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The Proposal for a European Border and Coast Guard: evolution or revolution in external border management?

Study for the LIBE Committee



DIRECTORATE GENERAL FOR INTERNAL POLICIES

**POLICY DEPARTMENT C: CITIZENS' RIGHTS AND
CONSTITUTIONAL AFFAIRS**

CIVIL LIBERTIES, JUSTICE AND HOME AFFAIRS

The proposal for a European Border and Coast Guard: evolution or revolution in external border management?

STUDY

Abstract

This study, which critically examines the Commission proposal for the establishment of a European Border and Coast Guard, was commissioned by the **European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs** at the request of the LIBE Committee. The proposal significantly **reinforces Frontex's regulatory and operational tasks and provides the Agency** with an additional supervisory role. The proposal does not amend the fundamental premise of operational cooperation at the external borders, reserving executive enforcement powers to the Member States. Nonetheless, the concept of shared responsibility in the absence of shared accountability increases existing fundamental rights concerns.

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To contact the Policy Department for Citizen's Rights and Constitutional Affairs or to subscribe to its newsletter, please write to:

poldep-citizens@europarl.europa.eu

Research Administrator Responsible

Darren NEVILLE

Policy Department C: Citizens' Rights and Constitutional Affairs

European Parliament

B-1047 Brussels

E-mail: poldep-citizens@europarl.europa.eu

AUTHOR(S)

Dr. Jorrit Rijpma, associate Professor of EU Law, Europa Institute, Leiden Law School. The author would like to acknowledge Melanie Fink and Maarten Schippers for their research assistance. He also would like to thank a number of national and EU officials for their insights and comments while writing this paper.

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LIST OF ABBREVIATIONS

CFR	Charter of Fundamental Rights of the European Union
CFSP	Common Foreign and Security Policy
CJEU	Court of Justice of the European Union
EASO	European Asylum Support Office
EBCG	European Border and Coast Guard
EBCGA	European Border and Coast Guard Agency
EBF	External Borders Fund
EBGT	European Border Guard Team
ECHR	European Convention on Human Rights
EDPS	European Data Protection Supervisor
EFCA	European Fisheries Control Agency
EMSA	European Maritime Safety Agency
FRO	Fundamental Rights Officer
ISF	Internal Security Fund
MMST	Migration Management Support Team
RABIT	Rapid Border Intervention Team
SAR	Search And Rescue
SIS	Schengen Information System
VIS	Visa Information System

EXECUTIVE SUMMARY

The Commission proposal for a European Border and Coast Guard Authority brings together a reinforced (and renamed) Frontex – the European Border and Coast Guard Agency (EBCGA) – **and the Member States’ border guard authorities under the umbrella of a European Border and Coast Guard (EBCG)**, making them jointly responsible for the management of the external borders. The proposal defines for the first time the notion of European integrated border management. It significantly broadens the scope of the new Agency to include internal security and measures within the area of free movement. The **proposal reinforces both Frontex’s regulatory and operational** role. In addition, it gives the Agency a **supervisory** role, placing it in charge of Vulnerability Assessments.

As such, the EBCG proposal is an important next step in the progressive Europeanisation of external border management. That said, the proposal is not a revolutionary leap forwards, as it preserves the fundamental premise that the Agency neither has its own border guards nor powers of command and control over national border guards. Still, a proposal of this complexity, with substantial financial implications and an obvious impact on fundamental rights, deserves careful consideration. The proposal does not address some key questions as regards accountability for operational activities at the external borders and is rather likely to add to the current unclear division of responsibilities. There is, moreover, a danger of placing unrealistic expectations on the Agency. It seems contradictory that Member States would be willing to accept more binding obligations under this proposal, while nothing prevents them from furnishing the Agency with the necessary tools now. Likewise, it would be naïve to think that greater powers and a new name for Frontex might suddenly remedy structural flaws **in some Member States’ external border management** systems.

Although the current crisis may have exposed shortcomings in **Frontex’s current legal** framework, the proposal does not constitute a genuine emergency measure designed to tackle a short-term problem. Therefore, if this proposal is to stand the test of time as the regulatory framework for external border management, it is important to carefully consider the structural implications of the rules currently being considered for adoption.

With this in mind, this analysis highlights some of the central challenges in the new EBCG framework and provides some recommendations on how these might be addressed.

Supervisory role

The **Agency’s** supervisory role also entails drawing up Vulnerability Assessments to identify operational weaknesses in external border management. In this regard, it is important to:

- **Clarify the relationship between the Schengen Evaluation Mechanism and the Vulnerability Assessment model.**
- **Ensure that the Agency’s supervisory role does not prejudice working relations in the field of operational cooperation.**
- **Introduce a fundamental rights component into the Assessments.**

Regulatory role

Under the proposal, Member States would be obliged to provide the Agency with relevant information for its risk analysis.

- **A more specific explanation of what constitutes relevant information could help to clarify the extent of this obligation.**
- **If the Agency were to be given access to European databases, this would have to be under strict conditions, taking into account relevant data protection legislation.**

Operational role

Availability of human and technical resources

The proposal aims to remedy the current lack of human and technical resources. As such, in emergency situations, Member States would be required to provide border guards, with no possibility, as is currently the case, to invoke an emergency situation requiring their deployment at home. Similar, yet weaker provisions have been included as regards the obligation to make available technical equipment. The Agency will be allowed to acquire its own equipment.

In addition, the Commission proposal provides for a right to intervene where a Member State does not follow up on the recommendations from the Vulnerability Assessment or in a situation where insufficient external border controls would put the overall functioning of the Schengen area at risk. This latter provision has, however, been amended in the Council text, which provides for a similar mechanism for reinstatement of the internal borders as under article 26 of the Schengen Borders Code.

- **The unqualified obligation to make border guards available for rapid border interventions and the 'right to intervene' under the Commission's proposal arguably contravene the Member States' ultimate responsibility for internal security under the Treaties (Article 4(2) TEU and Article 72 TFEU).**

Expansion of tasks and powers of guest officers

Guest officers' powers may be considerably broadened by the host Member State, allowing these officers to act on its behalf. Guest officers would also have automatic access to European databases. The proposal should:

- **Clearly state that guest officers act at all times within the scope of EU law and hence within the scope of the Charter of Fundamental Rights.**
- **Clearly state that, to the extent that national powers are delegated to guest officers, these officers should be considered to act as agents of the host Member State for the purpose of determining international responsibility.**

Hotspot approach

The proposal gives the Agency a key role in the hotspot approach. This is problematic as it seems to contradict the multi-agency purpose and nature of the hotspot approach, risking a one-sided focus on border control. The Commission is thus much better placed to coordinate the activities of the Migration Management Support Teams.

- **The hotspot approach and its legal and operational framework require prior definition, preferably in a separate legal framework, before making the Agency responsible for its functioning.**

- **If the Agency were to take primary responsibility for the hotspots, a reference to international protection should be included in the concept of integrated border management.**

Return cooperation

The Agency would gain significant operational powers in the area of return with three new on-call lists of Member State officials: forced return monitors, forced return experts and return specialists. The proposal provides for three types of return operations: return from a combination of Member States organised and carried out by the Member States and coordinated by Frontex; collecting return operations where the means of transport and return escorts are made available by a third country; and mixed return operations, where a number of returnees are transported from one third country to another.

There are a number of important concerns as regards the provisions on return that need to be addressed. It is important to:

- **Detail the tasks, powers and responsibilities of these officials. Attention should be paid to the specific legal regime applicable on board aircrafts.**
- **Extend reporting obligations to return operations and include a role for the Agency's Fundamental Rights Officer.**
- **Allow for collecting return operations only if the third country concerned is a party to the European Convention on Human Rights (ECHR).**
- **Allow for mixed return operations only if there are sufficient guarantees that the third country's return decision and procedures comply with EU fundamental rights standards.**

Information exchange and data protection

The proposal would transform the Agency into the central hub of information exchange of the EBCG, expanding its powers to collect and transmit data not only on people suspected of cross-border crime, but on irregular third country nationals. This requires sufficient data protection rules. As pointed out by the European Data Protection Supervisor (EDPS), the proposal has important flaws in this regard and requires clarification. The proposal should:

- **Clearly distinguish between the different purposes for which data is processed, because migration management and criminal law enforcement are covered by separate legal regimes.**
- **Exhaustively list the purposes for which data may be processed.**
- **Indicate not only the categories of people whose data may be processed, but also specify which data may be processed.**
- **Clearly distinguish between the transfer of data to third parties within and outside the European Union.**

Operational cooperation with third countries

The proposal would allow for joint operation activity on the territory of third countries. Cooperation with third countries should not allow the Agency and EU Member States to lower EU standards. As such:

- **Cooperation should be limited to third countries that are party to the ECHR and the Geneva Convention and its Additional Protocol.**

- **The safeguard whereby liaison officers may only be posted to countries with human rights-compliant border practices should be reintroduced.**

Coastguard

The provisions on the role of the Agency and the Member States in a European Coast Guard are the least developed part of the proposal and are largely limited to an obligation to exchange information. It is therefore important to clarify the extent to which this may involve the processing of personal data. Furthermore, it is important:

- **To clarify the relationship between the military and the Agency in maritime border surveillance operations and any other Member State military involvement in integrated border management.**
- **To include Search and Rescue provisions to allow the Agency to play a more active SAR role without affecting the international SAR framework.**

Constitutional considerations

It is submitted that, under the current rules on delegation of powers to Union bodies, it is not possible to delegate genuine executive powers to the EBCGA. The Commission proposal respects these limits. Nonetheless, the removal of the 'emergency situation' exception for the deployment of human and technical resources, as well as the 'right to intervene', are at odds with the Treaty principle of ultimate responsibility of the Member States for their own internal security. Moreover:

- **Careful consideration should be given to which decisions are politically sensitive and should be reserved for the Management Board and which are more technical and operational and should be left to the Executive Director.**

Fundamental rights considerations

The significant reinforcement of the tasks of the Agency without the transfer of genuine executive powers to the Agency (for the reasons set out above), as well as the explicit affirmation of a shared responsibility for European integrated border management, will only exacerbate the existing conundrum as regards shared accountability.

While the introduction of an individual complaints mechanism is an important positive development, the Commission's assertion that the mere existence of such a mechanism makes the Agency's actions fundamental rights-compliant is clearly exaggerated. Indeed, the proposed fundamental rights mechanisms require further refinement:

- **The complaints procedure provisions must lay down rules on format, content and deadlines or should empower the Agency to set such rules.**
- **The Executive Director's obligation to suspend or terminate operations in the event of fundamental rights violations should be further detailed and should provide for a role for the FRO and take into account the results of relevant monitoring mechanisms.**
- **The obligation for the Agency to set up a fundamental rights monitoring mechanism – with a broad review of fundamental rights at the external border – should be reintroduced.**
- **The FRO's obligation to report to the Consultative Forum should be reintroduced.**

1. INTRODUCTION: CONTEXT OF THE PROPOSAL

Common rules for the control of the external borders have always formed the *conditio sine qua non* for the lifting of checks at the internal borders.¹ The current refugee crisis and elevated terrorist threat have put the Schengen system under significant pressure. Failure to adequately guard the external borders and manage refugee flows has resulted in the reinstatement of controls at the internal borders of a number of Member States. It comes as no surprise that, **within this context, 'reflections' on the shared management of the European border as announced in the Commission's European Agenda on Migration resulted in a concrete proposal for the establishment of a European Border and Coast Guard in December 2015.**²

So far, responsibility for the implementation of the rules of the Schengen Borders Code has remained with the individual Schengen countries in charge of guarding their respective stretch of the external border, albeit in the interest of the area as a whole.³ The Schengen Borders Code exhaustively regulates checks at the external borders, but provides little detail on border surveillance and leaves the national organisation of border management in the hands of the Member States.⁴ **They are required to deploy 'appropriate staff and resources' to ensure 'an efficient, high and uniform level of control at their external borders'.**⁵ This means that some of them have faced a disproportionate burden due to the length of their borders or their geographical location on migratory routes into the EU.

Article 16 of the Schengen Borders Code provides that Member States shall assist each **other and maintain 'close and constant cooperation' for an effective implementation** of border control. In 2004, the Regulation establishing the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex) was adopted.⁶ Frontex was established both as a solidarity instrument, and as a means of promoting a more efficient and integrated approach to border management. In the past decade, it has developed into a key actor in terms of operational cooperation, risk analysis, training and information exchange. Its tasks and resources have expanded in line with the consistent call for a reinforcement of the external borders of the European Union at political level, however always resisting a true centralisation and transfer of executive power.⁷

Effective management **of the external borders has become central to the EU's response to the current crisis.**⁸ At so-called hotspots the 'economic' migrant and potential terrorist

¹ Case C-378/97, *Wijsenbeek* [1999] ECR-I 6207, para. 42.

² COM(2015) 240 final, European Agenda on Migration, 13 May 2015, p. 17. COM(2015) 671 final, Proposal for a **Regulation on the European Border and Coast Guard (...), 15 December 2015.**

³ Recital 14, Regulation (EC) No 562/2006 of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ 2006, L 105/1.

⁴ On the basis of Article 12(5) Schengen Borders Code, the Commission may adopt delegated acts concerning additional measures on border surveillance. See also Regulation (EU) No 656/2014 of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by [Frontex], OJ 2014, L 189/93. **The Commission in the Agenda on Migration referred in this regard to a 'patchwork of sectorial documents and instruments', COM(2015) 240 final, p. 11.**

⁵ Article 14, Schengen Borders Code.

⁶ Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ 2004, L 349/1 ('Frontex Regulation').

⁷ See in more detail: J. Rijpma, 'Frontex and the European System of Border Guards: The Future of European Border Management', in M. Fletcher *et al.* (eds), *The European Union as an Area of Freedom, Security and Justice*, Routledge, London (forthcoming 2016).

⁸ COM(2016) 120 final, Back to Schengen - A Roadmap, 4 March 2016, p. 4 ff.

should be separated from the 'genuine' asylum seeker. However, this has proven difficult in view of some Member States' inability to effectively guard their external borders, their reluctance to request assistance from Frontex and the failure of other Member States to furnish Frontex with the required human and technical resources. The Commission's proposal would bring together a reinforced (and renamed) Frontex - the European Border and Coast Guard Agency (EBCGA) - and the Member States' border guard authorities under the umbrella of a European Border and Coast Guard (EBCG), making them jointly responsible for the management of the external borders.

The establishment of an integrated system for the management of the external borders and the setting up of a European System of Border Guards has been under discussion ever since the Laeken Declaration of 2001 called upon the Council and the Commission to start work on arrangements for the cooperation between Member States' border guard authorities.⁹ In Section 2, therefore, a brief overview of the development of Frontex's powers will be given in order to situate the current proposal within the progressive establishment of such a system. Section 3 will examine the key changes made by the proposal. Section 4 will discuss the constitutional limits within which an EBCG may be established. Section 5 will address the fundamental rights challenges posed by the proposal. The concluding remarks will question the urgency with which the proposal is presented and asks whether it is realistic to expect the new Agency to be fully operational as of August 2016.

Although the strong emphasis on border management during a refugee crisis can be criticised, this analysis will limit itself to an assessment of the specific Commission proposal, as amended by the Council.¹⁰ It will only take into account broader questions of refugee law to the extent that this is relevant. It will evaluate whether the proposal constitutes an answer to the identified limits to Frontex's mandate and evaluate whether it indeed constitutes "a decisive step" towards an integrated management system for external borders.¹¹

⁹ European Council Conclusions, Laeken, 14 and 15 December 2001, point 42.

¹⁰ Where reference is made to the Council text, this is the consolidated text as put together by S. Peers on the basis of Council documents 6359/1/16, 6884/16, 6652/16 and 6744/16: Statewatch Analysis, 'The EU Border Guard takes shape' (13 March 2016), <http://www.statewatch.org/analyses/no-285-eu-border-guard.pdf>, last accessed 21 March 2016.

¹¹ COM(2015) 673 final, A European Border and Coast Guard and effective management of Europe's external Borders, 15 December 2015, p. 3.

2. DEVELOPMENT OF FRONTEX'S POWERS

Frontex's tasks are listed in Article 2(1) of its founding regulation. These have been expanded by amending regulations in 2007 and 2011, as well as other subsequent legislative measures. Frontex can currently be characterised as an agency with a dual character.¹² On the one hand, it fulfils the role of a classic EU regulatory agency, assisting in the implementation of a common policy through the provision of technical and informational support, such as the drawing up of risk analyses, following up on technical research and developing common training programmes. These tasks, however, are at least **in part carried out as a function of Frontex's second role, that of an operational agency entrusted with the coordination of joint operational activity between Member States' national border guards. Successive amendments and additions to Frontex's legal framework** have reinforced both roles. It is, however, important to stress that Frontex does not have law enforcement powers independent of the Member States.

The 2007 and 2011 amendments

The first amendment to Frontex's founding regulation was adopted in 2007. It introduced a **rapid response mechanism for situations of "urgent and exceptional pressure"**, characterised by the arrival of large numbers of third country nationals trying to cross the external borders illegally.¹³ Under this mechanism, emergency response teams consisting of pre-selected national border guards (rapid border intervention team pool) can be deployed at the request of a Member State. In principle, Member States are under an obligation to make the border guards available, thereby creating an on-call contingent of border guards at the disposal of the Agency.

Even more important, the 2007 Regulation explicitly defined the competences of national border guards when deployed in joint operational activity outside their own Member State ("**guest officers**"). They have all powers necessary to perform the tasks under the Schengen Borders Code, but do so under instructions from the host Member State.¹⁴

In 2011, a second amending regulation **strengthened Frontex's operational powers.**¹⁵ The Rapid Border Intervention Teams (RABITs) were renamed European Border Guard Teams (EBGTs). The Teams can be deployed both in rapid border intervention, as well as in normal joint operational activity. Member States maintain a pool of national border guards that comply with the profile and overall number established by the Agency.¹⁶ In addition, the possibility was introduced for national border guards that are seconded to the Agency to be included in the EBGTs, reinforcing the character of these teams as a nascent European Corps of Border Guards.¹⁷

¹² J. Rijpma, 'Hybrid agencification in the Area of Freedom, Security and Justice and its inherent tensions: the case of Frontex', in M Busuioc *et al.* (eds), *The agency phenomenon in the European Union: Emergence, institutionalisation and everyday decision-making*, Manchester University Press, Manchester, 2012.

¹³ Chapter I, Regulation (EC) No 863/2007 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 2007, L 199/30 ('2007 Regulation').

¹⁴ Article 10(1), Frontex Regulation

¹⁵ Regulation (EU) No 1168/2011 of 25 October 2011 amending Council Regulation (EC) No 2007/2004 [...], OJ 2011, L 301/1 ('2011 Regulation').

¹⁶ Article 3b, Frontex Regulation.

¹⁷ Article 3b(3), Frontex Regulation.

The “exceptional situation” which allows a Member State to refuse deployment of their border guards to the Agency continued to apply also in relation to normal joint operational activity, as well as to border guards seconded to the Agency. Moreover, the deployment of guest officers for normal joint operational activity is based on annual agreements. During the refugee crisis this meant that Frontex, in the absence of the activation of the Rapid Border Intervention Mechanism, was dependent on voluntary Member State contributions.

The European Border Surveillance System

In 2013, the Regulation for the establishment of a European Border Surveillance System (Eurosur) was adopted.¹⁸ More than a technological system, Eurosur is an organisational model, in which Frontex takes centre stage.¹⁹ The Eurosur Regulation strengthened **Frontex’s role in risk analysis, making it the central hub in a system of information exchange between national border guard authorities.** The Agency is responsible for the functioning of the system and uses its own information, as well as the input from the national contact points, to draw up a European situational picture, as well as a **“Common Pre-Frontier Intelligence Picture”**.²⁰ On the basis of the situational pictures, the Agency attributes impact levels (low, medium, and high) to the external land and sea border sections.²¹ Depending on the impact level, Member States are required to adjust their **“reaction capability” accordingly, where needed with the assistance of Frontex.**²²

The Schengen Governance Package

Originally Schengen evaluations, which scrutinise the implementation of the Schengen *acquis* by the Member States, were carried out by the Schengen Evaluation Committee, a **Council Working Party made up of Member States’ representatives reporting to the Council.**²³ It can be seen as a clear remnant of the intergovernmental origins of Schengen cooperation. The system was criticised for lacking consistency and effectiveness.²⁴ As early as 2008, the Commission hinted at Frontex’s involvement in the evaluation process owing to its **“independent status, its expertise on external border control and surveillance and its activities on training and risk analysis”**.²⁵

A large influx of irregular migrants following the Arab Spring in 2011 and consequent **tensions between France and Italy resulted in the Commission’s proposal for the so-called Schengen Governance Package.**²⁶ The package consisted of two proposals for regulations, **one strengthening Schengen’s supervisory mechanism and one amending the Schengen Borders Code’s rules on temporarily reinstating checks at the internal borders.**²⁷

¹⁸ Regulation (EU) No 1052/2013 of 22 October 2013 establishing the European Border Surveillance System (Eurosur), OJ 2013, L 295/11 (‘Eurosur Regulation’).

¹⁹ J. Rijpma & M. Vermeulen, ‘EUROSUR: saving lives or building borders?’ (2015) 24 *European Security* 1.

²⁰ Articles 7, 10 and 11, Eurosur Regulation.

²¹ Article 15, Eurosur Regulation.

²² Article 16, Eurosur Regulation.

²³ The Schengen Evaluation Committee was originally set up by the Decision of the Schengen Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen (SCH/ Com-ex (98) 26 def.

²⁴ G. Callovi, ‘Securing External Frontiers in a Union of 25’ (2004) Migration Policy Institute, Policy Brief No. 5.

²⁵ COM(2008) 67 final, Report on the evaluation and future development of the FRONTEX Agency, 13 February 2008, p. 8.

²⁶ J. Rijpma, ‘Institutions and Agencies: Government and Governance after Lisbon’, in D. Acosta Arcaza & C. Murphy (eds), *EU Security and Justice Law after Lisbon and Stockholm*, Hart Publishing, Oxford, 2014, p. 60 ff.

²⁷ COM(2011) 561 final, Schengen Governance – Strengthening the area without internal border controls; COM (2011) 560 final, Proposal for a regulation amending Regulation (EC) 562/2006 in order to provide for common rules on the temporary reintroduction of border control at internal borders in exceptional circumstances;

The Council replaced the Schengen Evaluation Committee with oversight by the European Commission.²⁸ Frontex was given an important supporting role. It produces yearly risk analyses that include recommendations on the priorities for both announced and un-announced inspections.²⁹ Evaluation reports of inspections are drawn up under the joint responsibility of the Commission and national experts. They are adopted by the Commission under comitology.³⁰ Frontex may be invited to on-site visits and may be asked for its input on the standard questionnaire, but does not play a role in the formulation of recommendations and the follow-up.³¹

Where there are serious deficiencies reported, the Commission may, on the basis of the amended Schengen Borders Code, recommend that the Member State in question requests deployment of a Rapid Intervention Team or sends its strategic plans, including information on the deployment of personnel and equipment, for an opinion to Frontex.³²

Finally, under Article 26 of the amended Schengen Borders Code, the Council may recommend the reintroduction of border controls for a maximum of two years **“where exceptional circumstances put the overall functioning of the area without internal border control at risk”, which may be demonstrated by a Schengen Evaluation Report.** In this situation, the Commission, before making a proposal for a Council Recommendation, may ask Member States, Frontex and other EU agencies such as Europol for more information and conduct on-site visits with their experts.³³

The European Union External Borders Fund (EBF) was originally set up in 2007 as part of the Solidarity and Management of Migration Flows Framework Programme.³⁴ It has now been replaced with the Instrument for Financial Support for External Borders and Visa (ISF-borders) under the new Internal Security Fund.³⁵ As was the case under the EBF, Frontex plays an important role in supporting the Commission in the administration of the fund. Money is allocated in part on the basis of the threat level at external border sections, which is **determined by the Commission in accordance with Frontex’s risk analysis** report and in consultation with the Agency.³⁶ **The Commission also consults Frontex on Member States’ draft multi-annual programmes.**³⁷ Together with the Commission, Frontex also addresses the findings from reports adopted under the Schengen Evaluation Mechanism in the context of the adjustment of national programmes.³⁸

COM(2011) 559 final, Proposal for a regulation on the establishment of an evaluation and monitoring mechanism to verify the application of the Schengen *acquis* (all dated 16 September 2011).

²⁸ Council Regulation (EU) No 1053/2013 of 7 October 2013 establishing an evaluation and monitoring mechanism to verify the application of the Schengen *acquis* and repealing the Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen, OJ 2013, L 295/27.

²⁹ Article 7, Council Regulation (EU) No 1053/2013, *supra* note 28.

³⁰ Article 14, *ibid.*

³¹ Articles 9(1) and 10(5), *ibid.*

³² Article 19a(3), Schengen Borders Code.

³³ Article 26a, *ibid.*

³⁴ Decision No 574/2007/EC of 23 May 2007 establishing the External Borders Fund for the period 2007 to 2013 as part of the General programme ‘Solidarity and Management of Migration Flows’, OJ 2007, L 144/22 (‘EBF’).

³⁵ Regulation (EU) No 515/2014 of 16 April 2014 establishing, as part of the Internal Security Fund, the instrument for financial support for external borders and visa and repealing Decision No 574/2007/EC (‘ISF-borders’) OJ L 150/143.

³⁶ Article 8, ISF-Borders.

³⁷ Article 10, ISF-Borders.

³⁸ Article 12, ISF Borders.

3. THE PROPOSAL FOR A EUROPEAN BORDER AND COAST GUARD

The proposal unites the European Border and Coast Guard Agency and the Member States' border guard authorities under the umbrella of a European Border and Coast Guard, whose task is not only to *manage migration* effectively but also to provide for a high level of *internal security*. This dual goal is also reflected in the definition of a European integrated border management system, which for the first time is defined in EU legislation.³⁹ The Agency and the Member State authorities carry a shared responsibility for the implementation of European integrated border management. It is, however, the Agency that will adopt an operational and technical strategy, with which the national strategies have to be coherent, implying a certain hierarchy within the network.⁴⁰

The broad nature of a European integrated border management system effectively widens the scope of the Agency's border control activities to the prevention of cross-border crime, as well as to measures *within* the area of free movement, thus broadening the substantive as well as territorial scope of its powers. However, the Agency's tasks as listed in Article 7 of the proposal do not reflect this expansion. The proposal significantly reinforces Frontex's existing roles in the management of migration, but is silent as to its concrete tasks in the field of internal security or within the area of free movement.

An important addition to the Agency's regulatory and operational role is the introduction of a new and independent supervisory role.

The proposal should clearly indicate the Agency's responsibilities as regards the detection, prevention and investigation of cross-border crime.

3.1. Introduction of a supervisory role

The main innovation of the proposal is the introduction of an independent supervisory role for the Agency. On the basis of a risk analysis, the Agency may post liaison officers to a Member State in order to monitor the management of the external border in that Member State.⁴¹ **The liaison officer's final report will feed into the so-called Vulnerability Assessment Model.**⁴² This model will be adopted on the basis of a decision of the Management Board and will be distinct from, and complementary to, the Schengen Evaluation Mechanism.⁴³ The Vulnerability Assessment will, on a continuous basis, identify operational weaknesses in **Member States' border management systems and therefore be capable of responding more rapidly to changing circumstance.** Nonetheless, there is a possible overlap and hence need for coordination. The portrayal of the Schengen Evaluation Mechanism as political, as **opposed to the purely "operational" Vulnerability Assessment**, seems to ignore the political consequences that possible Vulnerability Assessment findings may have.

In case of identified vulnerabilities, the Executive Director will issue a recommendation on how to address these, including a timeline within which to do so. If the Member State in question does not comply, the Management Board shall adopt a binding decision instructing

³⁹ Article 4, COM(2015) 671 final.

⁴⁰ De Bruycker, 'Solidarity as a sovereignty-reducing penalty for failing to meet responsibility in the European Border and Coast Guard', p. 13, <http://odysseus-network.eu/wp-content/uploads/2015/09/Searching-for-Solidarity-Short-Papers.pdf>, last accessed 21 March 2016.

⁴¹ Article 11, COM(2015) 671 final.

⁴² Ibid.

⁴³ Article 12, COM(2015) 671 final. Cf. Council Regulation (EU) No 1053/2013, *supra* note 28.

the Member State to remedy the vulnerabilities. Continued non-compliance may lead to further action, as described below. The introduction of a supervisory role, including the posting of liaison officers, implies the introduction of a hierarchy in the relationship between the Agency and its national counterparts. Care should be taken that this does not prejudice the Agency's working relations in the field of operational cooperation, which is based on equality and mutual trust.

The proposal should clarify the relationship between the Schengen Evaluation Mechanism and the Vulnerability Assessment Model.

The Agency's supervisory role should not be allowed to prejudice the Agency's working relations in the field of operational cooperation.

3.2. Expansion of regulatory tasks

The Agency's role in risk assessment is reinforced with the creation of a monitoring and risk analysis centre and the task to develop systems that allow for the exchange of information, in addition to the already existing Eurosur system. Member States will be under an obligation to provide the Agency with all necessary information. The proposal does not provide for access for the Agency to European databases, such as the Schengen Information System (SIS), the Visa Information System (VIS) or Eurodac, with the exception of liaison officers posted to a Member State.⁴⁴ This has, however, been deleted by the Council and was also advised against by the European Data Protection Supervisor (EDPS) in the absence of an operational role for the liaison officer.⁴⁵ Although there does not seem to be an immediate need for such access, it is recalled that both Eurojust and Europol have been granted access to SIS, VIS and Eurodac within the limits of their mandate and under strict conditions. It is advised that this point is taken into account also in the drafting of the regulation providing for an Entry-Exit System.⁴⁶

The obligation for Member States to furnish the Agency with relevant information for its risk analysis will contribute to the accuracy thereof. The Agency will, however, remain dependent on Member States' compliance with this provision. A more specific explanation of what constitutes relevant information could help to clarify the extent of this obligation.

If access to European databases such as SIS, VIS, Eurodac and the future Entry-Exit System were to be contemplated, this would have to be under strict conditions, taking into account relevant data protection legislation.

3.3. Expansion of operational tasks

3.3.1. Availability of technical and human resources

Under the current framework, Member States can only refuse to deploy guest officers if they are confronted with 'an emergency situation substantially affecting the discharge of national tasks'.⁴⁷ Moreover, as regards the obligation to provide guest officers in the

⁴⁴ Article 11(4), COM(2015) 671 final.

⁴⁵ EDPS Opinion 02/2016, Recommendations on the proposed European Border and Coast Guard Regulation (18 March 2016), p. 14.

⁴⁶ The publication of a revised proposal on Smart Borders is expected shortly.

⁴⁷ Article 3b(2), Frontex Regulation

context of normal joint operations, this obligation is limited by the annual agreements.⁴⁸ The Commission proposal has therefore put forward two important amendments.

First, it would eliminate the 'emergency situation' exception and create an unconditional obligation to make border guards available within the context of a rapid border intervention. In this respect, the proposal explicitly refers to the creation of a rapid reserve pool that would be a "standing corps placed at the immediate disposal of the agency".⁴⁹

Second, whilst the proposal maintains the 'emergency situation' exception for the deployment of guest officers outside the context of a rapid border intervention, it provides that, where necessary, guest officers from the rapid reserve pool shall be immediately complemented with additional guest officers from the national pools.⁵⁰

In the Council, these provisions have, however, been amended. In the context of a rapid border intervention mission, a Member State would only be required to make half of the predetermined number of guest officers available if the risk analysis and, if available, a Vulnerability Assessment were to indicate 'a situation that would substantially affect the discharge of national tasks'. Interestingly, the determination of whether such a situation exists is no longer left to the Member State itself, but depends at least in part on the **Agency's assessment of a national situation. In the context of normal joint operational activity Member States may also, under the Council text, continue to invoke a 'situation substantially affecting the discharge of national tasks', deleting the requirement for an exceptional situation.**

It is questionable whether an unqualified obligation to provide a set number of border guards in case of a rapid border intervention mission is compatible with the Treaty's explicit recognition that Member States themselves remain responsible for safeguarding their internal security (Articles 4(2) TEU and 72 TFEU). It is submitted that this decision should ultimately remain with the Member States.

Much like human resources, the availability of sufficient technical equipment has proven problematic in the past. The proposal aims to remedy this by reinforcing the rules on a technical equipment pool, which lists, per type of equipment, the minimum number needed for the **Agency's activities per year.**⁵¹ Member States shall, on the basis of annual agreements, **make their equipment available, but may invoke an 'exceptional situation, affecting the discharge of national tasks in the event of joint operations'.**⁵² Article 38(6) of the proposal provides that the Management Board shall prioritise the use of equipment and take a decision to remedy shortcomings in cases where the minimum levels of equipment identified by the Agency on a yearly basis are not reached.⁵³

In the event of a rapid border intervention or a situation requiring urgent action, Member States cannot invoke an exceptional situation with regard to equipment that was purchased with Union funding with a view to enhancing the operational capacity of the Agency.⁵⁴

⁴⁸ Article 3b(3), Frontex Regulation.

⁴⁹ Article 19(5), COM(2015) 671 final.

⁵⁰ Article 19(6), *ibid.*

⁵¹ Article 38, *ibid.*

⁵² Article 38(4), *ibid.*

⁵³ Article 38(6), *ibid.*

⁵⁴ Article 38(8), *ibid.*

In addition, the proposal regulates in more detail the acquisition by the Agency itself, or in co-ownership, of technical equipment.⁵⁵ Major technical equipment shall be registered in one Member State, which shall also provide the necessary experts and technical crew. In case of sole ownership of the Agency, a Member State is under an unqualified obligation to make this equipment available.⁵⁶ However, it is questionable what the practical effect of these provisions will be. Frontex has had the power to acquire its own equipment since the amendments of the 2007 Regulation, but, contrary to popular belief, Frontex does not possess any vehicles, ships or aircraft acquired on the basis of this article.⁵⁷ Joint ownership leads to difficult questions of responsibility and applicable law, not only to the equipment itself but also its operating crew. It is conceivable that the acquisition of technical equipment will be limited to small devices such as fingerprinting machines.

The provisions on the deployment of technical equipment are considerably weaker than those relating to the availability of human resources. Introducing a distinction between the obligation for Member States to contribute equipment in relation to rapid border intervention and further joint operational activity could be contemplated.

The practical relevance of the Agency's acquiring its own equipment should not be overstated. One could imagine that more could be gained from ensuring compatibility and interoperability of Member States' technical equipment and assistance of the Agency in placing joint orders by the Member States, thus improving their bargaining power.

3.3.2. Expansion of powers of guest officers

A number of important extensions to the powers of guest officers are provided for in the proposal. Host Member States may authorise guest officers to act on their behalf, including taking the decision to refuse entry to the national territory.⁵⁸ This, in theory, would make it possible for a Member State to delegate the power to deny entry, but not the power to allow entry.

Guest officers are further authorised to access European databases, which, under the proposal, is no longer made dependent on the consent of the host Member State.⁵⁹ Guest officers may only consult the data they require for the performance of their tasks, but the provision does not specify which data may be consulted for which specific task. Automatic access to national databases was also foreseen in the Commission proposal, but this has been rejected by the Council.

The expansion of guest officers' tasks and powers may contribute to the efficiency of joint operational activity, but may lead to a further blurring of responsibilities.

It should be made clear that, where a Member State authorises guest officers to act on their behalf, these officers continue to act within the scope of EU law and hence the safeguards of the Charter of Fundamental Rights of the European Union (CFR) apply in full.

⁵⁵ Article 37, *ibid.*

⁵⁶ Article 37(4), *ibid.*

⁵⁷ Article 7, Frontex Regulation.

⁵⁸ Article 39(9), COM(2015) 671 final.

⁵⁹ Article 39(8), *ibid.*

The purpose and type of data that may be consulted should be specified, as well as a reference to the applicability of national and EU data protection law.

To the extent that powers are delegated to guest officers, national officers should be considered to act as agents of the host Member State for the purpose of determining international responsibility.

The authorisation to deny entry should also include the power to allow access to the territory.

3.3.3. Right to intervene

Under the Commission's proposal, the Agency would have a right to intervene in situations at the external border requiring urgent action on the basis of a Commission implementing decision.⁶⁰ This would be the case where a Member State does not follow up on the Management Board's decision to remedy vulnerabilities identified in the Vulnerability Assessment or in the event of disproportionate migratory pressure on the external border rendering the control of the external borders ineffective to such an extent that it would put the functioning of the Schengen area in jeopardy. The Agency's intervention would still need to be based on an operational plan which requires the consent of a Member State.⁶¹ The provision was therefore inherently contradictory, but also raised the same concern as regards the unqualified obligation to make available guest officers, namely the compatibility with the principle that Member States are themselves responsible for their internal security.

The right to intervene under the Commission's proposal raises serious concerns as regards Articles 4(2) TEU and 72 TFEU. It would be legally, but probably also politically, undesirable to maintain this provision.

The Council has indeed amended the 'right to intervene' significantly. In case of non-compliance with a Management Board decision following a Vulnerability Assessment or in case of specific and disproportionate pressure on the external borders *and* where a Member State does not request support, it would be the Council, retaining implementing power itself, that could order the Agency to start drawing up an operational plan for a rapid border intervention or other joint operation. If the Member State were not to comply, a similar mechanism as in Article 26 Schengen Borders Code would be set in motion, where the Council can recommend the reinstatement of internal border checks, effectively excluding that Member State from the Schengen area for a maximum period of two years.

The provisions regulating the response to an urgent situation putting the functioning of the Schengen area in jeopardy as per the Council's amended text are more in line with the EU's constitutional set-up and would be in line with existing provisions under the Schengen Borders Code.

The Council's wish to retain implementing powers may be justified in view of the political dimension of a recommendation to reinstate control at the internal borders. It would, however, be advisable to provide a more detailed explanation, especially in light of the CJEU's case law, which requires that the Council properly explain, by reference to the nature and content of the basic instrument, why

⁶⁰ Article 18(1), with reference to Article 12(6), *ibid.*

⁶¹ Article 18(4), *ibid.*

exception is being made to the rule that implementing power is normally conferred on the Commission.⁶²

3.4. Developing the hotspot approach

The Commission, in its Communication on the EBCG, declared that developing the hotspot approach would become a key task of the new Agency.⁶³ In the Commission proposal, the Agency's task is less prominently described as providing assistance in the framework of migration management support teams (MMST) at hotspot areas. Whilst the proposal for the first time defines the term MMST ('teams that provide support at hotspot areas and which are composed of experts deployed from Member States, the EBGCA, the European Asylum Support Office and Europol'), the notion of hotspots is for now only defined in a Commission policy document as locations 'characterised by specific and disproportionate migratory pressure, consisting of mixed migratory flows, which are largely linked to the smuggling of migrants, and where the Member State concerned might request support and assistance to better cope with the migratory pressure'.⁶⁴

The hotspot approach intends to provide for a multidisciplinary and integrated way of assisting Member States in such areas. In the light of this integrated approach, the prominence of the Agency may be questioned. Although border guards are indeed the first point of contact at the external border, there is a risk that, by making the Agency a *primus inter pares*, too much emphasis is placed on border control and the prevention of cross-border crime at the expense of people in need of international protection, especially where the significant reinforcement of the Agency's staff and resources is not matched by a similar reinforcement of the European Asylum Support Office (EASO). Therefore, when there is a need for the deployment of MMSTs, it is arguably the Commission that is in the best position to coordinate the response and not the Agency.⁶⁵

The Commission's decision to establish modalities for cooperation in the hotspot areas in the proposal is welcome, though the current legal uncertainty as to the rules that apply in hotspots and the unclear interaction between national and EU law in these areas call for a separate legal instrument providing a sound legal basis for these hotspots and their operation.⁶⁶ The current proposal, for instance, indicates that guest officers deployed in the framework of MMSTs may provide 'information to persons in clear need of international protection, including persons eligible for relocation'.⁶⁷ This is not only a limitation of the rights under the Asylum Procedures Directive; it also seems to imply that guest officers will be called upon to make a preliminary evaluation of requests for asylum.⁶⁸

It is true that the European integrated border management system refers to inter-agency cooperation, but other than that it is silent on the need to accept requests for international protection also at the border.⁶⁹ Embedding the hotspot approach in the regulation for the EBCG again puts an undue focus on border control over the obligation to provide international protection.

⁶² Case C-257/01, *Commission v Council* ECR [2005] I-00345, para. 50 ff.

⁶³ COM(2015) 673 final, p. 6.

⁶⁴ Article 2(9), COM(2015) 671 final; Explanatory Note on the "Hotspot" approach, <http://www.statewatch.org/news/2015/jul/eu-com-hotspots.pdf> (last accessed 21 March 2016).

⁶⁵ As currently under Article 17(1), COM(2015) 671 final.

⁶⁶ Article 17(2a), Council text, *supra* note 10.

⁶⁷ Article 17(3)(b), COM(2015) 671 final.

⁶⁸ Article 8, 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, OJ 2013, L 180/60.

⁶⁹ Article 4(c), COM(2015) 671 final.

If the Agency is to be made responsible for the coordination of the hotspot approach, a reference to international protection at the border should be included in the integrated border management strategy.

The Commission should make a legislative proposal clarifying the roles of the different EU actors in the MMST operational at hotspots. It should clarify the legal framework applicable at the hotspots. It should be clear that the rules of the Common European Asylum System (CEAS) and the Return Directive can only be departed from on the basis of EU legislation itself.

3.5. Cooperation on return

From the outset, support in return operations formed part of Frontex's task.⁷⁰ The explanation for this is that, in many Member States, border guard authorities are also responsible for return. Member States' return procedures are governed by the rules of the Return Directive.⁷¹ Return has become an increasingly important element in the EU's migration management policy and the work of Frontex. The Commission's proposal boosts this task with the establishment of a designated Return Office within the Agency.⁷²

In fact the proposal creates three new on-call lists of Member State officials involved in return operations: forced return monitors, forced return experts and return specialists.⁷³ All of these need to be made available unless Member States are faced with an 'exceptional situation substantially affecting the discharge of national tasks.' The proposal seems to equate the position of staff involved in return-related activities with those of guest officers ('members of the teams').⁷⁴ This is, however, highly problematic as it is unclear in the context of return operations, which normally take place by air transport, which country is the host country, defined as the Member State in which an operation takes place or from which it is launched. Hence, it is unclear which rules apply to the return officers, importantly also the rules on criminal and civil liability.⁷⁵ This is particularly problematic from a human rights perspective as return may involve coercive measures.

Furthermore, it is noted that the relationship between the pool of monitors and the Agency, as well as the Fundamental Rights Officer (FRO), is unclear, as there seems to be no reporting obligation imposed on the forced return monitors. Also, in the Commission proposal, the evaluation obligation for joint operations, MMSTs and rapid border interventions seems to exclude return operations.

Specific provision should be made for the staff involved in return-related activity, detailing their tasks, powers and responsibilities. In this regard, special attention should be paid to the powers of the pilot in command and the extension of criminal law by the country of registration of the aircraft under international aviation law (Tokyo Convention).⁷⁶

⁷⁰ Article 2(f), Frontex Regulation.

⁷¹ 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, OJ 1998, L 348/98.

⁷² COM(2015) 673 final, 7.

⁷³ Articles 28, 29 and 30, COM(2015) 671 final.

⁷⁴ Article 2(8), *ibid*.

⁷⁵ Articles 41 and 42, *ibid*.

⁷⁶ 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft, UNTS 220/[1970].

There should be a reporting obligation from the forced return monitors to the Agency and the FRO. The evaluation obligation in Article 25 of the Proposal should be extended to return operations.

The proposal in fact envisages three possible scenarios for forced return operations.⁷⁷ First is the return of irregular migrants from Member States. Second are so-called 'collecting return operations' where the means of transport and the return escorts are made available by the third country of return. Third are the 'mixed return operations' in which a number of returnees are transported from one third country to another.

There are serious fundamental rights concerns in particular as regards the latter two operations. In the case of the collecting return operations, the proposal provides that at **least one Member State 'representative'** (presumably a forced return escort from a Member State competent authority) and a return monitor must be present.⁷⁸ The participating Member State and the Agency must ensure respect for fundamental rights and the proportionate use of constraints. It seems, however, impossible to enforce such an obligation against a third country national or hold a third country in any way accountable for possible fundamental rights violations during such a return operation.

The complications are even greater in relation to mixed return operations. Although there is an important safeguard here that the third country that orders the return is bound by the European Convention on Human Rights (ECHR), it is unclear why this obligation is not included also in the case of collecting return operations.⁷⁹ Moreover, the safeguard of the ECHR should be considered insufficient as it only provides for a corrective mechanism, not a preventive one. There is no way for the EU to ensure that the third country's return decision is taken in full compliance with fundamental rights and it contradicts the Union's aim to promote its values and standards, including those of the Return Directive, in its cooperation with third countries.⁸⁰

The proposal should be amended to ensure that collecting return operations can only be carried out by third countries that are parties to the ECHR. Mixed return operations should only be carried out if there are sufficient guarantees that both the third country return decision and the return procedure are in full compliance with EU fundamental rights standards.

3.6. Information exchange and data protection

The Commission's proposal provides the Agency with important new powers for the exchange of information, including the processing of personal data. Currently Frontex is allowed to process personal data concerning persons suspected of cross-border criminal activities, of facilitating illegal migration activities or of human trafficking activities.⁸¹ The Commission proposal broadens this to terrorism.⁸² More importantly, it allows the Agency to process personal data relating to all irregular migrants.⁸³ The Agency would in fact be the central hub of information exchange, receiving information from the Member States and transferring it onwards to EASO, Europol or Eurojust, as well as the Member States.

⁷⁷ Article 27, COM(2015) 671 final.

⁷⁸ Article 27(3), *ibid.*

⁷⁹ Article 27(4), *ibid.*

⁸⁰ Article 53(1), *ibid.*

⁸¹ Article 11(c)(2) Frontex Regulation

⁸² Article 46(1)(a), COM(2015) 671 final.

⁸³ Article 46(1)(b), *ibid.*

The right to data protection has the status of fundamental right in the EU legal order and therefore deserves specific attention. The proposal would entail the collection and processing of vast amounts of data of irregular third country nationals, including vulnerable people such as refugees. As has been made abundantly clear by the EDPS in his Opinion, **the Commission's proposal suffers from some important deficiencies in the way in which it regulates the processing of personal data by the Agency.**⁸⁴

This analysis will limit itself to pointing out some of the most important flaws and refers to **the EDPS' report for more detailed discussion. Most importantly, there is an unclear division** of responsibility over the data. It is beyond question that the Agency has a responsibility independent from that of the Member States to ensure compliance with Regulation 45/2001 when it processes personal data and transfers it onwards.⁸⁵ However, in joint operational activity it may be unclear **whether it is the Agency or the Member States' authorities that act as controller.**

Moreover, there is no clear distinction made between the different purposes for which data is being processed. This is fundamental since data processing by Member States in the field of migration control and data processing in the area of criminal law enforcement are covered by two distinct sets of rules (Directive 95/46/EC and Framework Decision 2008/977 respectively), a distinction maintained in the future EU framework for data protection (the General Data Protection Regulation and the Data Protection Directive in criminal matters).⁸⁶

The proposal should clearly indicate the purpose for which data is transferred, in particular indicating whether the aim is migration management or criminal law enforcement.

The Proposal does not detail which data may be processed in relation to the purposes listed in Article 45. It merely lists categories of people in relation to whom personal data may be processed. The purposes listed in Article 45(1) also seem to be unlimitedly broadened in Article 45(3) by allowing for the processing of data for a different purpose if authorised by the data provider of the information.

Article 45(3) violates the principle of purpose limitation and should therefore be deleted.

The proposal prohibits the onward transmission of personal data to third countries, except in the context of return. However, Article 47 is silent on the transfer of personal data by the Agency to third parties other than to the carrier if a Member State has not done so. Yet, it seems inherent in the nature of a return operation that personal data will be transferred **to third countries. In view of the Agency's enhanced role in return, it seems necessary for it**

⁸⁴ EDPS Opinion 02/2016, Recommendations on the proposed European Border and Coast Guard Regulation (18 March 2016).

⁸⁵ Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, OJ 2001, L 8/1.

⁸⁶ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ 1995, L 281/31; Council Framework Decision 2008/977 of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters, OJ 2008, L 350/60; COM(2012) 11 final, Proposal for a Regulation on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), 25 January 2012; COM(2012) 10 final, Proposal for a Directive on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data, 25 January 2012.

to be able to transfer data on returnees to the authorities of third countries, but it would need to be made clear which data can be transferred and that such transfer is subject to the requirements of Regulation 45/2001.

Article 47 needs to specify whether, and if so which, data may be transferred to third countries in the context of joint return operations.

Article 51(4) of the proposal on cooperation with other EU institutions and bodies subjects the transfer of personal data to EU bodies and agencies to the same requirements as international organisations. However, the transfer of data to these two categories of bodies is subject to different data protection rules. It moreover contradicts the provision in Article 44(4) that onward transmission to third countries is prohibited.

Article 51(4) should distinguish between the transfer of data to third parties within and outside the European Union and would need to be brought into line with Article 44(4).

3.7. Operational cooperation with third countries

From the outset, the Agency's tasks have included the facilitation of operational cooperation between Member States and third countries. For that purpose it may conclude working arrangements on the management of operational cooperation with the authorities of third countries, generally the authorities responsible for border management in those countries.⁸⁷ The 2011 Regulation introduced the possibility for the Agency to send liaison officers to third countries and to independently launch and finance technical assistance projects in third countries.⁸⁸ Member States 'may', in the conclusion of bilateral agreements with third countries, include provisions on the role of the Agency and the powers of guest officers in the context of joint operations.⁸⁹

The current proposal reiterates that the Agency and the Member States shall comply with norms and standards at least equivalent to those set out by Union legislation when cooperating with third countries, also when this cooperation takes place on third country territory.⁹⁰ This is all the more important since the proposal now expressly allows for the involvement of neighbouring third countries in joint operations at the external borders, *including on the territory of that third country*.⁹¹ This, however, raises questions as to the respective responsibilities of the different actors involved in such operations. The question is whether the operational plan involving third countries can have the same binding status under international law and can in fact be enforced against a third country. Remarkably, the provision that liaison officers shall only be deployed to third countries in which border management practices comply with minimum human rights standards has been deleted.⁹²

Cooperation with third countries should not allow the Agency and the Member States to effectively lower the EU's standards for border and migration management, even if they remain in compliance with fundamental rights.

⁸⁷ Article 14(1), Frontex Regulation.

⁸⁸ Article 14(3) and (5), Frontex Regulation.

⁸⁹ The use of bilateral agreements confirms existing practice. See, for instance, the agreement between Spain and Cape Verde: Acuerdo entre España y Cabo Verde sobre vigilancia conjunta de los espacios marítimos bajo soberanía y jurisdicción de Cabo Verde, *BOE* No 136, 5 June 2009, 47545.

⁹⁰ Article 53(1), COM(2015) 671 final.

⁹¹ Article 13(2)(c), *ibid.*

⁹² Article 14(3), Frontex Regulation.

Joint operational cooperation *within* the territory of neighbouring third countries should in any case be limited to states which are party to the ECHR as well as the Geneva Refugee Convention and the Additional Protocol.

The provision that liaison officers may only be posted to third countries in which border management practices comply with minimum human rights standards should be reintroduced.

Provisions should be included to ensure that the role and prerogatives of the FRO of the Agency are fully respected also when cooperating with third countries.

3.8. European Coast Guard

The part on the European Coast Guard is the least developed dimension of the proposal. The European Coast Guard is functionally limited to those authorities that are competent in the field of (maritime) border management and would as such already be covered by the current Frontex Regulation. In addition, Frontex already has the tools to cooperate with other EU agencies in this maritime sphere, within their respective fields of competence, and has indeed concluded working arrangements to this effect with the European Maritime Safety Agency (EMSA) and the European Fisheries Control Agency (EFCA).

The Commission proposal expands the Agency's powers to support national authorities carrying out coastguard functions (hence not limited to border control). There is an obvious advantage to be gained from synergies between the various actors in the maritime environment, in line with the EU's integrated border management and maritime security strategy.⁹³

Importantly, the proposal provides for the "sharing, fusing and analysing" of information available to the Agency, EMSA and EFCA, in accordance with their respective legal bases and without prejudice to the ownership of data by the Member States.⁹⁴ This provision requires clarification, because passing on information between agencies with different competences is in itself an extension of the mandate of those Agencies. It is also unclear to what extent such information exchange may include the processing of personal data.⁹⁵ The articles on the exchange of data in the proposal do not specifically refer to EMSA or EFCA and law enforcement in the maritime environment is not mentioned as a purpose for which the Agency may process personal data. At the same time, Article 45(3) allows for the processing of data for a different purpose if authorised by the data provider of the information, although, as argued above, this provision should be deleted.

The provisions on data protection should be clarified also in relation to the Agency's role in supporting national authorities carrying out coast guard functions

The proposal also remains unclear on the extent to which the provisions on the European Border and Coast Guard allow for the coordination of operational cooperation and the exchange of information between the Member States, the Agency and the military. This is an important omission since increasingly the military has been involved not only by contributing military equipment for use in border control operations, but also in independent operations targeting human smugglers, as well as search and rescue

⁹³ Council Document 11205/14, European Union Maritime Security Strategy, 24 June 2014.

⁹⁴ Article 52(a) COM(2015) 671 final.

⁹⁵ Article 45(1), *ibid.*

operations. The clearest example in this respect is the Common Foreign and Security Policy (CFSP) mission EUNAVFOR MED (renamed Sophia) and the current activity in the Aegean sea by NATO.⁹⁶ The only reference to the involvement of the military is made in Article 7(2), which allows Member States to continue cooperation at an operational level, including military operations.

One important omission in the proposal that could have been included under the heading of Article 52 is the importance of Search and Rescue (SAR) activities in the context of maritime border controls. The Commission identified the lack of an explicit role in SAR as **one of Frontex's main limitations**, recognising the tremendous loss of life at sea at the external maritime borders of the EU.⁹⁷ The attribution of such a task to the EBCGA would also do justice to the practical reality in which many, if not most, maritime border patrol operations at some stage become SAR operations. There is a clear recognition of this in Regulation 656/2014 on surveillance of the external sea borders, as well as in the Eurosur Regulation.⁹⁸

However, provisions on SAR activities have proven notoriously controversial as could already be seen in the negotiations on guidelines for Frontex-coordinated joint operations at sea and on the Eurosur system. The Commission proposal thus only explicitly refers to the possibility to provide for training in SAR activities, to which the Council has added the limitation "where appropriate", even if this is already a task under Regulation 656/2014.

The proposal does not provide for SAR as an operational objective. However, on the basis of Regulation 656/2014, the operational plans for maritime operations already contain provisions on SAR activities.⁹⁹ This has budgetary implications, as also acknowledged in the **Commission's proposal, because** SAR operations demand a different type of equipment than the equipment used for standard maritime surveillance.

In light of the **EU's ambitions on maritime security and integrated border management**, the omission of a clear competence for the Agency in the area of SAR operations is regrettable. Where Union law requires Member States to have a reaction capability in line with the impact factors attributed by the Agency to their external borders, this should include SAR capacity, for which the Agency should be allowed to offer active support.¹⁰⁰

This does not entail any deviation from, or amendment to, the international law framework for SAR, notably the 1974 Convention on Safety of Life at Sea (SOLAS) and the 1979 Search and Rescue Convention (SAR Convention), but would simply provide the EU with the necessary tools to effectively counter the tremendous loss of life at its maritime borders. The legal basis for this is arguably implied in Article 77(1)(d) TFEU on the gradual establishment of an integrated system for the management of the external borders.

Search and Rescue operations should be explicitly included as one of the tasks of the Agency. This would not entail an amendment to the applicable legal framework under public international law, but would rather provide the Agency with the tools to broaden the humanitarian scope of its activities.

⁹⁶ Council Decision (CFSP) 2015/778 of 18 May 2015 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED), OJ 2015 L 122/31;

http://www.nato.int/cps/en/natohq/opinions_127972.htm, last accessed 21 March 2016.

⁹⁷ COM(2015) 673 final, 2.

⁹⁸ Article 9, Regulation 656/2014, *supra* note 4 and Article 4(3)(b), Eurosur Regulation.

⁹⁹ Article 9, Regulation 656/2014, *ibid*.

¹⁰⁰ Article 1, 3(c) and 14, Eurosur Regulation.

4. CONSTITUTIONAL CONSIDERATIONS

The Commission proposal does not provide the Agency with any independent executive powers. For that it has been criticised **as a cosmetic exercise, creating a "Frontex+"** which remains dependent on the Member States.¹⁰¹ Indeed, in the absence of actual powers of command and control for the Agency, the notion of shared responsibility remains legal fiction rather than reality. However, from the above analysis it does follow that the Agency will be significantly strengthened. Within the EBCG network structure, the Agency will not merely function as a central knot and information hub, but also as *primus inter pares*, **setting out the "operational and technical strategy for European integrated border management with which Member States' strategies will have to be in line.** Moreover, it will have important new supervisory powers.

It is also questionable whether the current Treaties allow for a transfer of genuine executive powers to the EBCGA. There are also important constitutional limits to the transfer of executive powers to Union bodies outside the EU institutions. It is true that, in the ESMA case regarding the conferral of powers on the European Securities and Markets Authority, the Court limited the effects of its own anti-delegation ('Meroni') doctrine by allowing for the establishment of agencies with decision-making powers as an 'operational support mechanism' in the internal market.¹⁰² It seems tempting to transpose that logic to the Area of Freedom, Security and Justice.

However, it is submitted that border management is essentially a policing power, which may involve the use of force and coercion, and therefore requires a level of discretion that is difficult to regulate, certainly in the absence of European rules of engagement. In the context of justice and home affairs, the limitations of the *Meroni*-doctrine, such as the need for a precise delimitation of powers and judicial review, will apply much more readily.¹⁰³

It also seems inconsistent if the much more specifically formulated Treaty articles on Eurojust and Europol explicitly state that coercive measures remain with the Member States, while a similar limitation would not apply to the EBCGA, which would find its legal basis in the much more broadly formulated Article 77(2)(d) TFEU.¹⁰⁴ It would in any case constitute a serious case of 'competence creep'.

As an EU body, an appeal against a decision by the Agency, such as refusing entry, would have to be brought before the CJEU.¹⁰⁵ One could envisage a novel system, following the **example of the proposal for a European Public Prosecutor's Office, under which delegates of the European agencies would operate within specific Member States, subject to the control of the national courts.**¹⁰⁶ This would, however, require a thorough rethinking of judicial review in the EU.

¹⁰¹ S. Carrera & L. den Hertog, A European Border and Coast Guard: **What's in a name?**, (CEPS Paper No 88, March 2016), p. 2, <https://www.ceps.eu/system/files/LSE%20No%2088%20SC%20and%20LDH%20EBCG.pdf>, p. 2, last accessed 21 March 2016.

¹⁰² Case C-270/12 *UK v European Parliament and Council ('ESMA')* ECLI:EU:C:2014:18. See P. Van Cleynenbreugel, 'Meroni Circumvented? Article 114 TFEU and EU Regulatory Agencies' (2011) 21 *Maastricht Journal of European and Comparative Law*, 87.

¹⁰³ See Rijpma, *supra* note 7.

¹⁰⁴ Article 85 and 88 TFEU.

¹⁰⁵ Case 314/85, *Foto-frost* [1987] ECR 4199.

¹⁰⁶ COM(2013) 534 final, Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, 17 July 2013.

It is submitted that, under the current rules on delegation of powers to Union bodies, it is not possible to delegate genuine executive powers to the EBCGA. The Commission proposal respects these limits.

A full centralisation of border management powers would also undermine the constitutional principle that the Member States are ultimately responsible for their own internal security (Article 4(2) TEU and Article 72 TFEU). This point was first raised in 2007 when an amendment to the Frontex regulation introduced the obligation to make national border guards available for Rapid Border Interventions. That obligation was therefore qualified, allowing a Member State to refuse deployment of its national border guards when 'faced with an exceptional situation substantially affecting the discharge of national tasks.'¹⁰⁷

As argued above, the removal of this exception in the Commission draft and the limitation thereof in the Council text seem to encroach upon this principle, especially where the assessment of whether such a situation exists would no longer be left to the Member State itself. The same holds true for the power to intervene without the request of a Member State under the Commission proposal, which has rightly been removed by the Council. It is submitted that, in the case of non-compliance with EU law, it is the Commission that should make use of its enforcement powers under the Treaty, rather than providing the EBCGA with a right to intervene.¹⁰⁸

The removal of the 'exceptional situation' exception for the deployment of human and technical resources, as well as the 'right to intervene', are at odds with the Treaty principle of ultimate responsibility of the Member States for their own internal security.

Finally, a few words need to be said on the autonomy of the EBCGA as an Agency established under EU law. Within the EU's institutional structure, agencies have been established as independent, technical and apolitical bodies of EU law to assist the Commission and the Member States in the implementation of EU law. Although the Court has held in the *ESMA*-case that agencies may be granted implementing powers, they cannot be called upon to make political choices.¹⁰⁹ Indeed, part of the reason for Frontex's establishment was to create a body at arm's length from political (both institutional and national) interests.

Nonetheless, Frontex has always had to act in an extremely politicised environment, and has been an easy target for blame shifting. There is a risk that, under the Commission's proposal, the Agency is increasingly being called upon to take decisions which, if not political in themselves, are politically sensitive, and which may prejudice its good working relations with national border guard authorities. The Commission proposal, and even more so the Council's amended text, seem to acknowledge this.

Much like the comitology committee, there can be two views on the role of the Management Board: one as a "mini Council" representing Member States' interests, the

¹⁰⁷ Article 4(3), Regulation (EC) No 863/2007 of the European Parliament and of the Council of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers, OJ 2007, L 199/30.

¹⁰⁸ Art. 258 TFEU.

¹⁰⁹ *ESMA*, supra n. 103, para. 105.

other as a deliberative forum of like-minded experts.¹¹⁰ Under the Council's **amended** text, there appears to be a move towards the former, more political Management Board. This is evidenced by the number of instances in which decision-making power is shifted from the Executive Director to the Management Board. As such, the Commission is also given more influence over the Agency, through its representatives on the Management Board. In **addition, one of the Commission's representatives** on the Management Board will also be a **member of the new 'Supervisory Board', which**, despite its name, merely advises the Executive Director.¹¹¹

It is questionable if the enhanced role of the Management Board and the likely politicisation thereof will contribute to the effectiveness of the Agency's work. It should be questioned whether the Management Board that meets only twice yearly should be given extensive decision-making powers.

The legislation should carefully consider which decisions are of a politically sensitive nature and can be reserved for the Management Board, and which tasks are of a more technical and operational nature and could be left to the Executive Director.

¹¹⁰ J. Blom-Hansen, *The EU Comitology System: Who Guards the Guardian?* (Paper presented at the Fourth ECPR Pan-European Conference on EU Politics, Riga, 25-27 September 2008, Riga), <http://www.jhubc.it/ecpr-riga/virtualpaperroom/085.pdf>.

¹¹¹ Article 69, COM(2015) 671 final.

5. FUNDAMENTAL RIGHTS CONSIDERATIONS

5.1. Accountability in a multi-actor environment

Border management is an inherently sensitive task when it comes to fundamental rights, especially when it includes the use of force or the denial of access to persons that may have protection claims. Many of the provisions in the Commission's proposal indeed raise concerns about fundamental rights. It is unsurprising therefore that fundamental rights accountability has been a point of attention since the establishment of Frontex. First of all, there is uncertainty in the distribution of accountability among the Member States participating in Frontex-coordinated joint operations. Second, there is disagreement as to the possibility and extent of fundamental rights accountability of the Agency itself.¹¹²

While Frontex has been criticised for alleged fundamental rights violations at the EU's external border, the EU's official position has been that participating Member States are accountable for any possible fundamental rights violations that may occur during joint operations and not Frontex, since the Agency does not have executive powers. As Frontex clearly does not substitute the Member States' border guard authorities, it cannot be held accountable *in lieu* of the Member States. However, precisely because of its role as a coordinator and facilitator, it may be held accountable *in addition to* the Member States.

This submission is rooted in the doctrine of positive obligations, which entails a duty to protect individuals from fundamental rights violations committed by others. Accountability on this basis arises when a fundamental rights violation is foreseeable but the addressee of the obligation does not take reasonable steps to prevent the violation. Positive obligations are an inherent component of the rights enshrined in the ECHR and hence form part of the Charter of Fundamental Rights (CFR) on the basis of its Article 52(3). Under the CFR, Frontex is accordingly accountable for failures to protect individuals from foreseeable fundamental rights violations committed by national border guards participating in joint operations, when it would have had the means to prevent them.¹¹³

Taking into account the presence of Frontex staff *in situ* during joint operations and the reporting obligations of participating personnel, it appears that, in many situations, fundamental rights violations may be foreseeable for Frontex, especially if they are of an ongoing and persistent nature. Under such circumstances, the Agency has a duty to take all measures it can reasonably be expected to take, or else incurs accountability in addition to the respective Member States. Where violations of fundamental rights or international protection obligations are of a serious nature or are likely to persist, Article 3(1a) of the Frontex Regulation additionally sets out a specific positive obligation for Frontex' Executive Director to suspend or terminate, in whole or in part, the relevant joint operation.

The significant reinforcement of the tasks of the Agency, as well as the explicit affirmation of shared responsibility for European integrated border management, will only exacerbate the existing conundrum as regards shared accountability. A transfer of genuine executive enforcement powers would create clarity, but is – as explained above – problematic from a constitutional point of view.

¹¹² See e.g. Parliamentary Assembly of the Council of Europe, 'Frontex: human rights responsibilities', Report of 8 April 2013, Doc. 13161, <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=19547&lang=en>, last accessed 21 March 2016.

¹¹³ See also M. Fink, 'A "Blind Spot" in the Framework of International Responsibility? Third Party Responsibility for Human Rights Violations: The Case of Frontex', in T Gammeltoft-Hansen, J Vedsted-Hansen (eds), *Human Rights and the Dark Side of Globalisation: Transnational Law Enforcement* (Forthcoming 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2591126, last accessed 21 March 2016.

5.2. Mechanisms for fundamental rights accountability

Although fundamental questions as regards fundamental rights accountability thus continue to persist, the Agency has taken important steps in integrating fundamental rights into its work, thereby significantly contributing to fundamental rights awareness amongst national border guards. This mainstreaming of fundamental rights started in practice, but was later codified and reinforced by legislative amendments, in particular the 2011 Regulation.¹¹⁴ Frontex is now equipped with a Fundamental Rights Officer (FRO) and a Consultative Forum which contribute to fundamental rights monitoring, and has drawn up a Fundamental Rights Strategy and a Code of Conduct, which sets out behavioural standards for all persons participating in Frontex activities.¹¹⁵ In 2012, the European Ombudsman launched an own-initiative inquiry to assess how Frontex implemented these new obligations and mechanisms concerning fundamental rights. Whilst pointing out the positive developments, the Ombudsman noted in particular the absence of any procedure to deal with complaints on infringements of fundamental rights in all Frontex activities.¹¹⁶ The idea of setting up such a procedure has been supported by the European Parliament.¹¹⁷

5.3. Individual complaints mechanism

The European Border and Coast Guard Agency proposal indeed provides for an individual administrative complaints mechanism to monitor and ensure respect for fundamental rights in all its activities. Under Article 72, this procedure is handled by the FRO and open to anyone who alleges that he/she is the victim of a fundamental rights violation committed by staff during a Frontex-coordinated operation. All complaints, if deemed admissible by the FRO, shall result in an “appropriate follow-up” by the Agency or by the Member States, depending on whether the Agency’s staff or a Member State border guard is involved.¹¹⁸

The new procedure brings a number of positive developments, in particular providing a platform for individual victims of fundamental rights violations to file their complaints. Yet **important challenges remain. It is unclear what an ‘appropriate follow-up’** constitutes and what forms of remedy would be available in the case of well-founded complaints. The FRO is required to report to the Executive Director in the case of staff members of the Agency and the Management Board in the case of guest officers. However, it is unclear what powers the FRO has in the event of insufficient follow-up. Currently, the provision does not even lay down a timeline. Most importantly, an administrative procedure cannot substitute the right to an effective remedy, which, under Article 47 CFR, entitles individuals to *judicial* redress in case of a violation of their rights.

Finally, the administrative procedure - and indeed the overall accountability framework for fundamental rights violations - focuses on disciplinary action against border guards who are guilty of violations. This follows, for instance, from the existing provisions on guest officers’ criminal and civil liability and the host Member State’s **obligation to “provide for appropriate disciplinary or other measures in case of violations of fundamental rights or international protection obligations in the course of a joint operation or pilot project”**.¹¹⁹

¹¹⁴ The original Frontex Regulation merely stated, in recital 22, that the Regulation respects fundamental rights.

¹¹⁵ In particular Article 26a Frontex Regulation; [Articles 33, 34, 70, 71 Proposal for a EBCG Agency].

¹¹⁶ Decision of the European Ombudsman closing own-initiative inquiry OI/5/2012/BEH-MHZ, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2015-0422+0+DOC+PDF+V0//EN>, last accessed 21 March 2016.

¹¹⁷ 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)),

¹¹⁸ Article 72(5) and (6), COM(2015) 671 final.

¹¹⁹ Articles 20(5) and 72(6), *ibid*.

Notwithstanding the fact that the introduction of an individual complaints mechanism is to be assessed as an important positive development, the assertion in the Commission's explanatory notes that the existence of such a mechanism, of itself, means the proposal is in line with fundamental rights cannot be upheld.

The procedure itself needs to provide for much clearer obligations in terms of format, content and deadlines, or should confer implementing powers on the Agency to establish such rules.

5.4. Other remarks on fundamental rights compliance mechanisms

The Commission proposal also contains a number of elements that weaken the existing accountability mechanisms or that could have improved existing mechanisms. First, the Executive Director's obligation to suspend or terminate operations where fundamental rights violations are of a serious nature or likely to persist, does not provide the basis upon which this assessment shall be made.¹²⁰ There is also no reference to a possible role for the FRO or the results of the Schengen Evaluation Mechanism and/or the Vulnerability Assessment. The Commission proposal's addition that suspension or termination is also required when the conditions to conduct operations no longer exist is valuable if understood to include situations in which fundamental rights violations take place even outside the direct scope of the Agency's powers (e.g. sub-standard reception or detention conditions).

The obligation on the Executive Director to suspend or terminate operations in case of fundamental rights violations should be worked out in more detail, providing for a role for the FRO and taking into account the result of relevant monitoring mechanisms.

Second, although it may simply be an oversight in the legal drafting process, the current obligation from Article 26(a) of the Frontex Regulation, under which the Agency shall put in place an effective monitoring mechanism to ensure compliance with fundamental rights, has been omitted. Although Article 71(2) on the role of the FRO refers to such a mechanism, the explicit reference to establishing a monitoring mechanism is pivotal in ensuring respect for fundamental rights, in particular in view of its exemplary function. The principle in Article 33, under which the EBCG guarantees the protection of fundamental rights in the performance of its tasks, is important, as the EBCG encompasses both the Agency *and* national border guard authorities. The Agency is tasked with drawing up a Fundamental Rights Strategy, but this should include a clear reference to the monitoring mechanism. This mechanism should also be linked to the Agency's tasks in the Vulnerability Assessment, which should explicitly include a fundamental rights component that takes a broad view of rights at the border, so including reception and detention conditions.

The obligation on the Agency to set up a fundamental rights monitoring mechanism should be reintroduced. This mechanism should allow for a broad review of the fundamental rights situation at the external border.

The Vulnerability Assessment should contain a fundamental rights component.

Third, under the proposed Article 71(2), the FRO would no longer report to the Consultative Forum, but only the Management Board. This appears to be a backward step as regards the independence of the FRO and the transparency of its activities.

The FRO's obligation to report to the Consultative Forum should be reintroduced.

¹²⁰ Article 24, *ibid.*

6. CONCLUDING REMARKS

European external border management has become central to the EU's response to the refugee crisis and swift and decisive action is expected from the institutions. The European Commission has performed a Herculean task in presenting an elaborate proposal within a short space of time. Now there is considerable pressure on the EU legislature to reach agreement on this draft by the end of the Dutch Presidency.

It would, however, be incorrect to consider this proposal merely as an emergency measure. Rather, it constitutes an important next step in the progressive Europeanisation of external border management. The work on a European System of Border Guards has been underway for years.¹²¹ Albeit an important next step, the proposal does not present a revolutionary leap forwards, as it essentially preserves the fundamental premise that the Agency does not have its own border guards and does not have powers of command and control over national border guards.

Still, a proposal of this complexity, with such financial implications and impact on fundamental rights, deserves careful consideration. It is therefore also to be regretted that no impact assessment was presented with the proposal. Although some of the inconsistencies and oversights in the proposal may be remedied relatively easily, the proposal does not address some fundamental questions as regards accountability of operational activities at the external borders and is rather likely to add to the current unclear division of responsibilities.

Genuine emergency measures are targeted measures to address the specific problems that have arisen in relation to the establishment and operation of hotspots, defining the tasks and powers of all actors involved, addressing the lack of human and technical resources and confronting the most pressing deficiencies at specific stretches of the external border.¹²²

Although the current crisis may have shown the need to address some of the shortcomings **of Frontex's current legal framework, it would be wrong to think that the EBCG could** carry out all the additional tasks that it is given under this proposal from one day to the next.¹²³ It seems contradictory that Member States would be willing to submit themselves to more binding obligations under this proposal, whilst nothing prevents them from furnishing the Agency with the necessary tools now. Likewise, it would be naïve to think that an increase in **Frontex's powers and a new name** for the Agency will remedy the structural deficiencies **in some Member States' external border management systems**.

If this proposal is to provide the regulatory framework for external border management in the years to come, it is important to take the time now to carefully consider the structural implications of the rules currently being considered for adoption.

¹²¹ See notably: European Council, The Stockholm Programme: An Open and Secure Europe Serving and Protecting Citizens (Conclusions) (2009) OJ C 115/1, 26; Article 33(2)(a), Frontex Regulation, European Council, Conclusions of 26-27 June 2014 (European Council Document EUCO 79/14), 4.

¹²² Council Document 5985/16, Council Implementing Decision setting out a Recommendation on addressing the serious deficiencies identified in the 2015 evaluation of the application of the Schengen acquis in the field of management of the external borders by Greece, 12 February 2016.

¹²³ COM(2016) 120 final, *supra* note 8, p. 12. Note: no transitional arrangements other than for return.

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