Security” in MONAR, Jörg, *The Institutional...*, *op. cit.*, p. 188.

⁹⁴² Convención Europea (Secretaría), “Contribución de D. Dominique de Villepin, miembro de la Convención y de D.ª Ana Palacio, miembro suplente de la Convención: ‘Por el reforzamiento de la cooperación policial operativa’”, CONV 600/03 - CONTRIB 269, 07.03.2003.

authorities in the field of internal security, as is currently set out in article 71 TFEU⁹⁴³.

The COSI coexists with the CATS and SCIFA. The CATS shall assist the Committee of Permanent Representatives (COREPER) and the Council in preparing their strategic discussions and work concerning police and judicial cooperation in criminal matters⁹⁴⁴. The SCIFA supports the COREPER and the Council in preparing discussions in regards to migration, borders, and asylum⁹⁴⁵. Following the entry into force of the Treaty of Amsterdam, the CATS and the SCIFA were established to assist the COREPER and the Council in the preparation of a new legislation⁹⁴⁶. The Treaty of Lisbon, however, required the establishment of the COSI to facilitate, promote, and strengthen the coordination of operational cooperation of the Member States in matters ranging from police cooperation to the protection of external borders and judicial cooperation in criminal matters.

While the COSI cannot take part in the preparation of new legislation or conduct operations, it shall strengthen and evaluate the efficiency of operational cooperation on internal security. The COSI is in charge of recommending legal improvements to make joint operations possible, establishing a program for the implementation of joint operations, and recommending certain joint operations in order to cope with or prevent security problems⁹⁴⁷. Furthermore, the COSI shall assist in ensuring the consistency of action of, namely, Eurojust, Europol, and Frontex. The COSI thus invites the AFSJ agencies to regularly organize meetings, present their annual multilateral cooperation achievements, and put

⁹⁴³ NIEMEIER, Michael and WIEGAND, Marc André, "Europol...", *op. cit.*, p. 189. See, Council, "Discussion paper on the future Standing Committee on Internal Security (COSI) – Constitutional Treaty, art.III-261", doc. 6626/05, 21.02.2005; Council, "Standing Committee on Internal Security (COSI) - Constitutional Treaty, art.III-261", doc. 7344/05, 15.03.2005.

⁹⁴⁴ See, Council, "The future of CATS", doc. 17187/11, 18.11.2011; Council, "The future of CATS - Contribution to the evaluation by COREPER", doc. 15508/14, 05.12.2014.

⁹⁴⁵ See, Council, "SCIFA's Role and Working Methods", doc. 17476/10, 06.12.2010; Council, "The future of SCIFA", doc. 17182/11, 18.11.2011.

⁹⁴⁶ For a detailed study of the Council of Europe organization in regards to JHA matters see, VERMEULEN, Gert, DE BONDT, Wendy, *Justice, Home Affairs and Security. European and international institutional and policy development*, Antwerp: Maklu, 2015, pp. 70-75. See also, RIJPM, Jorrit, "Institutions and Agencies...", *op. cit.*, p. 69.

⁹⁴⁷ Council, "Views of the Forum Salzburg Group regarding the necessary specification of the role of COSI and a procedure for the initiation of joint operations and measures", doc. 9360/10, 05.05.2010.

forward specific measures to enhance their coherence, interoperability, and bilateral and multilateral cooperation.

Achieving a balance between the AFSJ agencies' operational autonomy and the COSI's goal of promoting an effective cooperation and horizontal coordination between them is, in practice, quite difficult. In 2017, the Council discussed the future role of the COSI in regards to the AFSJ agencies and it was merely reiterated that the "COSI should not replicate the work of the agencies' management boards but rather take a 'helicopter' view overseeing what is done by the agencies and address shortcomings in their cooperation"⁹⁴⁸. The COSI's streamlining of the AFSJ agencies' coordination, in regards to internal security, seems to continue to center on reviewing their multilateral cooperation reports, rather than actively steering such a process⁹⁴⁹.

3. The Current Multilateral Operational Cooperation Among Frontex, Easo, and Europol

Since the establishment of Easo and the entering into force of the Treaty of Lisbon, the focus has shifted from bilateral to multilateral cooperation among the AFSJ agencies. The logic behind the shift to multilateral cooperation was to "achieve synergy effects, avoid duplication of efforts and waste of resources, avoid infringements caused by uncoordinated overlaps through harmonizing operational activities"⁹⁵⁰. Namely, regular consultations and operational cooperation were promoted through the establishment of Single Points of Contact (i.e. representatives of the AFSJ agencies). These Points of Contact were in charge of gathering information on the operations organized by the AFSJ agencies in order to identify potential overlaps and reach a solution⁹⁵¹.

Several measures, which are periodically reflected in a scorecard detailing the agencies' joint priorities and the degree of their progress and achievement, have

⁹⁴⁸ Council, "Enhancing the role of COSI", doc. 8900/17, 12.05.2017, p. 5 (on file with the author).

⁹⁴⁹ RIJPM, Jorrit, "Institutions and Agencies...", *op. cit.*, p. 75. See, Council, "Way forward on the future of COSI", doc. 11722/14, 10.07.2014.

⁹⁵⁰ Council, "Coordination Mechanisms for Joint Operations", doc. 13077/10, 07.09.2010, p. 1.

⁹⁵¹ *Ibid.*, p. 4.

been adopted to promote multilateral interactions among Frontex, Easo, and Europol⁹⁵². To cite but three examples, Frontex, Easo, and Europol exchange and consult their annual work programs and strategic planning to identify potential synergies and areas for coordination, and to prevent duplication and overlaps⁹⁵³.

Furthermore, a sustained but contested multilateral practice of these AFSJ agencies involves the collection and exchange of information. However, this is looked upon with suspicion by some national authorities, making them less eager to provide information to the competent agency⁹⁵⁴. In particular, Frontex and Easo regularly exchange risk assessments and reports on the monthly and quarterly situation of the external borders and on asylum in the EU, and Easo and Europol contribute to the Frontex Risk Assessment Network⁹⁵⁵.

Lastly, Frontex, Easo, and Europol frequently cooperate in joint projects led by one of the three agencies. In 2014, a pilot project directed by Easo, which included the involvement of Europol and Frontex, was launched with the goal of gathering information during the asylum process in regards to the smuggling of irregular migrants, their traffickers, and modus operandi⁹⁵⁶. That same year, the JOT-MARE was designed by Europol, in which the concerned Member States and Frontex actively participated to combat irregular migration in the Mediterranean⁹⁵⁷. The JOT-MARE activities were expanded and incorporated in the 2016 EMSC to further promote the multilateral cooperation between Frontex, Easo, and Europol.

Similarly, in 2016, Frontex designed the European Coast Guard Cooperation

⁹⁵² See, Multilateral JHA Agencies Scorecard 2016 (on file with the author); Council, “Multilateral JHA Agencies Scorecard 2015”, doc. 14784/15, 01.12.2015; Multilateral JHA Agencies Cooperation Scorecard 2014 (on file with the author); Council, “Multilateral Cooperation Scorecard”, doc. 5969/13, 4.02.2013; Council, “Draft Scorecard – Implementation of the JHA Agencies report”, doc. 5676/11, 25.01.2011.

⁹⁵³ Council, “Cooperation between JHA Agencies 2013 – Activities and Key Findings”, doc. 17498/13, 06.12.2013, p. 1.

⁹⁵⁴ Council, “Cooperation between JHA Agencies: Information Exchange”, doc. 5797/14, 28.01.2014, p. 1.

⁹⁵⁵ The EU Justice and Home Affairs Agencies’ cooperation in 2014: working together to achieve common EU objectives, 3.11.2014, <http://bit.ly/2GyhUok> (last accessed: 30/04/2018), p. 5. See, Joint conclusions of the Heads of JHA Agencies meeting on 3-4 November 2015, Tallinn, November 2015, <http://bit.ly/2HFGHpS> (last accessed: 30/04/2018).

⁹⁵⁶ *Ibid.*, p. 6; Council, “Heads of JHA Agencies meeting, 3-4 November 2015”, doc. 14779/15, 01.12.2015, p. 7.

⁹⁵⁷ *Ibid.*, p. 6.

Network, composed of Easo, Europol, Eurojust and the FRA, among other actors (national authorities, EU bodies, international organizations, or representatives of third countries). This hub of expertise, hosted by Frontex, embraces fields of “law enforcement at sea in areas related to border management, migration, combatting cross-border crime, the prevention of terrorism and search and rescue”⁹⁵⁸.

Currently, Frontex, Easo, and Europol thus share their short and long-term priorities, continually updating them as well as their degree of achievement and execution. They regularly hold multilateral meetings, and are members of a network of JHA Agencies whose presidency rotates every year. In this regard, the directors of every AFSJ agency meet at the end of the year at the headquarters of the agency that is holding the rotating annual presidency that year⁹⁵⁹. This meeting is also attended by representatives of the European Commission, the LIBE Committee of the European Parliament, the Presidency of the Council of the EU, the General Secretariat of the Council, the European Anti-Fraud Office, and the European External Action Service.

This annual meeting “contributes to a more holistic and horizontal approach to planning and implementation, and ensures the agencies address EU policy needs in line with established priorities and available resources”⁹⁶⁰. During this high-level multilateral annual meeting, the accomplishment of the set objectives from the previous year are assessed, the priorities for the following year are put forward, and a final report evaluating the multilateral cooperation of the JHA agencies is adopted⁹⁶¹.

Consequently, while the AFSJ agencies’ multilateral cooperation has been enhanced since the adoption of the Stockholm Program and the entering into force of the Treaty of Lisbon, inter-agency relations have largely consisted in

⁹⁵⁸ Council, “EU Justice and Home Affairs Agencies’ cooperation in 2016 - Final report”, doc. 15579/16, 16.12.2016, p. 19.

⁹⁵⁹ See, Council, “Heads of JHA Agencies meeting, 3-4 November 2015”, doc. 14779/15, 01.12.2015; Council, “Heads of JHA Agencies meeting, 14 November 2016”, doc. 15580/16, 14.12.2016.

⁹⁶⁰ Council, “Cooperation between JHA Agencies 2013 - Activities and Key Findings”, doc. 17498/13, 06.12.2013, p. 8.

⁹⁶¹ See, Final Report of the JHA Agencies Network in 2015, “Joint conclusions of the Heads of JHA Agencies meeting on 3-4 November 2015, Tallinn”, November 2015; Council, “EU Justice and Home Affairs Agencies’ cooperation in 2016 - Final report”, doc. 15579/16, 16.12.2016.

informal coordination and consultations, exchanges of information and risk analyses, and the development of a strategic programming level cooperation. Only in recent years have Frontex, Easo, and Europol started to increasingly become more involved in their operational activities to coordinately and consistently assist those Member States on the ground that face extraordinary pressure at their external borders and asylum systems.

IV. THE HOTSPOT APPROACH: A REINFORCED, MULTILATERAL, AND OPERATIONAL INTER-AGENCY COOPERATION

The 2015 European Agenda on Migration envisaged a significant role for Frontex, Easo, and Europol, the function to operationally implement the Agenda and closely cooperate in the management of the hotspots established in Italy and Greece⁹⁶². Due to the extraordinary migratory pressure at the external borders of these frontline Member States, Frontex, Easo, and Europol were called to support the competent national authorities “on the spot”. While Frontex and Easo assisted in effectively fulfilling the Member States’ EU migration and asylum duties, Europol supported the Member States’ national investigations in regards to illegal migrant smuggling and human trafficking⁹⁶³.

Under the hotspot approach, Frontex, Easo, and Europol shall register, process, and identify the arriving migrants, assist in the investigations to dismantle smuggling and trafficking networks, provide the Greek and Italian authorities with infrastructural facilities and human resources, and refer the migrants to the asylum, return, or relocation procedure, as appropriate.

This section analyzes the key characteristics of this novel mechanism of multilateral inter-agency cooperation, and its implications concerning the EU

⁹⁶² The “hotspots” concept was originally introduced in the study requested by the European Commission in 2014 regarding the feasibility of creating a European System of Border Guards. See, Unisys, “Study on the feasibility of the creation of a European System of Border Guards to control the external borders of the Union”, 16.06.2014, pp. 24-27.

⁹⁶³ The hotspot approach is adapted to the migratory situation that the each Member State is being subject to and the particularities of the national asylum and border management system. In this respect see, Asylum Information Database, “Country Report: Greece”, 2016, <http://bit.ly/2nwd9nA> and Asylum Information Database, “Country Report: Italy”, 2016, <http://bit.ly/2832r83> (last accessed: 30/04/2018).

AFSJ agencies involved and the Member States that request its implementation. The mission, objectives, and framework governing the hotspot approach are firstly examined. Subsequently, the functioning and mechanism of the operational cooperation in practice at the hotspots is analyzed. Lastly, due to the lack of transparency surrounding the hotspot approach, the specific role, operational tasks, and responsibilities that Frontex, Easo, and Europol are called to play at the hotspots are studied.

1. Hotspots: What is in a Name?

The hotspots are defined as geographical areas subject to sudden, specific, and exceptional mixed migratory flows that the competent national border and asylum systems are unable to effectively process⁹⁶⁴. The establishment of a hotspot is requested by the concerned Member State after having assessed the situation at its external borders and considered the risk analysis prepared by Frontex and Easo⁹⁶⁵.

The Standard Operating Procedures (SOP) adopted for the Italian hotspots provided a twofold definition of the hotspots. Structurally, the hotspots are designated areas where new arrivals may land safely and are subject to medical screenings, and in which the migrants are pre-identified, fingerprinted, and channeled into the asylum or return procedures as appropriate⁹⁶⁶. Organizationally, the hotspot approach is “a method of teamwork, in which the Italian authorities (...) work closely and in full cooperation with European support teams (...) in order to ensure procedural, standardized and fully operational management of activities, while aiming at the interest of guaranteeing the most sustainable solutions for incoming third country nationals or stateless persons”⁹⁶⁷.

⁹⁶⁴ For a different approach in defining the hotspot approach see, TAZZIOLI, Martina and GARELLI, Glenda, “Containment beyond detention: The hotspot system and disrupted migration movements across Europe”, *Environment and Planning D: Society and Space*, 2018, pp. 1-19.

⁹⁶⁵ Explanatory note on the “Hotspot” approach, 15.07.2015, <http://www.statewatch.org/news/2015/jul/eu-com-hotspots.pdf>, p. 3 (last accessed: 30/04/2018).

⁹⁶⁶ SOP Applicable to Italian Hotspots, 2016, <http://bit.ly/2kt9JBX>, p. 4 (last accessed: 30/04/2018).

⁹⁶⁷ *Ibid.*, p. 4.

The mission of the hotspots consists in providing a platform for the EU AFSJ agencies to swiftly coordinate their activities while assisting frontline Member States that cannot adequately manage a disproportionate migratory pressure on their own. The hotspot approach establishes a framework, under which the extraordinary influx of third-country nationals can be disembarked, identified, registered, fingerprinted, and processed in a coordinated, effective, and expedited manner to ultimately relocate, return, or grant them asylum, as appropriate.

Indeed, the Commission has recently stressed that the hotspot approach has markedly contributed to better identifying risk profiles and vulnerable cases, fighting smuggler networks, and implementing the relocation program⁹⁶⁸. Regarding Frontex, Easo, and Europol, the creation of the hotspot approach aims to increase the agencies' operational assistance impact, strengthen their visibility, and avoid duplication when assisting frontline Member States dealing with exceptional migratory flows⁹⁶⁹.

For the sake of the AFSJ agencies' operational flexibility on the ground, the Commission put forward a policy framework rather than a specific legal instrument, which would have clearly regulated the powers of Frontex, Easo, and Europol in the hotspots⁹⁷⁰. In this regard, the 2015 European Agenda on Migration only mentioned the following concerning the hotspots:

“The European Asylum Support Office, Frontex and Europol will work on the ground with frontline Member States to swiftly identify, register and fingerprint incoming migrants. The work of the agencies will be complementary to one another. Those claiming asylum will be immediately channeled into an asylum procedure where Easo support teams will help to process asylum cases as quickly as possible. For those not in need of protection, Frontex will help Member States by coordinating the return of irregular migrants. Europol and Eurojust will assist the host Member State with investigations to dismantle the smuggling and trafficking networks”⁹⁷¹.

⁹⁶⁸ Commission, “European Agenda on Migration”, COM(2017) 558 final, 27.09.2017, p. 12. See, Commission, “Progress report on the European Agenda on Migration”, COM(2017) 669 final, 15.11.2017, p. 4.

⁹⁶⁹ Explanatory note on the “Hotspot” approach, 15.07.2015, pp. 5-6.

⁹⁷⁰ NEVILLE, Darren, SY, Sarah and RIGON, Amalia, “On the frontline: the hotspot approach to managing migration”, *Study for the European Parliament LIBE Committee*, PE 556.942, 2016, p. 30.

⁹⁷¹ Commission, “European Agenda on Migration”, COM(2015) 240 final, 13.05.2015, p. 6.

Apart from the previous brief description of the work of the EU AFSJ Agencies in the hotspots and an explanatory note sent later on by the Commissioner Avramopoulos to the JHA Ministers on 15 July 2015⁹⁷², no legal framework has been adopted to regulate the hotspot approach⁹⁷³. While the Italian Ministry of the Interior, the Department for Civil Liberties and Immigration, and the Department of Public Security adopted SOP in 2016, governing the activities taking place at the Italian hotspots, this document is not legally binding⁹⁷⁴. At the time of writing, the adoption of the Greek SOP has not yet taken place, which hinders the demarcation of tasks between the several actors involved in the hotspots⁹⁷⁵.

Moreover, no reference is made as to the legal basis for creating the hotspots, although articles 78(3) and 80 TFEU have been mentioned to that end⁹⁷⁶. Articles 78(3) and 80 TFEU state that in situations in which a Member State is confronted with a sudden and exceptional influx of migrants, the EU may adopt provisional measures for the benefit of the concerned Member State in accordance with the principles of solidarity and fair sharing of responsibility.

So far, only Regulation 2016/1624 on the EBCG and the partially agreed text on the EUAA concisely describe the functioning of the hotspots and specify the tasks of the agencies in them. In particular, Regulation 2016/1624 defines a hotspot as “an area in which the host Member State, the Commission, relevant Union agencies and participating Member States cooperate, with the aim of managing an existing or potential disproportionate migratory challenge characterized by a

⁹⁷² Explanatory note on the “Hotspot” approach, 15.07.2015.

⁹⁷³ European Court of Auditors, “EU response to the refugee crisis: the ‘hotspot’ approach”, 6, 2017, p. 16; NEVILLE, Darren, SY, Sarah and RIGON, Amalia, “On the frontline...”, *op. cit.*, p. 26.

⁹⁷⁴ GUILD, Elspeth, COSTELLO, Cathryn and MORENO-LAX, Violeta, “Implementation of the 2015 Council Decisions establishing provisional measures in the area of international protection for the benefit of Italy and of Greece”, *Study for the European Parliament LIBE Committee*, PE 583 132, 2017, p. 46.

⁹⁷⁵ European Court of Auditors, “EU response to the refugee crisis: the ‘hotspot’ approach”, 6, 2017, p. 44.

⁹⁷⁶ “In parallel with the above-mentioned efforts to strengthen the protection of EU external borders, the setting up of hotspots in Greece and Italy is a tangible operational achievement and a concrete example of the principles of solidarity and responsibility in responding to the pressure faced by these Member States”, see Commission, “Delivery of the European Agenda on Migration”, COM(2017) 558 final, 27.09.2017, p. 12. See, MORENO-LAX, Violeta, “Europe in Crisis: Facilitating Access to Protection, (Discarding) Offshore Processing and Mapping Alternatives for the Way Forward”, *Red Cross EU Office*, December 2015, p. 12; NEVILLE, Darren, SY, Sarah and RIGON, Amalia, “On the frontline...”, *op. cit.*, p. 26.

significant increase in the number of migrants arriving at the external borders” (article 2). In these geographical areas characterized by mixed migratory flows, migration management support teams, composed of experts to be deployed from the AFSJ Agencies, shall be set up to provide technical and operational support and closely cooperate with the frontline Member States⁹⁷⁷.

Regarding the Commission’s 2017 Communication on the Delivery of the European Agenda on Migration, the Commission paradoxically argued that “clear roles and responsibilities as well as a more effective coordination on the ground should also be ensured in close cooperation with the host Member States, in particular through the EU regional taskforces which should be given a clear mandate”⁹⁷⁸. However, the Commission has shown no intention of putting forward a legal instrument to govern the hotspots. The Commission continues to favor flexible and non-binding measures, like the recently adopted best practices on the implementation of the hotspot approach, which shall facilitate the effective and sustainable functioning of the hotspots and the distribution of responsibilities among stakeholders⁹⁷⁹.

Specifically, the European Commission considers that as soon as the hotspot approach is activated, according to article 18 Regulation 2016/1624, the SOP shall be the core document guiding the operations and delimiting the responsibilities of the actors involved in the hotspots.⁹⁸⁰ In our view, the SOP should not exclude, but rather complement, the adoption of a legal framework specifying the operational tasks that Frontex, Easo, and Europol may conduct in the hotspots, as well as detailing the degree of cooperation and assistance that these agencies shall provide to the national authorities subject to exceptional and sudden migratory pressures.

⁹⁷⁷ Article 18 Regulation 2016/1624 and article 21 partially agreed text on the EUAA. See, Commission, “Annex 2 to the Communication from the Commission to the European Parliament, the European Council and the Council. Managing the refugees crisis: immediate operational, budgetary and legal measures under the European Agenda on Migration”, COM(2015) 490 final, 23.09.2015.

⁹⁷⁸ Commission, “Delivery of the European Agenda on Migration”, COM(2017) 558 final, 27.09.2017, p. 12.

⁹⁷⁹ Commission, “Commission Staff Working Document Best practices on the implementation of the hotspot approach”, SWD(2017) 372 final, 15.11.2017.

⁹⁸⁰ Commission, Staff Working Document Best practices on the implementation of the hotspot approach, SWD(2017) 372 final, 15.11.2017.

That is, a EU legal instrument should regulate the hotspot approach and increase its transparency, promote legal security, clarify the operational responsibilities of each actor involved in the hotspots, and define the multifaceted operational interactions between Frontex, Easo, and Europol. Meanwhile, the SOP should, due to their flexible, comprehensive, and non-binding nature, standardize the functioning of the hotspots and quickly adapt to the volatile and changing migratory dynamics that are inherent to the hotspot approach. The SOP should thus be updated periodically and reviewed to reflect the dynamic operational environment in the hotspots.

2. The Functioning of the Hotspots

Before examining the specific tasks that Frontex, Easo, and Europol conduct in the hotspots, the general functioning of the hotspot approach is explored. Member States are responsible for the implementation of the hotspot approach. Specifically, a Member State facing an exceptional and sudden arrival of migrants at its external borders may request the assistance of the Commission and the AFSJ agencies through the establishment of a hotspot or several hotspots in its territory. However, if a concerned Member State is subject to a disproportionately high influx of third country nationals and does not request sufficient support, the European Commission may also suggest the creation of hotspots in the territory of the Member State.

According to the explanatory note on the hotspot approach, the AFSJ agencies shall swiftly assess a Member State's request for assistance, and under the coordination of the Commission, these agencies shall design a comprehensive support package for the concerned Member State⁹⁸¹. Subsequently, the requesting Member State is responsible for letting the Commission know the specific areas where the hotspots are needed and the resources to be allocated (e.g. reception facilities, pre-removal centers, national border and asylum authorities), as well as for drafting the SOP that will govern the hotspots, and

⁹⁸¹ Explanatory note on the "Hotspot" approach, 15.07.2015, p. 3.

appointing a body to oversee and coordinate the hotspot operations⁹⁸². The hotspots are centrally coordinated in the territory of the Member State that activated the hotspot approach. The hotspots are coordinated through an inter-agency coordination meeting that brings together the national and local competent authorities, the Commission, the EU AFSJ agencies, and the main international organizations operating on the ground⁹⁸³.

As soon as the hotspots are up and running, a EURTF, which is chaired by the European Commission, shall be established to promote the exchange of information and coordinate the work and operational tasks (on the ground) of the competent national officials and the AFSJ Agencies' Migration Management Support Teams deployed⁹⁸⁴. Frontex, Easo, or Europol, in cooperation with the competent national authorities, shall be charge of leading the EURTF, depending on whether the major challenge at the concerned hotspot is pressure at the external borders, processing asylum applications, or investigating migrant smuggling and trafficking networks.

The involvement of Frontex, Easo, and Europol in the EURTF facilitates the implementation of the hotspot approach by strengthening the agencies' operational presence on the ground, developing the agencies' regular cooperation, and building mutual trust with the competent national authorities, which all enhance the swift exchange of information and data among the hotspot stakeholders and promote the effective and uniform application of the EU *acquis* at the national and local level.

In practice, Frontex is in charge of disembarking, identifying, and registering the arriving migrants at the hotspots. Specifically, Frontex shall interview the third country nationals to determine their nationality and assist in taking, entering, and collating their fingerprints and personal data, which is overseen by the competent national border guards. Moreover, Frontex, Europol, and the

⁹⁸² Commission, "Commission Staff Working Document Best practices on the implementation of the hotspot approach", SWD(2017) 372 final, 15.11.2017, pp. 1-2.

⁹⁸³ European Court of Auditors, "EU response to the refugee crisis: the 'hotspot' approach", 6, 2017, p. 34.

⁹⁸⁴ Commission, "State of Play of Implementation of the Priority Actions under the European Agenda on Migration", COM(2016) 85 Final, 10.02.2016; European Court of Auditors, "EU response to the refugee crisis: the 'hotspot' approach", 6, 2017, p. 35. See, Easo, "Hotspot-Relocation Operating Plan to Italy", Easo/COS/2015/945/IT/2015, December 2015.

national authorities work hand in hand to conduct debriefing activities, with the objective of gathering information about the travel routes of the migrants and combating smuggling and trafficking mafias⁹⁸⁵.

If any arriving migrant applies for asylum during her registration, the case will be forwarded to the competent national asylum authorities, which shall in principle interview the asylum seeker. However, resulting from the lack of national personnel, Easo may conduct the interview and issue a non-binding opinion, which may be taken into consideration by the host Member State when ultimately deciding whether to grant asylum to a third-country national⁹⁸⁶. Easo also informs the host Member State on the relocation procedure. Lastly, for those migrants who neither qualify for asylum, nor need international protection, Frontex supports the concerned Member State in coordinating detention and returns.

	Authority	Competences
Rescue, registration and identification	Frontex and Member States	Rescue, disembarkation, registration and identification of people arriving at the external borders
	Frontex and Member States	Debriefing third-country nationals on their routes and networks of migrant smuggling and trafficking (information transmitted to Europol)
	Easo and Member States	Information and assistance regarding the right to asylum and international protection
	Europol	Operational assistance (through obtaining information and evidence) to the Member States in the investigation and prosecution of networks of migrant smuggling and trafficking
Asylum, International Protection	Easo and Member States	Registration and identification of applicants for international protection and asylum Transfer of the asylum seekers to centers where their request is processed by the competent national authorities with the support of Easo Once the asylum application has been favorably

⁹⁸⁵ Frontex, “General Annex of the Operational Plan – Joint Maritime Operations”, 2016, pp. 18-19 (on file with the author).

⁹⁸⁶ For a comprehensive description of the functioning of the hotspots in Italy and Greece see, SOP Applicable to Italian Hotspots, 2016 and ANTONAKAKI, Melina, KASPAREK, Bernd and MANIATIS, Georgios, “Counting Heads and Channeling Bodies. The Hotspot Centre Vial in Chios, Greece”, *Transit Migration*, 2, 2016, <http://bit.ly/ztV9OUM> (last accessed: 30/04/2018).

		processed, Easo is responsible for managing the relocation system
Detention and Removal	Member States	Administrative detention in centers while the removal file is processed
	Frontex and Member States	Coordination, preparation and effective execution of the removal decision of those irregular migrants who do not qualify for asylum or international protection

Table 3: Allocation of operational powers in the hotspots. Source: Author's own elaboration.

3. The Specific Operational Tasks that Frontex, Easo, and Europol Conduct in the Hotspots

The lack of a legal framework detailing the specific tasks of Frontex, Easo, and Europol and their reinforced multilateral cooperation at the hotspots blurs the allocation of operational responsibilities among the agencies, and makes it difficult to determine the specific powers that each agency shall undertake on the ground. Hence, this section analyzes the precise role and operational tasks that Frontex, Easo, and Europol are developing in practice in the hotspots (see figure 24).

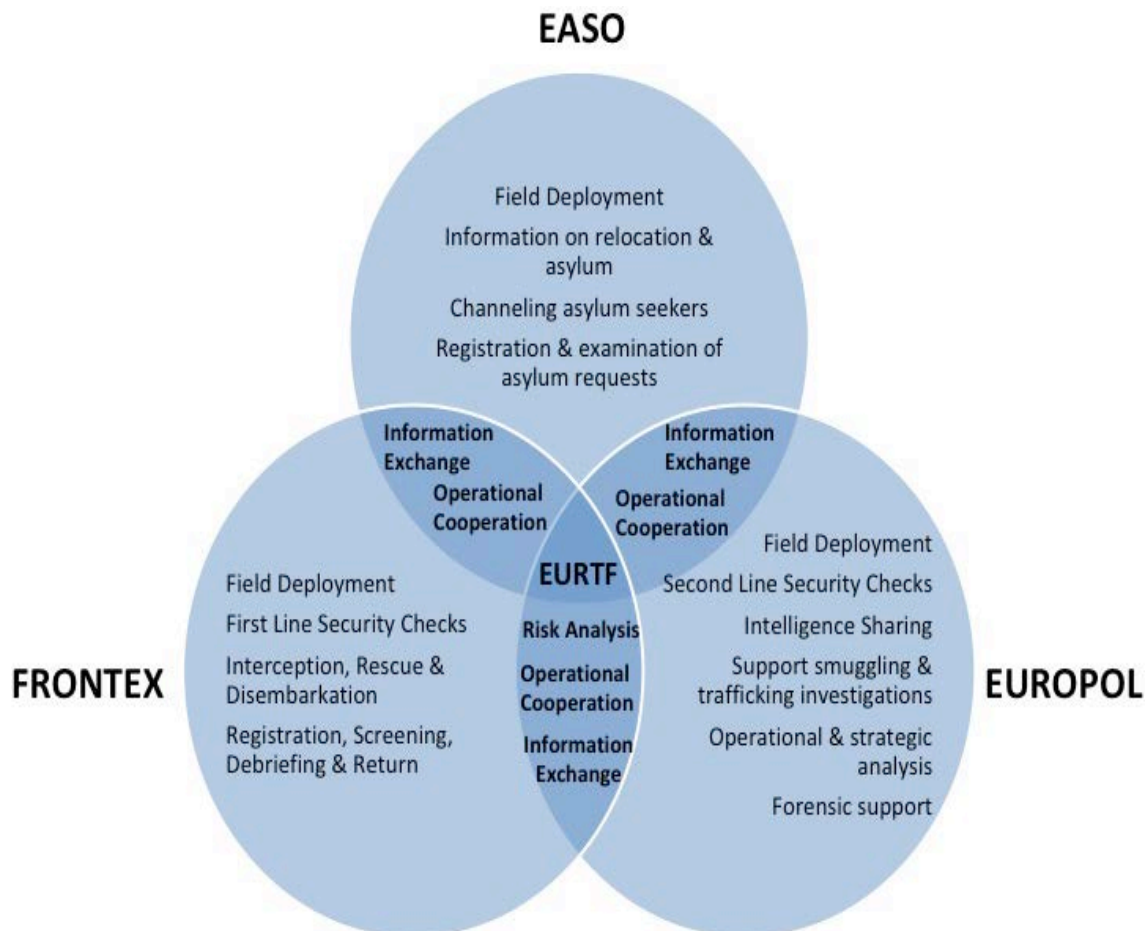


Figure 24: the role of Frontex, Easo and Europol in the Hotspots. Source: Author's own elaboration.

3.1. *Frontex' Assistance in Registering, Screening, Debriefing, and Returning the Arriving Migrants*

Frontex plays a threefold operational role at the hotspots; a registration and screening role — by assisting the concerned Member State in fingerprinting and determining the identity and nationality of the arriving migrants; a debriefing role — by contributing to the national illegal migrant smuggling and trafficking investigations; and lastly, a return role — by coordinating with the competent national authorities regarding the removal of those migrants that do not qualify for asylum or international protection. All of these tasks are expressly stated in article 18(4) Regulation 2016/1624 on the EBCG, which regulates the deployment of migration management support teams in the hotspots.

In regards to the registration and screening tasks of Frontex, it shall be pointed out that the agency's assistance starts even before the irregular migrants

arrive at the shores of the Member States hosting the hotspots. Specifically, Frontex (through patrol vessels, helicopters, and fixed wing airplanes made available to the agency, or in the near future, acquired or leased by Frontex) actively supports the concerned Member State in patrolling the external borders, improving cooperation on coast guard function activities, early detecting and preventing unauthorized border crossings, combating migrant smuggling and trafficking of human beings, and supporting search and rescue operations⁹⁸⁷.

Additionally, according to the SOP applicable to the Italian hotspots, “the Frontex team leader should contact the Frontex liaison officer on board the vessel or the captain of the vessel which carried out the rescue operation in order to receive all information useful for the subsequent preparation of debriefing and screening activities”⁹⁸⁸. Frontex also cooperates with the competent national authorities in disembarking and escorting the intercepted migrants to the hotspots.

As soon as the migrants arrive in the hotspots, Frontex provides them with information in regards to asylum and relocation procedures and assists in their registration, identification, and screening. A key step in identifying and registering the disembarked migrants consists in determining their nationality, since many of them travel undocumented or with forged or falsified documents. Frontex and the competent national officials, with the aid of an interpreter and a document fraud expert made available by the agency, conduct the nationality screening by assessing the documents that the irregular migrant brought; in the absence of such documents, the third country national is subject to a mandatory interview with the aim of gathering sufficient information to establish a country of origin⁹⁸⁹.

Frontex’ support teams deployed in the hotspots also play a significant role in identification procedures, particularly by filling out a screening form, which

⁹⁸⁷ Frontex, “Evaluation Report 2016 – JO EPN Triton 2016”, 2016, p. 10 (on file with the autor). See, FRANCO GARCÍA, Miguel Ángel, “El alcance de la cooperación entre las agencias de la Unión Europea implicadas en la Seguridad Marítima”, *Revista General de Derecho Europeo*, 44, 2018, pp. 13-54.

⁹⁸⁸ SOP Applicable to Italian Hotspots, 2016, p. 23.

⁹⁸⁹ GUILD, Elspeth, COSTELLO, Cathryn and MORENO-LAX, Violeta, “Implementation of...”, *op. cit.*, p. 55.

includes the nationality, age, language spoken, and whether the individual has the intention of applying for asylum⁹⁹⁰. Once the migrants have been identified and registered, Frontex' fingerprinting officers deployed at the hotspots assist the national authorities in collecting their fingerprints and registering them in Eurodac. The migrants must be fully informed about the obligation and objective of taking their fingerprints⁹⁹¹. In the event that the migrants oppose being fingerprinted, only the competent national officers may, as a last resort, apply the minimum level of coercion to obtain their fingerprints⁹⁹².

Frontex' equipment and experts are thus deployed in order to facilitate the effective and swift verification of the migrants' documents and nationality to the concerned Member State facing disproportionate migratory pressure. If Frontex' document experts reasonably believe such documents to be forged or falsified, or in the event that the migrants are undocumented, an interview is undertaken to determine a country of origin.

Ultimately, Frontex' screening experts will issue a non-binding recommendation to the Member State hosting the hotspot, detailing the identification assessment conducted and the presumed nationality of the migrant. While only the national authorities are competent to adopt a final decision regarding the country of origin of the irregular migrant, Frontex has a strong recommendatory power in identifying and registering the migrants arriving at the hotspots. Indeed, due to the extraordinary pressure that the concerned Member State is subject to, combined with the lack of sufficient national human and equipment resources to effectively screen the large number of migrants that arrive at a time, the national authorities tend to base their nationality decisions exclusively on Frontex' assessment and recommendation⁹⁹³.

Furthermore, Frontex plays a significant operational role in debriefing the migrants at the hotspots. According to the SOP of the Italian hotspots, Frontex'

⁹⁹⁰ European Council for Refugees and Exiles, "The implementation of the hotspots in Italy and Greece", 2016, <http://bit.ly/2HIgYgL>, p. 40 (last accessed: 30/04/2018).

⁹⁹¹ SOP Applicable to Italian Hotspots, 2016, pp. 12-13.

⁹⁹² Frontex, "General Annex of the Operational Plan – Joint Maritime Operations", 2016, p. 28 (on file with the autor).

⁹⁹³ European Council for Refugees and Exiles, "The implementation of the hotspots in Italy and Greece", 2016, p. 40.

debriefing experts shall receive any information regarding personal effects and other objects that the irregular migrants were carrying with them when intercepted at sea⁹⁹⁴. Frontex, in close cooperation with Europol and the competent national authorities, analyzes the seized items and any link to facilitators of illegal immigration and human trafficking.

The debriefing interviews, whose findings are shared with Europol in order to identify facilitators and report them to the Member States, aim to discover further details about the routes taken by the migrants, reasons for traveling, modus operandi, and any possible smuggling and trafficking networks operating on the ground. Frontex shall collect the information, analyze it, and store it as intelligence that will then contribute to the agency's risk analysis and to its future operational responses⁹⁹⁵.

Frontex' debriefing officers deployed at the hotspots are therefore in charge of collecting information for risk analysis purposes and contributing to national investigations that center on combating the illegal smuggling of migrants and the trafficking of human being mafias⁹⁹⁶. Unlike the screening interviews, migrants shall consent to be debriefed on a voluntary and anonymous basis. As the United Nations Special Rapporteur on the human rights of migrants recommended, "such interviews should not take place upon arrival, as often migrants are traumatized from the journey and such interviews may increase their fear of the authorities and lead them to hide protection needs, abuse suffered or vulnerabilities experienced"⁹⁹⁷.

The procedure and the actors involved at the hotspots may vary depending on whether the concerned migrant has applied or qualifies for asylum, can be returned immediately to her country of origin, or has a status that remains uncertain⁹⁹⁸. In regards to irregular migrants that cannot stay in the EU regularly,

⁹⁹⁴ SOP Applicable to Italian Hotspots, 2016, p. 24.

⁹⁹⁵ Frontex, "General Annex of the Operational Plan – Joint Maritime Operations", 2016, p. 20 (on file with the autor).

⁹⁹⁶ European Council for Refugees and Exiles, "The implementation of the hotspots in Italy and Greece", 2016, p. 40.

⁹⁹⁷ Human Rights Council, "Report of the Special Rapporteur on the human rights of migrants on his mission to Greece", A/HRC/35/25/Add.2, 24.04.2017, para 41.

⁹⁹⁸ Frontex, "General Annex of the Operational Plan – Joint Maritime Operations", 2016, pp. 18-19 (on file with the autor).

Frontex will assist the concerned Member State in conducting pre-return and return activities, organizing their removal, and enhancing cooperation with the authorities of the migrants' country of origin⁹⁹⁹.

Hence, during this first phase at the hotspots, in which Frontex plays a noteworthy operational role in registering, screening, and debriefing the arriving migrants, four types of officers are deployed by the agency to support and closely cooperate with the concerned Member State on the ground: screening experts, fingerprinting officers, advanced document officers, and debriefing experts. Whereas these experts provide significant operational support to the competent national authorities in practice, in regards to the management of their external borders, the concerned Member State should, in principle, ultimately be in charge of coordinating the work of the agency's deployed teams and overseeing all of their operational activities in the hotspots.

3.2. *Easo's Assistance in Informing, Registering, and Examining Requests for International Protection*

Easo's key mission in the hotspots consists in providing tailor-made operational assistance to those frontline national asylum systems subject to extraordinary pressure, resulting from a high number of asylum applications they register¹⁰⁰⁰. As per a specific hotspot Operating Plan signed between the agency and the concerned Member State, Easo deploys asylum teams at the hotspots with the aim of diminishing the backlog of asylum cases and establishing a sustainable and efficient national asylum system¹⁰⁰¹.

Within the hotspots, the tasks of Easo range from informing asylum seekers and deploying asylum support teams, to facilitating the preparation of the asylum or relocation case files as appropriate and assisting the concerned Member State in channeling the applicants into the relocation, asylum, or international

⁹⁹⁹ See, articles 27-33 Regulation 2016/1624.

¹⁰⁰⁰ Easo, "Single Programming Document: Multiannual Programming 2017-2019 and Work Programme 2017", December 2016, p. 10.

¹⁰⁰¹ PAPAGEORGIOU, Ioannis, "International protection in Greece Background information for the LIBE Committee delegation to Greece 22-25 May 2017", *Study for the European Parliament LIBE Committee*, PE 583.145, May 2017, p. 37.

procedure¹⁰⁰². In particular and according to Easo's hotspot Operating Plan to Italy and Greece, the role of Easo at the hotspots consists in: providing detailed information to the new arrivals on the relocation and asylum procedure, channeling asylum seekers into the appropriate asylum or relocation procedure, and assisting with the registration and examination of requests for international protection, for the preparation of case files, and for the joint processing of asylum applications¹⁰⁰³.

Firstly, Easo's AST, in close collaboration with the UNHCR, inform the arriving migrants at the hotspots about the phases and functioning of the asylum and relocation procedure. Third country nationals are also advised as to where and how asylum and relocation applications may be lodged, and are encouraged to cooperate with the national authorities in order to ensure effective access to the examination procedure¹⁰⁰⁴.

Secondly, those migrants who express their intention to apply for asylum during their identification processes are either immediately channeled into the relocation program if their nationalities are included within this program, or otherwise, are placed into a dedicated asylum procedure¹⁰⁰⁵. Easo has played a central role in the implementation of the Council's Decisions on relocation¹⁰⁰⁶.

Lastly, the most controversial operational power that Easo conducts in practice in the hotspots is supporting the competent national authorities in processing the asylum applications. Given the gridlock in the Greek asylum system, Easo has assumed the task of conducting the admissibility interview of the asylum applications. According to the 2018 Operating Plan agreed by Easo

¹⁰⁰² European Court of Auditors, "EU response to the refugee crisis: the 'hotspot' approach", 6, 2017, p. 17.

¹⁰⁰³ Easo, "Hotspot - Relocation Operating Plan to Italy", Easo/COS/2015/945/IT/2015, 12.12.2015 and Easo, "Hotspot Operating Plan to Greece", Easo/COS/2015/677 EL/1226, 30.09.2015. See, Easo, "Operating Plan Agreed by Easo and Italy", 15.12.2017 and Easo, "Operating Plan Agreed by Easo and Greece", 13.12.2017.

¹⁰⁰⁴ Easo, "Hotspot Operating Plan to Greece - Amendment No 2", Easo/COS/2016/391, 01.04.2016.

¹⁰⁰⁵ SOP Applicable to Italian Hotspots, 2016, p. 5.

¹⁰⁰⁶ Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece', OJ L-239, 15.09.2015, pp. 146-156; Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, OJ L-248, 24.09.2015, pp. 80-94; Council Decision (EU) 2016/1754 of 29 September 2016 amending Decision (EU) 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, OJ L-268, 01.10.2016, pp. 82-84.

and Greece, the operational assistance of Easo at the Greek hotspots aims to fully register, in a timely manner and on a case-by-case basis, the admissibility and/or eligibility of the applications for international protection, as well as to appropriately identify, assess, and refer vulnerable applicants.

Indeed, since the EU-Turkey statement was adopted¹⁰⁰⁷, Easo has been increasingly involved in the eligibility and merits examination procedure of applications of international protection by conducting admissibility interviews, drafting opinions, and recommending decisions¹⁰⁰⁸. The joint processing of asylum claims is expressly indicated in article 60(4)(b) Greek Law No. 4375 of 3 April 2016. Article 60(4)(b) states that while the Hellenic Police or the Armed Forces are responsible for registering applications for international protection, notifying decisions, and receiving appeals at the hotspots, Easo may assist the national authorities in conducting interviews with applicants for international protection as well as any other procedure¹⁰⁰⁹.

Article 60(4) Greek Law No. 4375 was revised by Greek Law No. 4399 of 22 June 2016, which further expanded the powers conferred to Easo. In the Greek hotspots, the agency may autonomously conduct the interviews of the applicants for international protection¹⁰¹⁰. The officials of Easo deployed at the Greek

¹⁰⁰⁷ European Council, EU-Turkey Statement, Press release, 144/16, 18.03.2016. In particular, “Ministers reaffirmed that returns to Turkey from Greece should be stepped up and that the EU’s assistance through Frontex and Easo should also be prioritized in contributing to these returns through efficient admissibility and eligibility support”, Council, “Outcome of the Council Meeting 3473rd Council meeting Justice and Home Affairs Luxembourg, 9 and 10 June 2016”, 9979/16, p. 10. See, GKLIATI, Mariana, “The Application of the EU-Turkey Agreement: A Critical Analysis of the Decisions of the Greek Appeals Committee”, *European Journal of Legal Studies*, 10(1), 2017, pp. 81-123; RODIER, Claire, “Le faux semblant des hotspots”, *La Revue des droits de l’Homme*, 13, 2017, pp. 1-22.

¹⁰⁰⁸ Easo Hotspot Operating Plan to Greece - Amendment No 2, Easo/COS/2016/391, 1.04.2016, p. 3; Easo Special Operating Plan to Greece, Easo/DOP/OU/2016/1812, 15.12.2016, p. 9 and Easo Operating Plan Agreed by Easo and Greece, 13.12.2017, p. 13. See, PAPAGEORGIOU, Ioannis, “International protection...”, *op. cit.*, p. 38.

¹⁰⁰⁹ Greece Law No. 4375 of 2016 on the organization and operation of the Asylum Service, the Appeals Authority, the Reception and Identification Service, the establishment of the General Secretariat for Reception, the transposition into Greek legislation of the provisions of Directive 2013/32/EC, 03.04.2016, <http://www.refworld.org/docid/573ad4cb4.html> (last accessed: 30/04/2018). See, European Council on Refugees and Exiles and the Advice on Individual Rights in Europe Center, “With Greece: Recommendations for refugee protection”, June 2016, http://www.asylumineurope.org/sites/default/files/resources/with_greece.pdf (last accessed: 30/04/2018).

¹⁰¹⁰ Greece Law 4399, “Institutional framework for establishing Private Investment Aid schemes for the country’s regional and economic development - Establishing the Development Council

hotspots play a crucial role in the admissibility procedure of an asylum application by undertaking vulnerability screenings, interviewing asylum seekers, assessing their cases, and filing recommendations to the Greek competent authorities, which are ultimately responsible for making a decision.

Due to the extraordinary pressure facing the Greek asylum system, Easo is, in practice, responsible for independently conducting interviews, assessing whether the safe third country or the first country of asylum concept applies, and adopting a recommendation on the admissibility of the international protection application¹⁰¹¹. Nevertheless, this recommendation has *de iure* no legal effect on the Greek asylum officials. However, Easo's opinion has *de facto* quasi-binding consequences, since the Greek Asylum Service largely does not undertake any assessment of the application, but rather rubberstamps the agency's decision in regards to the applications for international protection.

Whereas the fourteenth recital of Regulation of 19 May 2010, establishing Easo, states that the agency "should have no direct or indirect powers in relation to the taking of decisions by Member States' asylum authorities on individual applications for international protection", the officers of Easo deployed in the Greek hotspots exerted a significant influence on the competent national authorities regarding the admissibility of an asylum application. Precisely, based on the *de facto* joint processing experience of Easo in the Greek hotspots, the future Regulation on the EUAA will provide a legal basis for the new agency's assistance to the competent national authorities in screening third-country nationals and registering and examining applications for international protection¹⁰¹².

and other provisions", 22.06.2016, p. 6905, http://startupgreece.gov.gr/sites/default/files/gr_development_law_en_2.pdf (last accessed: 30/04/2018). See, TSOURDI, Evangelia, "Bottom-up salvation?...", *op. cit.*, p. 1023; TSOURDI, Evangelia, "Solidarity at work? The prevalence of emergency-driven solidarity in the administrative governance of the Common European Asylum System", *Maastricht Journal of European and Comparative Law*, 24(5), 2017, pp. 1-20.

¹⁰¹¹ PAPAGEORGIOU, Ioannis, "International protection...", *op. cit.*, p. 38; European Council for Refugees and Exiles, "The implementation of the hotspots in Italy and Greece", 2016, p. 38.

¹⁰¹² See chapter 4, section III.3.2.

3.3. *Europol's Assistance in Averting and Combating Migrant Smuggling and Human Trafficking Networks*

Europol is present in the hotspots and actively participates with Frontex and Easo in the EURTF. Europol's core mission in the hotspots is threefold: to reinforce the exchange of information, verify such intelligence within the relevant databases, and deploy teams of experts on the ground. The objective is to ensure a comprehensive European law enforcement approach and operationally assist the concerned frontline Member States in averting and combating migrant smuggling, human trafficking, and terrorist networks.

To achieve such an objective, Europol is namely responsible for fast-tracking information, improving the national investigations, conducting operational and strategic analysis, being present at the screening of the arrived migrants, and providing forensic support in the hotspots¹⁰¹³. However, unlike the EBCG and EUAA Regulations that expressly cover the support of the agencies to the Member States in the hotspots, Regulation 2016/794 on Europol does not mention the operational role that the agency plays in the hotspots. Given that a legal framework on the hotspots has not been adopted, there is important legal uncertainty surrounding Europol's specific operational powers on the ground.

According to the 2015 General Report on Europol activities, the agency's activities at the hotspots consisted in collecting real-time intelligence from all landing proceedings and interviews, cross-checking such information against Europol databases, providing forensic support via the examination of electronic devices and document scanning, and supporting the national and local investigators by collecting and analyzing all material relevant to the fight against migrant smuggling, trafficking and terrorism¹⁰¹⁴.

Subsequently, in 2016, Europol developed "the concept of EU Mobile Investigation Support Teams (EMIST) and support the pilot EMIST at the hotspot in Greece by deploying Europol specialists and analysts; delivering training to

¹⁰¹³ Europol, "General Report on Europol Activities 2015", 2016, p. 11. See, SOP Applicable to Italian Hotspots, 2016, pp. 21-22.

¹⁰¹⁴ Ibid., p. 11. SOP Applicable to Italian Hotspots, 2016, p. 22.

Member States' guest officers; financially support the secondment of MS guest officers to the EMIST"¹⁰¹⁵.

The main tool employed by Europol to assist the concerned Member States in the hotspots was the JOT-MARE, followed by the EMSC. Since February 2016, the EMSC has assisted the competent national enforcement authorities by providing secure-information, sharing opportunities and strategic and operational analysis, gathering evidence, and undertaking investigations against the smuggling networks facilitating the illegal entries, onward secondary movements, and residence of migrants in the EU¹⁰¹⁶. Not only is the EMSC active in supporting the national authorities in exchanging intelligence and investigating existing criminal networks operating in the Mediterranean, but Europol's officials, jointly with Frontex and the concerned Member State, also debrief on the migrants at the hotspots and assess the data gathered from the interviews and investigations.

The second activity report of the EMSC details that the Center has assisted the competent national enforcement authorities in cases related to migrant smuggling and document fraud through: forensic support in relation to questioned documents and materials used to produce suspicious documents, on-the-spot technical support to provide assistance and expertise in investigating forged documents and dismantling illegal print shops, and permanent deployments in the hotspots¹⁰¹⁷. The officials of Europol deployed in the hotspots offer expertise, coordinate operational meetings, provide analytical support, and perform cross-checks against the databases of the agency¹⁰¹⁸.

The key operational novelty of the EMSC, which is not established in Regulation 2016/794 on Europol, consists in deploying investigative and analytical support teams (EMIST and EMAST) on the ground, as well as guest officers to undertake systematic secondary security checks and support Greece in the hotspots¹⁰¹⁹. The presence of Europol in the hotspots is permanent and the EMIST and EMAST are responsible for delivering regional operational support

¹⁰¹⁵ Europol, "Europol Work Programme 2016", 03.02.2016, p. 17.

¹⁰¹⁶ Explanatory note on the "Hotspot" approach, 15.07.2015, p. 8.

¹⁰¹⁷ Europol, "Two Years of EMSC Activity Report Jan 2017-Jan 2018", 20.04.2018, p. 16.

¹⁰¹⁸ Europol, "Europol Review 2016-2017", 23.01.2018, p. 22.

¹⁰¹⁹ Council, "Conclusions of the 12th Annual Meeting of National Experts on Joint Investigation Teams (15 - 16 June 2016, The Hague)", doc. 12887/16, 05.10.2016, p. 3.

and serving as a platform to ensure trustworthy relationships with national authorities¹⁰²⁰.

Europol's Review 2016-2017 highlights the strong operational capacity provided by the agency in the hotspots and particularly in the secondary security checks undertaken by the deployed officials. Specifically, it is pointed out that "Europol experts worked side-by-side with national authorities at the EU's external borders to strengthen security checks on the inward flows of migrants, to disrupt migrant smuggling networks and identify suspected terrorists and criminals"¹⁰²¹.

V. THE HOTSPOT APPROACH: *DE IURE* VERSUS *DE FACTO* OPERATIONAL COOPERATION OF FRONTEX, EASO, AND EUROPOL ON THE GROUND

This section studies the implications derived from the absence of a specific legal framework regulating the strengthened operational cooperation of Frontex, Easo, and Europol in the hotspots. Firstly, the delay in implementing the hotspots and the insufficient experts and resources that the Member States made available to Frontex, Easo, and Europol are examined. Moreover, the operational powers that exceed the EU AFSJ agencies' legal remits are analyzed. This section concludes by exploring the consequences of the reinforced operational inter-agency cooperation in practice, with regards to the implementation prerogatives of the Member States.

1. The Delay and Criticism Surrounding the Implementation of the Hotspot Approach

The hotspot approach has brought about a more uniform and systematic multilateral cooperation among Frontex, Easo, and Europol. However, the initial impact of this approach was clearly limited due to the delay in launching the

¹⁰²⁰ Europol, "Two Years of EMSC Activity Report Jan 2017-Jan 2018", 20.04.2018, p. 19.

¹⁰²¹ Europol, "Europol Review 2016-2017", 23.01.2018, p. 22.

hotspots in Greece and Italy and the insufficient experts and resources that the Member States made available to the agencies. In regards to the implementation of the hotspot approach, out of the eleven hotspots that were scheduled to be created by December 2015, only three were fully operational by mid-January 2016¹⁰²².

Out of the five hotspot areas identified by the Greek authorities (Lesvos, Leros, Kos, Chios, and Samos), only Lesvos was partially functioning seven months after the European Agenda on Migration was adopted in May 2015¹⁰²³. Through a new Commission service, the Structural Reform Support Service that was launched on 1 July 2015, the Commission provided Greece daily-specialized technical assistance to make the hotspots fully operational without further delay¹⁰²⁴.

The situation in Italy was slightly better; out of the five hotspot areas designated (Lampedusa, Trapani, Pozzallo, Taranto, and Messina), the hotspots in Lampedusa and Trapani were fully operational on 22 December 2015¹⁰²⁵. Finally in 2017, five hotspots with a capacity of more than 7,000 spots became fully operational in Greece, with four fully operational hotspots with more than 1,500 spots in Italy, which in total hosted more than 261,000 migrants between 1 January 2016 and 15 September 2017¹⁰²⁶.

Given the reinforced operational support needed in the hotspot areas, Frontex, Easo, and Europol called upon the national authorities to make unprecedented human resources and technical equipment available to them. In 2015, Easo requested 370 additional experts and Frontex requested 776 border guards, screeners, debriefers, and interpreters, with the aim of effectively

¹⁰²² Commission, "Second report on relocation and resettlement", COM(2016) 222 final, 12.04.2016, p. 4; UNHCR, "Building on the Lessons Learned to Make the Relocation Schemes Work More Effectively", January 2016, See, NEVILLE, Darren, SY, Sarah and RIGON, Amalia, "On the frontline...", *op. cit.*, pp. 33-40.

¹⁰²³ Commission, "Progress Report on the Implementation of the hotspots in Greece", COM(2015) 678 final, 15.12.2015, p. 5. See, Commission, "Progress report on the implementation of the hotspot approach in Greece", COM(2016) 141 final, 04.03.2016.

¹⁰²⁴ *Ibid.*, p. 3.

¹⁰²⁵ Commission, "Progress Report on the Implementation of the hotspots in Italy", COM(2015) 679 final, 15.12.2015.

¹⁰²⁶ Commission, "On the Delivery of the European Agenda on Migration", COM(2017) 558 final, 27.09.2017, p. 12.

implementing the objectives stressed by the European Agenda on Migration¹⁰²⁷. Europol for its part announced in 2016 its intention to establish a team of 200 investigators to be deployed in the hotspots¹⁰²⁸.

However, the Member States' early commitments were insufficient for Frontex, Easo, and Europol's real and pressing needs in the hotspots¹⁰²⁹. Furthermore, since the personnel made available to Frontex, Easo, and Europol is only deployed for short periods of time, the agencies are constantly required to request experts, which "obviously implies a significant efficiency loss, as newly arriving experts need some time to adjust and become familiar with the specific situation"¹⁰³⁰. As HORII stresses, "the deployment of EU Member States' staff is not only affected by the political situation in EU Member States or practical/logistical obstacles, such as limited human resources, but also by the trust/institutional environments of hosting Member States"¹⁰³¹.

Although the Member States' commitments to Frontex, Easo, and Europol remained below what was required in 2017 and 2018, these agencies still saw more of a reinforcement of their resources than they had before¹⁰³². Frontex' Joint Operations, Poseidon and Triton, provided Greece and Italy respectively with support in the effective implementation of the hotspot approach. In particular, under the framework of Poseidon and Triton, Frontex deployed 888 officers in

¹⁰²⁷ Commission, "Managing the refugee crisis: State of Play of the Implementation of the Priority Actions under the European Agenda on Migration", COM(2015) 510 final, 14.10.2015, p. 3.

¹⁰²⁸ Europol, "Europol Setting up Team of 200 Investigators to Deploy to Migration Hotspots", 12.05.2016, <http://bit.ly/znasaed> (last accessed: 30/04/2018). Finally, in 2016 the initial pool of 200 investigators ended up in a pool of 116 guest officers, 32 of which were deployed to the Greek and Italian Hotspots. Commission, "Fifth Report on the Progress made in the implementation of the EU-Turkey Statement", COM(2017) 204 final, 02.03.2017, p. 4 and Europol, "European Migrant Smuggling Center First Year Activity Report", 2017, p. 15.

¹⁰²⁹ Commission, "Progress Report on the Implementation of the hotspots in Greece", COM(2015) 678 final, 15.12.2015, p. 7; Commission, "Progress report on the implementation of the hotspot approach in Greece", COM(2016) 141 final, 04.03.2016, p. 6; Commission, "Progress Report on the Implementation of the hotspots in Italy", COM(2015) 679 final, 15.12.2015, p. 3.

¹⁰³⁰ European Court of Auditors, "EU response to the refugee crisis: the 'hotspot' approach", 6, 2017, p. 32.

¹⁰³¹ HORII, Satoko, "Accountability, Dependency...", *op. cit.*, p. 26.

¹⁰³² Commission, "Fifth Report on the Progress made in the implementation of the EU-Turkey Statement", COM(2017) 204 final, 02.03.2017, p. 4; Commission, "Sixth Report on the Progress made in the implementation of the EU-Turkey Statement", COM(2017) 323 final, 13.06.2017, p. 3; Commission, "Seventh Report on the Progress made in the implementation of the EU-Turkey Statement", COM(2017) 470 final, 06.09.2017, p. 4; Commission, "Communication on Progress report on the Implementation of the European Agenda on Migration", COM(2018) 301 final, 16.05.2018.

Greece and 407 officers in Italy¹⁰³³. The Joint Operation, Triton, was replaced and reinforced in February 2018 with the new operation, Themis, which better addresses the changing patterns of migration in the Central Mediterranean¹⁰³⁴. In 2017, Easo deployed 232 persons in the hotspots, specifically 107 caseworkers, vulnerability experts and experts on information provision, 42 Easo staff members, and 83 interpreters¹⁰³⁵. As of 30 April 2018, Easo had deployed 63 national experts, 27 interim staff, and 85 interpreters in Greece, in addition to 38 national experts, 54 interim staff, and 98 cultural mediators in Italy¹⁰³⁶.

The deployment of guest officers by Europol in the Greek and Italian hotspots has assisted the competent national law enforcement authorities in identifying risk profiles, fighting smugglers' networks, and performing second-line security checks. Indeed, in 2016, Europol received an Internal Security Fund emergency assistance grant of 1.5 million euros in order to deploy guest officers in the hotspots, conduct secondary security checks, identify risk profiles, and fight smuggler networks¹⁰³⁷.

By the end of 2017, the pool of guest officers trained by Europol to be deployed on a three-month rotation basis to the Greek and Italian hotspots in order to perform secondary security checks had increased to 278¹⁰³⁸. As of 30 April 2018, Europol had deployed 13 guest officers and Europol had deployed 2 staff members to the Greek hotspots, with 15 guest officers and 3 Europol staff members deployed to the Italian hotspots to conduct secondary security

¹⁰³³ Commission, "Fifth Report on the Operationalisation of the European Border and Coast Guard", COM(2017) 467 final, 06.09.2017, p. 3. See, Commission, "Annex to the Report on the European Agenda on Migration European Border and Coast Guard", COM(2017) 669 final Annex 4, 15.11.2017.

¹⁰³⁴ Commission, "Communication on Progress report on the Implementation of the European Agenda on Migration", COM(2018) 250 final, 14.03.2018, p. 10. See, Commission, "Communication on Progress report on the Implementation of the European Agenda on Migration", COM(2018) 301 final, 16.05.2018, p. 9.

¹⁰³⁵ Commission, "Annex to the Report on the European Agenda on Migration Joint Action Plan on the implementation of the EU-Turkey Statement", COM(2017) 669 final Annex 2, 15.11.2017, p. 1.

¹⁰³⁶ Commission, "Communication on Progress report on the Implementation of the European Agenda on Migration", COM(2018) 301 final, 16.05.2018, pp. 6 and 9.

¹⁰³⁷ Parliament, Draft Opinion of the Committee on Civil Liberties, Justice and Home Affairs for the Committee on Budgetary Control on discharge in respect of the implementation of the budget of the European Union Agency for Law Enforcement Cooperation (Europol) for the financial year 2016 (2017/2169(DEC)), 12.12.2017, p. 3.

¹⁰³⁸ Commission, "Seventh Report on the Progress made in the implementation of the EU-Turkey Statement", COM(2017) 470 final, 6.09.2017, p. 4. See, European Court of Auditors, "EU response to the refugee crisis: the 'hotspot' approach", 6, 2017, p. 33.

checks¹⁰³⁹. To cite but one example of Europol's unprecedented operational presence on the ground, during September 2016, the guest officers deployed by Europol to Greece reached 782 persons, and increased to 1,490 in October 2016¹⁰⁴⁰.

The slow set up of the hotspots, the dependency of Frontex, Easo, and Europol on the resources made available by the Member States, the inadequacy and insufficiency of the reception facilities, and the unremitting exceptional migratory pressure at the Greek and Italian shores until the end of 2016 led to, in the Commission's own words, hotspots that were "not only overcrowded but have substandard material conditions in terms of sanitation and hygiene, access to essential services such as health care, in particular for vulnerable groups. Security is insufficient, and tensions persist between different nationalities"¹⁰⁴¹.

The hotspots are subject to wide criticism from civil society due to, among other reasons that are beyond the scope of this study, their intransparent functioning, their lack of sufficient procedural and legal guarantees, the detention of migrants and asylum seekers in appalling facilities while their legal status is determined, the recourse to repressive measures, the insufficient access to legal information and legal assistance, and the lack of effective access to fair asylum procedures independent of one's nationality¹⁰⁴².

¹⁰³⁹ Commission, "Communication on Progress report on the Implementation of the European Agenda on Migration", COM(2018) 301 final, 16.05.2018, pp. 6 and 9.

¹⁰⁴⁰ Council, "Implementation of the counter-terrorism agenda set by the European Council", doc. 14260/16, 11.11.2016, p. 4.

¹⁰⁴¹ Commission, "Commission Recommendation of 8.12.2016 addressed to the Member States on the resumption of transfers to Greece under Regulation (EU) No. 604/2013", C(2016) 8525 final, 08.12.2016, p. 5. In this regard see, Fundamental Rights Officer of Frontex, "Expression of Concern: Report on the reception situation upon disembarkation on Chios island, EPN Poseidon 2016 and 2017", FRO/IANR/2017, 27.03.2017 (on file with the author).

¹⁰⁴² The analysis of the human rights violations at the hotspots is beyond the scope of this thesis. In this regard see, ActionAid, *et. al.*, "Transitioning to a Government-Run Refugee and Migrant Response in Greece", Joint Agency Briefing Paper, December 2017, <https://drc.ngo/media/4154531/joint-ngo-roadmap-12122017.pdf> (last accessed: 30/04/2018); Amnesty International, "Hotspot Italy How EU's Flagship Approach Leads to Violations of Refugee and Migrant Rights", 2016, <https://www.amnesty.org/en/documents/eur30/5004/2016/en/> (last accessed: 30/04/2018); CAPRIOGLIO, Carlo, FERRI, Francesco and GENNARI, Lucia, "The Taranto Hotspot: Unveiling the Developments of EU Migration Management Policies", Blog: Border Criminologies, April 2018, <https://bit.ly/2GOXNG7> (last accessed: 30/04/2018); CREMIN, Geraldine, "'This is chaos' Inside the lawless 'hotspots' that are supposed to be solving Europe's refugee crisis", *Politico*, 11/19/15, <https://www.politico.eu/article/migrant-crisis-hotspots-europe-this-is-chaos/> (last accessed: 30/04/2018); Danish Refugee Council, "Fundamental Rights and the EU Hotspot Approach",

Moreover, the preeminent position of Frontex in the hotspots, in comparison to the secondary role that Easo plays, has also been criticized. The predominance of Frontex in the hotspots reveals that the “the focus to date has been on identification, registration and border control”¹⁰⁴³ and that “too much emphasis is placed on border control and the prevention of crossborder crime at the expense of people in need of international protection (...)”¹⁰⁴⁴.

2. The Hotspots: An Inter-Agency Operational Cooperation that Exceeds Frontex, Easo, and Europol’s Legal Mandate?

Despite the secrecy surrounding the specific functions and the extent of the hands-on support that Frontex, Easo, and Europol develop *de facto* in the hotspots, these agencies notably strain their vague legal mandates, and their operational tasks go well beyond the pure technical assistance and promotion of coordination. Firstly, article 5 Regulation 2016/1624 on the EBCG states that Member States “retain primary responsibility for the management of their sections of the external borders” and that “the Agency shall support the application of Union measures relating to the management of the external borders by reinforcing, assessing and coordinating the actions of Member States in the implementation of those measures and in return”.

However, Frontex plays a role that goes beyond simply assisting the competent national authorities in identifying, registering, and screening the arriving migrants in the hotspots. Not only does Frontex, in practice, aid in determining the nationality of the disembarked or rescued migrants, but it also

October 2017 https://drc.ngo/media/4051855/fundamental-rights_web.pdf (last accessed: 30/04/2018); European Council for Refugees and Exiles, “The implementation of the hotspots in Italy and Greece”, 2016; European Union Agency for Fundamental Rights, “Opinion of the European Union Agency for Fundamental Rights on fundamental rights in the ‘hotspots’ set up in Greece and Italy”, Opinion 5/2016, 29.11.2016; GUILD, Elspeth, COSTELLO, Cathryn and MORENO-LAX, Violeta, “Implementation...”, *op. cit.*; MAJCHER, Izabella, “The EU Hotspot Approach: Blurred Lines between Restriction on and Deprivation of Liberty”, Blog: Border Criminologies, April 2018, <https://bit.ly/2EjcZVv> (last accessed: 30/04/2018); NEVILLE, Darren, SY, Sarah and RIGON, Amalia, “On the frontline...”, *op. cit.*; Oxfam, “Hotspot, Rights Denied”, *Oxfam Briefing Paper*, 19.05.2016; SCHALLA, Mara, “Observations at the Campsite of Moria on Lesbos, October 22nd and 24th, 2015”, 06.11.2015, <http://bit.ly/2ryrC6s> (last accessed: 30/04/2018).

¹⁰⁴³ NEVILLE, Darren, SY, Sarah and RIGON, Amalia, “On the frontline...” *op. cit.*, p. 37.

¹⁰⁴⁴ RIJPMMA, Jorrit, “The proposal...” *op. cit.* p. 19.

exerts a crucial influence over the Greek officials, who, due to the extraordinary migratory pressure they are subject to, may in practice base their final decision entirely on Frontex' assessment. Frontex' strong recommendatory powers may have a very significant effect on a potential incorrect registration regarding the nationality of an irregular migrant, since a nationality screening largely determines and directly impacts the subsequent procedures of relocation, asylum, and return of the irregular migrants in the hotspots¹⁰⁴⁵.

Furthermore, the enrollment of data in Eurodac and the collection of pre-registration forms through interviews with candidates, conducted by Frontex, exceed its legal remit¹⁰⁴⁶. Precisely, the Regulation recently put forward by the European Commission, amending Eurodac, provides that “fingerprint data may also be taken and transmitted by members of the European Border and Coast Guard Teams (...) when performing tasks and exercising powers in accordance with Regulation on the European Border and Coast Guard”¹⁰⁴⁷. In other words, Frontex is already conducting an activity in the hotspots that is still merely foreseen in a Regulation that has not yet been adopted.

While Frontex constantly argues that its operational powers are limited to providing support to the competent national authorities, in a recent resolution, the European Parliament stated that “(...) Frontex coordination activity cannot in practice be dissociated from the Member State activity carried out under its coordination, so that Frontex (and thereby the EU through it) could also have a direct or indirect impact on individuals' rights and trigger, at the very least, the EU's extra-contractual responsibility (...)”¹⁰⁴⁸.

The resolution goes on to say that Frontex cannot evade its responsibility and control “simply because of the existence of administrative arrangements with the

¹⁰⁴⁵ See, BASILIEN-GAINCHE, Marie-Laure, “Hotspots, cold facts. Managing Migration by Selecting Migrants”, in GRUTTERS, Carolus, MANTU, Sandra and MINDERHOUD, Paul (eds.), *Migration on the Move. Essays on the Dynamic of Migration*, Brill, 2017, p. 4.

¹⁰⁴⁶ GUILD, Elspeth, COSTELLO, Cathryn and MORENO-LAX, Violeta, “Implementation ...”, *op. cit.*, p. 59.

¹⁰⁴⁷ Articles 10(3) and 13(7) Proposal for a Regulation of the European Parliament and of the Council on the establishment of “Eurodac”, COM(2016) 272 final, 04.05.2016. See, BASILIEN-GAINCHE, Marie-Laure, “Hotspots, cold facts...”, *op. cit.*, p. 6.

¹⁰⁴⁸ European Parliament resolution of 2 December 2015 on the Special Report of the European Ombudsman in own-initiative inquiry OI/5/2012/BEH-MHZ concerning Frontex (2014/2215(INI)), para C.

Member States involved in a Frontex-coordinated operation when such arrangements have an impact on fundamental rights”¹⁰⁴⁹. Certainly, even though the national authorities in the hotspots have exclusive enforcement, decision-making, and discretionary powers, the substantial operational assistance that Frontex provides on the ground should be reflected in a legal instrument and be subject to control.

Secondly, according to article 4(1)(c) Regulation 2016/794 on Europol, the agency shall “coordinate, organize and implement investigative and operational actions to support and strengthen actions by the competent authorities of the Member States”. Whereas Europol’s primary mission shall center on exchanging information and generating criminal intelligence, under the hotspot approach the agency also deploys guest officers on the ground, conducts second-line security checks, participates in debriefing the arriving migrants, and through the EMSC, operationally supports the competent national enforcement authorities in their investigations. Europol’s operational and analytical assistance in the hotspots ranges from coordinating and recommending the best course of action to the concerned Member State to effectively combating illegal migrant smuggling and trafficking in human being networks.

In the hotspots, Europol advises and operationally assists the competent national enforcement authorities in effectively implementing their executive measures, to both dismantle the smuggling and trafficking networks and to combat other serious criminal activities (i.e. organized crime and terrorism). Despite Europol’s operational role, in the recently adopted Regulation of Europol there is not a single mention of this agency’s operational powers in the hotspots, unlike in the EBCG and the future EUAA Regulations. Hence, the total secrecy surrounding the operational support of Europol in the hotspots and the lack of any legal reference to the activities of the agency on the ground prevent the general public from assessing the actual implications, meaning, and extent of Europol’s operational support.

Lastly, Regulation 439/2010 of Easo indicates that the agency “should have no direct or indirect powers in relation to the taking of decisions by Member States’

¹⁰⁴⁹ Ibid., para C.

asylum authorities on individual applications for international protection” (recital 14). Nonetheless, Easo primarily focuses on informing the irregular migrants of asylum and relocation procedures and facilitating the analysis of asylum applications to the national authorities in the Italian hotspots. However, since the adoption of the EU Turkey statement and the Greek Law 4375/2016, the agency is also in charge of registering and conducting the interviews of the applicants for international protection in the Greek hotspots.

Given the great backlog of asylum requests, the experts of Easo deployed in the Greek hotspots are mandated to carry out “the bulk of the fact-finding work for the determination of the asylum claim, thereby supporting first instance decision, which the Greek Asylum Service ultimately takes”¹⁰⁵⁰. Moreover, Easo supports the competent Greek asylum authorities in identifying vulnerable asylum applicants¹⁰⁵¹ and examining the first instance decisions appealed before the Independent Appeals Committees¹⁰⁵². This noteworthy hands-on operational assistance of Easo and its implications are examined in turn.

Until the future Regulation on the EUAA enters into force, the agency’s power to autonomously conduct the asylum interviews and draft an admissibility recommendation to the Greek Asylum Service will openly exceed the initial mandate of Regulation 439/2010, establishing Easo. With the acquiescence of the rest of the Member States and the EU Institutions, Easo does not have, at the EU level, a specific legal task to assess the asylum applications’ merits. The experts deployed by Easo in the Greek hotspots are thus operating in a legal limbo, in which it is unclear as to the extent of their specific operational responsibility and as to whether the procedural safeguards of the Greek legislation apply to them when examining the admissibility of asylum applications.

Civil society organizations have warned that “cases have been reported where, in practice, Easo experts have disregarded such safeguards (such as the right to a

¹⁰⁵⁰ European Union Agency for Fundamental Rights, “Opinion of the European Union Agency for Fundamental Rights on fundamental rights in the ‘hotspots’ set up in Greece and Italy”, Opinion 5/2016, 29.11.2016, p. 17.

¹⁰⁵¹ Easo, “Operating Plan Agreed by Easo and Greece”, 13.12.2017, p. 13.

¹⁰⁵² *Ibid.*, p. 17.

lawyer's applicant to be present during the interview)"¹⁰⁵³. Specifically, the European Center for Constitutional and Human Rights submitted a complaint to the European Ombudsman in April 2017. The Center argued that the interviews conducted by Easo fail to take individual experiences and vulnerabilities of the applicants into consideration, and that "Easo's involvement in the decision-making process of applications for international protection has no legal basis in the applicable Regulation (EU) No 439/2010 establishing the agency"¹⁰⁵⁴.

Furthermore, the Greek asylum officials are, in principle, exclusively in charge of identifying vulnerable applicants of international protection to whom the hotspots' fast-track border procedure does not apply¹⁰⁵⁵. However, the Greek asylum system is inundated by asylum applications and is only able to identify those cases of manifest vulnerability. In practice, while Easo is conducting asylum interviews, it also identifies vulnerable cases and forwards them to the Greek asylum office, which ultimately confirms the existence of such vulnerability.

Occasionally, asylum seekers initially identified as vulnerable by the Greek Asylum Service may, during the examination of their application, be subject to another vulnerability assessment by Easo, since there is no clear referral pathway between the agency and the national authorities¹⁰⁵⁶. This lack of coordination between Easo and the Greek Asylum Service is problematic, for it is not clearly provided anywhere whether and under what principles Easo shall carry out

¹⁰⁵³ European Council for Refugees and Exiles, "The implementation of the hotspots in Italy and Greece", 2016, p. 38. See, ZIEBRITZKI, Catharina, "Chaos in Chios: Legal Questions Regarding the Administrative Procedure in the Greek Hotspots", *EU Immigration and Asylum Law and Policy Blog*, July 2016, <http://eumigrationlawblog.eu/chaos-in-chios-legal-questions-regarding-the-administrative-procedure-in-the-greek-hotspots/> (last accessed: 30/04/2018).

¹⁰⁵⁴ European Centre for Constitutional and Human Rights, "Easo's influence on inadmissibility decisions exceeds the agency's competence and disregards fundamental rights", April 2017, <http://bit.ly/2saj5pC> (last accessed: 30/04/2018). See, European Ombudsman, "Easo's involvement in applications for international protection submitted in the 'hotspots' in Greece", Case: 735/2017/MDC opened 13.07.2017.

¹⁰⁵⁵ Article 60(4) Greek Law No. 4375 of 3 April 2016.

¹⁰⁵⁶ European Council for Refugees and Exiles, "The implementation of the hotspots in Italy and Greece", 2016, p. 44 and KRIONA SARANTI, Elli, PAPACHRISTOPOULOU, Danai and VAKOULI, Maria-Nefeli, "Easo's Operation on the Greek Hotspots: An overlooked consequence of the EU-Turkey Deal", *Greece Refugee Rights Initiative*, March 2018, p. 7.

vulnerability assessments, and because it may lead to contradictory findings vis-à-vis as to the existence of vulnerability in a particular case¹⁰⁵⁷.

Easo's assessment of vulnerability is not trivial, but rather carries significant consequences for the applicant of international protection. If a deployed expert of Easo, who is undertaking an asylum interview, does not identify or wrongly classifies an applicant as non-vulnerable, the case will follow the fast-track border procedure, which provides fewer guarantees. In particular, article 60(4) Greek Law No. 4375 designed an expedited procedure applicable to the hotspots. Under this procedure, the Hellenic Police or the Armed Forces may register applications for international protection, notify of decisions and other procedure-related documents, as well as receive appeals. Additionally, Easo may conduct, within 15 days, applicant interviews regarding international protection¹⁰⁵⁸. In this regard, the United Nations Special Rapporteur on the human rights of migrants was concerned that "asylum seekers may not be granted a fair hearing of their case, as their claims are examined under the admissibility procedure, with a very short deadline to prepare"¹⁰⁵⁹.

Lastly, Easo also plays a significant role in the appeal stage. Since most of the Greek Asylum Service's first instance decisions that are denied in the hotspots are brought to the Independent Appeals Committees' attention, significant delays have also been registered at the second instance level. Hence, Easo experts assist both applicants with the submission of their appeals¹⁰⁶⁰ and the Appeals Authority with file processing and administrative support¹⁰⁶¹. As of March 2018, 14 experts of Easo were assisting the Greek Asylum Appeal Authority¹⁰⁶².

¹⁰⁵⁷ Asylum Information Database, "The concept of vulnerability in European asylum procedures", 31.07.2017, <http://bit.ly/2f0gOmN>, p. 30 (last accessed: 30/04/2018).

¹⁰⁵⁸ Greek Asylum Service, Flowcharts of the Asylum Procedure in Greece: Asylum procedure in the context of the EU-Turkey statement, <http://asylo.gov.gr/en/wp-content/uploads/2017/11/Islands-procedure.pdf> (last accessed: 30/04/2018).

¹⁰⁵⁹ Human Rights Council, "Report of the Special Rapporteur on the human rights of migrants on his mission to Greece", A/HRC/35/25/Add.2, 24.04.2017, para 82.

¹⁰⁶⁰ European Council for Refugees and Exiles, "The implementation of the hotspots in Italy and Greece", 2016, p. 44.

¹⁰⁶¹ Easo, "Operating Plan Agreed by Easo and Greece", 13.12.2017, p. 17.

¹⁰⁶² Commission, "Progress report on the Implementation of the European Agenda on Migration", COM(2018) 250 final, 14.03.2018, p. 5.

According to the 2018 Operating Plan agreed upon by Easo and Greece, the Greek Appeals Authority shall appoint a measure coordinator to liaise with Easo and ensure effective operational coordination and implementation¹⁰⁶³. However, neither Easo's original Regulation, nor the Greek legislation provide a legal basis for the operational role that the agency should play during the appeal stage. In this regard, the tasks that Easo's experts undertake and their degree of influence they may exert on the Greek Independent Appeals Committees' decisions are nowhere specified.

VI. CONCLUSION

While bilateral and multilateral cooperation among Frontex, Easo, and Europol were promoted since their early establishment, the hotspot approach has clearly reinforced their inter-agency operational cooperation. The complementarity of these agencies' operational tasks and the increasing need to provide coordinated assistance to the frontline Member States were key factors leading to the design of the hotspot approach in 2015 by the EU Agenda on Migration. Since then, the hotspot approach has become a crucial EU measure to ensure effective multilateral and systematic cooperation among the EU AFSJ agencies on the ground. That is, the hotspots aim to advance the agencies' synergies, avoid duplication and overlaps in a fragmented policy area like the AFSJ, and enhance the agencies' direct operational engagement with the competent national authorities.

Formally, the hotspot approach does not confer Frontex, Easo, or Europol any executive, enforcement, decisional, or coercive powers, since it would go against the Treaties, the agencies' Regulations, and the non-delegation doctrine. However, in practice, these agencies' operational powers and cooperation have a clear impact on implementation matters, which previously was the Member States' exclusive competence. Due to the extraordinary migratory pressure that the competent national authorities are subject to in the hotspots, the EU AFSJ agencies play a significant role in registering the arriving migrants, assessing their

¹⁰⁶³ Easo, "Operating Plan Agreed by Easo and Greece", 13.12.2017, p. 17.

asylum applications, and issuing recommendations regarding the third country nationals' countries of origin, vulnerability, and/or merits of their asylum claim.

Since the hotspot approach is a EU emergency mechanism that is here to stay, as far as can be inferred from its explicit inclusion in the EBCG Regulation and the proposed EUAA Regulation, a legislative instrument that would regulate and detail the operational powers of Frontex, Easo, and Europol should be adopted. Such a legislative instrument would not only clarify the allocation of responsibilities among the several actors that closely cooperate in the hotspots, but also provide some transparency regarding the functioning of the hotspots, promoting coordination and control of the AFSJ agencies.

CHAPTER 6. Conclusions

The “refugee crisis” revealed the urge to ensure the functioning of the Schengen area and the CEAS, the need to operationally assist those Member States most affected by the sudden and extraordinary arrival of mixed migratory flows, and the need to effectively and uniformly implement the EU measures adopted in regards to migration, asylum and border management matters. Against this background, Frontex, Easo and Europol have emerged as key actors, not only in providing emergency operational assistance to the frontline Member States, but also in implementing the hotspot approach.

Nowadays, the expansion of the operational role, multilateral cooperation, presence on the ground, and institutional significance within the AFSJ of Frontex, Easo and Europol, is unquestionable. This study therefore comparatively analyzed the evolution of the operational tasks bestowed upon Frontex, Easo and Europol. Special attention was paid to the expansion of the legal mandates of these agencies, the reinforcement of the activities they undertake in practice on the ground, and to what extent a gap exist between these two dimensions.

This thesis makes four main contributions. First, it explored the establishment and early operational functions conferred to Frontex, Easo and Europol within the AFSJ. Second, it defined and classified Frontex, Easo and Europol as EU decentralized agencies, which are clearly distinguished by their operational powers and by the possibility to directly assist the competent national authorities on the ground. Moreover, the constitutionality and legal bases of Frontex, Easo and Europol, as well as the degree of discretion that these agencies enjoy according to the CJEU’s non-delegation doctrine, was examined. The internal administrative organization and governance of Frontex, Easo and

Europol was also studied as to determine the influence and real control that the Member States may exert over the increasing operational powers these agencies have been conferred. Third, it comparatively analyzed the reinforcement of the operational tasks vested on Frontex, Easo and Europol, as well as the extent of their assistance on the ground and influence on the implementation prerogatives of the national authorities. Fourth, it explored the bilateral and multilateral inter-agency cooperation between Frontex, Easo and Europol. In particular, the expanded multilateral and operational cooperation that takes place in the hotspots was studied.

Given the analysis conducted, in regards to the evolution of *de iure* and *de facto* operational tasks of Frontex, Easo and Europol, this chapter centers on presenting the main findings that can be drawn. Specifically, the hypothesis, that the role of Frontex, Easo and Europol is shifting from merely providing the Member States with technical assistance to truly developing operational powers on the ground, is firstly tested. Secondly, an overall assessment of the evolution of the operational tasks, cooperation, and implementation role of Frontex, Easo and Europol, is conducted. Lastly, the challenges faced while undertaking this study and avenues for further research are discussed.

I. MAIN FINDINGS

1. The Establishment and Reinforcement of Frontex, Easo and Europol under the Unrelenting Integration of the EU Area of Freedom, Security and Justice

The analysis of the institutional evolution of the AFSJ contributed to the examination of the increasing operational and implementation role of Frontex, Easo and Europol in regards to border management, migration and asylum matters. The current operational tasks and inter-agency cooperation of Frontex, Easo and Europol were examined in the context of the growing integration and supranationalization of the AFSJ.

Under the Treaty of Amsterdam, the role of the EU Institutions was

enhanced, JHA matters that were previously under the third pillar were communitarized, and the AFSJ was included as one of the key priorities of the EU. However, the Treaty of Amsterdam did not put an end to the pillar division previously set by the Treaty of Maastricht. Under the former, the preeminent position of the Member States, combined with the pillar structure, led to JHA policies that were very intricate and difficult to govern, as exemplified by the Convention of 1995, which created Europol.

Europol originally had a purely intergovernmental character, since every amendment of its mandate required the ratification of all the participating Member States, ultimately hampering the Office's ability to swiftly and effectively respond to the volatile challenges inherent to police cooperation matters. In spite of Europol's initial intergovernmental nature, its mere introduction already symbolized an institutional shift for the AFSJ. Member States showed their openness to balance the protection of national sovereign interests due to the increasing need to provide a common and coordinated approach to transboundary issues.

While the Treaty of Nice did not bring about significant institutional changes to the AFSJ compared to the Treaty of Amsterdam, the multiannual Hague Program did put forward very ambitious objectives. Several contemporary events (e.g. terrorist attacks, increasing migratory pressure, European enlargement, growing organized and cross-border crime) revealed that further integration in the AFSJ was needed. The Hague Program focused on developing a common asylum and migration policy, harmonizing external border controls and promoting closer police and judicial cooperation, while fostering and respecting fundamental rights.

A crucial institutional development in the AFSJ under the Treaty of Nice was the establishment of Frontex in 2004, which was mandated to strengthen cooperation between the Member States in order to effectively manage their external borders. Frontex was in charge of providing operational support to the Member States, which ultimately remained competent in managing their external borders.

In 2007, the introduction of the RABIT Regulation expanded Frontex' mission

by providing further technical and operational assistance to national authorities facing a disproportionate migratory pressure. Nonetheless, while the evaluation of the Hague Program stressed the added value of Frontex, it pointed out that no Member State had at that point requested the deployment of the RABIT and warned about the insufficient commitment (i.e. limited equipment, human and financial resources) of the Member States to Frontex' joint operations¹⁰⁶⁴.

The evaluation of the Hague Program also stressed the challenges that the next multi-annual agenda (the Stockholm Program), and particularly the AFSJ agencies, needed to address after the failed ratification of the Constitutional Treaty. This evaluation recommended that attention should gradually shift from adopting new AFSJ policy proposals and laws to effectively and evenly implementing the existing policy and legislative instruments at the national level. Hence, for the first time, the EU agencies were called to play a key operational role in the implementation of the EU migration, asylum, border management and police and judicial cooperation in criminal matters policies.

Precisely, in relation to EU migration, asylum and external border management policies, the Stockholm Program underlined that “effective implementation of all relevant legal instruments needs to be undertaken and full use should be made of relevant Agencies and Offices operating in this field”¹⁰⁶⁵. In the same vein, the 2014 European Council conclusions, setting the strategic guidelines until 2020 for the AFSJ, stressed that implementation should be the overall priority. In this regard, the operational functions of agencies like Frontex, Easo and Europol should be further developed to contribute to “filling the gap between political decisions in Brussels and the reality on the ground”¹⁰⁶⁶.

Under the Treaty of Lisbon, the EU competences in asylum, migration and external border management were expanded and the pillar differentiation was abolished. In particular, article 77 TFEU calls for the gradual introduction of an

¹⁰⁶⁴ Commission, “Justice, Freedom and Security in Europe since 2005: An Evaluation of The Hague Programme and Action Plan, an extended report on the evaluation of the Hague Programme”, SEC(2009) 766 final, 10.06.2009, p. 27.

¹⁰⁶⁵ European Council, “The Stockholm Programme — An Open and Secure Europe Serving and Protecting Citizens”, OJ C-115, 04.05.2010, p. 5.

¹⁰⁶⁶ Council, “Mid-term review of the JHA strategic guidelines - Information from the Presidency”, doc. 15224/17, 01.12.2017, p. 10.

integrated management system for external borders, and articles 78 and 79 TFEU design a common policy on asylum and migration. Article 80 TFEU states that the principle of solidarity and fair sharing of responsibility between the Member States shall govern these policies and their implementation. Article 88 TFEU explicitly mentions that Europol may conduct operational actions to support the competent national enforcement authorities in preventing and combating serious crime affecting two or more Member States, terrorism and forms of crime, which affect a common interest covered by a Union policy.

Against this background, Easo was established in 2010 to namely assist the Member States in the effective and uniform implementation of the CEAS. Europol's Convention was repealed by the adoption of a Council Decision in 2009, which enhanced the operational flexibility and assistance of the Office to the competent national law enforcement authorities. The mandate of Frontex and its operational support to the Member States on the ground was also strengthened in 2011. Moreover, the Stockholm Program required the EU AFSJ agencies to improve their cooperation, develop synergies and coordinately assist Member States in applying the measures adopted.

Currently, there are three priorities in the AFSJ: to offer operational support to the Member States, to promote cooperation and coordination, and to ensure a uniform and effective implementation of the AFSJ policies and instruments adopted at the EU level¹⁰⁶⁷. Due to the predominantly operational nature of the AFSJ, the EU decentralized agencies stand out as the mode of administrative governance, specially indicated for providing technical expertise, exchanging information, and coordinating the operational activities of the Member States.

¹⁰⁶⁷ Council, "Draft Council Conclusions on the Commission Communication Delivering an area of freedom, security and justice for Europe's citizens - Action Plan Implementing the Stockholm Programme, COM(2010) 171 final", doc. 9935/10, 19.05.2010, p. 6.

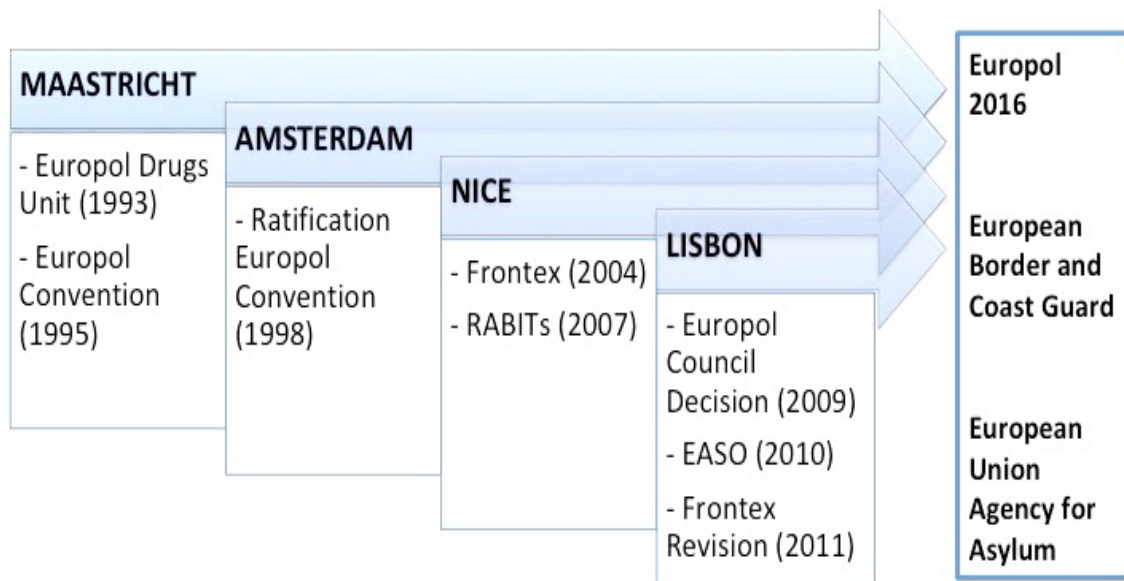


Figure 25: Evolution of Frontex, Easo and Europol under the Maastricht, Amsterdam, Nice and Lisbon Treaties. Source: author’s own elaboration.

2. The Distinctive Operational Tasks that Frontex, Easo and Europol Undertake on the Ground

Since Europol became a EU decentralized agency on 1 January 2010, its operational role started to gain momentum. Although the agency’s key mission still consisted in sharing criminal intelligence, developing operational analyses and assisting the Member States to initiate or strengthen cross-border criminal investigations, Europol began to offer operational support to the competent national law enforcement authorities. Specifically, Europol provided assistance through specialized data extraction equipment, technical expertise and operational analyses, and the deployment of mobile offices and experts on the ground. Europol experts were present and provided assistance even during national enforcement and coercive activities, such as house searches and arrests. The obscurity surrounding the agency’s early operational role prevented us from discovering the specific involvement of the agency when assisting the Member States on the ground.

Until recently, Europol’s mandate was thus primarily characterized by the intergovernmentalism that reigned in the former third pillar and under which Europol was originally established. It is also the case that, in comparison to

Frontex and Easo, Europol plays a secondary role in border management, migration and asylum matters. The mandate of Europol is wider since it not only focuses on supporting the Member States in fighting illegal migrant smuggling and trafficking of human beings, but rather assists the competent national enforcement authorities in preventing and combating organized crime, terrorism and other forms of serious crime affecting two or more Member States.

Europol, however, undertakes several activities while participating in the JITs that may involve a degree of discretion in operational matters, such as proposing its initiation, planning, organization and effective implementation. Europol is not responsible for launching JITs, but rather the agency's staff may participate in assisting the members of the team. The JITs are managed by a leader of the team that is always a national authority of one of the participating States.

Europol staff may only be present during the JITs' operational activities if invited by the participating States of the particular JIT, and with the aim of rendering on-the-spot advice and assistance to the members of the JIT. Not only does Europol actively participate in JITs by assisting the Member States in the implementation and adoption of the Teams, but it also engages in operational activities by deploying staff to provide analytical and operational support in the areas of trafficking in human beings and illegal migrant smuggling.

With respect to the operational tasks of Frontex, the Joint Operations distinctly reveals the significant and increasing operational role undertaken over the years by the agency. Since its establishment, Frontex was permitted to initiate and carry out Joint Operations following the agreement of the concerned host Member State. Frontex was also conferred the task of coordinating, planning and implementing the Joint Operations in accordance to a comprehensive Operational Plan drafted by the agency's Executive Director.

Moreover, Frontex' Operational Coordinator and Operational Manager, who are deployed in the territory of the Member State where the operation is taking place, are the main authorities in charge of guaranteeing the effective and uniform implementation of the activities foreseen in the specific Operational Plan. While the Regulations of Frontex and the operational plans analyzed in this study recurrently state that the power to manage the external borders exclusively

lies with the Member States, Frontex' operational assistance in practice exceeded the mandate of strictly assisting, coordinating and facilitating operational cooperation between the Member States. This was largely due to the trust of the Member States in the work of the agency and the high degree of vagueness of Frontex' legal mandate.

Although the very first activities of Frontex centered on assisting the competent national border authorities in circumstances requiring increased technical assistance, the operational functions of the agency rapidly grew. Firstly, the RABIT were introduced in 2007 to operationally support those Member States facing a disproportionate influx of irregular migrants. Upon the request of a Member State, the Executive Director of Frontex was in charge of deciding the deployment of one or more RABIT. Given the migratory pressure under which the national authorities hosting the RABIT were subject to, they were unable to effectively and fully control the operations and the experts deployed.

Subsequently, Regulation 1168/2011 further strengthened the operational role conferred to Frontex by establishing the EBGT, which built on the RABIT. Although the border guards composing the EBGT are formally under the supervision and instructions of the host Member State, Frontex exerts indirect control over the EBGT through the Operational Plan and the agency's views that the teams shall take into account. That is, whereas the Member States remained exclusively responsible for the management of their external borders, Frontex was competent to launch, coordinate, monitor and ensure the effective implementation of Joint Operations, as well as to deploy EBGT and technical equipment.

Particularly, Frontex' Coordinating Officer, who is in charge of overseeing the correct implementation of the Operational Plan and providing support to the EBGT deployed, best embodies the agency's soft law powers on the ground. Frontex' Coordinating Officer, jointly with the agency's Operational Coordinator, is present at the ICC and closely works with the national ICC Coordinator. While the host Member State commands the EBGT, Frontex' Coordinating Officer may communicate her views regarding the EBGT deployed to the host Member State. Not only shall the host Member State take such views into consideration, but it

shall also grant the Coordinating Officer full access to the EBGT at all times. The extraordinary migratory pressure that the national border authorities are under, the longstanding know-how of the agency in regards to the coordination of Joint Operations, and the very close collaboration of the Coordinating Officer and the national authorities blur the lines of authority between the host Member State and Frontex and the command of the EBGT.

Hence, since the RABIT Regulation was adopted in 2007 and the operational powers of Frontex were subsequently extended in 2011, the tasks bestowed upon the officials participating in operations coordinated by the agency encompassed the exercise of executive powers under the command and control of the host national officials. The guest officers deployed on the ground in the framework of a Joint Operation coordinated by Frontex intend to assist the competent host national authorities in determining the identity of the irregular migrants, gathering information on their route, and identifying the involvement of facilitators.

Although the guest officers shall conduct their activities under the supervision and command of the host Member State, it has been revealed that the competent national authorities have not always supervised the guest officers while interviewing third-country nationals. Additionally, Frontex' recommendations regarding the presumed nationality of the arriving migrants were merely rubberstamped by the Member States' officials.

Lastly, although Easo initially centered on offering the competent national asylum authorities "permanent support", progressively the agency's operational role gained momentum and started to assist those Member States subject to sudden and extraordinary pressure in their asylum and reception systems. Easo aimed to provide continuous support and coordination on the ground of the Member States by deploying experts as well as providing infrastructure or asylum services.

Easo may deploy one or more AST upon the request of a Member State and for a limited time. The AST are composed of seconded national experts previously made available by the Member States, who shall conduct their duties solely in the interest of the agency. Article 14 Regulation 439/2010 states that

Easo's AST shall only provide expertise in relation to interpreting services, COI, and knowledge of the handling and management of asylum cases. However, the Operating Plans studied in this thesis revealed that the AST closely assist some competent national asylum and first reception national services through the identification, registration, detection of vulnerabilities, and the management of national reception centers.

Like Frontex, Easo deploys a Coordinating Officer to manage the AST on behalf of the agency. Pursuant article 20 Regulation 439/2010, the agency's Executive Director shall designate one or more Support Office Experts to act as the Union Contact Point for coordination. Easo's Union Contact Point acts as an interface between the agency, the host Member State and the members of the AST. The Union Contact Point shall assist with the conditions of deployment of the teams, monitor the correct implementation of the Operating Plan, and upon authorization of the Executive Director, aid in resolving any disputes concerning the implementation of the Operating Plan and the deployment of the AST. Apart from the Union Contact Point, which is deployed on the ground to effectively coordinate the AST, a Responsible Officer is in charge of organizing the implementation of Easo's Operating Plans or the Special Support Plans.

While Easo's Operating Plans remain silent in regard to the specific role that the Union Contact Point and the Responsible Officer hold, both authorities provide significant advice and issue instructions to the national personnel and seconded national experts deployed as part of the AST. The Union Contact Point and the Responsible Officer actively monitor the correct application of the Operating Plan and report to Easo's Executive Director if the Plan is not being adequately implemented by the Member States. Therefore, the asylum and reception experts deployed by Easo also influence the host authorities' decisions through their support and advice.

By drawing up and closely monitoring the effective implementation of the adopted Operational and Operating Plans, Frontex and Easo play a strong recommendatory role in the daily management of the deployed EBGT and AST. These Plans prepared by Frontex and Easo, which shall be agreed to by the concerned host Member State, detail the modus operandi and the command

structures of the EBGT and the AST, as well as the specific operational support that the agencies shall provide.

Specifically, each time that the deployment of EBGT or AST is arranged, an Operational or Operating Plan shall be respectively drafted by Frontex and Easo, and any instruction that the host Member State may issue to the teams shall always be in conformity with the Plans. Additionally, any amendment to these Plans requires the agreement of the concerned agency and the requesting Member State. Hence, the Member States do not have full autonomous prerogatives to exclusively coordinate and organize the operational support of the EBGT and AST deployed in its own territory.

Whereas the operational tasks and deployment of teams on the ground may not yet characterize Europol, these activities clearly distinguish Frontex and Easo from the rest of the EU decentralized agencies. As this study analyzed, despite the fact that the EBGT and AST of Frontex and Easo are mandated to support the competent national authorities, the teams deployed in practice conduct noteworthy operational activities when assisting those national authorities subject to sudden and extraordinary mixed migratory flows.

However, these teams are not subject to a thorough control and command by the Member States due precisely to the emergency and/or disproportionate migratory pressure they are facing. It is questionable as to the degree of effective supervision that the national authorities may in practice exert over the EBGT and the AST when the very reason for their deployment is to supplement the capabilities of a Member State that is overwhelmed by the situation at its external borders.

3. The EBCG, the Future EUAA and Europol: Developing Operational, Implementation and Supervisory Teeth?

Frontex, Easo and Europol came to the forefront with the “refugee crisis”. The European Commission showed no hesitation in tabling the transformation of Frontex and Easo into what the Commission misleadingly refers to as “fully-fledged agencies”. In the aftermath of the “refugee crisis”, the EU’s strategy relied

on strengthening the operational and administrative capabilities of the EU, rather than adopting new laws. Hence, Regulation 2016/1624, establishing the EBCG, was agreed upon by co-decision in record time. Regulation 2016/794 of Europol entered into force in May 2017, and the final adoption of the Regulation on the EUAA awaits the pending negotiations on the rest of the CEAS package.

Although the Member States are now required to explain the reasons for refusing to launch a criminal investigation put forward by Europol within one month, Regulation 2016/794 mellows such a requirement by stating that “the reasons may be withheld if providing them would: (a) be contrary to the essential interests of the security of the Member State concerned; or (b) jeopardize the success of an ongoing investigation or the safety of an individual”. These exceptions are very broad and almost every reason provided by the concerned Member State may qualify as contrary to the “essential interests of the security”, or hinder an ongoing national investigation. Europol is neither authorized to initiate nor to carry out its own JITs, but rather to participate in them. The specific participation of Europol in the JITs is governed by the agreement that the competent national enforcement authorities adopt prior to the creation of the team.

Moreover, while Regulation 2016/794 of Europol explicitly indicates that the agency may establish centers of specialized expertise, such as the EMSC, it does not further clarify the specific operational tasks that Europol may conduct through these centers. Europol may deploy staff on the ground to support the national law enforcement authorities in dismantling the smuggling and trafficking networks. The extent of Europol’s involvement and operational support to the Member States on the ground is very difficult to determine due to the secrecy and systematic refusal of the agency to grant full or partial access to documents.

The Europol Review of 2016-2017 indicates that the EMSC delivers cross-match and operational analysis reports, facilitates information exchange among the Member States, and deploys mobile teams of specialists and analysts to provide direct analytical, specialist and forensic support to the national law

enforcement officers¹⁰⁶⁸. The agency recognizes that a “strong operational capacity (...) has also been used in the set-up of secondary security checks (...) to strengthen security checks on the inward flows of migrants, to disrupt migrant smuggling networks and identify suspected terrorists and criminals”¹⁰⁶⁹. In the aftermath of the “refugee crisis”, Europol started to develop an unprecedented operational role in migration and asylum matters by assisting, through the deployment of seconded national experts and guest officers, the Member States in their illegal migrant smuggling and human trafficking investigations.

The expansion of the operational powers and implementation role of the EBCG and the future EUAA is clearer than Europol’s current impact on the national migrant smuggling and trafficking investigations. Regarding the EBCG, Regulation 2016/1624 firstly reinforced the agency’s operational autonomy, as to reduce Frontex’ previous constant dependency on the resources and personnel made available at any given time by the Member States. Nonetheless, the European Commission repeatedly warned that serious gaps in pledges in human and technical resources continue to exist for operational activities, as compared to the needs assessed by the EBCG in its risk analysis, ultimately limiting the implementation of the land, sea and air activities planned by the EBCG.

The EBCG is now mandated to issue binding recommendations and even intervene in the territory of a Member State, that through its acts and/or omissions, may jeopardize the effective functioning of the Schengen area. Yet, the real binding and intervention powers that the new agency may be able to conduct in practice if the concerned Member State radically opposes any assistance in its sovereign territory is debatable.

Due to the sensitivity of this reinforced operational power conferred to the EBCG, Regulation 2016/1624 broadly regulates the agency’s right to intervene. The deliberately ambiguous text of Regulation 2016/1624 responds to the difficulty in achieving a balance between the need for an effective and uniform implementation of the European border management rules and policies, and the

¹⁰⁶⁸ Europol “Europol Review 2016-2017”, 23.01.2018, p. 22.

¹⁰⁶⁹ Ibid., p. 22.

resistance of the Member States to further delegate competences closely linked to their national sovereignty.

Whereas the EUAA is still under negotiation, the text partially agreed by the Parliament and the Council already reveals some substantial operational and implementation novelties in comparison to Easo. The EUAA will not only see its operational tasks expanded, but the agency will also be mandated to supervise and monitor the effective and uniform implementation of the CEAS, as well as to assess the preparedness of the Member States in the face of disproportionate pressure in their national asylum systems. The EUAA may make an emergency intervention if the functioning of the CEAS is jeopardized due to a Member State not implementing the measures recommended by the EUAA after a monitoring exercise, not requesting support from the EUAA, or not taking necessary implementing actions.

Moreover, several provisions of the future Regulation on the EUAA mention that the agency will assist or facilitate the Member States in examining the applications of international protection submitted to their asylum systems. Firstly, the Member States shall consider the EUAA's guidance notes on the COI when examining applications for international protection (article 10(2a) partial agreement EUAA). Furthermore, among the operational and technical assistance that the EUAA shall provide to Member States, the agency shall facilitate the examination of applications for international protection to the competent national authorities (article 16(2)(b) partial agreement EUAA). In this regard, the ASTs "should support Member States with operational and technical measures, including (...) by knowledge of the handling and management of asylum cases, as well as by assisting national authorities competent for the examination of applications for international protection and by assisting with relocation or transfer of applicants or beneficiaries of international protection" (recital 16 partial agreement EUAA).

The operational plan that the EUAA's Executive Director draws up shall also include organizational aspects, such as the agency's assistance to Member States in examining applications for international protection, without prejudice to the competence of the national asylum systems to decide on individual applications

(Article 19(2)(i) partial agreement EUAA). Lastly, the EUAA will be competent to register the applications for international protection in the hotspots, and to examine such applications if the concerned Member State requests (article 21(2)(d) partial agreement EUAA).

While it is foreseen that the future EUAA will be able to assist the Member States in examining the applications of international protection, Easo is already assisting the Greek Asylum Service in the hotspots by undertaking vulnerability screenings, interviewing asylum seekers, assessing their cases, and filing recommendations to the Greek authorities. However, the future Regulation on the EUAA vaguely delimits the specific role that the agency will play in examining the admissibility and applications of international protection. Nowhere in the future Regulation is it specified to what extent the EUAA may assist or facilitate the competent national authorities in examining applications for international protection.

As is the case with the EBCG, which does not establish a European System of Border Guards with autonomous enforcement powers to exclusively manage the European external borders, the future EUAA will also not be directly conferred decision-making powers in asylum matters. Rather, the future EUAA will play an assistance role in examining applications of international protection. It remains to be seen whether the EUAA will openly interpret its new and vaguely regulated examination prerogative, and to what degree the agency will examine the applications for international protection and exert an indirect impact in the final decisions that the national asylum systems ultimately adopt.

4. Reinforced Multilateral and Operational Cooperation of Frontex, Easo and Europol under the Hotspot Approach

Frontex, Easo and Europol have been conferred overlapping and fragmented functions over migration, asylum and border management matters. Against this background, inter-agency cooperation needs to be promoted as to prevent redundancy or inefficiency. Frontex, Easo and Europol do not just coexist but their respective Regulations call them to horizontally cooperate. This cooperation

has taken place over time both in a bilateral and multilateral way, as well as in a formal and informal manner. Frontex, Easo and Europol regularly exchange information and best practices, in addition to collaborating in joint projects or activities.

However, the hotspot approach is the most important framework to date, under which Frontex, Easo and Europol are called upon to operationally cooperate on the ground (see figure 26). In our view, the hotspot approach will not only be consolidated as a strategic measure for the EU to handle migratory crisis scenarios, but will also serve to ensure that frontline Member States are sufficiently prepared for extraordinary and sudden migratory pressures. Therefore, if the hotspots cease to be a short-term measure as a result of the “refugee crisis” and become a long-term approach, under which Frontex, Easo and Europol coordinately deploy teams on the ground, a legislative instrument specifying the responsibility of each actor should urgently be adopted.

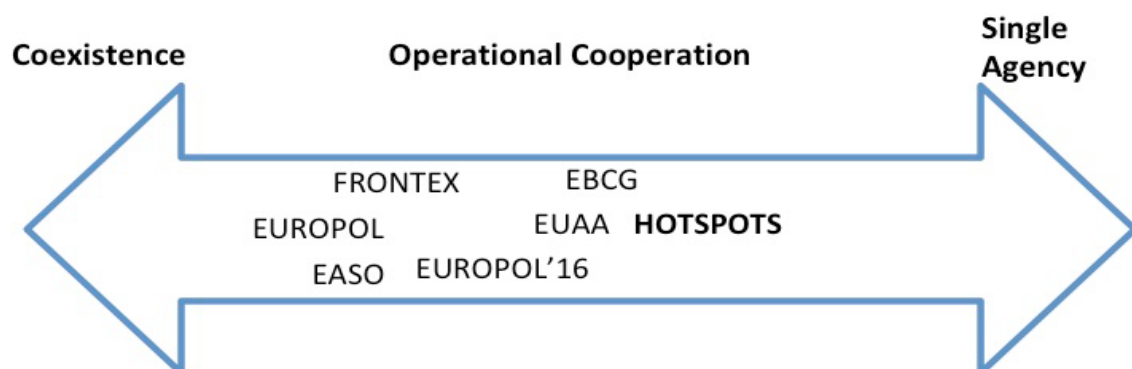


Figure 26: Evolution of the Operational Cooperation of Frontex, Easo and Europol. Source: author’s own elaboration.

Frontex, Easo and Europol are required to work together in the hotspots with the shared aim of coordinating their operational support to those Member States facing a sudden and disproportionate migratory pressure in their external borders. The role that these agencies play in ensuring consistent and coherent operational responses and implementation in crisis and emergency situations is now crucial.

The hotspot approach also shows that Frontex, Easo and Europol are increasingly expanding their operational powers to areas in which the Member States used to play a leading and exclusive role. However, the issue does not have

as much to do with the reinforcement of the agencies' operational powers on the ground, than with the lack of clear and specific provisions regulating the tasks that the agencies are undertaking in practice, and the precise allocation of competences among the numerous actors working in the hotspots.

Although in principle, the concerned Member State remains in charge of managing and overseeing the EU AFSJ agencies' activities, the extraordinary migratory pressure that the national authorities face in the hotspots impede them from effectively controlling the activities that Frontex, Easo and Europol develop on the ground. This is highlighted in regards to Greece, where Frontex, Easo and Europol implement the hotspot approach in practice, and the competent national authorities are formally and ultimately responsible for overseeing its functioning.

Notwithstanding that the hotspot approach has been incorporated in Regulation 2016/1624 on the EBCG and will be included in the future Regulation on the EUAA, which in turn reveals that the approach constitutes a EU long term measure to tackle extraordinary migratory pressures, there is no specific legal framework clarifying the functioning, powers and responsibility of each participating actor in the hotspots. While the EU AFSJ Agencies in the hotspots may only *de iure* support the concerned Member States in managing their borders and asylum systems, these agencies' hands-on and reinforced operational assistance *de facto* on the ground demands the adoption of a separate legal instrument.

The extensive operational powers that Frontex, Easo and Europol conduct in the hotspots further strain their formally narrow, but vague mandates in practice. The impact of these AFSJ agencies' operational cooperation on the ground and the degree of their involvement in functions that exclusively belong to the competent national authorities are elusively set by their Regulations. The precise responsibilities of Frontex, Easo and Europol, when cooperating under the hotspot approach, unfortunately remain in a legal limbo.

Hence, from a strict interpretation of the Regulations of Frontex, Easo and Europol, their inter-agency cooperation in the hotspots is legally limited to operationally supporting the Member States. However, the flexible and vague

legal provisions regulating these agencies' role on the ground, combined with the extraordinary migratory pressure that the competent national authorities are subject to in the hotspots, have led these AFSJ agencies to undertake tasks that go beyond their legal remit. It is thus true that *de iure*, the decisional, enforcement, discretionary and coercive competences remain exclusively in the Member States' hands, but *de facto*, Frontex, Easo and Europol steer the functioning of the hotspots and have a strong recommendatory influence in the decisions that the competent national authorities finally adopt.

II. TAKING STOCK OF THE EVOLVING OPERATIONAL AND IMPLEMENTATION POWERS OF FRONTEX, EASO AND EUROPOL

The evolution of the operational tasks of Frontex, Easo and Europol have been analyzed, and two trends can be highlighted. Firstly, while the Regulations of these AFSJ agencies continue to stress that their operational role is limited to providing the competent national authorities with the technical assistance they may require, the tasks of Frontex, Easo, and to a more limited extent, Europol, have a clear operational nature on the ground. Secondly, Frontex, Easo and Europol are increasingly involved in guaranteeing the effective and uniform implementation of EU migration, asylum and border management measures, as well as ensuring that the concerned Member States do not jeopardize the functioning of the Schengen area or the CEAS. These two emerging trends are discussed in turn.

This study has pointed out that Frontex, Easo and Europol closely accompany the frontline Member States in the implementation of EU migration, border management and asylum policies. These agencies focus on operationally supporting the competent border, asylum, and law enforcement national authorities in effectively implementing EU law. The expansion of EU competences in AFSJ matters has gone hand-in-hand with the reinforcement of their administration, which no longer falls exclusively on the Member States, but rather, on a conundrum of diverse actors, among which Frontex, Easo, and

Chapter 6

Europol play a prominent role.

The growing integration that the AFSJ is experiencing has led to a Europeanization of its administration. It is necessary to ensure a uniform and effective implementation of EU border management, asylum and migration laws. In this regard, the effective implementation of EU law by the Member States is essential for the proper functioning of the Union (article 197(1) TFEU). According to article 197(2), “the Union may support the efforts of Member States to improve their administrative capacity to implement Union law (...)”.

Back in 2001, the European Commission already foresaw that the establishment of autonomous agencies in clearly defined areas would improve the way rules were applied and enforced across the EU¹⁰⁷⁰. Certainly, the credibility of the EU Executive Power now depends to a great extent on its administrative capability to effectively and uniformly implement the measures adopted, and in particular, the role that the EU decentralized agencies play in such an implementation.

Like figure 27 illustrates, the long-standing notion of administrative and implementation power in AFSJ matters is therefore progressively shifting (from scenario 1 to 2). The deepening of the operational powers and cooperation of Frontex, Easo and Europol is progressively eroding the exclusive procedural autonomy that Member States previously enjoyed when implementing EU law. These agencies increasingly steer and shape the effective and uniform implementation of EU migration, asylum, and border management laws and policies at the national and local level.

¹⁰⁷⁰ Commission, “European Governance: A White Paper”, COM(2001) 428, 25.07.2001, p. 30.

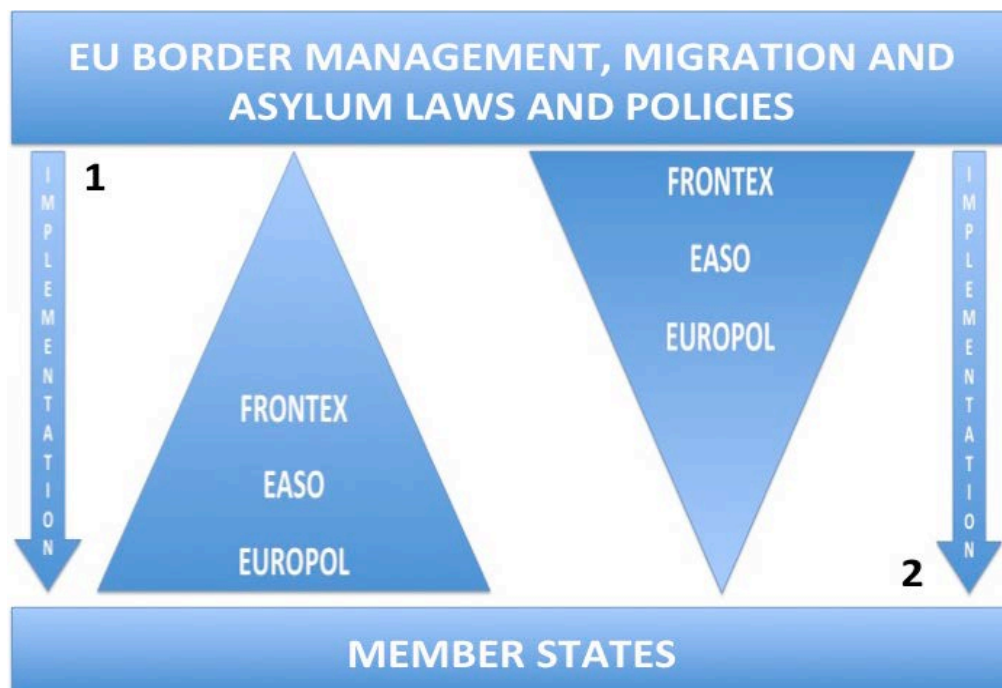


Figure 27: Evolution of the Implementation of EU Border Management, Migration and Asylum Laws and Policies. Source: author's own elaboration.

Furthermore, the extent of the operational functions of Frontex, Easo, and Europol may theoretically range from merely coordinating and providing technical assistance to the Member States, to developing full-fledged enforcement and coercive powers. Since Frontex, Easo, and Europol do not have independent executive competences, as this study analyzed, their tasks can no longer be described as merely technical or supportive. Despite the lack of transparency and the vague legal provisions regulating the activities that Frontex, Easo and Europol undertake in practice on the ground, their tasks do have an operational nature. The issue is that the legal frameworks of Frontex, Easo and Europol lag behind the real operational powers that these agencies conduct on the ground, which creates legal uncertainty.

The most clear and recent example of how the operational activities of Frontex, Easo, and Europol go beyond what is established in their legal frameworks can be found in the Greek hotspots. Whereas the Regulation of Easo clearly states that the agency shall have no power to make decisions on behalf of Member States' asylum authorities on individual applications for international protection, the AST, jointly with the competent national asylum and reception

authorities, have begun examining the asylum applications.

Additionally, Europol is deploying investigative and analytical support teams and guest officers on the ground to undertake systematic secondary security checks and support frontline Member States in the hotspots. However, Regulation 2016/794 of Europol does not regulate the operational role that the agency is starting to play.

Frontex also has a crucial impact, which is not specified in Regulation 2016/1624, in determining the nationality of those migrants that are disembarked in the hotspots. Due to the extraordinary migratory pressure that the Hellenic border authorities are subject to, they tend to entirely base their final decision regarding the irregular migrants' country of origin on Frontex' assessment.

Consequently, the reinforcement of the legal mandates and inter-agency cooperation of Frontex, Easo, and Europol reveal a trend under which these agencies are mandated to increasingly develop operational and implementation activities. As figure 28 shows, the operational and implementation role of Frontex, Easo, and Europol has followed a constant and linear progression since their respective establishment. All of these AFSJ agencies are currently located in the upper right quadrant, since the three agencies present powers that can be regarded as operational and that may have an impact on ensuring an effective and uniform implementation of EU border management, migration and asylum laws.

Figure 28 also illustrates that the extent of the operational and implementation functions of Frontex, Easo and Europol vary. While Europol, due to its still markedly intergovernmental nature, is starting to operationally assist the national law enforcement authorities in their national investigations, Frontex and Easo already conduct significant operational tasks on the ground and ensure the implementation of the adopted European measures at the national level.

Significantly, the EBCG and the future EUAA are/will be empowered to monitor the effective functioning of the external borders and asylum systems of the Member States, carry out vulnerability assessments, verify whether a Member State is able to effectively manage disproportionate migratory flows, and detect deficiencies in the administration of its borders, registration, and asylum

systems. If a Member State either fails to take the measures recommended by these agencies or does not take the necessary action in the face of disproportionate migratory pressure, the EBCG and the EUAA shall adopt a unified and effective EU approach, since the functioning of the Schengen area and the CEAS may otherwise be jeopardized.

Whereas the current tasks already represent an erosion of the operational powers and implementation prerogatives of the Member States, none of these AFSJ agencies have been bestowed centralized, fully autonomous operational and enforcement powers on the ground. Figure 28 shows that despite the new fancy names of these agencies, they all are still far from the upper-right corner of the right quadrant, which represents the full centralization or federalization of border management, asylum and migration matters. It remains to be seen, however, to what extent the EBCG and the EUAA will openly interpret their supervisory and intervention capacity, and whether the EU rules and policies on border management and asylum will ultimately be more effectively and uniformly implemented.

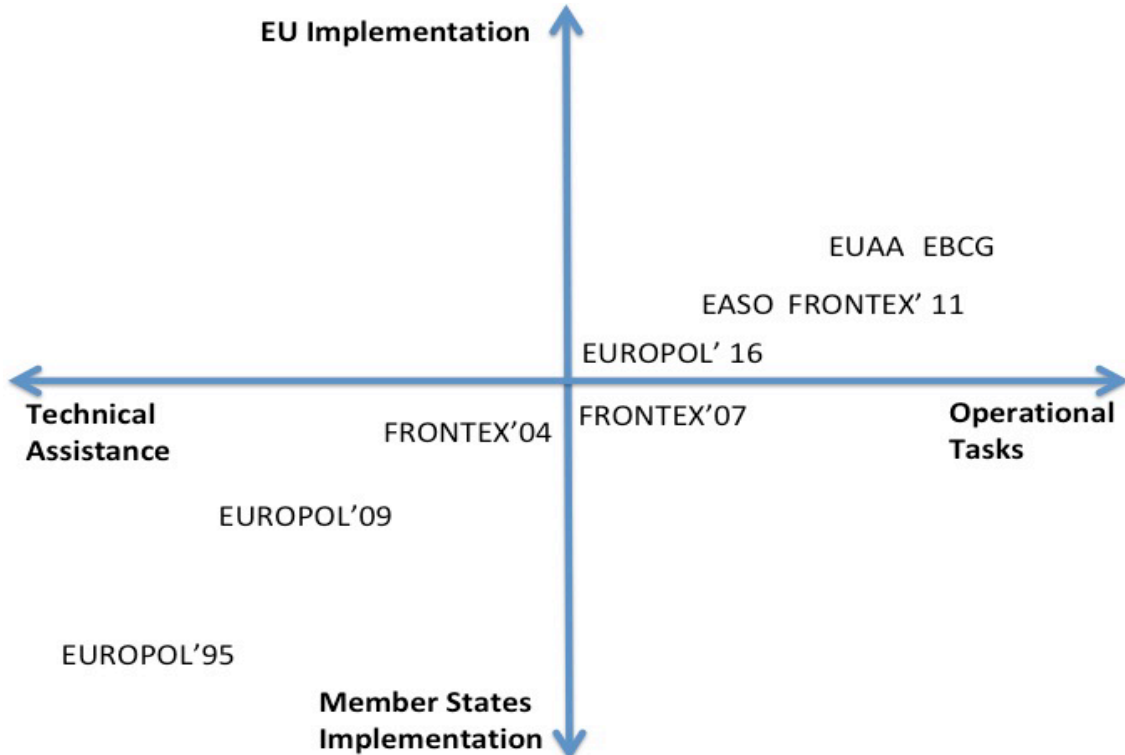


Figure 28: Evolution of the Operational and Implementation Role of Frontex, Easo and Europol. Source: Author's own elaboration.

The reinforcement of the operational tasks and implementation role of Frontex, Easo, and Europol is not in itself an issue. What is problematic is the broad formulation of these AFSJ agencies' legal bases and the lack of transparency surrounding their operational activities and cooperation, rendering the task of determining the degree of discretion that they enjoy difficult. The key challenge involves determining the degree of discretion that Frontex, Easo, and Europol enjoy and whether the institutional balance in the EU is fully respected.

In this light, and despite the fact that Frontex, Easo, and Europol have not been strictly delegated powers, this study followed the CJEU's non-delegation doctrine as useful guidance to analyze the legality of these AFSJ agencies under EU constitutional law. The CJEU, in "Short-Selling", updated and relaxed its initial Meroni doctrine by no longer confining delegation to "clearly defined executive powers"¹⁰⁷¹, but rather to powers "precisely delineated and amenable to judicial review in the light of the objectives established by the delegating authority"¹⁰⁷².

Unlike in the case of "Short-Selling", the operational powers of Frontex, Easo, and Europol are neither circumscribed by well-detailed conditions that limit their discretion, nor clearly detailed in a legal framework or their Regulations. These AFSJ agencies' operational powers are not restricted to merely providing technical support to the frontline Member States, but rather, they develop expanding cross-agency operational cooperation and activities on the ground. These agencies' tasks entail the exercise of discretionary prerogatives that are not narrowly delineated or clearly conditioned in any national or EU legal instrument.

For instance, Frontex and Easo play a strong recommendatory role in the hotspots, which in principle, is compatible with the non-delegation doctrine, since the concerned Member States are not bound by Frontex and Easo's recommendations. Nonetheless, the national authorities, subject to extraordinary migratory pressure, may decide to rubber-stamp the recommendations put forward by the agencies.

¹⁰⁷¹ CJEU, Case 9/56, ECLI:EU:C:1958:7, para 150.

¹⁰⁷² CJEU, Case C-270/12, ECLI:EU:C:2014:18, para 53.

Frontex' influence over the Greek officials in determining the nationality of the arriving migrants, Europol's advice and operational support to the national enforcement authorities to dismantle smuggling and trafficking networks, and Easo's admissibility assessment of the asylum applications or the detection of vulnerable applicants encompass in practice discretionary and political choices. In these cases, the responsibilities of the agencies are blurred, since the national authorities adopt a final decision solely based on the assessment of the agencies. Such a decision implies that the agencies enjoy an important degree of discretion.

Although fully autonomous enforcement and coercive powers are not possible under the current Treaties and would breach the non-delegation doctrine, the ambiguity and lack of transparency surrounding the operational tasks that Frontex, Easo, and Europol undertake on the ground challenge the determination of their discretion and whether they actually make policy choices. In our view, the main limitation to Frontex, Easo, and Europol's reinforced operational and implementation role comes from the Member States.

While it is true that Frontex, Easo and Europol assist the Member States in matters closely linked to their national sovereignty prerogatives, the competent national authorities that vote at the Management Boards tightly control their recently reinforced operational, implementation and supervisory functions. Only two representatives of the Commission have voting rights in Frontex and Easo's Management Boards, and this figure falls to just one representative in the case of Europol. The presence of the European Parliament in Frontex, Easo, and Europol's Management Boards is non-existent. Even higher voting thresholds have been set in regards to the deployment of the EBCGT and AST by Frontex and Easo, respectively. Member States also exert their influence on the appointment and supervision of the Executive Directors, who lead the governance, management and daily administration of Frontex, Easo, and Europol.

Member States' reluctance to fully abandon their well-established bilateral practices, share information, and operationally cooperate with Frontex, Easo, and Europol in core national sovereign matters like border management, asylum or migration is especially reflected in these AFSJ agencies' Management Boards. The Member States will thus maintain control of the strategic decisions and the daily

management of Frontex, Easo, and Europol.

While centralizing on the executive, decisional, and enforcement powers of Frontex, Easo, and Europol will ensure a fully effective and harmonized implementation, it is important to bear in mind that these agencies represent an “institutional trade-off” or a common ground between intergovernmentalism and communitarization at the AFSJ. That is, Member States do not wish to relinquish further sensitive competence to the EU Institutions, but at the same time, increasingly need supranational operational assistance regarding matters that can only be effectively managed in an integrated manner at the EU level. For this reason, whereas Europol, Frontex, and Easo have been conferred significant operational tasks, none of these agencies are vested decisional, enforcement or coercive powers, which remain and will remain as an exclusive power of the competent national authorities.

III. RESEARCH CHALLENGES

This study was based on a substantial exploratory task, which was deemed necessary due to the recent establishment and expansion of the operational role of Frontex, Easo, and Europol, as well as the secrecy, lack of transparency, and very limited and dispersed information and research available regarding the activities they conduct in practice on the ground. Subsequently, the findings regarding the operational activities that these agencies conduct were framed and analyzed within the institutional evolution of the AFSJ, the EU constitutional framework, the legal mandate of Frontex, Easo, and Europol, and the existing bilateral and multilateral cooperation between these AFSJ agencies.

This thesis largely managed to comparatively analyze the evolution of the *de iure* and *de facto* operational tasks of Frontex, Easo and Europol in migration, asylum, and border management matters. It has been concluded that the legal mandate, operational presence, and cooperation of these AFSJ agencies on the ground has been strengthened, which has an impact on ensuring an effective and uniform implementation of EU border management, migration and asylum measures. However, while examining the evolution of the legal frameworks of

Frontex, Easo and Europol was to a certain extent a straightforward task, studying and determining the activities that these agencies conduct in practice on the ground was extremely challenging and some uncertainty still remains.

For several reasons, the main challenge facing this study was to gain access to the information and documents reflecting the operational, and politically sensitive, tasks of Frontex, Easo, and Europol on the ground. While an immense amount of documents were released since the start of the “refugee crisis” in 2015, the existing information regarding the operational role of these agencies is highly dispersed, fragmented, and repetitive. Moreover, there is a significant lack of transparency concerning the operational activities of these AFSJ agencies.

An external observer never knows what specific documents the agencies hold. Against this background, such an individual may either lodge a general request for access to documents, requiring the agency to identify all of the relevant documents that may fall within the scope of the request, or identify specific documents through information previously made public by the agencies. Both options are problematic, since upon a wide request, the agencies may disregard certain documents of interest for the individual’s research, and upon a specific request, similar documents connected to the one requested may not be identified and disclosed.

Furthermore, the management of the requests of access to documents widely differs between Frontex, Easo, and Europol. While Frontex timely disclosed most of the documents requested for this research¹⁰⁷³, large parts of these documents were blanked out, since the agency claimed that they contained detailed, sensitive information whose disclosure would undermine public security or the protection of personal data. Such blanked out documents, which in many cases made it impossible to extract any significant information, were subject to confirmatory applications. When replying to the confirmatory applications, Frontex symbolically expanded the sections hidden by arguing that any further disclosure would undermine and put at risk the modus operandi of the agency and the national border guards.

Frontex maintains this firm position even with bodies that compose its

¹⁰⁷³ See Appendix A: Public Access to Documents.

administrative structure, like the Consultative Forum, which according to article 70(5) Regulation 2016/1624, “shall have effective access to all information concerning the respect for fundamental rights”. Specifically, in a request of documents filed by the Consultative Forum to Frontex, regarding the operational activities of the agency in Hungary, the agency granted the Forum access to the documents “but the information provided, in particular the operational plans, were not complete”¹⁰⁷⁴.

The number of documents requested to Easo for this research was considerably lower in comparison to Frontex, since Easo’s operational role was less significant until recently, and since the agency makes its special and operational plans publicly available on its website. Nevertheless, Easo’s management of the access to document requests submitted was unsatisfactory. For instance, on 4 March 2017, a request was lodged to Easo in regards to any information available related to the deployment of AST, the implementation of the operational plans, and the operational role of the agency in the hotspots. Not only did the agency incur significant delays in handling the request, but poorly justified the denial of granting access to such documents. On 15 July 2017, a complaint for maladministration was submitted to the European Ombudsman (reg. no 1230/2017/EIS), which at the time of writing has not yet been solved.

The public information available regarding the operational role of Europol on the ground is extremely limited. The only information available is that which is provided by the agency through its own press releases. Europol denied every request and confirmatory application for full and partial access to documents filed¹⁰⁷⁵. The agency argued that operational documents cannot be disclosed since making them available would undermine the protection of public interest in regards to public security and would endanger the present and future operational activities and investigations by the law enforcement authorities of the Member States aimed at fighting facilitated illegal immigration and trafficking of human beings.

In response to the confirmatory applications submitted, Europol did not

¹⁰⁷⁴ Frontex Consultative Forum on Fundamental Rights, “Fifth Annual Report, 2017”, 2018, p. 30.

¹⁰⁷⁵ See, Appendix A: Public Access to Documents.

deviate from its original assessment, denying access to any document related to the operational activities of the agency. This systematic refusal of the access to documents and the obscurity surrounding the operational activities of Europol was also brought to the attention of the European Ombudsman on 17 July 2017 (reg. No 1270/2017/EIS). At the time of writing, the European Ombudsman is still assessing the complaint.

Since gaining access to documents in regards to the operational activities and inter-agency cooperation between Frontex, Easo, and Europol was difficult, the research of this thesis was supplemented by semi-structured interviews¹⁰⁷⁶. Nonetheless, contacting strategic officials within Frontex, Easo, Europol, and the EU institutions is a very time-consuming and demanding task. It should also be noted that the headquarters of Frontex, Easo, and Europol are respectively located in Poland, Malta, and The Netherlands. Additionally, these agencies and the institutions were reluctant to be interviewed regarding matters as sensitive as operational tasks and activities on the ground. Hence, due to time and resource constraints, not as many interviews as anticipated were conducted for this study.

Another limitation directly derives from using “case-study” as a method. From the analysis of the evolution of Frontex, Easo, and Europol’s operational tasks, it has been concluded that the powers and cooperation of these agencies have an operational, rather than technical nature, and that these agencies are increasingly shaping and steering the implementation of border management, asylum, and migration laws and policies. However, these findings cannot be extrapolated to the other decentralized agencies that operate in the AFSJ (i.e. Eurojust, EIGE, Cepol, EU-Lisa, FRA or EMCDDA) or to other EU decentralized agencies. Further research is thus necessary to determine the extent to which, as this study argues through the analysis of three cases (Frontex, Easo and Europol), the AFSJ is moving towards an integrated EU administration.

¹⁰⁷⁶ See, Appendix E: List of Interviews.

IV. AVENUES FOR FURTHER RESEARCH

This study is the first attempt to comparatively analyze the evolution of the operational tasks of the three most representative agencies involved in migration and asylum matters in the EU. The *agencification* of the AFSJ is at a very early stage and is still underdeveloped and the avenues for further research are thus numerous. However, the main research possibilities and questions arising from the findings of this study are briefly examined below.

The most obvious question to be drawn from this thesis concerns whether the operational and implementation role of Frontex, Easo, and Europol in the AFSJ will be further expanded. Specifically, one may wonder how the supervisory, intervention, or operational powers of the recently established EBCG and the future EUAA will develop, as well as to what extent the Member States will limit these tasks in the agencies' Management Boards, or if the agencies will be provided the resources and staff required to effectively function. In regards to Europol, it remains to be seen whether the agency will become, in operational terms, as relevant as Frontex and Easo in migration and asylum matters.

It also remains to be seen whether the hotspot approach will become the central crisis management instrument in order to operationally support the Member States on the ground when they are confronted with a sudden and extraordinary migratory pressure in their external borders. The hotspots could actually become a useful testing ground to further strengthen the operational and implementation powers of Frontex, Easo, and Europol when the Member States face sudden and disproportionate mixed migratory flows. In this regard, a parallel legal framework for the hotspots could be adopted. Under this framework, Easo, Europol, and Frontex could be conferred executive powers jointly with the Member State to, for instance and respectively, jointly process asylum applications, investigate the modus operandi of migrant smuggling facilitators, or organize and lead border operations using its own equipment and border guards.

Furthermore, the growing operational role of Frontex, Easo, and Europol, in implementing EU border management, migration, and asylum measures, poses questions about the legitimacy and constitutionality of this emerging trend, and

most importantly, how to hold these agencies accountable and responsible. The operational and implementation functions of these AFSJ agencies may have a direct or indirect impact on the fundamental rights of the irregular migrants and asylum seekers.

Since Frontex, Easo, and Europol's operational role under EU law has significantly expanded, the responsibility of these agencies should be clarified and their capacity to deal with possible violations of fundamental rights should also be strengthened. It is crucial to study to what extent Frontex, Easo, and Europol can be held jointly responsible with the Member States for breaches of fundamental rights.

Particularly, the operational activities that Frontex, Easo, and Europol conduct on the ground should be subject to relevant safeguards that protect the fundamental rights of the individuals, grant them access to effective remedies, and streamline the transparency of the agencies' activities. In this regard, the key question to be addressed is whether these agencies adopt legally binding decisions for third parties, since the regulations of Frontex, Easo, and Europol do not formally confer them regulatory or direct enforcement competences to manage the European external borders, which ultimately and in principle remain an exclusive competence of the Member States. However, as this study revealed, Frontex, Easo, and Europol conduct important operational tasks in practice that should at least trigger a shared responsibility between the agency and the Member States.

Hence, the lack of transparency of these AFSJ agencies' operations and the obscure allocation of responsibilities among the high number of actors involved at the external borders makes it difficult to effectively hold the agencies accountable and responsible. Due to the difficulties that individuals may face when having to seek judicial redress at the EU or national level, the recent introduction of a complaint mechanism within the EBCG and the future EUAA may be regarded as useful mechanism to promote bottom-up accountability.

Allowing any person to lodge a complaint against these agencies would open a direct channel of communication between the individual and the EBCG or the EUAA. However, as this study pointed out, the main limitation of the individual

complaint mechanism is based on its lack of independence and impartiality¹⁰⁷⁷. The individual complaint mechanism presents an administrative nature, implying that it is not fully autonomous to independently operate from the EBCG or the future EUAA, and cannot investigate alleged fundamental rights violations. Additionally, no further administrative or judicial remedies are available if the complainant is not satisfied with the reply or the inadmissibility of her complaint, or if the measures adopted by the agency or the respective Member State are not executed.

It is thus necessary to further research how to enhance the effectiveness of the complaint mechanism, as well as the role of the CF and the FRO of the EBCG and the future EUAA to effectively and sufficiently determine the responsibility of these agencies and ensure that the individuals have access to effective remedies. While it is true that Europol still plays a secondary operational role in comparison to Frontex and Easo, the agency is increasingly conducting operational tasks on the ground that may also affect the individuals' fundamental rights. If the operational role of Europol keeps expanding, the appropriateness of creating a CF, a FRO, and an individual complaint mechanism within Europol should be examined as well.

¹⁰⁷⁷ See chapter 3 section IV.3.3.

APPENDIX A: Public Access to Documents

FRONTEX	SUBMISSION	DOCUMENTS REQUESTED	ANSWER (DATE)
1	16.11.2015	External Evaluation carried out by Ramboll and Eurasyllum to Frontex	Partial Access Granted (25.11.2015)
2	04.12.2015	1) CF Annual Report 2015. 2) Work Program 2016. 3) Project entitled “Promoting the participation of Jordan in the work of Easo as well as the participation of Morocco and Tunisia in the work of Easo and Frontex”	Partial Access Granted (15.12.2015)
3	16.01.2016	1) Work Plans and Annual Reports of the FRO. 2) Fundamental Rights Action Plan	Partial Access Granted (05.02.2016)
4	31.10.2016	Documents related to bilateral and multilateral cooperation between Frontex, Easo and Europol	Partial Access Granted (21.11.2016): 1) Final Report of the JHA Agencies Network in 2015 2) Multilateral JHA Agencies Scorecard 2015 3) Working Arrangement Frontex-Easo 4) Working Arrangement Frontex-Europol
5	08.01.2017	1) MEDSEA Report 2) BORTEC Report	Partial Access Granted (09.01.2017)
6	09.01.2017	2013 and 2014 EBGT and TEP Annual Reports	Partial Access Granted (10.01.2017)
7	03.04.2017	Key Operational Plans (OPLAN) per each border per year, and their evaluation reports (FER)	Partial Access Granted (24.05.2017) - 2006: Poseidon (OPLAN + FER) - 2007: Poseidon and Amazon (OPLAN + FER) - 2008: Poseidon and Hammer (OPLAN + FER) - 2009: Saturn and Hammer (OPLAN + FER) - 2010: Hubble and Poseidon (OPLAN + FER) - 2011: Poseidon and Hammer (OPLAN + FER)

FRONTEX	SUBMISSION	DOCUMENTS REQUESTED	ANSWER (DATE)
			<ul style="list-style-type: none"> - 2012: Focal Points and Poseidon (OPLAN + FER) - 2013: Poseidon and Focal Points (OPLAN + FER) - 2014: Pegasus and Poseidon (OPLAN + FER) - 2015: Alexis, Poseidon and Triton (OPLAN + FER) - 2016: Alexis, Poseidon and Triton (OPLAN + FER)
8	05.06.2017	1) Frontex RABIT Operation 2010 (OPLAN +FER) 2) Handbook to the OPLANs: Joint Maritime Operations, Joint Air Border Operations, Joint Land Border Operations and Return Operations	Partial Access Granted (08.06.2017)
9	15.07.2017	Frontex' Management Board Minutes and/or Frontex' Liaison Officers in Member States meeting minutes	Partial Access Granted (27.07.2017): 1) MB Minutes 2014-2017 2) Management Board Decision 38/2016 of 23 November 2016 adopting the profiles and the overall number of border guards and other relevant staff to be made available to the European Border and Coast Guard teams
10	20.09.2017	The operational activities and role of the Seconded Guest Officers (SGO) and the establishment of the SGO Task Force	Denied (9.10.2017): "Frontex is currently working on a strategy on this topic, but it is still in a draft form which still under discussion. This is why, I am afraid we cannot share it until the document is finalised and endorsed by Frontex Management Board"
11	20.09.2017	Any information regarding the development of Frontex' own operational capacity. Specifically but not limited to the acquisition of its own equipment and the comprehensive strategy on how the Agency's own capabilities will be developed/used	Partial Access Granted via Frontex Press Office (09.10.2017)

Appendix A: Public Access to Documents

FRONTEX	SUBMISSION	DOCUMENTS REQUESTED	ANSWER (DATE)
12	20.09.2017	<p>1) The 2016 and 2017 Fundamental Rights Officer Work Plans and any annual report on the situation of fundamental rights that she might issue.</p> <p>2) Documents related to the implementation of the new individual complaint mechanism</p>	<p>1) “The FRO does not issue any annual report on the situation of fundamental rights”. Information from 2016 in relation to the work of the FRO can be found on page 36 of the Annual Activity Report”</p> <p>2) “General information and documents related to the individual complaints mechanism can be found on the following link: http://frontex.europa.eu/complaints. There are no additional documents pertaining the complaints mechanism. The report on the implementation of the complaints mechanism in 2017 will be released in 2018”</p>
13	25.09.2017	<p>1) OPLAN and FER of Joint Operation Hermes 2011 and 2014</p> <p>2) OPLAN and FER of Joint Operation Pegasus 2015 and 2016</p>	Partial Access Granted (16.10.2017)
14	27.10.2017	<p>1) The rules for SGO which were approved by the Management Board in November 2012</p> <p>2) Management Board Decision 25/2012</p> <p>3) Any document covering the extensive discussions both internally within Frontex and with the Member States regarding the most appropriate way to put into practice the SGOs mechanism</p>	<p>Partial Access Granted 01.11.2017:</p> <p>1) MB Decision 27/2017 and 14/2017</p> <p>2) MB Decision 25/2012</p> <p>3) SGO Workshops Minutes</p>
15	20.01.2018	EU Justice and Home Affairs Agencies’ cooperation in 2017: Including but not limited the Final report, the Multilateral JHA Agencies Scorecard 2017 and the Priorities of the network	Partial Access Granted (12.02.2018)

FRONTEX	SUBMISSION	DOCUMENTS REQUESTED	ANSWER (DATE)
		of JHA Agencies in 2017	
16	29.01.2018	One OPLA per each border and their evaluation reports of the bigger and most important operations conducted by Frontex in 2017	<p>Denied (27.02.2018). Confirmatory Application sent on 27.02.2017.</p> <ul style="list-style-type: none"> - Denied (13.03.2018): “while the 2017 operations have concluded and were partly replaced by new operations, the evaluation phase commencing after the conclusion is part of the running time of an operation and thus subject to the same constraints for releasing those documents you have applied for”.
17	02.03.2018	Recommendations submitted since the end of 2016 by the CF and the FRO to the EBCG, and all written communications produced by the EBCG in reply to and/or in relation of these recommendations (i.e. replies by the Executive Director of the EBCG to the CF and the FRO)	<p>Access Granted (18.04.2018):</p> <ul style="list-style-type: none"> - CF recommendation on Frontex activities at the Hungarian-Serbian Border - CF recommendation on a child protection strategy for Frontex - CF recommendation on gender mainstreaming in Frontex activities - CF request for information regarding Hungary - FRO observations 2017
18	02.03.2018	The individual complaints submitted since the end of 2016 against the agency's and the Member States' staff, and the reports issued by the FRO to the Executive Director and the Management Board of the EBCG on findings and follow-up in respect of complaints declared admissible.	<p>Partial Access Granted (18.04.2018):</p> <ul style="list-style-type: none"> - Complaint 1, 2017 - Complaint 3, 2017 - Complaint 10, 2017 - Complaint 11, 2017 - Complaint 14,s 2017

Appendix A: Public Access to Documents

EASO	SUBMISSION	DOCUMENTS REQUESTED	ANSWER (DATE)
1	16.11.2015	1) Easo independent external evaluation (article 46 Easo Regulation) 2) Easo Annual General Report 2015 3) Any information regarding the role of Easo in the hotspots	Partial Access Granted (15.02.2016) - Independent External Evaluation of Easo's activities covering the period from February 2011 to June 2014 - Information regarding the ENPI project
2	31.10.2016	Documents related to bilateral and multilateral cooperation between Frontex, Easo and Europol	Partial Access Granted (18.11.2016) - Working Arrangement Frontex-Easo - Final Report of the JHA Agencies Network in 2015
3	16.02.2017	Easo-Frontex Cooperation Plan for 2017-2018 that the Executive Directors of the agencies signed on 8.02.2017	Partial Access Granted (07.03.2017) - Frontex-Easo 2017-2018 Cooperation Plan
4	04.03.2017	Easo's Operational Plans, Information regarding the deployment of AST and the operational plans of Easo at the hotspots. Additionally, any follow-up document regarding the implementation of the operational plans and the deployment of the asylum teams once a particular operation has started or concluded	Denied (27.04.2017) - Confirmatory Application Sent on 30.04.2017: since there was no reply from Easo, two follow-up emails were sent on 15.05.2017 and 20.05.2017 - Finally, after narrowing down the initial request for access to documents (during the whole month of June 2017), on 14.07.2017 Easo replied to the confirmatory application by granting access to: 1) Agenda of the Annual Meeting of Easo AIP-Nation Contact Points (8-9 June 2017); 2) Agenda of the Annual Meeting of Easo AIP-National Contact Points 12-13 January 2017; 3) Draft Agenda of 23 rd Easo Management Board and 1 st Easo/Frontex Management Board 7-8-9 February 2017; 4) Draft Agenda of 24 th Easo management Board 13 and 14 June 2017

EASO	SUBMISSION	DOCUMENTS REQUESTED	ANSWER (DATE)
			<ul style="list-style-type: none"> - On 15.07.2017 a complaint for maladministration was submitted to the European Ombudsman (reg. No 1230/2017/EIS): it was alleged that the significant delays in handling the initial application and the subsequent confirmatory application, as well as the unsatisfactory and very poorly justified reply of Easo breached Regulation 1041/2001
5	26.09.2017	<ul style="list-style-type: none"> - Manual for the deployment of Asylum Support Teams and the participation Easo in Special Support Measures - Easo procedure for amendments to operating plans and special support plans - Internal manuals to better define administrative processes and operational deployment of the Asylum Support Teams 	Partial Access Granted (16.10.2017) <ul style="list-style-type: none"> - Easo, Joint Processing Pilots (Technical Report), September 2015 - Decision of the Executive Director of Easo on the approval of Easo Procedure on Internal coordination for the implementation of Operating Plans, Special Support Plans and/or Hotspot (Relocation) Operating Plans, Ref.: Easo/ED/2016/195 - Decision of the Executive Director of Easo on the approval of Easo procedure for the selection of AIP experts deployed in operational support activities, Ref.: Easo/ED/2016/194 - Easo Procedure for Amendments to Operating Plans and Special Support Plans, February 2015

EUROPOL	SUBMISSION	DOCUMENTS REQUESTED	ANSWER (DATE)
1	16.11.2015	1) "Multilateral JHA Agencies Scorecard", 2) "Priorities of the network of JHA Agencies in	Partial Access Granted (24.11.2015) <ul style="list-style-type: none"> - EDOC-#712150: The new multiannual Justice and Home

Appendix A: Public Access to Documents

EUROPOL	SUBMISSION	DOCUMENTS REQUESTED	ANSWER (DATE)
		2016” and “The new multiannual JHA program”	Affairs (JHA) programme - EDOC-#804017: Multilateral JHA Agencies Scorecard 2015- updated - EDOC-#804016: Final Report JHA Agencies Network 2015
2	10.12.2015	Operational Role that Europol plays in the hotspots	Referral to public information available on Europol’s website (11.12.2015)
3	01.11.2016	Documents related to bilateral and multilateral cooperation between Europol, Frontex and Easo	Partial Access Granted (07.11.2016) - Joint conclusions of the Heads of JHA Agencies meeting on 3-4 November 2015, - Multilateral JHA Agencies Scorecard 2015
4	01.04.2017	Documents addressing the operational support of Europol regarding the control of the external EU borders (i.e. “illegal immigrant smuggling” and “trafficking in human beings”). Specifically, Europol’s JIT mutual agreements in these matters and Europol’s operational plans at the hotspots	Denied (05.06.2017) since the disclosure of the six identified documents would undermine the protection of the public interest as regards the proper fulfillment of Europol’s tasks and the investigations and operational activities of Member States, third parties and EU bodies - Confirmatory Application Sent on 05.06.2017: Europol Replied to the Confirmatory Application on 17.07.2017 by granting “partial access to the document with number #858057 (...) As regards to the other documents, no grounds to deviate from Europol’s original assessment as expressed in the reply of 24 May 2017 were found”. - On 17.07.2017 a complaint for maladministration was submitted to the European Ombudsman (reg. No 1270/2017/EIS): it was alleged that Europol

EUROPOL	SUBMISSION	DOCUMENTS REQUESTED	ANSWER (DATE)
			unsatisfactory and poorly justified its refusal to disclose some documents.
5	01.10.2017	- Evaluation Report (and any other document related to) of Operation Phantom - Evaluation Report (and any other document related to) of Operation Golf	After an internal consultation, we identify no “ <i>evaluation reports</i> ” regarding the two operations that you mention in your request (20.10.2017)
6	10.10.2017	- Consolidated Annual Activity Report (CAAR) 2009 - CAAR 2011 - CAAR 2012	Partial Access Granted (25.10.2017)
7	15.03.2018	1) The evaluation of the Europol Guest Officer Concept covering deployments in Greece and Italy (end of 2017). 2) The Europol Management Board minutes of the meeting endorsing the final evaluation report to address the recommendations therein suggested (13 December 2017)	Denied (23.03.2018): “as their disclosure would undermine the protection of the public interest as regards public security, such as the proper fulfilment of Europol’s tasks. The two documents refer to sensitive information regarding, among others, the Member States operational activities and Europol’s support provided for in the hotspots, such as forensic support and cross-checking of data, as well as the operational products distributed by Europol. The disclosure of information on sensitive aspects of Europol’s and Member States’ operational work would undermine the effectiveness of the Europol Guest Officers activities in the hotspots in their support to Member States in strengthening control at the external borders of the Union, in particular by assisting in the screening processes and reinforcing the secondary security checks, which further enhance the identification of potential threats to the Union’s security”

Appendix A: Public Access to Documents

EUROPOL	SUBMISSION	DOCUMENTS REQUESTED	ANSWER (DATE)
			<p>- Confirmatory Application Sent on 26.03.2018: on 17 April 2018 Europol replied saying that “the Management Board of Europol, as the foreseen authority to decide upon confirmatory applications concerning documents originating from the Management Board of Europol, finds no grounds to deviate from the original assessment as expressed in the reply of 23 March 2018, which remains valid”.</p>








COUNCIL	SUBMISSION	DOCUMENTS REQUESTED	ANSWER (DATE)
1	13.03.2015	Doc. 5946/15 Priorities of the network of JHA Agencies in 2015	Granted (01.04.2015)
2	23.02.2016	Doc. 5797/14 Cooperation between JHA Agencies: information exchange; Doc. 5968/13 Report of the Annual Heads of JHA Agencies Meeting on 3 December 2012; Doc. 6127/13 Cooperation between JHA agencies: issues for discussion; Doc. 7313/14 The JHA Agencies Contribution on the new multiannual JHA programme; Doc. 16287/14 The EU JHA agencies cooperation in 2014; Doc. 17004/11 Human rights violations by Frontex in refugee detention centres in Greece; Doc. 18075/11 Outcome of the JHA Heads of Agencies Meeting on 24 November 2011	Granted (09.03.2016)

COUNCIL	SUBMISSION	DOCUMENTS REQUESTED	ANSWER (DATE)
3	01.06.2016	Doc. 9632/00 Europol's participation in JIT	Granted 21.06.2016
4	31.10.2016	Doc. 14779/15 Heads of JHA Agencies meeting, 3-4 November 2015; Doc. 14784/15 The JHA Training Matrix Report 2014	Granted 17.11.2016
5	31.10.2016	Doc.5843/11 Annual Report to the Council 2009 pursuant to Point III 2.3 of the Hague Programme on the cooperation between Eurojust and Europol 2009; Doc. 9045/12 Joint Europol-Eurojust Annual Report to the Council and Commission for 2012 and 2011; Doc. 16760/08 Annual Report to the Council on Cooperation between Eurojust and Europol for 2007	Granted 14.12.2016
6	24.09.2017	Doc. 11231/17	Denied (25.10.2017): "Document 11231/17 is classified. This means that the unauthorised disclosure of its contents could be disadvantageous to the interests of the European Union or of one or more of its Member States"
7	14.11.2017	Docs.: 10009/17, 6709/17, 15220/16,10268/16, 9931/16, 14891/15, 14819/15 and 9953/15	Denied (14.11.2017): "The documents requested 10009/17, 6709/17, 15220/16,10268/16, 9931/16, 14891/15, 14819/15 and 9953/15 are all classified documents. This means that the unauthorised disclosure of their contents could be disadvantageous to the interests of the European Union or of one or more of its Member States"
8	27.12.2017	Doc. 8900/17 Enhancing the role of COSI	Granted 08.01.2018
9	15.12.2017	Doc. 15224/17 Mid-term review of the JHA strategic guidelines; Doc. 15224/1/17 Mid-term	Granted 19.01.2018











Appendix A: Public Access to Documents

COUNCIL	SUBMISSION	DOCUMENTS REQUESTED	ANSWER (DATE)
		review of the JHA strategic guidelines	
10	26.01.2018	Doc. WK 14940/2017 INIT The JHA Agencies Network activity report 2017	Granted 01.02.2018
11	16.03.2018	Doc. 14985/17 Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010 (First reading) = Endorsement	Denied (19.03.2018): “The note gives details of the on-going discussion and identifies sensitive issues that need to be addressed before the Council can reach an agreement. Release to the public of the information contained in this document would affect the negotiating process and diminish the chances of the Council reaching an agreement as it may put delegations under additional pressure of stakeholders. It may also undermine the negotiation position of the Council with the European Parliament since negotiation have not yet started”.







APPENDIX B: EU Decentralized Agencies

Full Name	Logo	Seat	Established (Phase)
European Center for the Development of Vocational Training		Greece	1975 (1 st)
European Foundation for the Improvement of Living and Working Conditions		Ireland	1975 (1 st)
European Monitoring Center for Drugs and Drug Addiction		Portugal	1993 (2 nd)
Translation Center for the Bodies of the European Union		Luxembourg	1994 (2 nd)
Community Plant Variety Office		France	1994 (2 nd)
European Environment Agency		Denmark	1994 (2 nd)
European Training Foundation		Italy	1994 (2 nd)
European Agency for Safety and Health at Work		Spain	1994 (2 nd)
European Medicines Agency		U.K. (By 2019, NL)	1995 (2 nd)
European Union Intellectual Property Office		Spain	1999 (2 nd)
European Police Office		NL	1999 (2 nd)
European Institute for Security Studies		France	2001 (3 rd)
European Food Safety Authority		Italy	2002 (3 rd)
European Maritime Safety Agency		Portugal	2002 (3 rd)

Appendix B: EU Decentralized Agencies

Full Name	Logo	Seat	Established (Phase)
European body for the enhancement of judicial co-operation		NL	2002 (3 rd)
European Union Satellite Centre		Spain	2002 (3 rd)
European Aviation Safety Agency		Germany	2003 (3 rd)
European Border and Coast Guard Agency (Frontex)		Poland	2004 (3 rd)
European Defense Agency		Belgium	2004 (3 rd)
European Railway Agency		France	2004 (3 rd)
European GNSS Agency		Czech Republic	2004 (3 rd)
European Police College		Hungary	2005 (3 rd)
European Center for Disease Prevention and Control		Sweden	2005 (3 rd)
European Fisheries Control Agency		Spain	2005 (3 rd)
European Network and Information Security Agency		Greece	2005 (3 rd)
European Chemicals Agency		Finland	2007 (3 rd)
European Institute for Gender Equality		Lithuania	2007 (3 rd)
Fundamental Rights Agency		Austria	2007 (3 rd)
Body of European Regulators of Electronic Communications		Latvia	2010 (4 th)
European Institute of Innovation and Technology		Hungary	2010 (4 th)
European Systemic Risk Board		Germany	2010 (4 th)

Appendix B: EU Decentralized Agencies

Full Name	Logo	Seat	Established (Phase)
Agency for the Cooperation of Energy Regulators		Slovenia	2011 (4 th)
European Asylum Support Office		Malta	2011 (4 th)
European Banking Authority		U.K. (By 2019, France)	2011 (4 th)
European Insurance and Occupational Pensions Authority		Germany	2011 (4 th)
European Securities and Markets Authority		France	2011 (4 th)
European Agency for the operational management of large-scale IT Systems in the AFSJ		Estonia	2012 (4 th)

APPENDIX C: Evolution of the Legal Mandates of Frontex, Easo and Europol

FRONTEX	Frontex 2004	Frontex 2011	EBCG 2016
Legal Framework	Council Regulation (EC) No 2007/2004 of 26 October 2004	Regulation (EU) No 1168/2011 of 25 October 2011	Regulation (EU) No 2016/1624 of 14 September 2016
Mission	Facilitate and render more effective the application of existing and future Community measures relating to the management of external borders. It shall do so by ensuring the coordination of Member States' actions in the implementation of those measures, thereby contributing to an efficient, high and uniform level of control on persons and surveillance of the external borders of the Member States (art. 1(2))	Facilitate and render more effective the application of existing and future Union measures relating to the management of external borders, in particular the Schengen Borders Code (...). It shall do so by ensuring the coordination of the actions of the Member States in the implementation of those measures, thereby contributing to an efficient, high and uniform level of control on persons and of surveillance of the external borders of the Member States" (art. 1(2))	"(...) to ensure European integrated border management at the external borders with a view to managing the crossing of the external borders efficiently. This includes addressing migratory challenges and potential future threats at those borders, thereby contributing to addressing serious crime with a cross-border dimension, to ensure a high level of internal security within the Union in full respect for fundamental rights, while safeguarding the free movement of persons within it" (art. 1)
Operational Powers	<ul style="list-style-type: none"> - The Agency shall evaluate, approve, coordinate and co-finance joint operations and pilot projects (art. 3) - Assist Member States in circumstances requiring increased technical and operational assistance at external borders by assisting on matters of coordination between two or more Member States, by deploying its experts to 	<ul style="list-style-type: none"> - The Agency may itself initiate and carry out joint operations and pilot projects in cooperation with the Member States. It may also decide to put its technical equipment at the disposal of Member States. The Agency shall finance or co-finance the joint operations and pilot projects (art. 3) - The Executive Director shall draw up an operational plan for the joint 	<ul style="list-style-type: none"> - The Agency shall ensure regular monitoring of all Member States' management of the external borders through liaison officers of the Agency (art. 12) - Conduct Vulnerability Assessments (monitor the availability of the technical equipment, systems, capabilities, resources, infrastructure, adequately skilled and trained staff of Member States

Appendix C: Evolution of the Legal Mandates of Frontex, Easo and Europol

FRONTEX	Frontex 2004	Frontex 2011	EBCG 2016
	<p>support the competent national authorities and by acquiring technical equipment for control and surveillance of external borders (art. 8)</p> <ul style="list-style-type: none"> - Provide Member States with the necessary support in organizing joint return operations. The Agency may use Community financial means available in the field of return (art. 9) 	<p>operations and pilot projects (art. 3a)</p> <ul style="list-style-type: none"> - Deployment of EBGT and SGOs (art. 3b and c) - Rapid Border Interventions: “At the request of a Member State faced with a situation of urgent and exceptional pressure (...) the Agency may deploy for a limited period one or more European Border Guard Teams on the territory of the requesting Member State for the appropriate duration” (art. 8a) - Return Operations: (...) without entering into the merits of return decisions, the Agency shall provide the necessary assistance, and at the request of the participating Member States ensure the coordination or the organization of joint return operations of Member States, including through the chartering of aircraft for the purpose of such operations. The Agency shall finance or co-finance the operations (...)” (art. 9) 	<p>necessary for border control) to assess the capacity and readiness of Member States to face upcoming challenges (art. 13)</p> <ul style="list-style-type: none"> - Initiate Joint operations and Rapid Border Interventions (art. 15 and 17) - Hotspots: Where a Member State faces disproportionate migratory challenges at particular hotspot areas of its external borders characterized by large inward mixed migratory flows, that Member State may request technical and operational reinforcement by migration management support teams (art. 18) - Intervention capacity where control of the external borders is rendered ineffective to such an extent that it risks jeopardizing the functioning of the Schengen area: the EBCG shall determine the actions to be taken for the practical execution of the measures identified in the implementing act of the Council (art. 19) - Deploy European Border and Coast Guard (art. 20) - Return Operations (art. 28): pool of forced-return monitors (art. 29),

Appendix C: Evolution of the Legal Mandates of Frontex, Easo and Europol

FRONTEX	Frontex 2004	Frontex 2011	EBCG 2016
			Pool of forced-return escorts (art. 30), Pool of return specialists (art. 31) and deployment of return intervention teams (art. 33) - The Agency may acquire, either on its own or as co-owner with a Member State, or lease technical equipment (art. 38)
Allocation of Responsibilities	“(…) the control and surveillance of borders lies with the Member (art. 1(2))	“(…) the responsibility for the control and surveillance of external borders lies with the Member States” (art. 1(2))	The EBCG shall implement European integrated border management as a shared responsibility of the Agency and of the national authorities responsible for border management, including coast guards to the extent that they carry out maritime border surveillance operations and any other border control tasks. Member States shall retain primary responsibility for the management of their sections of the external borders (art. 5(1))

EUROPOL	Europol 1995	Europol 2009	Europol 2016
Legal Framework	Council Act of 26 July 1995 drawing up the Convention based on Article K.3 of the Treaty on European Union, on the establishment of a European Police Office	Council Decision of 6 April 2009 establishing the European Police Office (Europol)	Regulation (EU) 2016/794 of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol)
Mission	The objective of Europol shall be (...) to improve (...) the effectiveness and	The objective of Europol shall be to support and strengthen action by the	Europol shall support and strengthen action by the competent authorities of

EUROPOL	Europol 1995	Europol 2009	Europol 2016
	<p>cooperation of the competent authorities in the Member States in preventing and combating terrorism, unlawful drug trafficking and other serious forms of international crime where there are factual indications that an organized criminal structure is involved and two or more Member States are affected by the forms of crime in question in such a way as to require a common approach by the Member States owing to the scale, significance and consequences of the offences concerned (art 2.1)</p>	<p>competent authorities of the Member States and their mutual cooperation in preventing and combating organized crime, terrorism and other forms of serious crime affecting two or more Member States (art. 3)</p>	<p>the Member States and their mutual cooperation in preventing and combating serious crime affecting two or more Member States, terrorism and forms of crime which affect a common interest covered by a Union policy (art. 3)</p>
<p>Operational Powers</p>	<ul style="list-style-type: none"> - To aid investigations in the Member States by forwarding all relevant information to the national units (art. 3.1) - To develop specialist knowledge of the investigative procedures of the competent authorities in the Member States and to provide advice on Investigations (art. 3.2) - To provide strategic intelligence to assist with and promote the efficient and effective use of the resources available at national level for operational activities (art. 3.2) 	<ul style="list-style-type: none"> - To aid investigations in the Member States, in particular by forwarding all relevant information to the national units (art. 5.1) - To ask the competent authorities of the Member States concerned to initiate, conduct or coordinate investigations and to suggest the setting up of joint investigation teams in specific cases (art. 5.1) - To develop specialist knowledge of the investigative procedures of the competent authorities of the Member States and to provide advice on investigations (art. 5.3) - To provide strategic intelligence to 	<ul style="list-style-type: none"> - Coordinate, organize and implement investigative and operational actions to support and strengthen actions by the competent authorities of the Member States (art. 4.1) - Participate in joint investigation teams, as well as propose that they be set up (art. 4.1) - Support Member States' cross-border information exchange activities, operations and investigations, as well as joint investigation teams, including by providing operational, technical and financial support (art. 4.1) - Develop Union centers of specialized

Appendix C: Evolution of the Legal Mandates of Frontex, Easo and Europol

EUROPOL	Europol 1995	Europol 2009	Europol 2016
		<p>assist and promote the efficient and effective use of the resources available at national and Union level for operational activities and the support of such activities (art 5.3)</p> <ul style="list-style-type: none"> - To assist Member States through support, advice and research in technical and forensic methods and analysis, and investigative procedures (art 5.4) - Europol staff may participate in supporting capacity in joint investigation teams. Europol staff may, within the limits provided for by the law of the Member States in which a joint investigation team is operating, assist in all activities and exchange information with all members of the joint investigation team (art. 6) 	<p>expertise for combating certain types of crime falling within the scope of Europol's objectives (art. 4.1)</p> <ul style="list-style-type: none"> - Europol staff may participate in the activities of joint investigation teams dealing with crime falling within Europol's objectives. Europol staff may, within the limits of the laws of the Member States in which a joint investigation team is operating, assist in all activities and exchanges of information with all members of the joint investigation team (art. 5)
Allocation of Responsibilities	<p>The objective of Europol shall be, within the framework of cooperation between the Member States to improve the effectiveness and cooperation of the competent authorities (art. 2.1)</p>	<p>Europol staff may, within the limits provided for by the law of the Member States in which a joint investigation team is operating and in accordance with the arrangement referred to in paragraph 2, assist in all activities and exchange information with all members of the joint investigation team, in accordance with paragraph 4.</p>	<p>Europol shall not apply coercive measures in carrying out its tasks (art. 4.5)</p>

Appendix C: Evolution of the Legal Mandates of Frontex, Easo and Europol

EUROPOL	Europol 1995	Europol 2009	Europol 2016
		They shall not, however, take part in the taking of any coercive measures (art. 6.1)	

EASO	Easo 2010	Future EUAA
Legal Framework	Regulation (EU) No 439/2010 of 19 May 2010 establishing a European Asylum Support Office	Proposal for a Regulation on the European Union Agency for Asylum, COM(2016) 271 final, 04.05.2016
Mission	Easo is established in order to help to improve the implementation of the CEAS, to strengthen practical cooperation among Member States on asylum and to provide and/or coordinate the provision of operational support to Member States subject to particular pressure on their asylum and reception systems (art. 1)	The European Union Agency for Asylum shall ensure the efficient and uniform application of Union asylum law in Member States. It shall facilitate the implementation and improve the functioning of the CEAS, and it shall be responsible for enabling convergence in the assessment of applications for international protection across the Union (art. 1.1 COM Proposal)
Operational Powers	<ul style="list-style-type: none"> - Easo shall provide effective operational support to Member States subject to particular pressure on their asylum and reception systems (art. 2.2) - Easo shall coordinate and support common action assisting asylum and reception systems of Member States subject to particular pressure which places exceptionally heavy and urgent demands on their reception facilities and asylum systems (art. 8) - Easo may coordinate the necessary technical and operational assistance to the requesting Member State or Member States and the deployment, for a limited time, of an asylum support team in the territory of that Member State or those Member States on the basis of an operating plan (art. 13.2) 	<ul style="list-style-type: none"> - Mechanism for monitoring and assessing the asylum and reception systems: should the EUAA's information analysis raise serious concerns regarding the functioning or preparedness of a Member State's asylum or reception systems, the agency may initiate a monitoring exercise (art. 13 COM Proposal) - The EUAA liaison officers will facilitate the monitoring role of the agency by reporting regularly to the Executive Director on the situation of asylum in the Member State concerned and its capacity to manage its asylum and reception systems effectively (article 14a(3) partial agreement EUAA). - Member States may request the Agency for assistance in implementing their obligations with regard to asylum, in

Appendix C: Evolution of the Legal Mandates of Frontex, Easo and Europol

EASO	Easo 2010	Future EUAA
		<p>particular when their asylum and reception systems are subject to disproportionate pressure (art. 16 COM Proposal)</p> <ul style="list-style-type: none"> - The Agency shall deploy asylum support teams to Member States to provide operational and technical assistance (art. 17 COM Proposal) - The EUAA may also deploy its own equipment to the host Member State insofar as this may complement equipment already made available by the host Member State or other Union agencies (article 23(1) partial agreement EUAA). - Hotspots: the EUAA will assist the competent national authorities in screening third-country nationals, providing the disembarked migrants in the hotspots with information regarding the procedure for international protection, registering their applications and, where requested by the host Member State, the examination of such applications (art. 21 COM Proposal) - Emergency Intervention Capacity: Where in the event of disproportionate pressure on the asylum or reception systems a Member State does not request the Agency for operational and technical assistance or does not accept an offer by the Agency for such assistance or does not take sufficient action to address that pressure, or where it does not comply with the Commission's recommendations, thereby rendering the asylum or reception systems ineffective to the extent of jeopardizing the functioning of the CEAS, the Commission may adopt a decision by means of an implementing act, identifying measures to be taken by the Agency to support the Member State concerned (art. 22 COM Proposal).
Allocation of	The Support Office should have no direct or indirect	To facilitate and improve the proper functioning of the CEAS

Appendix C: Evolution of the Legal Mandates of Frontex, Easo and Europol

EASO	Easo 2010	Future EUAA
Responsibilities	<p>powers in relation to the taking of decisions by Member States' asylum authorities on individual applications for international protection (recital 14)</p> <p>The Support Office shall facilitate, coordinate and strengthen practical cooperation among Member States on the many aspects of asylum and help to improve the implementation of the CEAS (art. 2.1)</p> <p>Easo shall have no powers in relation to the taking of decisions by Member States' asylum authorities on individual applications for international protection (art. 2.6)</p>	<p>and to assist Member States in implementing their obligations within the framework of CEAS, the European Union Agency for Asylum should provide Member States with operational and technical measures, including (...) by knowledge of the handling and management of asylum cases, as well as by assisting national authorities competent for the examination of applications for international protection and by assisting with relocation or transfer of applicants or beneficiaries of international protection” (recital 16 partial agreement EUAA)</p> <p>The competence to take decisions by Member States' asylum authorities on individual applications for international protection remains with Member States (recital 46 COM Proposal)</p>

APPENDIX D: Interview Questions

Script for the Interviews Conducted in Brussels

Thank you for agreeing to be interviewed. The purpose of my research is to better understand the evolution of the operational powers and cooperation of Frontex, Easo and Europol. The questions that I will be asking you today deal with your perception of the recently reinforced operational powers conferred to the European Border and Coast Guard, the EU Agency for Asylum and Europol. Not all standard questions may be applicable to each interviewee or may be superseded by answers to previous questions.

SECTION 1: INTRODUCTION

1. Position
2. Time of service
3. Short job description

SECTION 2: REINFORCED OPERATIONAL COMPETENCES

1. To what extent do you think that the operational competences conferred to the EBCG, the EU Agency for Asylum and Europol have been reinforced in comparison to their previous legislative framework?
2. Is the main objective of the EBCG, Easo and Europol still to operationally assist the Member States or do you believe that these agencies are becoming more operationally independent from the competent national authorities? To what degree do Member States effectively cooperate with these AFSJ agencies?
3. Do you believe that the EBCG, Easo and Europol interpret extensively their legal mandates?
4. The AFSJ suffers from an implementation deficit. Are the EBCG, Easo and Europol sufficient operational measures to overcome this deficit? Should/Is it possible to delegate them further operational, supervisory, implementation, enforcement powers?
5. What operational role should the EBCG, Easo and Europol play to guarantee and effective and uniform implementation of the AFSJ *acquis*? How are, if any, regulatory, intervention, supervisory functions envisaged?
6. Do you believe that these agencies will play an increasing role in enforcing the adopted EU AFSJ legislation and policies? Do you think that the reinforcement of the operational powers conferred to the EBCG, Easo and Europol is moving the implementation and enforcement competence from an exclusive task of the Member States to a shared task between the EU and the Member States?

SECTION 3: OPERATIONAL COOPERATION

1. How do you perceive the bilateral operational cooperation between the EBCG, Easo and Europol?
2. Which are the main formal and informal mechanisms of Inter-Agency Cooperation/Coordination? What are the formal goals of cooperation that are set out in the formal arrangements? How are these formal arrangements enforced? What other mechanisms of cooperation are used?
3. How do MOUs work? How are they unenforceable? How are they insulated from judicial review? How are they overseen?
4. Is Cooperation/Coordination evaluated somehow? Is there any way to measure how much and how well agencies have cooperated/coordinated?
5. How do you perceive the current multilateral cooperation between the EBCG, Easo and Europol at the Hotspots? Is there a need of a legal instrument regulating and clarifying the cooperation and activities of the agencies at the hotspots? How do the EBCG, Easo and Europol assist the competent national authorities at the hotspots?

SECTION 4: OVERSIGHT & FUNDAMENTAL RIGHTS

1. To whom do you think the EBCG, Easo and Europol are most accountable to? Do you think that the mechanisms of accountability focus more on ex ante, on going, or ex post accountability in order to prevent/repair potential alleged fundamental rights violations?
2. Fundamental Rights Challenges of the Increasing Operational Competences and Cooperation of Europol, Frontex and Easo
3. Do you think fundamental rights are sufficiently protected?
4. Is there any legal obstacle for individuals who wish to seek judicial redress against an agency action? How could the legal standing of the third country nationals could be improved regarding the potential violation of their fundamental rights in an operation coordinated by the EBCG, Easo or Europol?
5. How do you perceive the EBCG's individual complaint mechanism? Should this mechanism be extended to Easo and Europol? How could this mechanism be improved?
6. Has accountability improved since the EBCG, Easo and Europol were created? How?

SECTION 5: CLOSURE

1. Do you think limits on the EBCG, Easo and Europol objectives come from the EU institutions, the Member States or the public?
2. What expectations do you have for the future, further delegation of operational (implementation/enforcement) powers to Frontex, Easo and Europol? Towards Federal agencies?
3. Do EU agencies promote EU integration or are just a way for Member States to keep an indirect control in matters in which they need to cooperate at the EU level?

Appendix D: Interview Questions

4. Any comment, question, anecdote?

Script for the Interviews Conducted in Washington D.C.

Thank you for agreeing to be interviewed. The purpose of my research is to better understand to what extent some European Union Justice and Home Affairs Agencies cooperate and are held accountable (namely Frontex, Easo and Europol). The questions that I will be asking you today deal with your perception of the cooperation and accountability of the Department of Homeland Security. Not all standard questions may be applicable to each interviewee or may be superseded by answers to previous questions.

SECTION 1: INTRODUCTION

1. What specific competences/mandate does the DHS have?
2. Federal v. States Competences: Is the authority to address immigration, asylum and border protection fully centralized at the federal level? What competences do states have (if any)? How do they formally or informally cooperate with the DHS and its agencies?

SECTION 2: CREATION OF THE DEPARTMENT OF HOMELAND SECURITY

1. Could you please briefly describe the pre-2002 landscape (before the DHS was created)? Do you believe this pre-2002 landscape was characterized by excessive overlap of agency authority?
2. Why was the DHS created? How was it designed?
3. Did the creation of the DHS minimize overlap in agency authority and increase coordination and efficiency? If so, how?
4. Is a 'super-agency' like the DHS less agile, less adaptable and more inward looking than smaller departments?
5. Rather than centralizing authority in the DHS by reducing the number of agencies, do you believe that policymakers should have considered either delineating more distinct lines of substantive authority or allocating distinct functional authority to different agencies with jurisdiction over the same subject matter?
6. Do you think that efficiency, effectiveness, better cooperation and coordination could have been achieved in any other way (rather than through the creation of the DHS)?

SECTION 3: COORDINATION

1. When is it positive for agencies to develop overlapping responsibilities? When do agencies want to collaborate with each other, and when do they want to compete?
2. Formal v. Informal Mechanisms of Inter-Agency Cooperation/Coordination: What are the formal goals of cooperation that are set out in the formal arrangements? How are these formal arrangements enforced? In addition to legally binding agreements and laws, what other mechanisms of cooperation are used?
3. What type of document is used to arrange this formal agreement?
4. How do MOUs work? How are they deployed? How are they unenforceable? How are they insulated from judicial review? How are they overseen?
5. Is Cooperation/Coordination evaluated somehow? Is there any way to measure how much and how well agencies have cooperated/coordinated?

SECTION 4: OVERSIGHT

1. To whom do you feel the DHS is most accountable to?
2. Has oversight improved since the DHS was created? How?

SECTION 5: COORDINATION-ACCOUNTABILITY

1. Do you think that coordination can promote accountability by combating drift, shirking, and free-riding through facilitation of inter-agency monitoring?
2. Do you think coordination can promote accountability by providing the agencies with the opportunity to review and serve as a check on other authorities in the performance of delegated functions?
3. Do you think that cross-agency collaboration blurs lines of authority and accountability?
4. Do you believe that the rationale for agencies to collaborate should be imposed externally through legislation or should come from the agencies' own perceptions of the benefits they can obtain from working together?

SECTION 6: CLOSURE

In the EU, the agencies in charge of immigration, asylum and border protection are understood as special agencies with particular features, since their activities may directly or indirectly affect the fundamental rights of individuals.

1. Is it difficult to balance both independence & accountability? In other words, does the DHS focus more on ex ante, on going, or ex post accountability in order to prevent/ repair potential alleged fundamental rights violations?
2. What effective remedies and claim rights do third country nationals and asylum seekers have access to? Is there any legal obstacle for individuals who wish to seek redress against an agency action?
3. Can individuals directly address the agency (similar to an individual complaint

Appendix D: Interview Questions

- mechanism) if they believe their rights have been violated?
4. How does the allocation of responsibility for potential fundamental rights violations work when the DHS agencies coordinate?
 5. What role does the Office of Civil Rights and Civil Liberties of the DHS, as well as the Ombudsman who fields complaints against USCIS play in effectively streamlining fundamental rights? Moreover, in each of the agencies, the Office of the Chief Counsel (the Principal Legal Advisor in the case of ICE) weighs in on legal issues, would that include human rights issues as well?

APPENDIX E: List of Interviews

Number Interview	Date	Position	Place
1	04.10.2016	Two Officials, U.S. Department of Homeland Security	Washington D.C.
2	13.10.2016	Three officials, U.S. Government Accountability Office	Washington D.C.
3	20.10.2016	Official U.S. Department of Homeland Security	Washington D.C.
4	28.10.2016	Official Center for Homeland Security	Washington D.C.
5	17.11.2016	Official Administrative Conference of the U.S.	Washington D.C. (by phone)
6	18.11.2016	Deputy Director U.S. Citizenship and Immigration Services Ombudsman	Washington D.C.
7	07.04.2017	Europol migration expert	The Hague (by phone)
8	04.10.2017	Easo Official	Malta (by phone)
9	25.10.2017	Inspector Jefe de la Unidad Central de Fronteras de la Policía Nacional and Inspector Jefe del Servicio de Coordinación Operativa de Puestos Fronterizos	Madrid (by phone)
10	30.10.2017	Former Frontex Official	Madrid (by phone)
11	08.11.2017	Two Members of the European Parliament (LIBE Committee)	Brussels
12	16.11.2017	Frontex Official	Brussels
13	16.11.2017	Easo Official	Brussels
14	16.11.2017	Expert on Frontex, Expert on Easo and Expert on Europol, Council of the European Union (Justice and Home Affairs Configuration)	Brussels
15	21.11.2017	Three Policy Officers DG HOME, European Commission	Brussels

REFERENCES

Bibliography (alphabetically)

- AAS, Katja Franko and GUNDHUS, Helene, "Policing Humanitarian Borderlands: Frontex, Human Rights and the Precariousness of Life", *British Journal of Criminology*, 55(1), 2015, pp. 1-18.
- ABRISKETA URIARTE, Joana, "La dimensión externa del derecho de la Unión Europea en materia de refugio y asilo: un examen desde la perspectiva del non-refoulement", *Revista de Derecho Comunitario Europeo*, 56, 2017, pp. 119-158.
- "La reubicación de los refugiados un déficit de solidaridad y una brecha en la Unión Europea: comentario a la sentencia del Tribunal de Justicia de 6 de septiembre de 2017, asuntos C-643/15 y C-647/15, Hungría y Eslovaquia contra el Consejo", *Revista General de Derecho Europeo*, 44, 2018, pp. 125-154.
- ACOSTA ARCARAZO, Diego and MURPHY, Cian (eds.), *EU Security and Justice Law: After Lisbon and Stockholm*, Bloomsbury Publishing, 2014.
- ACOSTA SÁNCHEZ, Miguel Ángel, "La nueva Guardia Europea de Fronteras y Costas una necesaria evolución de FRONTEX", *Boletín Instituto Español de Estudios Estratégicos*, 4, 2016, pp. 466-482.
- and DEL VALLE GÁLVEZ, Alejandro, "Las crisis de los cayucos. La Agencia Europea de Fronteras FRONTEX y el control marítimo de la inmigración clandestina", *Tiempo de Paz*, 83, 2006, pp. 19-30.
 - and GONZÁLEZ GARCÍA, Inmaculada, "TJUE – Sentencia de 05.09. 2012, Parlamento c. Consejo–C-355/10: Vigilancia de fronteras marítimas y elementos esenciales en los actos de ejecución", *Revista de Derecho Comunitario Europeo*, 47, 2014, pp. 267-284.
- ADAMSKI, Dariusz, "The ESMA doctrine: A constitutional revolution and the economics of delegation", *European Law Review*, 6, 2014, pp. 819-825.
- ALBERTI, Jacopo, "Delegation of powers to EU Agencies after the Short Selling Ruling", *Il Diritto dell'Unione Europea*, 2, 2015, pp. 451-492.
- ALDECOA LUZARRAGA, Francisco, "El Tratado de Niza, consolidación y reforma de la Unión Europea", *Cuadernos Europeos de Deusto*, 25, 2001, pp. 11-54.
- ALEGRE, Susie, BIGO, Didier, GUILD, Elspeth, MENDOS, Kuskonmaz, ELIF, Ben, JAFFEL, Hager and JEANDESBOZ, Julien, "The implications of the United Kingdom's withdrawal from the European Union for the Area of Freedom, Security and Justice", Study for the European Parliament LIBE Committee, PE 596.824, December 2017.
- ÁLVAREZ RUBIO, Juan José, "El Tratado de Lisboa y la plena comunitarización del espacio de libertad, seguridad y justicia", *Revista electrónica de estudios internacionales (REEI)*, 15, 2008, pp. 1-33.
- ANDERSEN, Stine, "Non-Binding Peer Evaluation within an Area of Freedom, Security and Justice" in HOLZHACKER, Ronald and LUIF, Paul (eds.), *Freedom, Security and Justice in the European Union*, New York: Springer, 2014, pp. 29-48.

- ANDRÉS SÁENZ DE SANTAMARÍA, Paz, “La reforma institucional en el Tratado de Niza: la búsqueda del círculo cuadrado” in MOREIRO GONZÁLEZ, Carlos J. (ed.), *Tratado de Niza: análisis, comentarios y texto*, Madrid: Colex, 2002, pp. 41-66.
- ANTONAKAKI, Melina, KASPAREK, Bernd and MANIATIS, Georgios, “Counting Heads and Channeling Bodies. The Hotspot Centre Vial in Chios, Greece”, *Transit Migration*, 2, 2016.
- ARGOMANIZ, Javier, “Post-9/11 institutionalisation of European Union counter-terrorism: emergence, acceleration and inertia”, *European Security*, 18(2), 2009, pp. 151-172.
- “A ‘Coordination Nightmare’? Institutional Coherence in European Union Counter-Terrorism” in KAUNERT, Christian, LÉONARD, Sarah and PAWLAK, Patryk, *European Homeland Security: A European Strategy in the Making?*, London: Routledge, 2012, pp. 72-94.
- ARNÁEZ, Inmaculada, “Mecanismos para el control de los Derechos Fundamentales en las actividades de Frontex” in BLASI CASAGRÁN, Cristina and ILLAMOLA DAUSÀ, Illamola (eds.), *El control de las agencias del Espacio de Libertad, Seguridad y Justicia: contrapeso necesario a su autonomía*, Madrid: Marcial Pons, 2016, pp. 125-134.
- AZOULAI, Loïc and DE VRIES, Karin (eds.), *EU Migration Law: legal complexities and political rationales*, Oxford: Oxford University Press, 2014.
- BALDACCINI, Anneliese, “Extraterritorial border controls in the EU: The role of FRONTEX in operations at sea”, in BERNARD, Ryan and VALSAMIS, Mitsilegas, *Extraterritorial Immigration Control*, The Netherlands: Martinus Nijhoff Publishers, 2010, pp. 229-256.
- and TONER, Helen, “From Amsterdam and Tampere to the Hague: An Overview of Five Years of EC Immigration and Asylum Law” in BALDACCINI, Anneliese, GUILD, Elspeth and TONER, Helen (eds.), *Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy*, Oxford: Oxford University Press, 2007, pp. 1-22.
- BALZACQ, Thierry and CARRERA, Sergio, “The Hague Programme: The Long Road to Freedom, Security and Justice” in BALZACQ, Thierry and CARRERA, Sergio (eds.), *Security versus Freedom? A Challenge for Europe’s Future*, New York: Routledge, 2006, pp. 1-34.
- BARBIERI, Dario and ONGARO, Edoardo, “Les agences de l’UE: points communs et différences avec les agences publiques agissant au niveau national”, *Revue Internationale des Sciences Administratives*, 74(3), 2008, pp. 419-446.
- BASILIEN-GAINCHE, Marie-Laure, “Hotspots, cold facts. Managing Migration by Selecting Migrants”, in GRUTTERS, Carolus, MANTU, Sandra and MINDERHOUD, Paul (eds.), *Migration on the Move. Essays on the Dynamic of Migration*, Brill, 2017, pp. 153-171.
- BAUER, Michael and TRONDAL, Jarle (eds.), *The Palgrave Handbook of the European Administrative System*, Springer, 2015.
- BELLANOVA, Rocco and DUEZ, Denis, “The Making (Sense) of EUROSUR: How to Control the Sea Borders?” in BOSSONG, Raphael and CARRAPICO, Helena

References

- (eds.), *EU Borders and Shifting Internal Security*, Basel: Springer International Publishing, 2016, pp. 23-44.
- BERGSTRÖM, Carl Fredrik, “Shaping the new system for delegation of powers to EU agencies: United Kingdom v. European Parliament and Council (Short selling)”, *Common Market Law Review*, 52(1), 2015, pp. 219-242.
- and RITLENG, Dominique (eds.), *Rulemaking by the European Commission: The New System for Delegation of Powers*, Oxford: Oxford University Press, 2016.
- BERNARD, Elsa, “Accord sur les agences européennes: la montagne accouche d'une souris”, *Revue du droit de l'Union Européenne*, 3, 2012, pp. 399-446.
- BERNARD, Ryan and MITSILEGAS, Valsamis (eds.), *Extraterritorial Immigration Control*, Brill, 2010.
- BIGO, Didier, BONDOTTI, Philippe, BONELLI, Laurent and OLSSON, Christian, “Mapping the Field of the EU Internal Security Agencies” in BIGO, Didier (ed.), *The Field of the EU Internal Security Agencies*, Centre d'études sur les conflits/l'Harmattan, 2007, pp. 5-66.
- BINDER, Tom, KARAGIANNI, Argyro and SCHOLTEN, Miroslava, “Emergency! But What about Legal Protection in the EU?”, *European Journal of Risk Regulation*, 9(1), 2018, pp. 99-119.
- BLASI CASAGRAN, Cristina, “El Reglamento de Europol: un nuevo marco jurídico para el intercambio de datos policiales en la Unión Europea”, *Revista General de Derecho Europeo*, 40, 2016, pp. 202-221.
- “El papel de Europol en la lucha contra el tráfico de migrantes y la trata de seres humanos”, *Revista de Derecho Comunitario Europeo*, 59, 2018, pp. 333-357.
- BLOCK, Ludo, “EU Joint Investigation Teams: Political Ambitions and Police Practices” in HUFNAGEL, Saskia, BRONIT, Simon and HARFIELD, Clive (eds.), *Cross-Border Law Enforcement Regional Law Enforcement Cooperation - European, Australian and Asia-Pacific Perspectives*, London: Routledge, (2011), pp. 87-108.
- BOELES, Pieter, “Parliamentary and Judicial Control in Matters of Asylum and Immigration under the Treaty of Amsterdam” in HEUKELS, Ton, BLOKKER, Niels and BRUS, Marcel (eds.), *The European Union after Amsterdam: A Legal Analysis*, The Hague: Kluwer Law International, 1998, pp. 217-222.
- BOSWELL, Christina, “Migration control in Europe after 9/11: Explaining the absence of securitization”, *Journal of Common Market Studies*, 45(3), 2007, pp. 589-610.
- BRADY, Hugo, “Europol and the European criminal intelligence model: a non-state response to organized crime”, *Policing: A Journal of Policy and Practice*, 2(1), 2008, pp. 103-109.
- BRUGGEMAN, Willy, “What are the Options for Improving Democratic Control of Europol and for Providing it with Adequate Operational Capabilities?”, *European Parliament Briefing Paper*, 16.02.2006.
- BUNYAN, Tony, “Trevi, Europol and the European state”, *Statewatching the new Europe*, 1993, pp. 1-15.
- “Key texts on justice and home affairs in the European Union: 1976-1993”, *Statewatch*, 1997, pp. 46-47.

- “The Impact of the Amsterdam Treaty on Justice and Home Affairs Issues”, *European Parliament Civil Liberties Series*, 2000.
 - “The Story of Tampere: An Undemocratic Process Excluding Civil Society”, *Statewatch briefing*, 2003, pp. 1-6.
 - “The EU’s Police Chief Task Force (PCTF) and Police Chiefs Committee”, *Statewatch Analysis*, 2006, pp. 1-12.
- BUONO, Laviero, “From Tampere to The Hague and beyond: towards the Stockholm Programme in the Area of Freedom, Security and Justice”, *ERA Forum*, 10, 2009, pp. 333-342.
- BURES, Oldrich, “Europol’s fledgling counterterrorism role”, *Terrorism and Political Violence*, 20(4), 2008, pp. 498-517.
- BURRIDGE, Andrew, “The ‘Added Value’ of RABITs: Frontex, Emergency Measures and Integrated Border Management at the External Borders of the European Union”, *Consortium for Comparative Research on Regional Integration and Social Cohesion Working Papers*, 1, 2012.
- BUSUIOC, Madalina, “Accountability, control and independence: the case of European agencies”, *European Law Journal*, 15(5), 2009, pp. 599-615.
- and CURTIN, Deirdre, “The EU internal security strategy, the EU policy cycle and the role of (AFSJ) agencies: promise, perils and pre-requisites”, Study for the LIBE Committee, PE 453.185, 2011.
 - CURTIN, Deirdre and GROENLEER, Martijn, “Agency growth between autonomy and accountability: The European Police Office as a ‘living institution’”, *Journal of European Public Policy*, 18(6), 2011, pp. 848-867.
 - “European agencies and their boards: promises and pitfalls of accountability beyond design”, *Journal of European Public Policy*, 19(5), 2012, pp. 719-736.
 - and GROENLEER, Martijn, “Wielders of supranational power? The administrative behaviour of the heads of European Union agencies” in BUSUIOC, Madalina, GROENLEER, Martijn and TRONDAL, Jarle, *The Agency Phenomenon in the European Union: Emergence, Institutionalisation and Everyday Decision-Making*, Manchester: Manchester University Press, 2012, pp. 128-150.
 - *European Agencies: Law and Practices of Accountability*, Oxford: Oxford University Press, 2013.
 - and GROENLEER, Martijn, “Beyond design: The evolution of Europol and Eurojust”, *Perspectives on European Politics and Society*, 14(3), 2013, pp. 285-304.
 - and GROENLEER, Martijn, “The theory and practice of EU agency autonomy and accountability: early day expectations, today’s realities and future perspectives” in EVERSON, Michelle, MONDA, Cosimo and VOS, Ellen (eds.), *European Agencies in between Institutions and Member States*, Alphen aan den Rijn: Kluwer Law International, 2014, pp. 175-200.
 - “Friend or Foe? Inter-Agency Cooperation, Organizational Reputation, and Turf”, *Public Administration*, 94(1), 2016, pp. 40-56.
 - “EU Justice and Home Affairs Agencies: Securing Good Governance”, *Study for the LIBE Committee*, PE 596.812, 2017.

References

- and GROENLEER, Martijn, “EU Justice and Home Affairs Agencies: Securing Good Governance”, *Study for the European Parliament LIBE Committee*, PE 596.812, October 2017.
- CALONGE VELÁZQUEZ, Antonio (ed.), *La reforma institucional en el Tratado de Niza*, Valladolid: Lex Nova, 2004.
- CAMPESI, Giuseppe, “European Border and Coast Guard (Frontex): Security, Democracy, and Rights at the EU Border”, *Oxford Research Encyclopedia of Criminology*, 2018, pp. 1-32.
- “Crisis, Migration and the Consolidation of the EU Border Control Regime”, *International Journal of Migration and Border Studies*, forthcoming.
- CARRAPIÇO, Helena and TRAUNER, Florian, “Europol and its influence on EU policy-making on organized crime: analyzing governance dynamics and opportunities”, *Perspectives on European Politics and Society*, 14(3), 2013, pp. 357-371.
- CARRERA, Sergio, “The EU Border Management Strategy: FRONTEX and the Challenges of Irregular Immigration in the Canary Islands”, *CEPS Working Document*, 261, March 2007, pp. 1-33.
- and GEYER, Florian, “El Tratado de Lisboa y un espacio de libertad, seguridad y justicia: excepcionalismo y fragmentación en la Unión Europea”, *Revista de Derecho Comunitario Europeo*, 12(29), 2008, pp. 133-162.
- and GUILD, Elspeth, “Assistance to Greece’s Border with Turkey: Revealing the Deficiencies of Europe’s Dublin Asylum System”, *CEPS Paper in Liberty and Security in Europe*, 2010, pp. 1-19.
- and GUILD, Elspeth, “Does the Stockholm Programme matter? The Struggles over Ownership of AFSJ Multiannual Programming”, *CEPS Paper in Liberty and Security in Europe*, 51, 2012, pp. 1-37.
- DEN HERTOOG, Leonhard and PARKIN, Joanna, “The peculiar nature of EU Home Affairs agencies in migration control: beyond accountability versus autonomy?”, *European Journal of Migration and Law*, 15(4), 2013, pp. 337-358.
- HERNANZ, Nicholas and PARKIN, Joanna, “The ‘Lisbonisation’ of the European Parliament: Assessing Progress, Shortcomings and Challenges for Democratic Accountability in the Area of Freedom, Security and Justice”, *Centre for European Policy Studies Liberty and Security in Europe Paper*, 58, 2013, pp. 1-44.
- HERNANZ, Nicholas and PARKIN, Joanna, “The ‘Lisbonisation’ of the European Parliament: Assessing progress, shortcomings and challenges for democratic accountability in the Area of Freedom, Security and Justice”, *Centre for European Policy Studies Liberty and Security in Europe Paper*, 58, 2013, pp. 1-43.
- and GUILD, Elspeth, “The European Council’s Guidelines for the Area of Freedom, Security and Justice 2020: Subverting the ‘Lisbonisation’ of Justice and Home Affairs?”, *CEPS Essay*, 13, 2014, pp. 1-55.
- BLOCKMANS, Steven, GROS, Daniel and GUILD, Elspeth, “The EU’s Response to the Refugee Crisis: Taking Stock and Setting Policy Priorities”, *CEPS Essay*, 20, 2015, pp. 1-27.

- GROS, Daniel and GUILD, Elspeth, “What priorities for the new European agenda on migration?”, *CEPS Commentary*, 2015, pp. 1-3.
 - and GUILD, Elspeth, “Implementing the Lisbon Treaty Improving the Functioning of the EU on Justice and Home Affairs”, Study for the European Parliament AFCO Committee, PE 519.225, 2015.
 - and DEN HERTOOG, Leonard, “A European Border and Coast Guard: What’s in a Name?”, *CEPS Paper in Liberty and Security in Europe*, 88, 2016, pp. 1-22.
 - GUILD, Elspeth and LUK, Ngo Chun, “What Does Brexit Mean for the EU’s Area of Freedom, Security and Justice?”, *CEPS Commentaries*, 2016, pp. 1-12.
 - and STEFAN, Marco, “Complaint Mechanisms in Border Management and Expulsion Operations in Europe: Effective Remedies for Victims of Human Rights Violations?”, *Centre for European Policy Studies*, 2018.
- CASOLARI, Federico, “The EU’s Hotspot Approach to Managing the Migration Crisis: A Blind Spot for International Responsibility?”, *The Italian Yearbook of International Law Online*, 25(1), 2016, pp. 109-134.
- CHALKIA, Anastasia and GIOUZEPAS, Anastasios, “It’s Just Europe’s Turn: EU’s and Greece’s Responses to the Current Refugee and Migration Flows” in KURY, Helmut and REDO, Sławomir (eds.), *Refugees and Migrants in Law and Policy*, Springer, 2018, pp. 437-456.
- CHAMON, Merijn, “EU agencies: does the Meroni Doctrine make sense”, *Maastricht Journal of European and Comparative Law*, 17, 2010, pp. 281-305.
- “EU agencies between Meroni and Romano or the devil and the deep blue sea”, *Common Market Law Review*, 48, 2011, pp. 1055-1075.
 - “How the Concept of Essential Elements of a Legislative Act Continues to Elude the Court, Parliament v. Council”, *Common Market Law Review*, 50, 2013, pp. 849-860.
 - “The empowerment of agencies under the Meroni Doctrine and Article 114 TFEU: comment on United Kingdom v. Parliament and Council (Short-Selling) and the proposed Single Resolution Mechanism”, *European Law Review*, 39(3), 2014, pp. 380-403.
 - “Les agences de l’Union Européenne: Origines, état des lieux et défis”, *Cahiers de Droit Européen*, 51(1), 2015, pp. 293-318.
 - *Transforming the EU Administration: Legal and Political Limits to Agencification*, PhD Thesis: Universiteit Gent, 2015.
 - “The Institutional Balance, and Ill-Fated Principle of EU Law?”, *European Public Law*, 21(2), 2015, pp. 371-392.
 - “Clarifying the Divide between Delegated and Implementing Acts?”, *Legal Issues of Economic Integration*, 42(2), 2015, pp. 175-189.
 - *EU Agencies: Legal and Political Limits to the Transformation of the EU Administration*, Oxford: Oxford University Press, 2016.
- CHETAIL, Vincent, DE BRUYCKER, Philippe and MAIANI, Francesco (eds.), *Reforming the Common European Asylum System: The New European Refugee Law*, The Netherlands: Brill, 2016.

References

- CHITI, Edoardo, “Beyond Meroni: The Community Legitimacy of the Provisions Establishing the European Agencies” in DELLA CANANEA, Giacinto (ed.), *European Regulatory Agencies*, Paris: Rive Droite, 2005, pp. 75-84.
- “Les Agences, l’Administration Indirecte et la Co-administration” in AUBY, Jean-Bernard and DUTHEIL DE LA ROCHÈRE, Jacqueline (eds.), *Droit Administratif Européen*, Brussels: Bruylant, 2007, pp. 99-108.
 - “An Important Part of the EU’s Institutional Machinery: Features, Problems and Perspectives of European Agencies”, *Common Market Law Review*, 46(5), 2009, pp. 1395-1442.
- CHRISTENSEN, Jorgen and NIELSEN, Vibeke, “Administrative capacity, structural choice and the creation of EU agencies”, *Journal of European Public Policy*, 17(2), 2010, pp. 176-204.
- CHRISTIANSEN, Thomas, “Intra-institutional politics and inter-institutional relations in the EU: towards coherent governance?”, *Journal of European Public Policy*, 8(5), 2001, pp. 747-769.
- and DOBBELS, Mathias, “Non-Legislative Rule Making after the Lisbon Treaty: Implementing the New System of Comitology and Delegated Acts”, *European Law Journal*, 19(1), 2013, pp. 42-56.
- COLLETT, Elizabeth, “The European Union’s Stockholm Program: Less Ambition on Immigration and Asylum, but More Detailed Plans”, *Migration Policy Institute*, 2010.
- “The EU’s Strategic Guidelines on Migration: Uncontentious Consensus, but Missed Opportunity”, *Migration Policy Institute*, 2014.
- COMTE, Françoise, “A new agency is born in the European Union: The European Asylum Support Office”, *European Journal of Migration and Law*, 12(4), 2010, pp. 373-405.
- “2008 Commission Communication ‘European Agencies—the Way Forward’: What is the Follow-Up Since Then?”, *Review of European Administrative Law*, 3(1), 2010, pp. 65-110.
- CORTINOVIS, Roberto, “The Evolution of Frontex Governance: Shifting from Soft to Hard Law?”, *Journal of Contemporary European Research*, 11(3), 2015, pp. 252-267.
- COUDERT, Fanny, “The Europol Regulation and Purpose Limitation: From the ‘Silo-Based Approach’ to... What Exactly?”, *European Data Protection Law Review*, 3(3), 2017, pp. 313-324.
- COUZINET, Jean-François, “La Prise en Compte de l’Existence des ‘Agences’ para les Récents Traités” in MOLINIER, Joël, *Les Agences de l’Union Européenne*, Brussels: Bruylant, 2011, pp. 191-197.
- CRAIG, Paul, “Delegated acts, implementing acts and the new comitology regulation”, *European Law Review*, 36(5), 2011, pp. 671-687.
- *EU Administrative Law*, Oxford: Oxford University Press, 2012.
- CURTIN, Deirdre, “Delegation to EU non-majoritarian agencies and emerging practices of public accountability” in GERADIN, Damien, et al. (ed.), *Regulation through agencies in the EU: a new paradigm of European governance*, Cheltenham: Edward Elgar Publishing, 2005, pp. 88-119.
- “Holding (Quasi-) Autonomous EU Administrative Actors to Public Account”, *European Law Journal*, 13(4), 2007, pp. 523-541.

- *Executive Power of the European Union. Law, Practices and the Living Constitution*, Oxford: Oxford University Press, 2009.
 - “Brexit and the EU Area of Freedom, Security and Justice: Bespoke Bits and Pieces” in FABBRINI, Federico, *The Law & Politics of Brexit*, Oxford: Oxford University Press, 2017.
- DAVIES, Bleddyn, “Delegation and Accountability of Criminal Agencies after Lisbon: An Examination of Europol” in TRYBUS, Martin and RUBINI, Luca (eds.), *The Treaty of Lisbon and the future of European law and policy*, London: Edward Elgar Publishing, 2012, pp. 325-340.
- DAVITTI, Daria and LA CHIMIA, Annamaria, “A Lesser Evil? The European Agenda on Migration and the Use of Aid Funding for Migration Control”, *UCD Working Papers in Law, Criminology & Socio-Legal Studies*, 7, 2017, pp. 1-46.
- DEBARDELEBEN, Joan (ed.), *Soft or Hard Borders?: managing the divide in an enlarged Europe*, Taylor & Francis, 2017.
- DE BRUYCKER, Philippe, “The European border and coast guard: a new model built on an old logic”, *European Papers*, 1(2), 2016, pp. 559-569.
- DE BUCK, Bart, “Joint Investigation Teams: The participation of Europol officials”, *ERA Forum*, 8(2), 2007, pp. 260-261.
- DE CAPITANI, Emilio, “The Evolving Role of the European Parliament”, in MONAR, Jorg (ed.) *The Institutional Dimension of the European Union’s Area of Freedom, Security and Justice*, Brussels: Peter Lang, pp. 113-144.
- DE MOOR, Alexandra, “The Role of Europol in Joint Investigation Teams: a Foretaste of an Executive European Police Office” in COOLS, Marc (ed.), *Readings on Criminal Justice, Criminal Law and Policing*, Antwerp: Maklu, 2009, pp. 330-331.
- and VERMEULEN, Gert, “The Europol council decision: transforming Europol into an agency of the European Union”, *Common Market Law Review*, 47(4), 2010, pp. 1089-1121.
- DE WITTE, Bruno, “The Pillar Structure and the Nature of the European Union: Greek Temple or French Gothic Cathedral?” in HEUKELS, Ton, BLOKKER, Niels and BRUS, Marcel (eds.), *The European Union after Amsterdam: A Legal Analysis*, The Hague: Kluwer Law International, 1998.
- DE ZWAAN, Jaap, “EU Asylum and Immigration Law and Policy: State of Affairs in 2005” in DE ZWAAN, Jaap W. and GOUDAPPEL, Flora A.N.J. (eds.), *Freedom, Security and Justice in the European Union: Implementation of the Hague Programme*, The Hague: TMC Asser Press, 2006, pp. 91-150.
- and VROUENRAETS, Mireille, “The Future of the Third Pillar: An Evaluation of the Treaty of Amsterdam” in HEUKELS, Ton, BLOKKER, Niels and BRUS, Marcel (eds.), *The European Union after Amsterdam: A Legal Analysis*, The Hague: Kluwer Law International, 1998.
- DEHOUSSE, Renaud, “Regulation by networks in the European Community: the role of European agencies”, *Journal of European Public Policy*, 4(2), 1997, pp. 246-261.
- “Misfits: EU Law and the Transformation of European Governance”, *Jean Monnet Working Paper*, 2, 2002.
 - “Delegation of powers in the European Union: The need for a multi-principals model”, *West European Politics*, 31(4), 2008, pp. 789-805.

References

- “The Politics of Delegation in the European Union” in RITLENG, Dominique (ed.), *Independence and Legitimacy in the Institutional System of the European Union*, Oxford: Oxford University Press, 2016, pp. 57-82.
- DEL VALLE GÁLVEZ, Alejandro, “La refundación de la libre circulación de personas, tercer Pilar y Schengen: el espacio europeo de libertad, seguridad y justicia”, *Revista de Derecho Comunitario Europeo*, 2(3), 1998, pp. 62-70.
- “Las fronteras de la Unión: el modelo europeo de fronteras”, *Revista de Derecho Comunitario Europeo*, 12(6), 2002, pp. 299-341.
- “El reparto de competencias en el Espacio de Libertad, Seguridad y Justicia” in LIÑÁN NOGUERAS, Diego, and LÓPEZ JURADO ROMERO DE LA CRUZ, Carmen (eds.), *La reforma de la delimitación competencial en la futura Unión Europea*, Universidad de Granada, 2003, pp. 161-180.
- “Europa como espacio de libertad, seguridad y justicia. Las previsiones del Tratado Constitucional” in BOU FRANCH, Valentín and CERVERA VALLTERRA, María (eds.), *El derecho de la Unión Europea: 20 años después de la adhesión de España*, Tirant lo Blanch, 2007, pp. 143-178.
- “Inmigración, extranjería y fronteras de la Unión Europea. Cinco problemas conceptuales” in FORNER I DELAYGUA, Joaquim Joan (ed.), *Fronteras exteriores de la U.E. e inmigración a España: relaciones internacionales y derecho*, Tirant lo Blanch, 2007, pp. 43-80.
- “Unión europea, crisis de refugiados, y ‘limes imperii’”, *Revista General de Derecho Europeo*, 38, 2016, pp. 1-13.
- “Los refugiados, las fronteras exteriores, y la evolución del concepto de frontera internacional”, *Revista de Derecho Comunitario Europeo*, 55, septiembre-diciembre 2016, pp. 759-777.
- DEN BOER, Monica and BRUGGEMAN, Willy, “Shifting gear: Europol in the contemporary policing era”, *Politique Européenne*, 23(3), 2007.
- and WALKER, Neil, “European policing after 1992”, *Journal of Common Market Studies*, 1993, 31(1), pp. 3-28.
- DEN HEIJER, Maarten, RIJPMAN, Jorrit and SPIJKERBOER, Thomas, “Coercion, prohibition, and great expectations: The continuing failure of the Common European Asylum System”, *Common Market Law Review*, 53(3), 2016, pp. 607-642.
- and TAUSCHINSKY, Eljalill, “Where Human Rights Meet Administrative Law: Essential Elements and Limits to Delegation: European Court of Justice, Grand Chamber C-355/10: European Parliament v. Council of the European Union”, *European Constitutional Law Review*, 9(3), 2013, pp. 513-533.
- DI NOIA, Carmine and GARGANTINI, Matteo, “Unleashing the European securities and markets authority: Governance and accountability after the ECJ decision on the short selling regulation (Case C-270/12)”, *European Business Organization Law Review*, 15(1), 2014, pp. 1-57.
- DONAIRE VILLA, Francisco Javier, “El espacio de libertad, seguridad y justicia en el Tratado de Niza”, *Cuadernos de derecho público*, 13, 2011, pp. 103-124.
- “¿De qué hablamos cuando hablamos de coordinación en el ámbito de la Unión Europea, y por tanto, del ELSJ?” in DONAIRE VILLA, Francisco Javier and OLESTI RAYO, Andreu (eds.), *Técnicas y ámbitos de coordinación en el*

- Espacio de Libertad, Seguridad y Justicia*, Madrid: Marcial Pons, 2015, pp. 39-46.
- EGERBERG, Morten and TRONDAL, Jarle, “EU-level agencies: new executive centre formation or vehicles for national control?”, *Journal of European Public Policy*, 18(6), 2011, pp. 868-887.
- MARTENS, Maria and TRONDAL, Jarle, “Building Executive Power at the European Level: On the Role of European Union Agencies” in BUSUIOC, Madalina, GROENLEER, Martijn and TRONDAL, Jarle, *The Agency Phenomenon in the European Union: Emergence, Institutionalisation and Everyday Decision-Making*, Manchester: Manchester University Press, 2012, pp. 28-38.
 - “Agencification of the European Union Administration: Connecting the Dots”, *TARN Working Paper*, 1, 2016, pp. 1-20.
 - “Researching European Union Agencies: What Have We Learnt (and Where Do We Go from Here)?”, *Journal of Common Market Studies*, 55(4), 2017, pp. 1-16.
- EKELUND, Helena, “Making Sense of the ‘Agency Programme’ in post-Lisbon Europe: Mapping European Agencies”, *Central European Journal of Public Policy*, 6(1), 2012, pp. 26-49.
- “The establishment of FRONTEX: A new institutionalist approach”, *Journal of European Integration*, 36(2), 2014, pp. 99-116.
- ELSEN, Charles, “From Maastricht to The Hague: the politics of judicial and police cooperation”, *ERA Forum*, 8(1), 2007, pp. 13-26.
- ENGSTRÖM, Viljam and HEIKKILÄ, Mikaela, “Challenges and complexities in the protection of fundamental rights in the EU’s Area of Freedom, Security and Justice”, *Cuadernos Europeos de Deusto*, 53, 2015, pp. 107-130.
- “Lisbonising back and forth? Strategic planning and fundamental rights in the AFSJ” in WOLFGANG, Benedek, BENOÎT-ROHMER, Florence, KETTEMANN, Matthias C., KNEIHS, Benjamin and NOWAK, Manfred (eds.), *European Yearbook on Human Rights 2015*, United Kingdom: Intersentia, 2015, pp. 295-306.
- ESTEVE, Francina, “El rescate como nueva función europea en la vigilancia del Mediterráneo”, *Revista CIDOB d’afers internacionals*, 111, 2015, pp. 153-172.
- “El control judicial de las agencias del espacio de libertad, seguridad y justicia” in BLASI CASAGRAN, Cristina and ILLAMOLA DAUSÀ, Mariona, *El control de las agencias del Espacio de Libertad, Seguridad y Justicia: Contrapeso necesario a su autonomía*, Marcial Pons, 2017, pp. 81-104.
- EVERSON, Michelle, “Independent agencies: hierarchy beaters?”, *European Law Journal*, 1(2), 1995, pp. 180-204.
- MONDA, Cosimo and VOS, Ellen (eds.), *European Agencies in between Institutions and Member States*, Alphen aan den Rijn: Kluwer Law International, 2014.
 - and VOS, Ellen, “European Agencies. What about the institutional balance?”, *Maastricht Law Working Papers Series*, 4, 2014, pp. 1-18.

References

- FERNÁNDEZ, Maité, “Multi-Stakeholder Operations of Border Control Coordinated at the EU Level and the Allocation of International Responsibilities” in GAMMELTOFT-HANSEN, Thomas and VEDSTED-HANSEN, Jens (Eds.), *Human Rights and the Dark Side of Globalisation*, London: Routledge, 2017, pp. 238-271.
- FERNÁNDEZ ROJO, David, “Reglamento 2016/1624: de Frontex a la Guardia Europea de Fronteras y Costas”, *Revista General de Derecho Europeo*, 41, 2017, pp. 223-251.
- “Los Hotspots: Expansión de las tareas operativas y cooperación multilateral de las agencias europeas Frontex, Easo y Europol”, *Revista de Derecho Comunitario Europeo*, 61, forthcoming.
 - “La Guardia Europea de Fronteras: ¿Hacia una Gestión Compartida de las Fronteras Exteriores de la Unión y una Mayor Protección de los Derechos Fundamentales?” in MARTÍNEZ PÉREZ, Enrique Jesús y SALINAS DE FRIAS, Ana María, *La UE y la protección de los derechos fundamentales*, Tirant lo Blanch, forthcoming.
- FERRARO, Francesca and DE CAPITANI, Emilio, “The new European Border and Coast Guard: yet another ‘half way’ EU reform?”, *ERA Forum*, 17(3), 2016, pp. 385-398.
- FINK, Melanie, “Frontex Working Arrangements: Legitimacy and Human Rights Concerns Regarding ‘Technical Relationships’”, *Merkourios-Utrecht Journal of International and European Law*, 28(75) 2012, pp. 20-35.
- “Salami Slicing Human Rights Accountability: How the European Border and Coast Guard Agency may inherit Frontex’ genetic defect”, *Blog of the European Journal of International Law*, 10.03.2016.
 - *Frontex and Human Rights: Responsibility in ‘Multi-Actor Situations’ under the ECHR and EU Public Liability Law*, PhD thesis: Leiden University and the University of Vienna, 2017.
- FISCHER, Robert, *The Europeanization of migration policy: the Schengen Acquis between the priorities of legal harmonization and fragmentation*, Peter Lang Publishing, 2012.
- FLETCHER, Maria, HERLIN-KARNELL, Ester and MATERA, Claudio (eds.), *The European Union as an Area of Freedom, Security and Justice*, Routledge, 2016.
- FRANCO GARCÍA, Miguel Ángel, “El alcance de la cooperación entre las agencias de la Unión Europea implicadas en la Seguridad Marítima”, *Revista General de Derecho Europeo*, 44, 2018, pp. 13-54.
- FUENTETAJA PASTOR, Jesús Ángel, “Las Agencias Ejecutivas de la Comisión Europea”, *Revista de Derecho de la Unión Europea*, 6, 2004, pp. 123-159.
- “Las agencias Europeas de la cooperación policial y judicial”, *Revista de Derecho de la Unión Europea*, 10, 2006, pp. 51-93.
 - “Hacia una Gobernanza Administrativa Europea”, *Revista de Derecho de la Unión Europea*, 16, 2009, pp. 89-118.
 - *Derecho Administrativo Europeo*, Pamplona: Civitas, 2014.
- GAMMELTOFT-HANSEN, Thomas and VEDSTED-HANSEN, Jens (eds.), *Human Rights and the Dark Side of Globalisation: Transnational Law Enforcement and Migration Control*, Taylor & Francis, 2016.
- GARCÍA ANDRADE, Paula, *La Acción Exterior de la Unión Europea en Materia Migratoria: un problema de reparto de competencias*, Tirant lo Blanch, 2014.

- and MARTÍN, Iván, “EU Cooperation with Third Countries in the Field of Migration”, *Study for the European Parliament LIBE Committee*, PE 536.469, 2015.
 - “EU External Competences in the Field of Migration: How to Act Externally When Thinking Internally”, *Common Market Law Review*, 55, 2018, pp. 157-200.
- GARCÍA COSO, Emiliano, *La regulación de la inmigración irregular, derechos humanos y el control de fronteras en la Unión Europea*, Aranzadi, 2014.
- GARLICK, Madeline, *Solidarity under Strain: Solidarity and Fair Sharing of Responsibility in Law and Practice for the international Protection of Refugees in the European Union*, PhD Thesis: Radboud University, 2016.
- GERADIN, Damien, “The development of European regulatory agencies: what the EU should learn from American experience”, *Columbia Journal of European Law*, 11, 2004, pp. 1-52.
- and PETIT, Nicolas, “The Development of Agencies at EU and National Levels: Conceptual Analysis and Proposals for Reform”, *Jean Monnet Working Paper*, 1, 2004, pp. 1-64.
 - MUÑOZ, Rodolphe and PETIT, Nicolas (eds.), *Regulation through agencies in the EU: a new paradigm of European governance*, Cheltenham: Edward Elgar Publishing, 2005.
- GERRING, John, “What is a case study and what is it good for?”, *American political science review*, 98(2), 2004, pp. 341-354.
- GIANNETTO, Leila, *More Than Consultation: Civil society organisations mainstreaming fundamental rights in EU border management policies: The case of Frontex and its Consultative Forum*, PhD thesis: University of Trento, 2018.
- GIL-BAZO, Maria Teresa, “The Protection of Refugees under the Common European Asylum System: The Establishment of a European Jurisdiction for Asylum Purposes and Compliance with International Refugee and Human Rights Law”, *Cuadernos Europeos de Deusto*, 36, 2007, pp. 153-182.
- GKLIATI, Mariana, “The Application of the EU-Turkey Agreement: A Critical Analysis of the Decisions of the Greek Appeals Committee”, *European Journal of Legal Studies*, 10(1), 2017, pp. 81-123.
- GOIZUETA VÉRTIZ, Juana, “La cooperación policial en el seno de Europol: el principio de disponibilidad y la confidencialidad de la información”, *Revista Española de Derecho Constitucional*, 110, 2017, pp. 75-103.
- GOLDNER LANG, Iris, “The EU Financial and Migration Crises: Two Crises - Many Facets of EU Solidarity” in BIONDI, Alessandra, DAGILYTE, Egle and KÜÇÜK, Esin (eds.), *Solidarity in EU Law: Legal Principle in the Making*, Edward Elgar Publishing, forthcoming.
- GONZÁLEZ VEGA, Javier Andrés, “¿Regreso al futuro? La difícil concreción de una política europea de inmigración” in ALDECOA LUZÁRRAGA, Francisco (coord.), *Los Tratados de Roma en su cincuenta aniversario: perspectivas desde la Asociación Española de Profesores de Derecho Internacional y Relaciones Internacionales*, Madrid: Marcial Pons, 2008, pp. 1561-1578.

References

- GOODWIN-GILL, Guy, "Refugees and Migrants at Sea: Duties of Care and Protection in the Mediterranean and the Need for International Action", *Notes for a Presentation Jean Monnet Centre of Excellence on Migrants' Rights in the Mediterranean University of Naples 'L'Orientale*, 2015, pp. 1-16.
- GORTÁZAR ROTAECHE, Cristina, "Entre la Utopía y el posibilismo: el Tratado de Lisboa y el Espacio de Libertad, Seguridad y Justicia", *Revista de las Cortes Generales*, 70-72, 2007, pp. 155-174.
- *European Migration and Asylum Policies: Coherence Or Contradiction: an Interdisciplinary Evaluation of the EU Programmes of Tampere (1999), The Hague (2004), and Stockholm (2009)*, Brussels: Bruylant, 2012.
- GREGORY, Frank, "The EU's response to 9/11: a case study of institutional roles and policy processes with special reference to issues of accountability and human rights", *Terrorism and Political Violence*, 17(1-2), 2005, pp. 105-123.
- GRILLER, Stefan and ORATOR, Andreas, "Everything under control? The 'way forward' for European agencies in the footsteps of the Meroni doctrine", *European Law Review*, 35(1), 2010, pp. 3-35.
- GROENLEER, Martijn, *The Autonomy of European Union Agencies: A Comparative Study of Institutional Development*, PhD thesis: Technical University of Delft, 2009.
- KAEDING, Michael and VERSLUIS, Esther, "Regulatory governance through agencies of the European Union? The role of the European agencies for maritime and aviation safety in the implementation of European transport legislation", *Journal of European Public Policy*, 17(8), 2010, pp. 1212-1230.
- GUALTIERI, Claudia, "Joint Investigation Teams", *ERA Forum*, 8(2), 2007, pp. 233-238.
- GUILD, Elspeth, "Does the EU Need a European Migration and Protection Agency?", *International Journal of Refugee Law*, 28(4), 2016, pp. 585-600.
- GUILD, Elspeth, CARRERA, Sergio, DEN HERTOOG, Leonhard and PARKIN, Joanna, "Implementation of the EU Charter of Fundamental Rights and its Impact on EU Home Affairs Agencies", Study for the European Parliament LIBE Committee, PE 453.196, 2011.
- CARRERA, Sergio, DEN HERTOOG, Leonhard and PARKIN, JOANNA, "What is happening to the Schengen borders?", *CEPS Paper in Liberty and Security in Europe*, 86, 2015, pp. 1-26.
 - and CARRERA, Sergio, "Rethinking asylum distribution in the EU: Shall we start with the facts?", *CEPS Commentary*, 17.06.2016, pp. 1-9.
 - and GEYER, Florian (Eds.), *Security versus justice?: Police and Judicial Cooperation in the European Union*, Routledge, 2016.
 - COSTELLO, Cathryn and MORENO-LAX, Violeta, "Implementation of the 2015 Council Decisions establishing provisional measures in the area of international protection for the benefit of Italy and of Greece", Study for the European Parliament LIBE Committee, PE 583 132, 2017.
- HARDACRE, Alan and KAEDING, Michael, "Delegated & Implementing Acts The New Comitology", *EIPA Essential Guide*, 4, 2011.
- HARLOW, Carol, LEINO, Päivi and DELLA CANANEA, Giacinto (eds.), *Research Handbook on EU Administrative Law*, Edward Elgar Publishing, 2017.

- and RAWLINGS, Richard, *Process and Procedure in EU Administration*, Bloomsbury Publishing, 2014.
- HARRISON, Helena, BIRKS, Melanie, FRANKLIN, Richard and MILLS, Jane, “Case Study Research: Foundations and Methodological Orientations”, *Forum Qualitative Sozialforschung/Forum: Qualitative Social Research*, 2017.
- HAYES, Ben, “The activities and development of Europol - towards an unaccountable ‘FBI’ in Europe”, *Statewatch*, 2002, pp. 1-2.
- HELLER, Charles and JONES, Chris, “Eurosur: Saving lives or reinforcing deadly borders?”, *Statewatch Journal*, 23(3/4), 2014, pp. 9-11.
- HERLIN-KARNELL, Ester, “Denmark and the European area of freedom, security and justice: a Scandinavian arrangement”, *Amsterdam Law Forum*, 5, 2013, pp. 95-105.
- HERTOG, Leonhard and STROB, Simon, “Coherence in EU External Relations: Concepts and Legal Rotting of an Ambiguous Term”, *European Foreign Affairs Review*, 18, 2013, pp. 373-388.
- HESCHL, Lisa, *Protecting the Rights of Refugees Beyond European Borders: Establishing Extraterritorial Legal Responsibilities*, Intersentia, 2018.
- HOBGING, Peter, “Management of External EU Borders: Enlargement and the European Border Guard Issue” in CAPARINI Marina and MARENIN, Otwin (eds.), *Borders and Security Governance. Managing Borders in a Globalised World*, Geneva: Geneva Centre for the Democratic Control of Armed Forces, 2006.
- HOFMANN, Herwig, “Legislation, delegation and implementation under the Treaty of Lisbon: typology meets reality”, *European Law Journal*, 15(4), 2009, pp. 482-505.
- and TÜRK, Alexander (eds.), *EU Administrative Governance*, Edward Elgar Publishing, 2006.
- and TÜRK, Alexander, *Legal Challenges in EU Administrative Law: Towards an Integrated Administration*, Edward Elgar Publishing, 2009.
- “Seven challenges for EU administrative law”, *Review of European Administrative Law*, 2(2), 2009, pp. 37-59.
- ROWE, Gerard and TÜRK, Alexander, *Administrative Law and Policy of the European Union*, Oxford: Oxford University Press, 2011.
- and MORINI, Alessandro, “Constitutional Aspects of the Pluralisation of the EU Executive through ‘Agencification’”, *University of Luxembourg Law Working Paper Series*, 1, 2012, pp. 1-41.
- “Agencies in the European Regulatory Union”, *TARN Working Paper*, 5, 2016, pp. 1-22.
- HOLZHACKER, Ronald and LUIF, Paul (eds.), *Freedom, Security, and Justice in the European Union*, Springer, 2013.
- HORII, Satoko, “It is about more than just training: The effect of Frontex border guard training”, *Refugee Survey Quarterly*, 31(4), 2012, pp. 158-177.
- “The effect of Frontex's risk analysis on the European border controls”, *European Politics and Society*, 17(2), 2016, pp. 242-258.
- “Accountability, Dependency, and EU Agencies: The Hotspot Approach in the Refugee Crisis”, *Refugee Survey Quarterly*, 0, 2018, pp. 1-27.

References

- HORSTHEMKE, Lana and VOGT, Friederike, “The Role of Easo in the European Asylum System” in MRATSCHKOWSKI, Anna (ed.), *Asylum Related Organisations in Europe*, Baden: Nomos, 2017, pp. 21-52.
- HRUSCHKA, Constantin, “The (reformed) Dublin III Regulation—a tool for enhanced effectiveness and higher standards of protection?”, *ERA Forum*, 15(4), 2014, pp. 469-483.
- JACQUÉ, Jean-Paul, “The Principle of Institutional Balance”, *Common Market Law Review*, 41, 2004, pp. 383-391.
- JEANDESBOZ, Julien, “An Analysis of the Commission Communications on Future Development of Frontex and the Creation of a European Border Surveillance System (Eurosur)”, European Parliament Briefing Paper, PE 408.295, 2008.
- “Beyond the Tartar Steppe: EUROSUR and the ethics of European border control practices” in BURGESS, Peter and GUTWIRTH, Serge (eds.), *A threat against Europe? Security, migration and integration*, Brussels: VUB Press, 2011, pp. 111-132.
- JENEY, Petra, “The European Union’s Area of Freedom, Security and Justice without the United Kingdom—Legal and Practical Consequences of Brexit”, *ELTE Law Journal*, 1, 2016, pp. 117-140.
- JONES, Chris, “Border guards, planes, “thermal vision vans” and heartbeat detectors – who is equipping Frontex?”, *Statewatch Analysis*, 2014, pp. 1-9.
- JORDANA, Mirentxu, “El control de la Comisión y el Consejo a las agencias del Espacio de Libertad, Seguridad y Justicia” in BLASI CASAGRAN, Cristina and ILLAMOLA DAUSA, Illamola (eds.), *El control de las agencias del Espacio de Libertad, Seguridad y Justicia: contrapeso necesario a su autonomía*, Madrid: Marcial Pons, 2016, pp. 21-46.
- JORRY, Héléne, “Construction of a European Institutional Model for the Management of Operational Cooperation at the EU External Borders: Does the FRONTEX Agency take a decisive step forward?”, *Challenge Liberty and Security*, Research Paper 6, 2007, pp. 1-32.
- KASPAREK, Bernd, “Borders and populations in flux: Frontex’s place in the European Union’s migration management”, in GEIGER, Martin and PÉCOUD, Antoine, *The politics of International Migration Management*, London: Palgrave Macmillan, 2010, pp. 119-140.
- KASSIM, Hussein and MENON, Anand, “The principal-agent approach and the study of the European Union: promise unfulfilled?”, *Journal of European Public Policy*, 10(1), 2003, pp. 121-139.
- KAUNERT, Christian, “The area of freedom, security and justice: the construction of a ‘European public order’”, *European Security*, 14(4), 2005, pp. 459-483.
- and LÉONARD, Sarah, “The European Union asylum policy after the Treaty of Lisbon and the Stockholm Programme: towards supranational governance in a common area of protection?”, *Refugee Survey Quarterly*, 31(4), 2012, pp. 1-20.
 - LÉONARD, Sarah and PAWLAK, Patryk (eds.), *European Homeland Security: A European Strategy in the Making?*, Routledge, 2012.

- LÉONARD, Sarah and OCCHIPINTI, John, “Agency Governance in the European Union's Area of Freedom, Security and Justice”, *Perspectives on European Politics and Society*, 14(3), 2013, pp. 273-284.
 - LÉONARD, Sarah and OCCHIPINTI, John, *Justice and Home Affairs Agencies in the European Union*, London: Routledge, 2015.
 - LÉONARD, Sarah and OCCHIPINTI, John, *Supranational governance of Europe's Area of Freedom, Security and Justice*, Routledge, 2016.
- KELLER, Ska, LUNACEK, Ulrike, LOCHBIHLER, Barbara and FLAUTRE, Hélène, “Frontex Agency: Which Guarantees for Human Rights”, Brussels, Greens/EFA in European Parliament, 2011.
- KREHER, Alexander, “Agencies in the European Community—a step towards administrative integration in Europe”, *Journal of European Public Policy*, 4(2), 1997, pp. 225-245.
- KRIONA SARANTI, Elli, PAPACHRISTOPOULOU, Danai and VAKOULI, Maria-Nefeli, “Easo’s Operation on the Greek Hotspots: An overlooked consequence of the EU-Turkey Deal”, *Greece Refugee Rights Initiative*, March 2018.
- LABAYLE, Henri and DE BRUYCKER, Philippe, “Towards the Negotiation and Adoption of the Stockholm Programme’s Successor for the Period 2015-2019”, Study to the European Parliament’s LIBE Committee, PE 493.015, 2013.
- LADENBURGER, Clemens, “Police and Criminal Law in the Treaty of Lisbon”, *European Constitutional Law Review*, 4(1), 2008, pp. 20-40.
- LAURSEN, John (ed.), *The Treaty of Nice: actor preferences, bargaining and institutional choice*, Leiden: Brill Academic Publishers, 2005.
- LAVENEX, Sandra, “Transgovernmentalism in the area of freedom, security, and justice” in TÖMMEL, Ingeborg and VERDUN, Amy (eds.), *Innovative governance in the European Union: The politics of multilevel Policymaking*, Lynne Rienner Publishers, 2009, pp. 255-271.
- LENAERTS, Koen, “Regulating the Regulatory Process: delegation of powers in the European Community”, *European Law Review*, 18(1), 1993, pp. 23-49.
- LÉONARD, Sarah, “The creation of FRONTEX and the politics of institutionalisation in the EU external borders policy”, *Journal of Contemporary European Research*, 5(3), 2009, pp. 371-388.
- “EU border security and migration into the European Union: FRONTEX and securitisation through practices”, *European Security*, 19(2), 2010, pp. 231-254.
 - “Border Controls as a Dimension of the European Union’s Counter-Terrorism Policy: A Critical Assessment”, *Intelligence and National Security*, 30 (2-3), 2015, pp. 306-332.
 - and KAUNERT, Christian, “Beyond Stockholm: in search of a strategy for the European Union's Area of Freedom, Security, and Justice”, *European Politics and Society*, 17(2), 2016, pp. 143-149.
- LIPICS, László, “Focal points on the external borders of Schengen”, *International Journal of Security, Strategic, Defense Studies and Military Technology*, 9(2), 2010, pp. 229-239.

References

- LUCHTMAN, Michiel and VERVAELE, John, “European Agencies for Criminal Justice and Shared Enforcement (Eurojust and the European Public Prosecutor's Office)”, *Utrecht Law Review*, 10(5), 2014, pp. 132-150.
- MAGGETTI, Martino and PAPADOPOULOS, Yannis, “The Principal-Agent Framework and Independent Regulatory Agencies”, *Political Studies Review*, 2016, pp. 1-12.
- MAIANI, Francesco, “The Reform of the Dublin III Regulation”, *Study for the European Parliament LIBE Committee*, PE 571.360, 2016.
- MAJCHER, Izabella, “Human Rights Violations During EU Border Surveillance and Return Operations: Frontex’s Shared Responsibility or Complicity?”, *Silesian Journal of Legal Studies*, 7, 2015, pp. 45-78.
- MAJONE, Giandomenico, “The rise of the regulatory state in Europe”, *West European Politics*, 17(3), 1994, pp. 77-101.
- “The new European agencies: regulation by information”, *Journal of European Public Policy*, 4(2), 1997, pp. 262-275.
 - “The regulatory state and its legitimacy problems”, *West European Politics*, 22(1), 1999, pp. 1-24.
 - “The Credibility Crisis of Community Regulation”, *Journal of Common Market Studies*, 38(2), 2000, pp. 273-302.
 - “Delegation of regulatory powers in a mixed polity”, *European Law Journal*, 8(3), 2002, pp. 319-339.
- MANGAS MARTÍN, Araceli, “La reforma institucional en el Tratado de Ámsterdam”, *Revista de Derecho Comunitario Europeo*, 2(3), 1998, pp. 7-40.
- “El Tratado de Niza: los complejos equilibrios en la futura Unión Europea ampliada”, *Cursos de Derecho Internacional de Vitoria-Gasteiz 2001*, Bilbao: Servicio Editorial Universidad del País Vasco, 2002, pp. 245-284.
 - and MARTÍN Y PÉREZ DE NANCLARES, José, *La inmigración y el asilo en la Unión Europea: hacia un nuevo espacio de libertad, seguridad y justicia*, Madrid: Colex, 2002.
- MARENIN, Otwin, “Challenges for integrated border management in the European Union”, *Geneva Centre for the Democratic Control of Armed Forces (DCAF)*, 17, 2010, pp. 101-103.
- MARIN, Luisa, “Is Europe turning into a ‘Technological Fortress’? Innovation and technology for the management of EU’s external borders: Reflections on FRONTEX and EUROSUR” in HELDEWEG, Michiel and KICA Evisa (eds.), *Regulating Technological Innovation*, UK: Palgrave Macmillan, 2011, pp. 131-151.
- “Policing the EU’s External Borders: A Challenge for the Rule of Law and Fundamental Rights in the Area of Freedom, Security and Justice? An Analysis of Frontex Joint Operations at the Southern Maritime Border”, *Journal of Contemporary European Research*, 7(4), 2014, pp. 468-487.
- MARJOSOLA, Heikki, “Bridging the constitutional gap in EU executive rule-making: the court of justice approves legislative conferral of intervention powers to European securities markets authority: Court of Justice of the European Union (Grand Chamber) judgment of 22 January 2014, case C-270/12, UK v. Parliament and Council (Grand Chamber)”, *European Constitutional Law Review*, 10(3), 2015, pp. 500-527.

- MARTÍN Y PÉREZ DE NANCLARES, José, “La flexibilidad en el Tratado de Ámsterdam: especial referencia a la noción de cooperación reforzada”, *Revista de Derecho Comunitario Europeo*, 3, 1998, pp. 205-232.
- “La inmigración en la Unión Europea: la difícil configuración de una política de inmigración”, *Revista General de Derecho Europeo*, 5, 2003, pp. 83-90.
 - “El Espacio de Libertad Seguridad y Justicia en el Tratado de Lisboa”, *Revista de las Cortes Generales*, 70-72, 2007, pp. 85-126.
 - *La dimensión exterior del espacio de libertad, seguridad y justicia de la Unión Europea*, Iustel, 2012.
- MATHIEU, Emmanuelle, *Regulatory Delegation in the European Union: Networks, Committees and Agencies*, London: Palgrave Macmillan, 2016.
- MCDONOUGH, Paul and TSOURDI, Evangelia, “The “other” Greek crisis: Asylum and EU solidarity”, *Refugee Survey Quarterly*, 31 (4), 2012, pp. 67-100.
- MENDES, Joana, “Delegated and implementing rule making: proceduralisation and constitutional design”, *European Law Journal*, 19(1), 2013, pp. 22-41.
- MENENDEZ, Agustin, “The refugee crisis: between human tragedy and symptom of the structural crisis of European integration”, *European Law Journal*, 22(4), 2016, pp. 388-416.
- MEUWESE, Anne, SCHUURMANS, Ymre and VOERMANS, Wim, “Towards a European Administrative Procedure Act”, *Review of European Administrative Law*, 2(2), 2009, pp. 3-35.
- MITSILEGAS, Valsamis, “Police Co-operation: What are the Main Obstacles to Police Cooperation in the EU?”, European Parliament Briefing Paper, 14.02.2006.
- “Solidarity and Trust in the Common European Asylum System”, *Comparative Migration Studies*, 2(2), 2014, pp. 181-202.
 - CARRERA, Sergio and EISELE, Katharina, “The End of the Transitional Period for Police and Criminal Justice Measures Adopted before the Lisbon Treaty. Who Monitors Trust in the European Justice Area?”, Study for the European Parliament LIBE Committee, PE 509.998, November 2014.
- MOBERG, Axel, “The Nice Treaty and voting rules in the Council”, *Journal of Common Market Studies*, 40(2), 2002, pp. 259-282.
- MOLINIER, Joël, “L’Élaboration d’un Cadre Commun aux Agences de L’Union” in MOLINIER, Joël, *Les Agences de l’Union Européenne*, Brussels: Bruylant, 2011, pp. 221-245.
- MOLONEY, Niamh, “The European Securities and Markets Authority and institutional design for the EU financial market—a tale of two competences: Part (1) rule-making”, *European Business Organization Law Review*, 12(1), 2011, pp. 41-86.
- MONACO, Francis R., “Europol: The culmination of the European Union’s international police cooperation efforts”, *Fordham International Law Journal*, 19(1), 1995, pp. 247-308.
- MONAR, Jörg, “The Evolving Role of the Union Institutions in the Framework of the Third Pillar”, in MONAR, Jörg and MORGAN, Roger (eds.), *The Third Pillar of the European Union: Cooperation in the fields of Justice and Home Affairs*, Brussels: European Interuniversity Press, 1994, pp. 69-83.

References

- “Justice and Home Affairs in the Treaty of Amsterdam: Reform at the price of Fragmentation”, *European Law Review*, 23, 1998, pp. 330-331.
 - “The dynamics of justice and home affairs: laboratories, driving factors and costs”, *Journal of Common Market Studies*, 2001, 39(4), pp. 747-764.
 - “Cooperation in the justice and home affairs domain: characteristics, constraints and progress”, *European Integration*, 28(5), 2006, pp. 495-509.
 - “The Project of a European Border Guard: Origins, Models and Prospects in the Context of the EU’s Integrated External Border Management” in CAPARINI Marina and MARENIN, Otwin (eds.), *Borders and Security Governance. Managing Borders in a Globalised World*, Geneva: Geneva Centre for the Democratic Control of Armed Forces, 2006, pp. 193-208.
 - *The Institutional Dimension of the European Union’s Area of Freedom Security and Justice*, Brussels: P.I.E. Peter Lang, 2010.
 - “Justice and home affairs: The Treaty of Maastricht as a decisive intergovernmental gate opener”, *Journal of European Integration*, 34(7), 2012, pp. 717-734.
- MORAVCSIK, Andrew and NICOLAÏDIS, Kalypso, “Explaining the Treaty of Amsterdam: interests, influence, Institutions”, *Journal of Common Market Studies*, 37(1), 1999, pp. 59-85.
- MORENO-LAX, Violeta, “Europe in Crisis: Facilitating Access to Protection, (Discarding) Offshore Processing and Mapping Alternatives for the Way Forward”, *Red Cross EU Office*, December 2015.
- *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law*, Oxford: Oxford University Press, 2017.
 - “The EU Humanitarian Border and the Securitization of Human Rights: The ‘Rescue Through Interdiction/Rescue Without Protection’ Paradigm”, *Journal of Common Market Studies*, 56(1), 2018, pp. 119-140.
- MUNGIANU, Roberta, “Frontex: Towards a common policy on external border control”, *European Journal of Migration and Law*, 15(4), 2013, pp. 359-385.
- *Frontex and Non-Refoulement: The International Responsibility of the EU*, Cambridge: Cambridge University Press, 2016.
- MURPHY, Cian and ACOSTA ARCARAZO, Diego, “Rethinking Europe’s Freedom, Security and Justice” in MURPHY, Cian and ACOSTA ARCARAZO, Diego (eds.), *EU Security and Justice Law: After Lisbon and Stockholm*, Oxford: Hart Publishing, 2014, pp. 1-16.
- NASCIMBENE, Bruno, “The global approach to migration: European Union policy in the light of the implementation of the Hague Programme”, *ERA Forum*, 9(2), 2008, pp. 291-300.
- NAVARRO BATISTA, Nicolás, “El déficit democrático y la reforma de las instituciones comunitarias” in OLESTI RAYO, Andreu (coord.), *Las incertidumbres de la Unión Europea después del Tratado de Amsterdam*, Barcelona: Jose Maria Bosh, 2000, pp. 55-66.
- NEAL, Andrew, “Securitization and risk at the EU border: The origins of FRONTEX”, *Journal of Common Market Studies*, 47(2), 2009, pp. 333-356.

- NEFRAMI, Eleftheria, “Division of competences between the European Union and its Member States concerning immigration”, *Study for the European Parliament LIBE Committee*, PE 453.178, 2011.
- NEVILLE, Darren, SY, Sarah and RIGON, Amalia, “On the frontline: the hotspot approach to managing migration”, *Study for the European Parliament LIBE Committee*, PE 556.942, 2016.
- NIEMEIER, Michael and WIEGAND, Marc André, “Europol and the Architecture of Internal Security” in MONAR, Jörg, *The Institutional Dimension of the European Union’s Area of Freedom, Security and Justice*, Brussels: Peter Lang, 2010, pp. 169-194.
- NILSSON, Hans G. and SIEGL, Julian, “The Council in the Area of Freedom Security and Justice”, in MONAR, Jörg, *The Institutional Dimension of the European Union’s Area of Freedom, Security and Justice*, Brussels: Peter Lang, 2010, pp. 53-82.
- OCCHIPINTI, John D., *The politics of EU police cooperation: Toward a European FBI?*, London: Lynne Rienner Publishers, 2003.
- “Still moving toward a European FBI? Re-examining the politics of EU police cooperation”, *Intelligence and National Security*, 30(2-3), 2015, pp. 234-258.
- OREJA AGUIRRE, Marcelino (ed.), *El Tratado de Ámsterdam de la Unión Europea: análisis y comentarios*, Madrid: McGraw-Hill, 1998.
- OSSEGE, Christoph, *European regulatory agencies in EU decision-making: between expertise and influence*, Springer, 2016.
- OTTOW, Annetje, “Europeanization of the supervision of competitive markets”, *European Public Law*, 18(1), 2012, pp. 191-221.
- PAPAGEORGIOU, Ioannis, “International protection in Greece Background information for the LIBE Committee delegation to Greece 22-25 May 2017”, *Study for the European Parliament LIBE Committee*, PE 583.145, May 2017.
- PARKIN, Joanna, “EU Home Affairs Agencies and the Construction of EU Internal Security”, *CEPS Papers in Liberty and Security in Europe*, 53, 2012, pp. 1-47.
- PASCOUAU, Yves, “The future of the area of freedom, security and justice: Addressing mobility, protection and effectiveness in the long run”, *European Policy Centre*, 23 January 2014.
- and SCHUMACHER, Pascal, “Frontex and the respect of fundamental rights: from better protection to full responsibility”, *EPC Policy Brief*, 03.06.2014.
- PAUL, Regine, “Harmonisation by risk analysis? Frontex and the risk-based governance of European border control”, *Journal of European Integration*, 39(6), 2017, pp. 1-18.
- PEEK, Johannes, “International Police Cooperation Within Justified Political and Juridical Frameworks: Five Theses on TREVI” in MONAR, Jörg and MORGAN, Roger (eds.), *The Third Pillar of the European Union: Cooperation in the fields of Justice and Home Affairs*, Brussels: European Interuniversity Press, 1994, pp. 201-207.
- PEERS, Steve, “Transforming Decision-Making on EC Immigration and Asylum Law”, *European Law Review*, 30(2), 2005, pp. 285-296.
- “The future of the EU judicial system and EC immigration and asylum law”, *European Journal of Migration and Law*, 7(3), 2005, pp. 263-274.

References

- “Europol: The final step in the creation of an ‘Investigative and Operational’ European Police Force”, *Statewatch Analysis*, 2007, pp. 1-6.
 - “In a world of their own? Justice and Home Affairs Opt-outs and the Treaty of Lisbon”, *Cambridge Yearbook of European Legal Studies*, 10, 2008, pp. 383-412.
 - *EU Justice and Home Affairs Law* (Third Ed.), Oxford: Oxford University Press, 2011.
 - “Mission Accomplished? EU Justice and Home Affairs Law after the Treaty of Lisbon”, *Common Market Law Review*, 48, 2011, pp. 661-693.
 - “The next multi-year EU Justice and Home Affairs programme Views of the Commission and the Member States”, *Statewatch Analysis*, 2014, pp. 1-4.
 - MORENO-LAX, Violeta, GARLICK, Madeline and GUILD, Elspeth (eds.), *EU Immigration and Asylum Law (Text and Commentary): Volume 3: EU Asylum Law*, The Netherlands: Brill, 2015.
 - *EU Justice and Home Affairs Law: EU Criminal Law, Policing, and Civil Law*, Volume II, Oxford: Oxford University Press, 2016.
 - “The Reform of Frontex: Saving Schengen at Refugee’s Expense?”, *Statewatch*, 281, 2016.
- PÉREZ DE LAS HERAS, Beatriz, “La reforma institucional: hacia una mayor legitimidad democrática y transparencia”, *Cuadernos Europeos de Deusto*, 15, 1996, pp. 103-120.
- PÉREZ GONZÁLEZ, Carmen, “Entre las exigencias de la seguridad y la retórica de los derechos humanos: la respuesta de la Unión Europea a los flujos de refugiados y migrantes”, *Anuario de Derecho Público*, 1, 2016, pp. 455-472.
- De Frontex a la agencia europea de la guardia de fronteras y costas: ¿Cambia todo para que todo siga igual? A propósito de la necesidad de mejorar la protección de los derechos fundamentales in BLASI CASAGRAN, Cristina and ILLAMOLA DAUSÀ, Mariona, *El control de las agencias del Espacio de Libertad, Seguridad y Justicia: Contrapeso necesario a su autonomía*, Marcial Pons, 2017, pp. 191-208.
- PERKOWSKI, Nina, “A normative assessment of the aims and practices of the European border management agency Frontex”, *Working Paper Series Refugee Studies Centre*, 81, 2012, pp. 1-47.
- PI LLORENS, Montserrat, “El Programa de Estocolmo: el difícil camino hacia la Constitución de una política transversal de derechos humanos en la Unión Europea” in PI LLORENS, Montserrat and ZAPATER DUQUE, Esther (eds.), *¿Hacia una Europa de las personas en el espacio de libertad, seguridad y justicia?*, Marcial Pons, 2010, pp. 129-150.
- and ZAPATER DUQUE, Esther (eds.), *La dimensión exterior de las agencias del Espacio de Libertad, Seguridad y Justicia*, Madrid: Marcial Pons, 2014.
 - “El nuevo mapa de las agencias europeas del Espacio de Libertad, Seguridad y Justicia”, *Revista de Derecho Comunitario Europeo*, 56, 2017, pp. 77-117.
- PLENDER, Richard, “EU Immigration and Asylum Policy: The Hague Programme and the way forward”, *ERA Forum*, 9(2), 2008, pp. 301-325.
- POLLACK, Mark, *The engines of European integration: delegation, agency, and agenda setting in the EU*, Oxford: Oxford University Press, 2003.

- POLLAK, Johannes and SLOMINSKI, Peter, “Experimentalist but not accountable governance? The role of Frontex in managing the EU's external borders”, *West European Politics*, 32(5), 2009, pp. 904-924.
- QUEL LÓPEZ, Francisco Javier, “Análisis de las reformas en el Espacio de Libertad, Seguridad y Justicia en el Tratado de Niza”, *Revista de Derecho Comunitario Europeo*, 5(9), 2001, pp. 117-144.
- RAULUS, Helena, “Fundamental Rights in the Area of Freedom, Security and Justice”, in WOLFF, Sarah, GOUDAPPEL, Flora and DE ZWAAN, Jaap (eds.), *Freedom, Security and Justice after Lisbon and Stockholm*, The Netherlands: T.M.C. ASSER PRESS, 2011, pp. 213-240.
- RIJKEN, Conny, “Joint Investigation Teams. Principles, practice, and problems: Lessons learnt from the first efforts to establish a JIT”, *Utrecht Law Review*, 2(2), 2006, pp. 99-118.
- and VERMEULEN, Gert, *Joint Investigation Teams in the European Union: From Theory to Practice*, The Hague: TMC Aser Press, 2006.
- RIJPMA, Jorrit, “Building Borders: The Regulatory Framework for the Management of the External Borders of the European Union”, PhD Thesis: European University Institute, 2009.
- “Frontex: successful blame shifting of the Member States?”, *Análisis del Real Instituto Elcano*, 69, 2010.
 - “Hybrid agencification in the area of Freedom, Security and Justice and its inherent tensions: the case of Frontex” in BUSUIOC, Madalina, GROENLEER, Martijn and TRONDAL, Jarle, *The agency phenomenon in the European Union: Emergence, institutionalisation and everyday decision-making*, Manchester: Manchester University Press, 2012, pp. 77-99.
 - “The Third Pillar of the Maastricht Treaty: The Coming Out of Justice and Home Affairs” in DE VISSER Maartje and VAN DER MEI, Anne Pieter (Eds.), *The Treaty on European Union 1993-2013: Reflections from Maastricht*, Cambridge: Intersentia, 2013, pp. 269-288.
 - “Institutions and Agencies: Government and Governance after Lisbon” in ACOSTA ARCARAZO, Diego and MURPHY, Cian C. (eds.), *EU Security and Justice Law: After Lisbon and Stockholm*, Oxford: Hart Publishing, 2014, pp. 69-71.
 - and VERMEULEN, Mathias, “EUROSUR: saving lives or building borders?”, *European security*, 24(3), 2015, pp. 454-472.
 - “The Proposal for a European Border and Coast Guard: Evolution or Revolution in External Border Management?”, *Study for the European Parliament LIBE Committee*, PE 556.934, 2016.
 - “External Migration and Asylum Management: Accountability for Executive Action Outside EU-Territory”, *European Papers*, 2(2), 2017, pp. 571-596.
 - “Frontex and the European System of Border Guards: the Future of European Border Management” in FLETCHER, Maria, HERLIN-KARNELL, Ester and MATERA, Claudio (Eds.), *The European Union as an Area of Freedom, Security and Justice*, London: Routledge, 2017, pp. 217-245.

References

- RIPOLL SERVENT, Ariadna, "Playing the co-decision game? Rules' changes and institutional adaptation at the LIBE committee", *Journal of European integration*, 34(1), 2012, pp. 55-73.
- and TRAUNER, Florian (eds.), *The Routledge Handbook of Justice and Home Affairs Research*, Routledge, 2017.
 - "A new form of delegation in EU asylum: Agencies as proxies of strong regulators", *Journal of Common Market Studies*, 56(1), 2018, pp. 83-100.
- RITLENG, Dominique, "The Reserved Domain of the Legislature: The Notion of 'Essential Elements of an Area'" in BERGSTRÖM, Carl and RITLENG, Dominique (Eds.), *Rulemaking by the European Commission: The New System for Delegation of Powers*, Oxford: Oxford University Press, 2016.
- RODIER, Claire, "Le faux semblant des hotspots", *La Revue des droits de l'Homme*, 13, 2017, pp. 1-22.
- ROZÉE, Stephen, KAUNERT, Christian and LÉONARD, Sarah, "Is Europol a Comprehensive Policing Actor?", *Perspectives on European Politics and Society*, 14(3), 2013, pp. 372-387.
- RYAN, Bernard, "The EU's Borders: Schengen, Frontex and the UK", *ILPA Brexit Briefings*, 19.05.2016.
- and MITSILEGAS, Valsamis, *Extraterritorial Immigration Control: Legal Challenges*, Martinus Nijhoff Publishers, 2010.
- SANCHEZ BARRUECO, Maria Luisa, "L'Agence Européenne de Défense: Un Organe Intergouvernemental au Service d'une Institution Communautaire?", *Revue du Droit de l'Union Européenne*, 3, 2008, pp. 507-542.
- SANTOS VARA, Juan, "El desarrollo de las competencias de la Oficina Europea de Policía (EUROPOL): el control democrático y judicial", *Revista de Derecho Comunitario Europeo*, 7(14), 2003, pp. 141-179.
- and FAHEY, Elaine, "Transatlantic Relations and the Operation of AFSJ flexibility", in BLOCKMANS, Steven (ed.), *Differentiated Integration in the EU: From the inside Looking Out*, Brussels: Centre for European Policy Studies, 2014, pp. 103-125.
 - "The External Activities of AFSJ Agencies: The Weakness of Democratic and Judicial Controls", *European Foreign Affairs Review*, 20(1), 2015, pp. 118-136.
 - and SANCHEZ-TABERNERO, Soledad, "In Deep Water: Toward a Greater Commitment for Human Rights in Sea Operations Coordinated by Frontex?", *European Journal of Migration and Law*, 18, 2016, pp. 65-87.
 - "The EU's Agencies: Ever More Important for the Governance of the Area of Freedom, Security and Justice" in RIPOLL SERVENT, Ariadna and TRAUNER, Florian, *Routledge Handbook of Justice and Home Affairs Research*, London: Routledge, 2018, pp. 445-455.
 - "La transformación de Frontex en la Agencia Europea de la Guardia de Fronteras y Costas: ¿hacia una centralización en la gestión de las fronteras?", *Revista de Derecho Comunitario Europeo*, 59, 2018, pp. 143-186.
- SAURER, Johannes, "The Accountability of Supranational Administration: The Case of European Union Agencies", *American University International Law Review*, 24(3), 2008, pp. 429-488.

- “Supranational governance and networked accountability structures: Member state oversight of EU agencies”, *European Journal of Risk Regulation*, 2(1), 2011, pp. 51-60.
- SCHALKEN, Tom and PRONK, Maarten, “On joint investigation teams, Europol and supervision of their joint actions”, *European Journal of Crime Criminal Law and Criminal Justice*, 10(1), 2002, pp. 70-82.
- SCHAMMO, Pierre, “The European Securities and Markets Authority: Lifting the Veil on the Allocation of Powers”, *Common Market Law Review*, 48, 2011, pp. 1879-1914.
- SCHNEIDER, Jens-Peter, “A Common Framework for Decentralized EU Agencies and the Meroni Doctrine”, *Administrative Law Review*, 61, 2009, pp. 29-44.
- SCHNEIDER, Stephanie and NIESWANDT, Carolin, “EASO—Support Office or Asylum Authority? Boundary Disputes in the European Field of Asylum Administration”, *Österreichische Zeitschrift für Soziologie*, 43(1), 2018, pp. 13-35.
- SCHOLTEN, Miroslava, “What If the European Parliament Says ‘No’?: The Strength of European Parliament’s Discharge Power”, *SSRN*, 2011, pp. 1-21.
- “The Newly Released ‘Common Approach’ on EU Agencies: Going Forward or Standing Still?”, *Columbia Journal of European Law*, 19(1), 2012.
- *The political accountability of EU and US independent regulatory agencies*, Leiden: Martinus Nijhoff Publishers, 2014.
- and VAN RIJSBERGEN, Marloes, “Limits of Agencification in the European Union”, *German Law Journal*, 15(7), 2014, pp. 1223-1256.
- and VAN RIJSBERGEN, Marloes, “The ESMA-short selling case: Erecting a new delegation doctrine in the EU upon the Meroni-Romano remnants”, *Legal Issues of Economic Integration*, 41(4), 2014, pp. 389-405.
- “Mind the trend! Enforcement of EU law has been moving to ‘Brussels’”, *Journal of European Public Policy*, 24(9), 2017, pp. 1-19.
- and SCHOLTEN, Daniel, “From regulation to enforcement in the EU policy cycle: a new type of functional spillover?”, *Journal of Common Market Studies*, 55(4), 2017, pp. 925-942.
- SCHÖN-QUINLIVAN, Emanuelle, “Administrative Reform in the European Commission: From Rhetoric to re-legitimation”, *EU-CONSENT Wider Europe, Deeper Integration? Constructing Europe Network*, 18.10.2006.
- SCHÜTZE, Robert, “‘Delegated’ Legislation in the (new) European Union: A Constitutional Analysis”, *The Modern Law Review*, 74(5), 2011, pp. 661-693.
- SCHWARZE, Jurgen, “European Administrative Law in the Light of the Treaty of Lisbon”, *European Public Law*, 18(2), 2012, pp. 285-304.
- SCIPIONI, Marco, “De Novo Bodies and EU Integration: What is the Story behind EU Agencies' Expansion?”, *Journal of Common Market Studies*, 2017, pp. 1-17.
- “Failing forward in EU migration policy? EU integration after the 2015 asylum and migration crisis”, *Journal of European Public Policy*, 2017, pp. 1-19.
- SIMONCINI, Marta, “Legal boundaries of European Supervisory Authorities in the financial markets: Tensions in the development of true regulatory agencies”, *Yearbook of European Law*, 34(1), 2015, pp. 319-350.

References

- SOLER GARCÍA, Carolina, “La Guardia Europea de Fronteras y Costas: ¿un avance respecto a Frontex? Una valoración provisional”, *Revista Electrónica de Estudios Internacionales*, 34, 2017, pp. 1-44.
- TALLBERG, Jonas, *European Governance and Supranational Institutions: Making States Comply*, London: Routledge, 2003.
- TAZZIOLI, Martina and GARELLI, Glenda, “Containment beyond detention: The hotspot system and disrupted migration movements across Europe”, *Environment and Planning D: Society and Space*, 2018, pp. 1-19.
- THATCHER, Mark, “Delegation to independent regulatory agencies: Pressures, functions and contextual mediation”, *West European Politics*, 25(1), 2002, pp. 125-147.
- and SWEET, Alec Stone, “Theory and practice of delegation to non-majoritarian institutions”, *West European Politics*, 25(1), 2002, pp. 1-22.
 - “The creation of European regulatory agencies and its limits: a comparative analysis of European delegation”, *Journal of European Public Policy*, 18(6), 2011, pp. 790-809.
- THYM, Daniel, “The ‘refugee crisis’ as a challenge of legal design and institutional legitimacy”, *Common Market Law Review*, 53(6), 2016, pp. 1545-1573.
- TIMMERMAN, Peter and ANDOURA, Sami, “Governance of the EU: The reform debate on European agencies reignited”, *European Policy Institutes Network Working Paper*, 19, 2008, pp. 1-33.
- TONER, Helen, “Impact Assessments: A Useful Tool for ‘Better Lawmaking’ in EU Migration Policy?” in BALDACCINI, Anneliese, GUILD, Elspeth and TONER, Helen, *Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy*, Portland: Hart Publishing, 2007, pp. 109-148.
- TOTH, A.G., “The Legal Effects of the Protocols Relating to the United Kingdom, Ireland and Denmark” in HEUKELS, Ton, BLOKKER, Niels and BRUS, Marcel (eds.), *The European Union after Amsterdam: A Legal Analysis*, The Hague: Kluwer Law International, 1998, pp. 227-252.
- TOVO, Carlo, “Delegation of Legislative Powers in the EU: how EU Institutions Have Eluded the Lisbon Reform”, *European Law Review*, 42(5), 2017, pp. 677-705.
- TRAUNER, Florian, “The internal-external security nexus: more coherence under Lisbon?”, *European Union Institute for Security Studies*, 89, 2011, pp. 1-40
- “The European Parliament and agency control in the Area of Freedom, Security and Justice”, *West European Politics*, 35(4), 2012, pp. 784-802.
 - and SERVENT, Ariadna Ripoll (eds.), *Policy Change in the Area of Freedom, Security and Justice: How EU Institutions Matter*, Routledge, 2014.
 - “Asylum policy: the EU’s ‘crises’ and the looming policy regime failure”, *Journal of European Integration*, 38(3), 2016, pp. 311-325.
- TREIB, Oliver, “Implementing and complying with EU governance outputs”, *Living Review European Governance*, 1(1), 2006, pp. 1-26.
- TRIANDAFYLLIDOU, Anna and MANTANIKI, Regina, “Emergencia de refugiados en el Mediterráneo: evaluación de las respuestas políticas de la Unión Europea”, *Migración y Desarrollo*, 15(28), 2017, pp. 7-38.
- TSEBELIS, George and YATAGANAS, Xenophon, “Veto Players and Decision-making in the EU After Nice”, *Journal of Common Market Studies*, 40(2), 2002, pp. 283-307.

- TSOURDI, Evangelia, “Bottom-up Salvation? From Practical Cooperation Towards Joint Implementation Through the European Asylum Support Office”, *European Papers*, 1(3), 2016, pp. 997-1031.
- and DE BRUYCKER, Philippe, “EU asylum policy: In search of solidarity and access to protection”, *Migration Policy Centre Brief*, 6, 2015, pp. 1-12.
 - “Solidarity at work? The prevalence of emergency-driven solidarity in the administrative governance of the Common European Asylum System”, *Maastricht Journal of European and Comparative Law*, 24(5), 2017, pp. 1-20.
 - “Hotspots and EU Agencies: Towards an Integrated European Administration?”, *EU Immigration and Asylum Law and Policy Blog*, <http://eumigrationlawblog.eu/hotspots-and-eu/>, 26.01.2017.
 - “The European Asylum Support Office in Action: Comments on the Changing Nature of Practical Cooperation in the EU Asylum Policy”, *Academic Research Network on Agencification of EU Executive Governance Blog*, <https://eutarn.blogactiv.eu/2017/04/10/the-european-asylum-support-office-in-action-comments-on-the-changing-nature-of-practical-cooperation-in-the-eu-asylum-policy/>, 10.04.2017.
 - “Monitoring and Steering through Frontex and Easo 2.0: The Rise of a new Model of AFSJ agencies?”, *EU Immigration and Asylum Law and Policy Blog*, <http://eumigrationlawblog.eu/monitoring-and-steering-through-frontex-and-easo-2-0-the-rise-of-a-new-model-of-afsj-agencies/>, 29.01.2018.
- ULRICH, Jessurun and D’OLIVEIRA, Hans, “Expanding External and Shrinking Internal Borders: Europe’s Defense Mechanisms in the areas of Free Movement, Immigration and Asylum” in O’KEEFFE, David and TWOMEY, Patrick M. (eds.), *Legal Issues of the Maastricht Treaty*, Chicester: Wiley Chancery, 1994, pp. 261-278.
- URREA CORRES, Mariola, “Control de fronteras exteriores y seguridad interna en la Unión Europea: la puesta en marcha de Frontex” in ALDECOA LUZAR-RAGA, Francisco and SOBRINO HEREDIA, Jose Manuel (Eds.), *Migraciones y desarrollo: II Jornadas Iberoamericanas de Estudios Internacionales*, Madrid: Marcial Pons, 2007, pp. 469-482.
- “El control de fronteras exteriores como instrumento para la seguridad: una aproximación al nuevo marco jurídico de frontex”, *Revista del Instituto Español de Estudios Estratégicos*, 2012, pp. 153-172.
- USHER, John A., “Assessment of the Treaty of Nice - Goals of institutional reform”, in ANDENAS, Mads and USHER, John A. (eds.), *The Treaty of Nice and Beyond. Enlargement and Constitutional Reform*, Portland: Hart Publishing, 2003, pp. 183-206.
- VAN CLEYNENBREUGEL, Pieter, “Meroni circumvented? Article 114 TFEU and EU regulatory agencies”, *Maastricht Journal of European and Comparative Law*, 21, 2014, pp. 64-88.
- VAN OOIK, Ronald, “The growing importance of agencies in the EU: shifting governance and the institutional balance” in CURTIN, Deirdre and WESSEL, Ramses A. (eds.), *Good governance and the European Union: reflections on concepts, institutions and substance*, Antwerp: Intersentia, 2005, pp. 139-145.

References

- VAN RIJSBERGEN, Marloes, “On the Enforceability of EU Agencies’ Soft Law at the National Level: The Case of the European Securities and Markets Authority”, *Utrecht Law Review*, 10(5), 2014, pp. 116-131.
- VENDE SOMPEL, Roger, “Europol, the high potential EU law enforcement agency, despite the Member States”, *Cahiers Politiestudies*, 16(3), 2010, pp. 139-162.
- VERMEULEN, Gert, DE BONDT, Wendy, *Justice, Home Affairs and Security. European and international institutional and policy development*, Antwerp: Maklu, 2015, pp. 70-75.
- VERSLUIS, Esther, “Even rules, uneven practices: Opening the ‘black box’ of EU law in action”, *West European Politics*, 30(1), 2007, pp. 50-67.
- VÍRGALA FORURIA, Eduardo, *Las Agencias Reguladoras de la UE*, Granada: Comares, 2011.
- VOGIATZIS, Nikos, “Frontex: Human Rights Obligations and the Role of the European Ombudsman” in KARATZOGIANNI, Athina, NGUYEN, Dennis and SERAFINELLI, Elisa (eds.), *The Digital Transformation of the Public Sphere: Conflict, Migration, Crisis and Culture in Digital Networks*, Berlin: Springer, 2016, pp. 303-318.
- VOS, Ellen, “Reforming the European Commission: What role to play for EU agencies”, *Common Market Law Review*, 37(5), 2000, pp. 1113-1134.
- “Agencies and the European Union” in ZWART, Tom and VERHEY, Luc, *Agencies in European and Comparative Law*, Antwerp: Intersentia, 2003, pp. 113-148.
 - “EU agencies: Features, Framework and Future”, *Maastricht Faculty of Law Working Paper*, 3, 2013, pp. 1-41.
 - “European Agencies and the Composite EU Executive” in EVERSON, Michelle, MONDA, Cosimo and VOS, Ellen (eds.), *European Agencies in between Institutions and Member States*, Alphen aan den Rijn: Kluwer Law International, 2014, pp. 11-47.
 - “EU agencies on the move: challenges ahead”, *Swedish Institute for European Policy Studies*, 1, 2018.
- VOS, Johannes, “Police Cooperation on an EU-Wide Level 1998–2010: Developments and Challenges” in GUILD, Elspeth, CARRERA, Sergio and EGGENSCHWILER, Alejandro, *The Area of Freedom, Security and Justice Ten Years on: Successes and Future Challenges under the Stockholm Programme*, Brussels: Centre for European Policy Studies, 2010, pp. 79-89.
- WALKER, Neil, “In search of the area of freedom, security and justice: a constitutional odyssey” in WALKER, Neil (ed.), *Europe’s Area of Freedom, Security, and Justice/Neil Walker*, Oxford: Oxford University Press, 2004, pp. 1-37.
- WEYEMBERG, Anne, ARMADA, Inés and BRIÈRE, Chloé, “The inter-agency cooperation and future architecture of the EU criminal justice and law enforcement area”, *Study for the European Parliament LIBE Committee*, PE 510.000, 2014.
- WOLFF, Sarah, “The Rule of Law in the Area of Freedom, Security and Justice: Monitoring at home what the European Union preaches abroad”, *Hague Journal on the Rule of Law*, 5(1), 2013, pp. 119-131.

- and SCHOUT, Adriaan, “Frontex as Agency: More of the Same?”, *Perspectives on European Politics and Society*, 14(3), 2013, pp. 305-324.
- WOODWARD, Rachel, “Establishing Europol”, *European Journal on Criminal Policy and Research*, 1993, 1(4), pp. 7-33.
- WUNDERLICH, Daniel, “Towards coherence of EU external migration policy? Implementing a complex policy”, *International Migration*, 51(6), 2013, pp. 26-40.
- YATAGANAS, Xenophon A., “The Treaty of Nice: The Sharing of Power and the Institutional Balance in the European Union - A Continental Perspective”, *European Law Journal*, 7(3), 2001, pp. 242-291.
- “Delegation of regulatory authority in the European Union: the relevance of the American model of independent agencies”, *Jean Monnet Working Paper*, 3, 2001, pp. 1-73.
- ZAINAL, Zaidah, “Case study as a research method”, *Jurnal Kemanusiaan*, 5(1), 2007.
- ZIEBRITZKI, Catharina, “Chaos in Chios: Legal Questions Regarding the Administrative Procedure in the Greek Hotspots”, *EU Immigration and Asylum Law and Policy Blog*, July 2016.

Case Law (chronologically)

- ECJ, “Meroni & Co., Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community”, Case 9-56, 13 June 1958, ECLI:EU:C:1958:7.
- ECJ, “Giuseppe Romano v Institut national d'assurance maladie-invalidité”, Case 98/80, 14 May 1981, ECLI:EU:C:1981:104.
- ECJ, “European Parliament v Council of the European Communities”, Case C-70/88, 22 May 1990, ECLI:EU:C:1990:217.
- CJEU, “Commission of the European Communities v Council of the European Union”, Case C-257/01, 18 January 2005, ECLI:EU:C:2005:25.
- CJEU, “Tralli v ECB”, C-301/02 P, 26 May 2005, ECLI:EU:C:2005:306.
- CJEU, “Alliance for Natural Health and Others”, joined cases C-154/04 and C-155/04, 12 July 2005, ECLI:EU:C:2005:449.
- CJEU, “United Kingdom v Parliament and Council”, Case C-66/04, 6 December 2005, ECLI:EU:C:2005:743.
- CJEU, “United Kingdom v Parliament and Council”, Case C-217/04, 2 May 2006, ECLI:EU:C:2006:279.
- CJEU, “United Kingdom of Great Britain and Northern Ireland v Council of the European Union”, Case C-77/05, 18 December 2007, ECLI:EU:C:2007:803.
- CJEU, “European Parliament v Council of the European Union”, Case C-133/06, 6 May 2008, ECLI:EU:C:2008:257.
- CJEU, “European Parliament v Council of the European Union”, Case C-355/10, 5 September 2012, ECLI:EU:C:2012:516.
- CJEU, “United Kingdom v Parliament and Council”, Case C- 270/12, 22 January 2014, ECLI:EU:C:2014:18.

References

CJEU, “European Parliament v Council of the European Union”, Case C-363/14, 10 September 2015, ECLI:EU:C:2015:579.

Treaties, Legislation, Decisions (chronologically)

Treaties

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

Treaty on European Union, Maastricht, 07.02.1992.

Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Amsterdam, 1997.

Treaty of Amsterdam, Protocol integrating the Schengen acquis into the framework of the European Union, 02.10.1997.

Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, Nice, 26.02.2001

Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community Lisbon, 13.12.2007.

Charter of Fundamental Rights of the European Union, OJ C-326, 26.10.2012.

Legislation and Legislative Materials

Ministerial agreement on the establishment of the Europol Drugs Unit, Copenhagen, 02.06.1993.

Council, “Joint Action of 10 March 1995 adopted by the Council on the basis of Article K.3 of the Treaty on European Union concerning the Europol Drugs Unit”, 95/73/JHA, OJ L-62, 20.03.1995.

Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L-145, 31.05.2001.

Council Regulation (EC) No 58/2003 of 19 December 2002 laying down the statute for executive agencies to be entrusted with certain tasks in the management of Community programmes, OJ L-11, 16.01.2003.

Commission, “Proposal for a Council Regulation establishing a European Agency for the Management of Operational Co-operation at the External Borders”, COM(2003) 687 final/2, 20.11.2003.

- Council, "Council Conclusions on the main elements of the Commission proposal for a Council Regulation establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union", doc. 15446/03, 28.11.2003.
- Parliament, "Report on the proposal for a Council regulation establishing a European Agency for the Management of Operational Co-operation at the External Borders (COM(2003) 687 – C5-0613/2003 – 2003/0273(CNS))", A5-0093/2004, 24.02.2004.
- Council, "Draft Council Regulation establishing on the main elements of the Commission proposal for a Council Regulation establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union", doc. 7428/04, 16.03.2004.
- European Economic and Social Committee "Opinion on the proposal for a Council Regulation establishing a European Agency for the Management of Operational Co-operation at the External Borders (COM(2003) 687 final - 2003/0273(CNS))", OJ C-108, 30.04.2004.
- 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, OJ L-349, 25.11.2004.
- Commission, "Proposal for a Regulation of the European Parliament and of the Council establishing a European Institute for Gender Equality", COM(2005) 81 final, 08.03.2005.
- Commission, "Proposal for a Regulation of the European Parliament and of the Council establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism", COM(2006) 401 final, 19.07.2006.
- Commission, "Analyse d'Impact COM(2006) 401 final", SEC(2006) 954, 19.07.2006.
- 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, OJ L-199, 31.07.2007.
- Commission, "Report on the evaluation and future development of the FRONTEX Agency", SEC(2008) 148, 13.02.2008.
- Commission, "Proposal for a Regulation of the European Parliament and of the Council establishing a European Asylum Support Office", COM(2009) 66 final, 18.02.2009.
- Commission, "Commission Staff Working Document Accompanying the Proposal for a Regulation of the European Parliament and of the Council Establishing an European Asylum Support Office", SEC(2009) 153, 18.02.2009.
- Commission, "Impact Assessment accompanying the Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX)", SEC(2010) 149, 24.02.2010.
- Commission, "Proposal for a Regulation of the European Parliament and the Council amending Council Regulation (EC) No 2007/2004 establishing a European

References

- Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX)", COM(2010) 61 final, 24.02.2010.
- Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office, OJ L-132, 29.05.2010.
- Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC, OJ L-331, 15.12.2010.
- 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, OJ L-304, 22.11.2011.
- Commission, "Proposal for a regulation of the European Parliament and of the Council establishing the European Border Surveillance System (EUROSUR)", COM(2011) 873 final, 12.12.2011.
- Commission, "Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Law Enforcement Cooperation and Training (Europol) and repealing Decisions 2009/371/JHA and 2005/681/JHA", COM(2013) 173 final, 27.03.2013.
- Commission, "Impact Assessment on adapting the European police Office's legal framework with the Lisbon Treaty", SWD(2013) 98 final, part 1, 27.03.2013.
- Commission, "Impact Assessment on merging the European Police College (Cepol) and the European Police Office (Europol) and implementing a European police training scheme for law enforcement officials", SWD(2013) 98 final, part 2, 27.03.2013.
- Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), OJ L-180, 29.06.2013.
- Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), OJ L- 180, 29.06.2013.
- Regulation (EU) No 1052/2013 of the European Parliament and of the Council of 22 October 2013 establishing the European Border Surveillance System (Eurosur), OJ L-295, 06.11.2013.
- 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, OJ L-189, 27.06.2014.
- Commission, "Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No

- 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC ", COM(2015) 671 final, 15.12.2015.
- Greece Law No. 4375 of 2016 on the organization and operation of the Asylum Service, the Appeals Authority, the Reception and Identification Service, the establishment of the General Secretariat for Reception, the transposition into Greek legislation of the provisions of Directive 2013/32/EC, 03.04.2016.
- Commission, "Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)", COM(2016) 270 final, 04.05.2016.
- Commission, "Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010", COM(2016) 271 final, 04.05.2016.
- Commission, "Proposal for a Regulation of the European Parliament and of the Council on the establishment of Eurodac for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013", COM (2016) 272 final, 04.05.2016.
- Regulation (EU) No 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol), OJ L-135, 24.05.2016.
- Greece Law 4399, "Institutional framework for establishing Private Investment Aid schemes for the country's regional and economic development - Establishing the Development Council and other provisions", 22.06.2016.
- Commission, "Proposal for a Regulation of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast)", COM(2016) 465 final, 13.07.2016.
- Commission, "Proposal for a Regulation of the European Parliament and of the Council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents", COM(2016) 466 final, 13.07.2016.
- Commission, "Proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU", COM(2016) 467 final, 13.07.2016.
- Commission, "Proposal for a Regulation of the European Parliament and of the Council establishing a Union Resettlement Framework and amending Regulation (EU) No 516/2014 of the European Parliament and the Council", COM(2016) 468 final, 13.07.2016.
- Regulation (EU) No 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard, OJ L-251, 16.09.2016.

References

Decisions

- Council, “Council Act of 26 July 1995 drawing up the Convention based on Article K.3 of the Treaty on European Union, on the establishment of a European Police Office (Europol Convention)”, OJ C-316, 27.11.1995.
- Council, “Act of 23 July 1996 drawing up, on the basis of Article K.3 of the Treaty on European Union, the Protocol on the interpretation, by way of preliminary rulings, by the Court of Justice of the European Communities of the Convention on the establishment of a European Police Office”, OJ C-299, 09.10.1996.
- Council, “Council Framework Decision 2002/465/JHA on joint investigation teams”, OJ L-162, 13.06.2002.
- Council, “Protocol amending the Convention on the establishment of a European Police Office (Europol Convention) and the Protocol on the privileges and immunities of Europol, the members of its organs, the deputy directors and the employees of Europol”, OJ C-312/1, 16.12.2002.
- Council Decision of 26 April 2005 designating the seat of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (2005/358/EC), OJ L-114/13, 04.05.2005.
- Commission, “Proposal for a Council Decision establishing the European Police Office (EUROPOL)”, COM(2006) 817 final, 20.12.2006.
- Commission, “Accompanying document to the proposal for a Council Decision establishing the European Police Office (EUROPOL): Impact Assessment”, SEC(2006) 1682, 20.12.2006.
- Council Decision of 6 April 2009 establishing the European Police Office (Europol), OJ L-121, 15.05.2009.
- Council Decision of 25 February 2010 on setting up the Standing Committee on operational cooperation on internal security, OJ L-52, 03.03.2010.
- European Ombudsman, “Decision of the European Ombudsman closing own-initiative inquiry OI/5/2012/BEH-MHZ Frontex”, 12.11.2013.
- Commission “Decision establishing guidelines for the establishment and operation of executive agencies financed by the general budget of the Union”, C(2014) 9109 final, 02.12.2014.
- European Ombudsman, “Decision of the European Ombudsman closing her own-initiative inquiry OI/9/2014/MHZ concerning Frontex”, 04.05.2015.
- Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece’, OJ L-239, 15.09.2015.
- Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, OJ L-248, 24.09.2015.
- Council Decision (EU) 2016/1754 of 29 September 2016 amending Decision (EU) 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, OJ L-268, 01.10.2016.

Reports, Communications, Declarations (chronologically)

European Union Institutions and Bodies

- European Council, Lisbon Summit, 26-27 June 1992.
- Council, "Reflection Group's Report", SN 520/95 (REFLEX 21), 05.12.1995.
- Council, "Action plan to combat organized crime", OJ C-251, 15.08.1997.
- Parliament, "Resolution of 3 April 1998 on the implications of enlargement of the European Union for cooperation in the field of justice and home affairs", OJ C-138, 04.05.1998.
- Commission, "Towards an Area of Freedom, Security and Justice", COM(1998) 459 final, 14.07.1998.
- Council, "Action Plan of the Council and the Commission on how Best to Implement the Provisions of the Treaty of Amsterdam on an Area of Freedom, Security and Justice", OJ C-19, 23.01.1999.
- Commission, "Second Report on Reform of the Commission Analysis of current practice and proposals for tackling mismanagement, irregularities and fraud", 10.09.1999.
- European Council, Tampere Presidency Conclusions, 15-16 October 1999.
- Council, "First reflections concerning the Tampere Conclusions as far as they relate to Europol", doc. 13370/99, 25.11.1999.
- Council, "European Police Chiefs Operational Task Force", doc. 5858/00, 02.02.2000.
- Commission, "Reforming the Commission - White Paper", COM(2000) 200, 05.03.2000.
- European Council, "Council of the European Union & JHA: Cooperation in the fields of Justice and Home Affairs", BX-01-96-599-EN-C, 20.07.2000.
- Commission, "Communication Towards a common asylum procedure and a uniform status, valid throughout the Union, for persons granted asylum", COM(2000) 755 final, 22.11.2000.
- Council, "Council recommendation of 30 November 2000 to Member States in respect of Europol's assistance to joint investigative teams set up by the Member States", OJ C-357, 13.12.2000.
- Commission, "European Governance: A White Paper", COM(2001) 428 final, 25.07.2001.
- Council, "Evaluation of the conclusions of the Tampere European Council", doc. 13416/2/01 REV 2, 14.11.2001.
- Commission, "Communication on a Common Policy on Illegal Immigration", COM(2001) 672 final, 15.11.2001.
- Commission, "Communication on the common asylum policy, introducing an open coordination method", COM(2001) 710 final, 28.11.2001.
- Council, "Coordination between Europol, (Pro-) Eurojust, the EU Police Chiefs Task Force – Conclusion No 12 of the JHA Council on 20 September 2001", doc. 15389/01, 14.12.2001.
- Presidency Conclusions - Laeken, 14 and 15 December 2001, doc. SN 300/1/01 REV 1.

References

- Commission, "Commission Communication towards Integrated Management of the External Borders of the Member States of the European Union", COM(2002) 233 final, 07.05.2002.
- Commission, "European Governance: Better Lawmaking", COM(2002) 275 final 05.06.2002.
- Council, "Plan for the management of the external borders of the Member States of the European Union", doc. 10019/02, 14.06.2002.
- Council, "Presidency Conclusions, Seville European Council, 21-22 June 2002", 22.06.2002.
- European Council, "Presidency conclusions from the 6th meeting of police chiefs task force (Copenhagen, Denmark, 22-23 July 2002)", doc. 11751/02, 09.09.2002.
- Commission, "The operating framework for the European Regulatory Agencies", COM(2002) 718 final, 11.12.2002.
- Council, "Progress Report for the Implementation of the Plan for the management of external borders of the Member States of the European Union and the comprehensive plan for combating illegal immigration", doc. 7504/03, 17.03.2003.
- Commission, "Communication in view of the European Council of Thessaloniki on the Development of a Common Policy on Illegal Immigration, Smuggling and Trafficking of Human Beings, External Borders and the Return of Illegal Residents", COM(2003) 323 final, 03.06.2003.
- Council, "Report on the implementation of programmes, ad hoc centres, pilot projects and joint operations", doc. 10058/1/03, 11.06.2003.
- Commission, "Meta-Evaluation on the Community Agency System", 15.09.2003.
- Council, "Feasibility study on the control of the European Union's maritime borders - Final Report", doc. 11490/1/03 REV 1, 19.09.2003.
- European Council, Thessaloniki 19 and 20 June 2003, doc. 11638/03, 01.10.2003.
- Parliament, "Resolution on the communication from the Commission: The operating framework for the European regulatory agencies", P5_TA(2004)0015, 13.01.2004.
- Council, "Presidency conclusions of the extraordinary meeting of the European Chiefs of Police Task Force held in Brussels on 10 May 2004", doc. 9453/04, 11.05.2004.
- Commission, "Area of Freedom, Security and Justice: Assessment of the Tampere programme and future orientations", COM(2004) 4002 final, 02.06.2004.
- Commission, "The Area of Freedom, Security and Justice: assessment of the Tampere programme and future orientations - List of the most important instruments adopted", SEC(2004) 680, 02.06.2004.
- Council, "2593rd Council Meeting Environment Luxembourg", doc. 10746/04, 28.06.2004.
- Council, "Role and positioning of the Police Chiefs Task Force with a view to strengthening the EU operational police cooperation", doc. 14708/04, 15.11.2004.
- European Council, "Presidency Conclusions 4/5 November 2004", doc. 14292/1/04 REV 1, 08.12.2004.
- Council, "Discussion paper on the future Standing Committee on Internal Security (COSI) - Constitutional Treaty, art.III-261", doc. 6626/05, 21.02.2005.
- Commission, "Draft Interinstitutional Agreement on the operating framework for the European regulatory agencies", COM(2005) 59 final, 25.02.2005.

- European Council, "The Hague Programme: Strengthening Freedom, Security and Justice in the European Union", OJ C-53, 03.03.2005.
- Commission, "The Hague Programme: Ten priorities for the next five years - The Partnership for European renewal in the field of Freedom, Security and Justice", COM(2005) 184 final, 10.05.2005.
- Council, "Summary of discussions", doc. 9494/05, 30.05.2005.
- Council, "Draft Interinstitutional Agreement on the operating framework for the European regulatory agencies", doc. 9738/05, 03.06.2005.
- Council, "Joint Investigation Teams – Proposal for designation of national experts", doc. 11037/05, 08.07.2005.
- Council, "Council and Commission Action Plan implementing the Hague Programme on strengthening freedom, security and justice in the European Union", OJ C-198, 12.08.2005.
- Parliament, "Resolution on the draft interinstitutional agreement presented by the Commission on the operating framework for the European regulatory agencies", P6_TA(2005)0460, 01.12.2005.
- Council, "Conclusions of the first meeting of the national experts on Joint Investigation Teams", doc. 15227/05, 02.12.2005.
- Council, "Brussels European Council 15/16 December 2005 Presidency Conclusions", doc. 15914/1/05 REV 1, 30.01.2006.
- Commission, "Communication on Strengthened Practical Cooperation. New Structures, New Approaches: Improving the Quality of Decision Making in the Common European Asylum System", COM(2006) 67 final, 17.02.2006.
- Council, "Friends of the Presidency's report to the Future of Europol", doc. 9184/1/06, 19.05.2006.
- Commission, "Guidelines for the establishment and operation of executive agencies financed by the general budget of the European Communities", SEC(2006) 662 final, 31.05.2006.
- Council, "Council Conclusions on the Future of Europol", doc. 9670/2/06, 06.06.2006.
- Commission, "Report on the implementation of the Hague Programme for 2005", COM(2006) 333 final, 28.06.2006.
- Council, "Frontex feasibility study on Mediterranean Coastal Patrols Network – MEDSEA", doc. 12049/06, 20.11.2006.
- Council, "Conclusions of the second meeting of the national experts on Joint Investigation Teams", doc. 15023/06, 21.11.2006.
- Commission, "Reinforcing the management of the European Union's Southern Maritime Borders", COM(2006) 733 final, 30.11.2006.
- Council, "Annual Report to the Council on co-operation between Eurojust and Europol for 2005 and 2006 (Point 2.3 of the Hague Programme)", doc. 17069/06, 21.12.2006.
- Commission, "Green Paper on the future Common European Asylum System", COM(2007) 301 final, 06.06.2007.
- Council, "Summary of discussions", doc. 11034/07, 25.06.2007.
- Commission, "Communication - Report on the implementation of The Hague Programme for 2006", COM(2007) 373 final, 03.07.2007.

References

- Commission, "Communication Report on the evaluation and future development of the FRONTEX Agency", COM(2008) 67 final, 13.02.2008.
- Commission, "Communication Examining the creation of a European Border Surveillance System (EUROSUR)", COM(2008) 68 final, 13.02.2008.
- Commission, "Communication Preparing the next steps in border management in the European Union", COM(2008) 69 final, 13.02.2008.
- Commission, "European agencies – The way forward", COM(2008) 135 final, 11.03.2008.
- Council, "2863rd Council meeting Justice and Home Affairs Luxembourg, 18 April 2008", doc. 8397/08, 18.04.2008.
- Council, "Council Conclusions on the management of the external borders of the member states of the European Union", 2873rd Justice and Home Affairs Council meeting Luxembourg, 5 and 6 June 2008.
- Commission, "Policy Plan On Asylum: An Integrated Approach to Protection Across the EU", COM(2008) 360 final, 17.06.2008.
- Commission, "Report on implementation of the Hague programme for 2007", COM(2008) 373 final, 02.07.2008.
- Parliament, "Report on a strategy for the future settlement of the institutional aspects of Regulatory Agencies (2008/2103(INI))", 17.09.2008.
- Council, "European Pact on Immigration and Asylum", doc. 13440/08, 24.09.2008.
- Parliament, "Report on the evaluation and future development of the FRONTEX Agency and of the European Border Surveillance System (EUROSUR) (2008/2157(INI))", A6-0437/2008, 11.11.2008.
- Council, "Annual Report to the Council on co-operation between Eurojust and Europol for 2007 (Point 2.3 of the Hague Programme)", doc. 16760/08, 04.12.2008.
- Commission, "Impact Assessment Accompanying the Proposal for a Regulation of the European Parliament and of the Council establishing an European Asylum Support Office", SEC(2009) 153, 18.02.2009.
- Council, "Preparing the Stockholm Programme – Conference in Bruges on 4-5 March 2009", doc. 10576/09, 02.06.2009.
- Commission, "Communication Justice, Freedom and Security in Europe since 2005: An Evaluation of The Hague Programme and Action Plan, an extended report on the evaluation of the Hague Programme", SEC(2009) 766 final, 10.06.2009.
- Commission, "Communication An Area of Freedom, Security and Justice Serving the Citizen", COM(2009) 262 final, 10.06.2009.
- Council, "Summary of discussions", doc. 11033/09, 23.06.2009.
- Council, "Summary of discussions of the meeting of the JHA Agencies (18 June 2008)", doc. 11843/09, 09.07.2009.
- Council, "Frontex and Europol", doc. 12954/09, 07.09.2009.
- Council, "Interim report on cooperation between JHA Agencies", doc. 5816/10, 29.01.2010.
- Council, "Consequences of the entry into force of the Lisbon treaty: the COSI", doc. 5815/10, 29.01.2010.
- Council, "Final Report on the cooperation between JHA Agencies", doc. 8387/10, 09.04.2010.

- Commission, “Communication Delivering an area of freedom, security and justice for Europe’s citizens Action Plan Implementing the Stockholm Programme”, COM(2010) 171 final, 20.04.2010.
- European Council, “The Stockholm Programme — An Open and Secure Europe Serving and Protecting Citizens”, OJ C-115, 04.05.2010.
- Council, “Views of the Forum Salzburg Group regarding the necessary specification of the role of COSI and a procedure for the initiation of joint operations and measures”, doc. 9360/10, 05.05.2010.
- Council, “Draft Council Conclusions on the Commission Communication “Delivering an area of freedom, security and justice for Europe’s citizens - Action Plan Implementing the Stockholm Programme COM(2010) 171 final”, doc. 9935/10, 19.05.2010.
- Council, “Coordination Mechanisms for Joint Operations”, doc. 13077/10, 07.09.2010.
- Council, “SCIFA’s Role and Working Methods”, doc. 17476/10, 06.12.2010.
- Parliament, “The EU Internal Security Strategy, the EU Policy Cycle and the Role of (AFSJ) Agencies: Promise, Perils and Pre-requisites”, PE 453.185, 2011.
- Council, “Draft Scorecard – Implementation of the JHA Agencies report”, doc. 5676/11, 25.01.2011.
- Council, “Joint Investigation Teams Manual”, doc. 15790/1/11, 04.11.2011.
- Council, “The future of SCIFA”, doc. 17182/11, 18.11.2011.
- Commission, “Communication on enhanced intra-EU solidarity in the field of asylum: An EU agenda for better responsibility-sharing and more mutual trust”, COM(2011) 835 final, 02.12.2011.
- Council, “Conclusions on a Common Framework for genuine and practical solidarity towards Member States facing particular pressures on their asylum systems, including through mixed migration flows”, 3151st Justice and Home Affairs Council meeting Brussels, 08.03.2012.
- Council, “Council Conclusions on a common framework for genuine and practical solidarity towards Member States facing particular pressures due to mixed migration flows”, doc. 7485/12, 09.03.2012.
- Council, “EU Action on Migratory Pressures – A Strategic Response”, doc. 9650/12, 10.05.2012.
- Joint Statement of the European Parliament, the Council of the EU and the European Commission on decentralised agencies, 19.07.2012.
- Council, “Greece’s National Action Plan on Asylum Reform and Migration Management”, doc. 15258/12, 23.10.2012.
- Council, “Stockholm Programme mid-term review”, doc. 15921/12, 13.11.2012.
- Commission, “Roadmap on the follow-up to the Common Approach on EU decentralised agencies”, 19.12.2012.
- Council, “Cooperation between JHA agencies: issues for discussion”, doc. 6127/13, 07.02.2013.
- Council, “Cooperation between JHA Agencies 2013 – Activities and Key Findings”, doc. 17498/13, 06.12.2013.
- Commission, “Progress report on the implementation of the Common Approach on EU decentralised agencies”, 10.12.2013.

References

- Council, "Letter from the LT Presidency to the incoming EL Presidency on the future development of the JHA area", doc. 17808/13, 13.12.2013.
- Council, "Cooperation between JHA Agencies: Information Exchange", doc. 5797/14, 28.01.2014.
- Parliament, "Report: Plenary sitting on the mid-term review of the Stockholm Programme (2013/2024(INI))", 04.03.2014.
- Council, "The JHA Agencies Contribution on the new multiannual Justice and Home Affairs programme", doc. 7313/14, 10.03.2014.
- Commission, "An Open and Secure Europe: Making it Happen", COM(2014) 154, 11.03.2014.
- Commission, "The EU Justice Agenda for 2020 – Strengthening Trust, Mobility and Growth within the Union", COM(2014) 144, 11.03.2014.
- Commission, "Commission Staff Working Document on the internal Evaluation of the European Asylum Support Office (Easo)", SWD(2014) 122 final, 27.03.2014.
- Parliament, "Resolution on the mid-term review of the Stockholm Programme", 2013/2024(INI), 02.04.2014.
- European Council, "Conclusions 26/27 June 2014", EUCO 79/14, 27.06.2014
- Council, "Way forward on the future of COSI", doc. 11722/14, 10.07.2014.
- European Council, "Extract from the 26-27 June 2014 European Council Conclusions concerning the area of Freedom, Security and Justice and some related horizontal issues", OJ C-240, 24.07.2014.
- Council, "Commission Staff Working Document the Assessment of the Greek Action Plan on Asylum and Migration Management", doc. 13892/14, 07.10.2014.
- Council, "The future of CATS - Contribution to the evaluation by COREPER", 14207/1/14 REV 1 CATS 152, 07.11.2014.
- Council, "The Greek Government's Road Map on Asylum for 2015 (follow-up to the Revised Greek Action Plan on Asylum and Migration Management)", doc. 6817/15, 11.03.2015.
- Commission, "Progress report on the implementation of the Common Approach on EU decentralized agencies", COM(2015) 179 final, 24.04.2015.
- Commission, "The European Agenda on Security", COM(2015) 185 final, 28.04.2015.
- Parliament, "Resolution on the latest tragedies in the Mediterranean and EU migration and asylum policies", 2015/2660(RSP), 29.04.2015.
- Commission, "A European Agenda on Migration", COM(2015) 240 final, 13.05.2015.
- Commission, "EU Action Plan against migrant smuggling (2015-2020)", COM(2015) 285 final, 27.05.2015.
- Parliament, "Resolution on migration and refugees in Europe", 2015/2833(RSP), 10.09.2015.
- Commission, "Managing the refugee crisis: State of Play of the Implementation of the Priority Actions under the European Agenda on Migration", COM(2015) 510 final, 14.10.2015.
- Council, "Heads of JHA Agencies meeting, 3-4 November 2015", doc. 14779/15, 01.12.2015.
- Parliament, "Resolution on the Special Report of the European Ombudsman in own-initiative inquiry OI/5/2012/BEH-MHZ concerning Frontex", 2014/2215(INI), 02.12.2015.

- Commission, “Progress Report on the Implementation of the hotspots in Greece”, COM(2015) 678 final, 15.12.2015.
- Commission, “Progress Report on the Implementation of the hotspots in Italy”, COM(2015) 679 final, 15.12.2015.
- Commission, “State of Play of Implementation of the Priority Actions under the European Agenda on Migration”, COM(2016) 85 Final, 10.02.2016.
- Commission, “Progress report on the implementation of the hotspot approach in Greece”, COM(2016) 141 final, 04.03.2016.
- Council, “Conclusions on migrant smuggling”, doc. 6995/16, 10.03.2016.
- Commission, “Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe”, COM(2016) 197 final, 06.04.2016.
- Parliament, “Resolution on the situation in the Mediterranean and the need for a holistic EU approach to migration”, 2015/2095(INI), 12.04.2016.
- Commission, “Second report on relocation and resettlement”, COM(2016) 222 final, 12.04.2016.
- Commission, “Fourth report on relocation and resettlement”, COM(2016) 416 final, 15.06.2016.
- Council, “Joint Investigation Teams Practical Guide”, doc. 11501/16, 26.07.2016.
- Council, “Conclusions of the 12th Annual Meeting of National Experts on Joint Investigation Teams (15 - 16 June 2016, The Hague)”, doc. 12887/16, 05.10.2016.
- Council, “EU Policy Cycle: Monitoring of the Operational Action Plans 2016 - Priority "Illegal Immigration", doc. 15212/16, 06.12.2016.
- Commission, “Commission Recommendation of 8.12.2016 addressed to the Member States on the resumption of transfers to Greece under Regulation (EU) No. 604/2013”, C(2016) 8525 final, 08.12.2016.
- Council, “Heads of JHA Agencies meeting, 14 November 2016”, doc. 15580/16, 14.12.2016.
- Council, “EU Justice and Home Affairs Agencies’ cooperation in 2016 - Final report”, doc. 15579/16, 16.12.2016.
- Commission, “Report on the operationalisation of the European Border and Coast Guard”, COM(2017) 42 final, 25.01.2017.
- Council, “Joint Investigation Teams Practical Guide”, doc. 6128/1/17, 14.02.2017.
- Commission, “Report on the operationalisation of the European Border and Coast Guard”, COM(2017) 201 final, 02.03.2017.
- Commission, “Fifth Report on the Progress made in the implementation of the EU-Turkey Statement”, COM(2017) 204 final, 02.03.2017.
- Commission, “Third Report on the operationalization of the European Border and Coast Guard”, COM(2017) 219 final, 02.05.2017.
- Council, “Enhancing the role of COSI”, doc. 8900/17, 12.05.2017 (on file with the author).
- Commission, “Sixth Report on the Progress made in the implementation of the EU-Turkey Statement”, COM(2017) 323 final, 13.06.2017.
- Commission, “Fourth Report on the operationalization of the European Border and Coast Guard”, COM(2017) 325 final, 13.06.2017.
- Council, “Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010 – State of play and guidance for further work”, doc. 10555/17, 27.06.2017.

References

- Commission, “Fifth Report on the operationalisation of the European Border and Coast Guard”, COM(2017) 467 final, 06.09.2017.
- Commission, “The Delivery of the European Agenda on Migration”, COM(2017) 558 final, 27.09.2017.
- Commission, “Report from the Commission to the European Parliament, the European Council and the Council Progress Report on the European Agenda on Migration”, COM(2017) 669 final, 15.11.2017.
- Commission, “Commission Staff Working Document Best practices on the implementation of the hotspot approach”, SWD(2017) 372 final, 15.11.2017.
- Council, “Mid-term review of the JHA strategic guidelines - Information from the Presidency”, doc. 15224/17, 01.12.2017.
- Council, “Reform of the Common European Asylum System and Resettlement”, doc. 15057/1/17, 06.12.2017.
- Commission, “Communication from the Commission to the European Parliament, the European Council and the Council Progress Report on the Implementation of the European Agenda on Migration”, COM(2018) 250 final, 14.03.2018.
- Commission, “Communication on Progress report on the Implementation of the European Agenda on Migration”, COM(2018) 301 final, 16.05.2018.

Frontex

- Frontex, “BORTEC: Study on technical feasibility of establishing a surveillance system (European Surveillance System)”, December 2006.
- Frontex, “Annual Report 2006”, 2006.
- Frontex, “General Report 2008”, 25.04.2008.
- Frontex, “Operational Plan – Joint Operation Poseidon 2010, Land”, 03.03.2010 (on file with the author).
- Frontex, “Draft Operational Plan – Joint Operation Hubble 2010”, 17.05.2010 (on file with the author).
- Frontex, “RABIT Operation 2010 – Operational Plan”, 29.10.2010 (on file with the author).
- Frontex, “RABIT Operation 2010 - Evaluation Report”, 2011, (on file with the author).
- Frontex, “Operational Plan – Joint Operation Poseidon 2011 Sea”, 2011 (on file with the author).
- Frontex, “Joint Operation Hammer 2011”, 2011 (on file with the author).
- Frontex, “Fundamental Rights Strategy”, 31.03.2011.
- Frontex, “Operational Plan – Joint Operation Hammer 2011”, September 2011 (on file with the author).
- Frontex, “Fundamental Rights Action Plan”, 29.09.2011, (on file with the author).
- Frontex, “Operational Plan – Focal Points 2012 Air”, 21.02.2012, (on file with the author).
- Frontex, Management Board Decision No 25/2012 of 28 November 2012 laying down rules on the secondment of national experts with the tasks and powers of the guest officers to Frontex (on file with the author).

- Frontex, “Code of Conduct for joint Return Operations Coordinated by Frontex”, 2013.
- Frontex, “General Report 2012”, 2013.
- Frontex, “Annual Information on the Commitments of the Member States to the European Border Guard Teams and the Technical Equipment Pool: Report 2013”, 11.03.2013.
- Frontex, “Evaluation Report – Joint Operation Focal Points 2013 Air”, 2013 (on file with the author).
- Frontex, “General Report 2013”, 2014.
- Frontex, “Programme of Work 2015”, 2014.
- Frontex, “Joint Operation Pegasus 2014”, 2014 (on file with the author).
- Frontex, “Evaluation Report – Joint Operation Pegasus 2014”, 2014, (on file with the author).
- Frontex, “Annual Information on the Commitments of the Member States to the European Border Guard Teams and the Technical Equipment Pool for 2013”, 2014.
- Frontex Consultative Forum on Fundamental Rights, “Annual Report 2013”, 2014.
- Frontex, “Handbook to the Operational Plan – Joint Maritime Operations”, 2014 (on file with the author).
- Frontex, “Handbook to the Operational Plan – Air Border Joint Operations”, 2014 (on file with the author).
- Frontex, “Handbook to the Operational Plan – Joint Land Borders Operations”, 2014 (on file with the author).
- Frontex, “Handbook to the Operational Plan: Operations – Return Operations Sector”, 2014, (on file with the author).
- Frontex, “General Report 2014”, 2015.
- Frontex, “Joint Operation Alexis I 2015”, 2015, (on file with the author).
- Frontex, “Joint Operation EPN Poseidon Sea 2015”, 2015, (on file with the author).
- Frontex, “Evaluation Report – JO EPN Poseidon Sea 2015”, 2015, (on file with the author).
- Frontex, “Evaluation Report – JO EPN Triton 2015”, 2015, (on file with the author).
- Frontex, “Evaluation Report – LBS JO Flexible Operational Activities 2015”, 2015, (on file with the author).
- Frontex, “Annual Information on the Commitments of the Member States to the European Border Guard Teams and the Technical Equipment Pool for 2014”, 2015.
- Frontex Consultative Forum on Fundamental Rights, “Second Annual Report, 2014”, 2015.
- Frontex, Management Board Decision No 40/2015 adopting recommendations of the Management Board following the evaluation of Frontex (art. 33), 20.10.2015.
- Frontex Consultative Forum on Fundamental Rights, Work Programme for 2016, 16.11.2015.
- Frontex, “General Report 2015”, 2016.
- Frontex, “Annual Information on the Commitments of the Member States to the European Border Guard Teams and the Technical Equipment Pool: Report 2015”, 2016.
- Frontex, “Joint Operation EPN Triton 2016”, 2016 (on file with the author).
- Frontex, “General Annex of the Operational Plan – Joint Maritime Operations”, 2016, (on file with the autor).

References

- Frontex Consultative Forum on Fundamental Rights, “Recommendation by the Consultative Forum to the Executive Director and Management Board of the European Border and Coast Guard Agency (Frontex)”, 10.11.2016, (on file with the author).
- Frontex Management Board Decision 38/2016 of 23 November 2016 adopting the profiles and the overall number of border guards and other relevant staff to be made available to the European Border and Coast Guard teams (on file with the author).
- Frontex, “Annual Information on the Commitments of the Member States to the European Border Guard Teams and the Technical Equipment Pool: Report 2016”, 2017.
- Frontex, “Code of Conduct applicable to all persons participating in Frontex operational activities”, 2017.
- Frontex Consultative Forum on Fundamental Rights, “Fourth Annual Report 2016”, 2017.
- Frontex-Easo 2017 Annual Cooperation Plan, 23.01.2017 (on file with the author).
- Frontex, “Recommendation on Frontex activities at the Hungarian-Serbian Border”, 01.02.2017 (on file with the author).
- Frontex, “Frontex Executive Director to the Chair of the Consultative Forum”, 07.03.2017, (on file with the author).
- Frontex, Management Board Decision 14/2017 on the deployment of Frontex Liaison Officers to Member States, 13.06.2017 (on file with the author).
- Frontex, Management Board Decision 27/2017 laying down rules on the secondment of national experts with the tasks and powers of the members of the teams to Frontex, 27.09.2017 (on file with the author).
- Frontex Consultative Forum on Fundamental Rights, “Fifth Annual Report, 2017”, 2018.
- Frontex, “Annual Information on the Commitments and Deployments of the Member States to the European Border Guard Teams and the Technical Equipment Pool: Report on the Operational Resources in 2017”, 2018.

Easo

- Easo, Decision No 1 of the Management Board laying down rules on the secondment of national experts (SNE) to the European Asylum Support Office (Easo), 25.11.2010 (on file with the author).
- Easo, “Work Programme 2011”, 2011.
- Easo, “Operating Plan for the Deployment of Asylum Support Teams to Greece”, 2011.
- Easo, “Consultative Forum Operational Plan”, 2012.
- Easo, “Special Support Plan Swedish Migration Board”, 2012.
- Easo, “Operating Plan for the Deployment of Asylum Support Teams to Luxembourg”, 2012.
- Easo-Frontex, “Working Arrangement between the European Asylum Support Office (Easo) and the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex)”, 26.09.2012.

- Easo, "Operating Plan - Phase II for the Deployment of Asylum Support Teams to Greece", 2013.
- Easo, "Special Support Plan to Italy", 2013.
- Easo, "Special Support Plan to Bulgaria", 2014.
- Easo, "Special Support Plan to Greece", 13.05.2015.
- Easo, "Hotspot Operating Plan to Greece", Easo/COS/2015/677 EL/1226, 30.09.2015.
- Easo, "Hotspot-Relocation Operating Plan to Italy", Easo/COS/2015/945/IT/2015, December 2015.
- Easo, "Code of Conduct for persons participating in Easo operational support activities", 2016.
- Easo, "Easo Single Programming Document: Multiannual Programming 2017-2019 and Work Programme 2017", 2016.
- Easo, "Special Operating Plan to Greece", 2016.
- Easo, "Operating Plan to Italy", 2016.
- Easo, "Procedure for Internal Coordination of the Implementation of Operating Plans, Special Support Plans and/or Hotspot (Relocation) Operating Plans", 2016 (on file with the author).
- Easo, "Procedure for the Selection of A.I.P. Experts Deployed in Operational Support Activities, 2016 (on file with the author).
- Easo, "Single Programming Document: Multiannual Programming 2017-2019 and Work Programme 2017", 2016.
- Easo, "Hotspot Operating Plan to Greece - Amendment No 2", Easo/COS/2016/391, 01.04.2016.
- Easo, "Consolidated Annual Activity Report of Easo 2016", 2017.
- Easo, "Operating Plan Agreed by Easo and Greece", 13.12.2017.
- Easo, "Operating Plan Agreed by Easo and Italy", 15.12.2017.

Europol

- Europol, "EU Organized Crime Threat Assessment 2006", 2007.
- Europol-Frontex, "Strategic Co-operation Agreement between the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union and the European Police Office", 28.03.2008.
- Europol, "Ten Years of Europol 1999-2009", 2009.
- Europol, "2009 General Report on Europol Activities", 2010.
- Europol, "Operation Phantom", 28.02.2010.
- Europol, "Operation Golf", 30.10.2010.
- Europol, "2010 Annual Activity Report", 2011.
- Europol, "2011 General Report on Europol Activities", 2012.
- Europol, "2012 General Report on Europol Activities", 2013.

References

- Europol-Frontex, "Agreement on Operational Cooperation between the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union ('FRONTEX') and the European Police Office ('EUROPOL')", 04.12.2015.
- Europol, "General Report on Europol Activities 2015", 2016.
- Europol, "Europol Work Programme 2016", 03.02.2016.
- Europol, "Europol Programming Document 2017-2019", 17.01.2017.
- Europol, "European Migrant Smuggling Center – First Year Activity Report", 24.02.2017.
- Europol, "2016 Consolidated Annual Activity Report", 01.05.2017.
- Europol, "Major International Operation Dismantles Migrant Smuggling Network", 26.10.2017.
- Europol, "Europol Review 2016-2017", 23.01.2018.
- Europol, "Two Years of EMSC Activity Report Jan 2017-Jan 2018", 20.04.2018.

Other

- Analytical Fiches. Interinstitutional Working Group on EU Agencies, undated.
- House of Lords, "Prospects for the Tampere Special European Council", 27.07.1999.
- Feasibility Study for the Setting-up of a European Border Police, Final Report, Roma, 2002.
- House of Lords (European Union Committee), "Europol's Role in Fighting Crime", 5th Report of Session 2002-03, 28.01.2003.
- House of Lords (European Union Committee), "Proposals for a European Border Guard", 29th Report of Session 2002-03, 01.07.2003.
- House of Lords (European Union Committee), "Proposed European Institute for Gender Equality", 24th Report of Session 2005-06, 14.02.2006.
- UNISYS, "Study on Conferring Executive Powers on Border Officers Operating at the External Borders of the EU", Brussels, April 2006.
- House of Lords (European Union Committee), "Human rights protection in Europe: the Fundamental Rights Agency", 29th Report of Session 2005-06, 04.04.2006.
- House of Lords (European Union Committee), "Frontex: the EU external borders agency", 9th Report of Session 2007-08, 05.03.2008.
- House of Lords (European Union Committee), "EUROPOL: coordinating the fight against serious and organised crime", 29th Report of Session 2007-08, 12.11.2008.
- COWI A/S, "External evaluation of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union", January 2009.
- Euréal, "Meta-Study on Decentralized Agencies: Cross-Cutting Analysis of Evaluation Findings", September 2008; Ramboll, "Evaluation of the EU decentralised agencies in 2009", December 2009.
- Ramboll, "Evaluation of the EU decentralised agencies in 2009", December 2009.

- Human Rights Watch, “The EU’s Dirty Hands Frontex Involvement in Ill-Treatment of Migrant Detainees in Greece”, 2011.
- RAND Europe, “Evaluation of the implementation of the Europol Council Decision and of Europol’s activities”, 2012.
- Commission, “Study on the Feasibility and legal and practical implications of establishing a mechanism for the joint processing of asylum applications on the territory of the EU”, 13.02.2013.
- Council of Europe (Parliamentary Assembly), “Frontex: human rights responsibilities”, Resolution 1932 (2013), 08.04.2013.
- CRÉPEAU, François, “Report by the Special Rapporteur on the human rights of migrants. Regional study: management of the external borders of the European Union and its impact on the human rights of migrants”, Human Rights Council Twenty-third session UN General Assembly, A/HRC/23/46, 24.04.2013.
- CRÉPEAU, François, “Report by the Special Rapporteur on the human rights of migrants Mission to Italy (29 September–8 October 2012)”, Human Rights Council Twenty-third session UN General Assembly, A/HRC/23/46/Add.3, 30.04.2013.
- House of Lords (European Union Committee), “Strategic guidelines for the EU’s next Justice and Home Affairs programme: steady as she goes”, 13th Report of Session 203-14, 14.04.2014.
- European Migration Network, “A Descriptive Analysis of the Impacts of the Stockholm Programme 2010-2013”, May 2014.
- Unisys, “Study on the feasibility of the creation of a European System of Border Guards to control the external borders of the Union”, 16.06.2014.
- Explanatory note on the “Hotspot” approach, 15.07.2015.
- Ramboll and EurAsylum, “External Evaluation of the Agency under Art. 33 of the Frontex Regulation”, 28.07.2015.
- Ernst & Young, “Independent External Evaluation of Easo’s activities covering the period from February 2011 to June 2014”, 2015.
- SOP Applicable to Italian Hotspots, 2016.
- Amnesty International, “Hotspot Italy How EU’s Flagship Approach Leads to Violations of Refugee and Migrant Rights”, 2016.
- UNHCR, “Building on the Lessons Learned to Make the Relocation Schemes Work More Effectively”, 2016.
- Asylum Information Database, “Country Report: Greece”, 2016.
- Asylum Information Database, “Country Report: Italy”, 2016.
- European Council for Refugees and Exiles, “The implementation of the hotspots in Italy and Greece”, 2016.
- Eurostat, “Asylum in the EU Member States Record number of over 1.2 million first time asylum seekers registered in 2015. Syrians, Afghans and Iraqis: top citizenships”, 04.03.2016.
- European Council on Refugees and Exiles and the Advice on Individual Rights in Europe Center, “With Greece: Recommendations for refugee protection”, June 2016.
- European Council on Refugees and Exiles, “Comments on the Commission Proposal for a Regulation on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010 COM(2016) 271”, July 2016.

References

- German Bundestag (European Affairs Directorate Research Section for European Affairs), “Consequences of Brexit for the realm of justice and home affairs Scope for future EU cooperation with the United Kingdom”, PE 6-3000 - 115/16, 18.08.2016.
- Oxfam, “Hotspot, Rights Denied”, *Oxfam Briefing Paper*, 19.05.2016; SCHALLA, Mara, “Observations at the Campsite of Moria on Lesbos, October 22nd and 24th, 2015”, 06.11.2015.
- Deloitte, “How do EU agencies and other bodies contribute to the Europe 2020 Strategy and to the Juncker Commission Agenda?”, November 2016.
- House of Commons (European Scrutiny Committee), “Europol: Opt-in Debate”, Twenty-first Report of Session 2016-17, 29.11.2016.
- European Union Agency for Fundamental Rights, “Opinion of the European Union Agency for Fundamental Rights on fundamental rights in the ‘hotspots’ set up in Greece and Italy”, Opinion 5/2016, 29.11.2016.
- House of Lords (European Union Committee), “Brexit: future UK-EU security and police cooperation”, 16.12.2016.
- UNHCR, “Comments on the European Commission proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum – COM (2016) 271”, December 2016.
- European Court of Auditors, “EU response to the refugee crisis: the ‘hotspot’ approach”, 6, 2017.
- House of Commons (European Scrutiny Committee), “Europol: Agreement with Denmark”, Thirty-second Report of Session 2016–17, 28.02.2017.
- European Centre for Constitutional and Human Rights, “Easo’s influence on inadmissibility decisions exceeds the agency’s competence and disregards fundamental rights”, April 2017.
- Human Rights Council, “Report of the Special Rapporteur on the human rights of migrants on his mission to Greece”, A/HRC/35/25/Add.2, 24.04.2017.
- Danish Refugee Council, “Fundamental Rights and the EU Hotspot Approach”, October 2017.
- European Parliamentary Research Service, “EU asylum, borders and external cooperation on migration: recent developments”, PE 621.878, May 2018.
- European Migration Network, “Annual Report on Migration and Asylum 2017”, 15.05.2018.

