

Construction of a European Institutional Model for Managing Operational Cooperation at the EU's External Borders: Is the FRONTEX Agency a decisive step forward?

Hélène Jorry

Abstract

Within the context of the fifth enlargement of the EU, the increasing securitisation of JHA policies and the establishment of an area of freedom, security and justice, the issue of integrated border management (IBM) has become crucial since 2001. Building upon the existing fragmented framework, the creation of the FRONTEX Agency brings an innovative and tailor-made institutional response designed by the Council Regulation No. 2007/2004/EC in order to promote burden sharing, solidarity and mutual trust between the Member States in the operational management of the EU's external borders. Despite no direct operational powers, the FRONTEX Agency has been assigned a large array of competences in various sectors, including a pioneering mission of coordination of operational cooperation and the controversial task of assisting joint return operations.

This paper addresses fundamental questions related to the issue of integrated border management. It seeks to assess the role and limits of the FRONTEX Agency in the operational management of the EU's external borders in order to examine in what way the creation of this 19th European agency embodies a decisive step forward towards the construction of an EU common policy on external borders.

An Integrated Project Financed by
the Sixth EU Framework Programme



Generated by the CEPS CHALLENGE programme (Changing Landscape of European Liberty and Security), papers in this series focus on the implications of the new security practices being implemented throughout Europe for civil liberties, human rights and social cohesion in an enlarged EU. Unless otherwise indicated, the views expressed are attributable only to the author in a personal capacity and not to any institution with which she is associated.

ISBN-13: 978-92-9079-703-6

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CONSTRUCTION OF A EUROPEAN INSTITUTIONAL MODEL FOR MANAGING OPERATIONAL COOPERATION AT THE EU'S EXTERNAL BORDERS:

IS THE FRONTEX AGENCY A DECISIVE STEP FORWARD?

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In the context of assessing the progress made in implementing the Hague Programme, the need for a common EU approach to border management ranks high among the European Union's priorities. In this respect, the JHA Council meeting in December 2006¹ provided an up-to-date definition of 'integrated border management' with adoption of the 'border management strategy' initiated by the Finnish Presidency.² This strategy aims to efficiently tackle all border-related issues in the hopes of avoiding, inter alia, the recent tragic effects of migratory pressures in the Mediterranean.

With regards to the establishment of an 'area of freedom, security and justice', the issue of integrated border management is receiving renewed attention since the Laeken EU summit in December 2001. Furthermore, the perception of post-September 11 and March 11 terrorist threats contributed to the securitisation of JHA policies³ and migratory policies⁴ calling for tighter border controls at the EU's external borders and placing border security at the core of EU citizens' preoccupations. The changing nature of the security challenges calls for a new conceptualisation of external border controls, which are becoming increasingly challenged by freedom of movement. The growing "interpenetration of internal and external security" highlights the evolution of border controls becoming more differentiated, detached from the territorial logic and more targeted at specific groups.⁵ In this respect, the concept of integrated border management represents an attempt to reconcile different economic, political, security and legal imperatives: facilitation of exchanges, principle of sovereignty, respect of individual freedoms and an efficient fight against security threats.

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¹ Council of the European Union, 2768th session of JHA Council meeting, Brussels, 4-5 December 2006, 15801/06 (Presse 341), p. 27.

² Finnish Presidency, "Development of the EU's integrated management system for external borders: Border management strategy", JHA informal Ministerial meeting, Tampere, 20-22 September 2006. Brussels, 7 September 2006 (retrieved from www.eu2006.fi/news_and_documents/other_documents/vko36/fr_FR/1157615375954/#en).

³ Jörg Monar, "Problems of balance in JHA and the impact of 11 September", in Malcolm Anderson and Joanna Apap (eds), *Police and Justice Cooperation and the New European Borders*, The Hague: Kluwer Law International, 2002, pp. 165-182.

⁴ Yann Richard, *Les frontières improbables de l'espace migratoire européen*, 8 July 2005 (see www.peuplesmonde.com).

⁵ Didier Bigo, "The Möbius Ribbon of Internal and External security(ies)", in Mathias Albert (ed.), *Identities, Borders, Orders: Rethinking International Relations Theory*, Minneapolis, MN: University of Minnesota Press 2001, pp. 91-116; Didier Bigo, "La mondialisation de l'(in)sécurité? Réflexions sur le champ des professionnels de la gestion des inquiétudes et analytique de la transnationalisation des processus d'(in)sécurisation", *Cultures et Conflits*, No. 58, pp. 53-100.

The fifth EU enlargement, including Bulgaria and Romania since 1 January 2007, also favoured the emergence of integrated border management. The new member states became in charge of a great share of the EU external borders causing increasing imbalances between old and new members. Burden-sharing has therefore become crucial. In this context, the European Agency for the Management of Operational Cooperation at the External Borders of the member states of the EU (hereinafter FRONTEX) was established to bring an institutional response to the task of fostering the principle of solidarity and promoting integrated border management. The creation of this European regulatory agency builds upon the existing fragmented framework of informal structures, particularly criticised for the mushrooming of its different activities and its lack of democratic accountability, in order to enhance cooperation between the member states in the management of external borders.

The Commission and the European Parliament initially supported the creation of a European Corps of Border Guards. However, following the reluctance of member states to set up such an integrated border force, the establishment of the FRONTEX Agency appeared as a tailor-made institutional response promoting burden-sharing, solidarity and mutual trust in the management of external borders. It was designed by the Council Resolution No. 2007/2004/EC establishing a European Border Agency⁶ on 1 May 2005 in Warsaw. As a permanent institutionalisation of existing informal structures, the FRONTEX Agency is a centralised, professionalised and independent Community body. Despite having no direct operational missions, it bears a large set of competences, including a unique mission of coordination of operational cooperation and a widely-discussed competence of assisting joint return operations. Although its scope of action is indeed limited to the voluntary participation of the member states in the tasks of the Agency, its various activities in the fields of training, risk analysis, technical and operational support, research and development as well as assistance in joint return operations represent a “first breakthrough in EU history of Member States’ monopoly in implementing and enforcing EU legislation at the borders”.⁷

Therefore, its creation underlines fundamental questions. In what manner does the FRONTEX Agency fulfil its role as assigned by the Council Regulation and the Hague Programme with respect to the construction of an area of freedom, security and justice? Is it an added value compared to the existing framework in terms of efficiency, enhancement of cooperation, coherence of the border management system and democratic accountability? To what extent does its creation pave the way towards integrated border management?

This paper represents an attempt to answer these questions. It seeks to expand upon the issues of border management in the EU in order to assess the role and limits of the FRONTEX Agency as well as to illustrate in what way, in combination with the establishment of a Community Border Code, a special regime for local border traffic and an External Borders Fund, it embodies a first decisive step towards ‘integrated border management’ of the EU external borders.

⁶ Council Regulation 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, Brussels, OJ L 349, 25 November 2004, pp. 1-11.

⁷ Peter Hobbing, “Management of External EU Borders: Enlargement and the European Border Guard Issue”, paper for the seminar on Managing International and Inter-Agency Cooperation at the Border, Geneva Centre for the Democratic Control of Armed Forces (DCAF), Geneva, 13-15 March 2003.

1. Issues of Border Management in the EU

1.1 The changing nature of border controls

Symbol of identity and physical demarcation of the territory on which a state exercises its sovereignty, borders “traditionally represent the point at which a person seeking to enter the country must demonstrate their admissibility”.⁸ Border management is indeed a sensitive issue as it deals with the reconciliation of the principle of sovereignty, trade facilitation and individual freedoms. Each member state is responsible for border control and surveillance at its external borders; hence, there co-exist various authorities, methods, techniques and practices of border management.

The Schengen ‘laboratory’ for cooperation in border management

With the collapse of the Soviet Union, the nature of borders and border controls profoundly changed as they were no longer understood as clear dividing lines between Eastern and Western Europe. In the 1990s, the completion of the internal market and the integration of European economies created a common territory without internal borders between the member states.⁹ This process of abolition of internal borders was initiated in 1968 as regards goods with the removal of customs duties and the establishment of a common external tariff. Article 14 TEC indeed provided for the establishment of an area without internal borders to ensure freedom of movement for goods, services, capital and people, which de facto created only one external border for the EU as a whole. However, due to growing concerns about security risks caused by increasing cross-border phenomena, border controls on people were not yet abolished.¹⁰

In order to achieve provisions of Article 14 and to tackle the expansion of trans-national security challenges, some member states decided to cooperate at a European level within the intergovernmental framework of the Schengen Agreement of 14 June 1985. The core of this cooperation relies on mutual trust between the participating member states. Indeed, the objective of the Schengen regime is the gradual abolition of checks at the common borders of the parties concomitantly with the reinforcement of external borders. It is based on a huge set of provisions regarding, on the one hand, checks and surveillance at the external borders based on common uniform principles, standards and procedures, and on the other hand, police force actions across internal borders. The *Common Manual* provides full details of these rules notably including crossing of external borders at fixed crossing points and opening hours,¹¹ maximum stay of 3 months except for people representing a “threat to public policy, national security or international relations” of any Schengen member state,¹² systematic and equivalent checks all along the external borders with respect to national law and the interests of all parties¹³ as well as

⁸ Select Committee on the European Union, *Proposals for a European Border Guard*, London: The Stationary Office Limited, House of Lords, Session 2002-03, 29th report, 2003, p. 6.

⁹ Article 14 TEC.

¹⁰ Elspeth Guild and Didier Bigo, “The Schengen Border System and Enlargement”, in Malcolm Anderson, Joanna Apap (eds), *Police and Justice Cooperation and the New European Borders*, The Hague: Kluwer Law International, 2002, pp. 121-138.

¹¹ Article 3, “Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders”, OJ 22.9.200, pp. 19-62.

¹² *Ibid.*, Article 5.

¹³ *Ibid.*, Article 6.

on-line access to the Schengen Information System (SIS).¹⁴ The Schengen cooperation also bears its own mechanism for the evaluation of border performance.

The integration of the Schengen regime into both Title IV TEC and Title VI TEU by the Amsterdam Treaty entailed the Schengen *acquis* becoming an essential element for the definition and the protection of the “area of freedom, security and justice”. Indeed, the Schengen *acquis* is the core source of any relevant EU border management and “other than the Schengen *acquis*, the EU has practically no other *acquis* concerning external border control”.¹⁵ Schengen external borders created a single internal security zone which contributed to blur external and internal security identities as well as to disseminate threats, due to the fact that crossing of external borders therefore provided access to the rest of the EU territory as a whole.

Thus, the management of external borders has become a priority area for the EU and an increasing preoccupation for the European citizens,¹⁶ especially in the context of widespread illegal activities and post-September 11 perception of terrorist threats. Internal security therefore has become the focus and the major difficulty is to find the right balance between security of the EU’s citizens, individual freedoms and the EU’s external relations related to border management. Indeed, tight border controls are not desirable: they could notably endanger local economies as well as threaten the EU’s capacity in its relations with the wider Europe and finally do not efficiently solve the problem of illegal entry of immigrants who would find other means to penetrate EU territory. This consequently raises the issue of the nature of external border controls.

Certainly the EU *acquis* in external border management is permanently evolving towards a common approach – and the creation of the FRONTEX Agency is a great illustration – yet, the Schengen system still clearly bears operational issues that need to be overcome in order to foster coordinated actions and a more coherent external border management system.

Operational difficulties of the Schengen regime

The objective of the Schengen cooperation is to set up uniform standards and procedures for the crossing of external borders. However, it has to be implemented by 15 different legal orders and at least as many diverging administrative structures, which undoubtedly entails difficulties to ensure the effective uniform application of these standards.

Firstly, it highlights the problem of lack of trust between the member states which have to rely on police border forces’ competences rather than on their own police. It is notable that member states prefer to cooperate on the basis of existing bilateral arrangements which work successfully, as for example the Kehl cooperation.¹⁷ This problem of a lack of trust is a reflection of the practical reality of a network of security authorities responsible for border

¹⁴ *Ibid.*, Articles 92-101.

¹⁵ Arto Niemenkari, *EU/Schengen requirements for national border security systems*, DCAF Working Paper No. 8, Geneva Centre for the Democratic Control of Armed Forces, Geneva, March 2002, p. 1.

¹⁶ According to a Eurobarometer survey released by the Commission on 1 March 2004, 80% of respondents asked for controls at the entry of the European Union to be reinforced. The highest rates were noted in countries that have the longest borders such as Greece and Italy (89%), Germany (81%). Sweden had the lowest rate (65%), but this still remains a very high rate.

¹⁷ Hobbing, 2003, *op. cit.*, note 7.

management but which hold different characteristics, organisation, priorities and perspectives.¹⁸ Indeed, the lack of trust can be explained by existing competition between professionals of (in)security, notably over the social construction of threat.¹⁹ Didier Bigo emphasises that security agencies have long been structured in networks according to the ‘*routinisation*’ of information exchange, creating solidarities and divergences between nationalities and professions.²⁰ In the context of the de-territorialisation and the politicisation of police matters, the field of security is therefore defined by rivalries between security agencies that compete to collect information and exclude other actors.²¹ This is patently evident as regards data exchange which “represents a form of knowledge that increases the state’s power. Thus, authorities that hold that data are anxious to retain control over that data”.²² Lack of trust can therefore be perceived through the competition over the construction of facts by these specific actors. Furthermore, the lack of common language and intelligence-sharing, worries about police corruption and about the complexity of cooperative arrangements, insufficient knowledge and understanding of differences²³ as well as suspicion about common instruments, especially towards the SIS database, are additional elements that constrain trust-building between the member states.

This indicates an evident lack of mutual recognition.²⁴ It then explains the rigid requirements that candidate countries have to meet in the prospect of their accession. In fact, since 2007, EU member states are in charge of controlling more than 8,100 km of land borders, 85 600 km of coastline in addition to airports and seaports. Most of the EU external borders fall within the responsibility of the new member states, in particular Poland which holds the surveillance of 1,258 km of land border. The EU’s “shift of emphasis towards external borders and cooperation in internal security [has then placed] the new member states as the first line of defence”.²⁵ It implies that the candidate countries must fully implement Title IV TEC and the Schengen *acquis* before their accession.

This can also involve a dynamic of ‘exclusion’,²⁶ especially in comparison with the ‘variable geometry’ of the Schengen regime. Indeed, non-EU countries (Norway and Iceland) fully participate in the Schengen agreement whereas Denmark, the United Kingdom and Ireland, although they fully participate in the third-pillar measures, have negotiated a partial or total

¹⁸ Malcolm Anderson, “Trust and Police Cooperation”, in Malcolm Anderson and Joanna Apap (eds), *Police and Justice Cooperation and the New European Borders*, The Hague: Kluwer Law International, 2002, pp. 35-46.

¹⁹ Bigo, 2001, *Identities, Borders, Order*, op. cit., note 5.

²⁰ Bigo, 2001, *Cultures et Conflits*, op. cit., note 5.

²¹ *Ibid.*

²² Thierry Balzacq, Didier Bigo, Sergio Carrera and Elspeth Guild, *Security and the Two-Level Game: The Treaty of Prüm, the EU and the Management of Threats*, CEPS Working Document No. 234, Centre for European Policy Studies, Brussels, January 2006.

²³ *Ibid.*

²⁴ Elspeth Guild and Didier Bigo, pp. 134-135, op. cit., note 10.

²⁵ Judy Batt, *The EU’s new borderlands*, Centre for European Reform, London, October 2003, p. 6.

²⁶ Jörg Monar, *Justice and Home Affairs in a Wider Europe: The Dynamics of Inclusion and Exclusion*, Working Paper No. 07/00 of the ESRC ‘One Europe or several?’ programme, at the Centre for European Politics and Institutions, University of Leicester, 2000, p. 2.

‘opt-out’ from first-pillar measures with a possibility to ‘opt-in’.²⁷ Conversely, new member states have no possibility to opt-out under either pillar, whereas they will only gain full Schengen membership on the basis of a positive Schengen evaluation and a unanimous Council decision stating that they have shown a “high level of external border control”. These examples (legal diversity, pure national border management, development of bilateral arrangements or strict Schengen requirements) clearly illustrate that a lack of trust is an aspect that undermines border cooperation. The newly established FRONTEX Agency has therefore the hard task to find the appropriate ground to promote mutual trust among the member states as a key component for homogeneous external border management and cooperation.

Secondly, communication between relevant national border services as well as training of professional border guards need to be fostered for an enhanced operational cooperation. Indeed, border security in practice clearly suffers from *difficulties in terms of compatibility between national border guard services*. Traditionally, forces in charge of controlling criminal activities threatening the citizens’ security (police forces) were clearly distinct from forces responsible for security threats coming from inter-state conflicts (military forces).²⁸ As concepts of internal and external security have become blurred, such distinctions can no longer be acknowledged. Therefore, the identification of the relevant national authorities is nowadays more complex and often undermines operational cooperation.²⁹ For example, in France, police forces and subdivisions of the *Gendarmerie nationale* are all in charge of border management. In this respect, the successful Finnish experience should be highlighted, especially regarding its border cooperation with Russia, which has one unified and professional border authority – the Finnish Frontier Guard – responsible for external border management.³⁰ Professionalism and common training of the border guard as well as efficient technology are also existing issues to be tackled with a view to efficient cooperation. Indeed, it is crucial to overcome linguistic barriers, to train border patrols according to common rules for the surveillance of external borders and to develop proficient crossing points with standardised technology.

Finally, *lack of resources* is an additional important issue that member states currently faces in border security as most costs have to be borne by national budgets, which sometimes results in safety deficits.

In the light of these issues deriving from the Schengen regime, there was a clear need for the EU to provide border management with a common approach in order to give more coherence to this multidimensional system. In this respect, the innovative (but rather vague) concept of ‘integrated border management’ emerged in the EU institutional sphere. Within this framework, the FRONTEX Agency was then designed to become a tool for the implementation of integrated border management.

²⁷ Council Decision No. 2000/365/EC of 29 May 2000 for the United-Kingdom, Council Decision No. 2002/192/EC of 28 February 2002 for Ireland. The Danish ‘opt-in’ regime provides for the necessity to transpose the measures in its internal order.

²⁸ Derek Lütterbeck, “Between Police and Military: The New Security Agenda and the Rise of Gendarmeries”, *Cooperation and Conflict*, Vol. 39, March 2004, p. 45.

²⁹ Adam Townsend, *Guarding Europe*, Centre for European Reform, London, May 2003.

³⁰ Arto Niemenkari, The Finnish Border Security Concept, DCAF Working Paper Series No. 7, Geneva Centre for the Democratic Control of Armed Forces, Geneva, March 2002, p. 22.

1.2 The concept of integrated border management: Ensuring effective external border control and surveillance on the basis of burden-sharing between the member states

In the context of the forthcoming 2004 enlargement and the September 11 events, the Laeken European Council of 14-15 December 2001 embodied a cornerstone for border management acknowledging that “better management of the Union’s external borders will help in the fight against terrorism, illegal immigration networks and the traffic in human beings”.³¹ It also gave the European Commission the mandate to prepare “arrangements for cooperation between services responsible for external border control and to examine the conditions in which a mechanism or common services to control external borders should be created”.³² The Commission built upon the Council’s request and released a communication³³ entitled “Towards integrated border management of the external borders of the member states of the European Union” on 7 May 2002. Based on the analysis of the issues of EU border management, the Commission sought to provide border security patterns with a common EU framework via the concept of integrated border management. This notion is a ‘pre-defined concept’ elaborated in the 1990s to create a ‘border community’.³⁴ However, the Commission communication, although providing content to this vague concept, did not foresee any clear definition of ‘integrated border management’. It set five components of this ‘common policy’ for external borders which should tend towards the establishment of a European border guard.³⁵

A common corpus of legislation in order to recast the Schengen Common Manual, to introduce best practices, to carry out the elaboration of a practical handbook for border guards and to examine the legal framework to create this European border guard;

A common mechanism for coordination and cooperation via the establishment of an External Borders Practitioners Common Unit as the central steering body of SCIFA+ for integrated border management;

A common integrated risk analysis issuing to the Common Unit;

Staff and inter-operational equipment focusing on common modules for training of border guards, standardised use of technology; and

Financial burden-sharing mechanism between the member states leading towards the creation of a European border guard and including cooperation with customs services.

The Commission partially took up the suggestion in the Italian-led feasibility study presented in 2002 by France, Belgium, Italy, Spain and Germany regarding the creation of a European border police.³⁶ However, the study was based on a complex network of national border forces

³¹ Presidency Conclusions, Laeken European Council meeting of 14-15 December 2001, SN/300/1/01 REV 1 CONCL 42.

³² *Ibid.*

³³ Communication to the Council and the European Parliament, Brussels, 7 May 2002, COM(2002) 233 final, 28p.

³⁴ Peter Hobbing, *Integrated Border Management at the EU Level*, CEPS Working Document No. 227, Centre for European Policy Studies, Brussels, August 2005, p. 2.

³⁵ Jörg Monar, “The project of a European Border Guard: Potential, Models and Challenges, conference paper prepared for seminar on Managing International and Inter-Agency Cooperation at the Border, Geneva Centre for the Democratic Control of Armed Forces (DCAF), Geneva, 13-15 March 2003; David Hrvoje Hoic, Jörg Monar (Supervisor), “Towards a European Border Guard”, College of Europe, Bruges, 2004.

³⁶ Jörg Monar, *op. cit.*, note 35, 2003, p. 4.

according to common elements, such as ad hoc centres specialised in different areas of border security and located in different member states. Following the reluctance of certain member states like the United Kingdom and the Scandinavian countries, the JHA Council meeting on 13 June 2002 agreed on a Plan for the management of the external borders of the member states,³⁷ which adopted a more moderated approach. It recommended the creation of the External Borders Practitioners Common Unit as steering body of the SCIFA+ committee. The common unit was set-up in autumn 2002 and already launched joint operations and pilot projects such as Ulysses regarding border control in the Northern part of the Mediterranean Sea. This operation was initiated in January and May 2003 under the supervision of Spain and with the participation of France, Germany, the United Kingdom, Italy and Portugal. The Triton operation was launched in March 2003 under the supervision of Greece in the North-Eastern area of the Mediterranean Sea. An operational centre for external borders was set up in Berlin and pilot projects were implemented regarding training for border guards or airport controls. However, an evaluation report from the Greek Presidency released on June 2003 highlighted deficiencies of this framework for cooperation and the subsequent necessity to establish a new institutional structure.³⁸ In the light of the Hague Programme, the FRONTEX Agency was then set up, building upon this fragmented framework in order to promote integrated border management.

The concept of integrated border management should aim at realising a “delicate attempt to marry security and trade facilitation”.³⁹ In this respect, the construction of border management has implications for free movement and individual freedoms in defining less permeable borders. The EU institutions conceive of ‘integrated border management’ as “the way towards convergence of national systems in order to ensure a high and uniform level of control of persons at and surveillance of the external borders as a precondition to develop the area of freedom, security and justice.”⁴⁰ Border controls have indeed become more and more deterritorialised and focused on groups of people, which fosters border controls as a key element of the area of freedom, security and justice. Therefore, the EU discourse emphasises a securitised vision of the area of freedom, security and justice with regard to the level of border controls, without necessarily taking into account the implications for freedom of movement. The FRONTEX Agency emerges from this EU conception of differentiated border management involving a high level of border control and a focus on targeted groups. Nevertheless, it can be noted that FRONTEX’s operational activities aim at the development of common rules and standards, carrying out collective actions and diffusion of best practices, which contribute to the building-up of integrated border management.

The EU is progressively trying to shape this vague concept of integrated border management, for example through the adoption of a Community Border Code⁴¹ as well as financial mechanisms, fostering solidarity like the Schengen facility to support the development of national border infrastructure in the new member states and the candidate countries (€50

³⁷ Council of the European Union, 14 June 2002, 10019/02.

³⁸ Presidency Conclusions, Thessaloniki European Council 19-20 June 2003, Brussels (retrieved from http://europa.eu.int/constitution/futurum/documents/other/oth200603_en.pdf).

³⁹ Peter Hobbing, *op. cit.*, note 34, p. 1.

⁴⁰ Proposal for a Council Regulation establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, Brussels, 20 November 2003, COM(2003) 687 final, p. 1.

⁴¹ Regulation of the European Parliament and of the Council establishing a Community Code on the rules governing the movement of persons across borders, OJ L 105, Brussels, 13 April 2006.

million for 2002-06) or the External Borders Fund⁴² within the framework of the general programme on Solidarity and Management of Migration Flows. Some member states even wished to speed up cooperation through the establishment of the so-called ‘Prüm cooperation’ named after the Treaty signed on 27 May 2005 between Germany, France, Spain, Benelux and Austria. Although criticised,⁴³ it aims at speeding up exchange of information between the parties, especially in the fields of terrorism, illegal immigration and cross-border crime.

Therefore, it is of major importance to provide the concept of integrated border management with a clear definition in order to pave the way towards an EU common policy in border management. It is indeed a task that the Finnish Presidency was willing to carry out⁴⁴ and therefore initiated the ‘border management strategy’ with a view to defining this concept as unambiguously as possible.⁴⁵ On 4-5 December 2006, the JHA Council adopted the ‘border management strategy’ in its conclusions.⁴⁶ The latter is based on border control and surveillance as defined by the Border Community Code including risk analysis and criminal intelligence, investigation of cross-border crime, a ‘four-tier access control model’, cooperation between relevant authorities at national and international levels as well as coordination and coherence of action taken by the member states and institutions.

In this context, the creation of the FRONTEX Agency represents an attempt to bring an effective institutional response to these challenges, to design a specific tool promoting burden-sharing and a harmonised content to the concept of ‘integrated border management’. With respect to the principle of subsidiarity, the Agency aims at facilitating “the application of existing and future Community measures relating to the management of external borders by ensuring the coordination of member states’ actions in the implementation of those measures”.⁴⁷ Its objective is therefore to optimise operational cooperation at the external borders.

2. Optimising Operational Cooperation at the External Borders

2.1 A cautious institutional creation: An independent agency coordinating joint operations between the member states

FRONTEX is the 19th decentralised European regulatory agency created by the European Union. Although it does not bear any policy-making or direct operational powers, it is however technically independent with a clear legal basis in the EC Treaty as well as financial, administrative and legal autonomy.

A constitutive act built upon the Schengen acquis

Contrary to Europol, which was established by a conventional instrument, the core of the creation of FRONTEX lies within the provisions of the EC Treaty, in particular Article 62§2a) and Article 66 TEC. According to this legal basis, the member states hold the responsibility for

⁴² Proposal for a Decision of the European Parliament and the Council establishing the External Borders Fund for the period of 2007-2013 as part of the General programme Solidarity and Management of Migrations Flows, Brussels, 6 April 2005, COM(2005) 123 final.

⁴³ Thierry Balzacq, Didier Bigo, Sergio Carrera and Elspeth Guild, *op. cit.*, note 22.

⁴⁴ Markku Hassinen, JHA Counsellor (Border Security and Visas), Finnish Permanent Representation, Interview, Brussels, 11 May 2006.

⁴⁵ Finnish Presidency, *op. cit.*, note 2.

⁴⁶ Council of the European Union, 2768th session of JHA Council meeting, *op. cit.*, note 1.

⁴⁷ Council Regulation No. 2007/2004, § 4, *op. cit.*, note 6.

external border management, in particular *via* the implementation of joint operations or pilot projects. However, FRONTEX can coordinate the activities of the member states,⁴⁸ without prejudice to their competences, in order to improve operational cooperation between individual national administrations which are not able to sufficiently achieve “a comprehensive and integrated European management of the operational cooperation in the fields of control of the external borders and removal of third country nationals from the territories of the member states”.⁴⁹ Furthermore, Article 66 TEC states that Council Regulation No. 2007/2004 has to fulfil the objective of supporting the development of the ‘area of freedom, security and justice’ via the reinforcement of administrative cooperation between the national level and the European Commission regarding the implementation of the Schengen *acquis* on border control and surveillance. Indeed, the EU common policy on external border management is Schengen *acquis*, and therefore the FRONTEX regulation also constitutes a development of the Schengen *acquis*. Consequently, the acceding countries will be bound by the regulation as they are required to comply with the full transposition of the *acquis* into their legal systems as it stands on the day of their accession. Furthermore, the FRONTEX regulation is subject to an *à la carte* implementation according to the Protocols under Title IV TEC on the positions of the United Kingdom, Ireland and Denmark as well as on the participation of Norway and Iceland.

An *à la carte* participation in its activities

The United Kingdom and Ireland both benefit from a flexible opt-out regime as they can request a partial or total opt-in at any time for certain provisions of the Schengen *acquis*. Thus, the question of their participation in the missions of the FRONTEX Agency was raised before the adoption of its constitutive regulation as both countries already take part in numerous operational joint actions within the framework of the existing ad hoc centres for cooperation. Finally, the FRONTEX regulation clearly states that both countries do not take part in its adoption, which caused the United Kingdom to bring the case before the ECJ to request the annulment of the regulation for misinterpretation of certain provisions of the Schengen Protocol.⁵⁰ Furthermore, the two countries are neither bound by the regulation nor subject to its application. However, they can take part in some activities but their participation must be decided by the management board.⁵¹ In practice, cooperation with the United Kingdom and Ireland works smoothly; they both have appointed national experts at the Agency.⁵²

Nevertheless, due to the tensions between Spain and the United Kingdom,⁵³ the application of the FRONTEX regulation to Gibraltar has been suspended until an agreement is reached on a border-crossing regime for people.

Regarding Denmark, its participation is conditional on the transposition into its legal system within six months following the adoption of the FRONTEX regulation (Article 5 of the Schengen Protocol).

⁴⁸ COM(2003) 687 final, p. 2, op. cit., note 40.

⁴⁹ Ibid., p. 10.

⁵⁰ United Kingdom v. Council of the European Union, C-77/05, OJ C 82, 2 April 2005, p. 25.

⁵¹ Council Regulation No. 2007/2004, Article 20 § 5, op. cit., note 6.

⁵² Ilkka Laitinen, Memorandum submitted by External Border Agency, Select Committee on the European Union, London: House of Lords, 2 November 2006, p. 12.

⁵³ These tensions also contributed to delay the establishment of FRONTEX which was planned for 1 January 2005; see “EU compromise leaves Gibraltar out of the new borders agency”, 16 September 2004 (www.eubusiness.com).

With respect to the association agreement, Norway and Iceland fully take part in the Schengen *acquis* and are thus bound by the application of the FRONTEX regulation. As regards Article 21 of the Regulation, the Commission released a proposal in April 2006 on the signature of an arrangement with Norway and Iceland defining the modalities of their participation in the missions of the Agency.⁵⁴

A small independent unit with legal personality

Regarding composition and governance, the ‘light’ structure with its small budget (€6-12 million) proposed by the Commission surely contributed to balance the member states’ decision to create the external border Agency.⁵⁵ The Agency is currently composed of 50 persons⁵⁶ recruited as temporary agents, auxiliary agents and ‘seconded national experts’.⁵⁷ It is chaired by the Executive Director who is proposed by the Commission and appointed by the management board by a two-third majority voting rule. However, contrary to the request of the European Parliament, the candidate does not need to be auditioned before being appointed.⁵⁸ Currently, the Executive Director is a former Finnish frontier guard Ilkka Laitinen and is assisted by a Deputy Executive Director, Gil Arias, both nominated for five years on the basis of their experience and merits.⁵⁹ In this respect, a proposal from the Commission amending the FRONTEX regulation⁶⁰ with a view to harmonise the term of office of directors of all EU agencies is currently pending at the EU Council for adoption. The Executive Director is independent, although its appointment can be dismissed by the Management Board, drafts the working programme⁶¹ as well as the annual activity report⁶² and does not bear, along with all FRONTEX personnel, neither repressive nor direct operational powers.

⁵⁴ Proposal for a Council Decision on the signature, on behalf of the European Community, of an Arrangement between the European Community and the Republic of Iceland and the Kingdom of Norway on modalities of those states’ participation in the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, Brussels, 26 April 2006, COM(2006)178 final.

⁵⁵ Nils Hanninger, JHA Counsellor for the Swedish Ministry of Foreign Affairs, Swedish Permanent Delegation to the European Union, Interview, Brussels, 3 May 2006.

⁵⁶ Ilkka Laitinen, FRONTEX Agency Executive Director, telephone interview, Bruges, 10 May 2006.

⁵⁷ Council Regulation No. 2007/2004, Article 17, *op. cit.*, note 6; EU Council General Secretariat, Frontex General Report for the year 2005, Brussels, 13 June 2006, 10438/06, p. 5.

⁵⁸ Legislative Resolution on the Proposal for a Council Directive amending Regulation No 2007/2004 as regards the term of the office of the Executive Director and the Deputy Executive Director of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, Brussels, 13 December 2005, P6_TA(2005)0488, amendment 40.

⁵⁹ Council Regulation No. 2007/2004, Article 26, *op. cit.*, note 6.

⁶⁰ Proposal for a Council Directive amending Regulation No 2007/2004 as regards the term of the office of the Executive Director and the Deputy Executive Director of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, Brussels: Commission of the European Communities, 13 May 2005, COM(2005)190 final.

⁶¹ In this respect, FRONTEX working programmes for 2006 was an ‘A’ item adopted in the form of a restricted Council at the JHA Council meeting at Luxembourg on 27-28 April 2006. EU Council, 2725th Council meeting Justice and Home Affairs, Brussels, 26 April 2006, 8629/06, p.2 (available at: http://www.frontex.europa.eu/minutes_and_decisions/decisions).

⁶² FRONTEX General Report for 2005 was adopted by the Management Board on 24 March 2006. Note from the General Secretariat to SCIFA Committee (COMIX) Frontex General Report for the year 2005, Brussels, 13 June 2006, 10438/06.

The Management Board is represented by a Chairperson and a Deputy Chairperson both appointed for two years. Initially, the Commission proposal established twelve ‘members’ and two ‘representatives’ of the Commission. This composition was highly criticised by the European Parliament which denounced the strong intergovernmental features of the Agency (composition and unanimity voting rule). Finally, the Council settled for one representative of each member states and two representatives of the Commission to compose the management board for four years.⁶³ “The management board which exercises the supreme command control within the FRONTEX Agency consists of the heads of the border guard services which was a very, very good decision by the Council in terms of commitment and keeping the focus on operational things”.⁶⁴ Meetings of the management board occur at least twice a year⁶⁵ and its decisions are taken according to the majority voting rule.⁶⁶

The organisation of the FRONTEX Agency does not have a particularly hierarchical structure, as it is split in six units: ⁶⁷ administration, finance and procurement, planning/research/development, training, risk analysis, operations. The latter is divided into four ‘light’ sub-units (each composed of two or three people), respectively, in charge of land borders, coastlines, airports as well as return operations and coordination of operations. However, the Agency still benefits from infrastructure, furniture, IT and communications equipment donated by the Polish Ministry of Interior and Administration⁶⁸ which causes, according to Mr Laitinen, certain difficulties as FRONTEX is supposed to remain independent from its host country⁶⁹. Furthermore, the Agency can set up ‘specialised branches’ in the member states to identify best practices in the field of external border management. Following the request from the European Parliament, these branches should however be implemented “taking into account that due priority should be given to operational and training centres already established”⁷⁰ in order to avoid overlaps with the existing ad hoc centres.

Financial autonomy

The FRONTEX Agency has its own revenues subsidised by the Community, the associated countries and any voluntary contribution of the member states and is furthermore enriched by fees for services provided. The budget is drafted by the Executive Director, adopted by the Management Board and transmitted to the Commission and the Budgetary Authority. The European Parliament wished to include a contribution from the hosting country, but this argument never came through and the reason is easily understandable. Indeed, contributions from the member states take place on a voluntary basis so there is clearly no justification for a financial obligation falling on Poland, especially taking into account that the latter has already donated material and IT infrastructures to the Agency. The expenditure includes staff, administration, infrastructure and operational expenses ⁷¹ such as technical equipment

⁶³ Council Regulation No. 2007/2004, Article 21, op. cit., note 6.

⁶⁴ Ilkka Laitinen, op. cit., note 52, p. 11.

⁶⁵ Council Regulation No. 2007/2004, Article 23, op. cit., note 6.

⁶⁶ Council Regulation No. 2007/2004, Article 24, *ibid*.

⁶⁷ Rustamas Liubajevs, Head of Planning Research and Development Unit at FRONTEX, (www.espi.or.at).

⁶⁸ FRONTEX General Report for 2005, op. cit., note 62, p. 5.

⁶⁹ Jukka Nortio, “Security of the EU’s borders in Finnish hands”, *TietoEnator*, 4 April 2006 (www.tietoenerator.fi).

⁷⁰ Council Regulation No. 2007/2004, Article 16, op. cit., note 6.

⁷¹ Council Regulation No. 2007/2004, Article 29, op. cit., note 6.

procurement to provide the member states with during joint operations. In 2005, the Commission subsidy for operational expenditure amounted €4 million.⁷²

FRONTEX budgetary line enters in the general budget of the European Union, Chapter 2, Title 18, Section III. Initially, the revenue of the Agency amounted €6.2 million but it has been increased to €12.4 million for 2006, with respect to a transfer from the ARGO budgetary line⁷³ as FRONTEX has overtaken the activities under the ARGO programme in the field of operational cooperation at the external borders. There is notably evidence of this participation in the Mediterranean Sea providing assistance to the authorities of the Italian Island of Lampedusa to boost reception facilities or the AMPHITRI project on surveillance of sea areas between Italy, Libya and Crete.

However, the limited amount of FRONTEX revenue clearly bounds FRONTEX activities of coordination of operational cooperation.⁷⁴ Yet, it allows the Agency to co-finance some joint operations and pilot projects within the limits of its budget. For example, in February 2006, around €600,000 were dedicated to 10 operational projects to be launched in 2006.⁷⁵

2.2 A need to establish common rules for the coordination of operational cooperation

According to Council Regulation No. 2007/2004, FRONTEX is invested with a mission to coordinate operational cooperation at the external borders of the member states that is enshrined in six specific vertical and horizontal tasks. It aims at embodying “a trustworthy operational community coordinator and contributor”⁷⁶ to promote intelligence-driven cooperation and burden-sharing between the member states as well as to pave the way towards the establishment of common rules for the coordination of operational cooperation.

An ‘orchestra conductor’ without direct operational assignments

Article 2 of Council Regulation No. 2007/2004 identifies the main tasks of the FRONTEX Agency. Its primordial task is to “coordinate operational cooperation between member states in the field of management of external borders”. In this respect, its activities are purely complementary to those of the national authorities as it is clearly stated in Article 1 § 2 of the FRONTEX regulation. The Agency directly cooperates with the concerned member states in order to coordinate joint operations or pilot projects at the external borders. In this respect, FRONTEX has established a network of national contact points that most member states have appointed.⁷⁷ Joint operations can be described as operational activities carried out by at least two member states, eventually in cooperation with the Agency, in order to reinforce border control and surveillance on specific areas of the EU’s external borders.⁷⁸ The first land operation within the scope of FRONTEX took place from 16 to 25 December 2005 in Austria, Czech Republic, Germany, Hungary, Poland, Slovakia and Slovenia.⁷⁹ Pilot projects are identified as operational

⁷² FRONTEX General Report for the year 2005, p. 6, op. cit., note 62.

⁷³ Budgetary Support Service, Decentralised Agencies – Complementary information, European Commission, Brussels, 8 June 2005.

⁷⁴ Ilkka Laitinen, Telephone interview, op. cit., note 56.

⁷⁵ FRONTEX General Report for the year 2005, op. cit., note 62.

⁷⁶ Council Regulation No. 2007/2004, op. cit., note 6, p.3.

⁷⁷ FRONTEX General Report for the year 2005, op. cit., note 62, p. 7.

⁷⁸ COM(2003) 687 final, op. cit., note 40, p. 10.

⁷⁹ FRONTEX General Report for the year 2005, op. cit., note 62, p. 7.

activities related to external border control and surveillance with a view to examine the feasibility of certain operational methodology and technical equipment.⁸⁰ It aims at bringing technical, material and financial assistance to the member states taking into account variable geographical features as well as insufficient resources of certain member states to satisfactorily fulfil this task. The FRONTEX Agency has the task to examine, approve and coordinate these proposals for joint operations or pilot projects and in certain circumstances, it can initiate such activities with the consent of the member states. It also has the power to decide upon co-financing these activities and/or providing technical assistance. In this respect, the setting-up of the so-called ‘specific branches’ are important elements to a successful coordination of the cooperation. Regarding joint operations and pilot projects, the European Council of 15-16 December 2005 in Brussels called for FRONTEX, within the context of a global approach to migrations, to draw specific attention to the Mediterranean Sea area and African countries where uncontrolled migratory flows of people arriving at sea have to be appropriately dealt with.⁸¹ Mr Laitinen stressed out that the Mediterranean Sea area ranks high among the top priorities of the Agency⁸² which has already participated in several joint operations since October 2006, notably land cooperation from December 2005 to January 2006 to tackle illegal workers, air cooperation in Turin in February 2006 as well as in a procedure to identify best practices in the field of return operations.⁸³

A core task of risk analysis and risk assessment

Risk analysis and risk assessment are certainly placed at the core of FRONTEX activities as they provide the Agency with the suitable basis for its operational activities and the development of a common core curriculum for training of border guards.⁸⁴ Indeed, Article 4 of Council Regulation No. 2007/2004 states that FRONTEX “shall develop and apply a common integrated risk analysis model” composed of general and tailored risk analyses. In this respect, the Finnish Risk Analysis Centre (RAC), now placed under the responsibility of FRONTEX, has already developed a risk analysis model that is flexible enough to fit general assessments as well as specific analyses focused on certain group of people or territories.⁸⁵ In this respect, this instrument reflects the modern vision of security as it embodies the expression of differentiated border management detached from the territorial logic and targeted to certain groups of people.

These risk assessments are aimed to allow the Agency to plan as accurately as possible major joint operations. This task also requires a close collaboration and fruitful exchange of information with local authorities, for example, when repeated criminal activities are identified and reported. In this respect, the European Council of 15-16 December 2005 requested FRONTEX to present a risk analysis on Africa in 2006 as well as a feasibility study on strengthening sea border surveillance in the Mediterranean Sea and on the network of Mediterranean coast guards. FRONTEX indeed completed such study as regards Ceuta and Mellila with the objective to elaborate a risk analysis model for the coordination of operational

⁸⁰ Ibid.

⁸¹ Presidency Conclusions, Brussels European Council of 15-16 December 2005, 30.1.2006, 15914/1/05 REV I, p. 10.

⁸² Ilkka Laitinen, *op. cit.*, note 52, p. 13 and telephone interview, *op. cit.*, note 56.

⁸³ Ibid., p. 23.

⁸⁴ Telephone interview, *ibid.*

⁸⁵ Giuseppe Callovi, “Securing External Frontiers in a Union of 25”, paper presented at Dutch Presidency Conference on Asylum, Migration and Frontiers and published as MPI Policy Brief 5, Migration Policy Institute, Washington, D.C., September 2004, p. 5.

cooperation in this region.⁸⁶ The Agency also engaged in a technical mission of the EU Commission to Morocco and the Canary Islands of Ceuta and Mellila.⁸⁷ It is also commissioned to carry out a common risk analysis in order to contribute determining the financial support under the External Borders Fund.⁸⁸

Risk analyses are presented to the European Commission and the Council. The European Parliament is however excluded from its diffusion which denotes a regrettable lack of transparency of FRONTEX activities since risk assessments provide for the basis of all FRONTEX's operational tasks.

Conditional technical and operational support to member states: The Rapid Border Intervention Teams

Article 8 of Council Regulation No. 2007/2004 provides for technical and operational support to be given by the Agency to member states requesting it in particular circumstances. During the consultative procedure, the nature of these situations requiring such assistance from the Agency has been raised. The European Parliament voted to specify the character of 'exceptional' circumstances⁸⁹ but the Council finally kept the original writing of "circumstances requiring increased technical and operational assistance at external borders". Therefore, in such situations FRONTEX can provide expertise and manpower of border guards on a temporary basis and/or technical equipment for border control and surveillance.

According to this legal basis, the European Council, in the conclusions of its meeting in Brussels on 15-16 December 2005, invited the Commission "to bring forward a proposal for the creation of rapid reaction teams made up of national experts able to provide rapid technical and operational assistance at times of high influxes of migrants, in accordance with the Hague Programme, by Spring 2006".⁹⁰ Consequently, the Commission drafted a proposal⁹¹ on 19 July 2006 to establish these Rapid Border Intervention Teams, hence the name of the so-called 'RABIT proposal'. The proposal aims at creating a mechanism to rapidly respond to a requesting state facing extreme difficulties by providing support to be given by the Agency in the form of expertise, manpower of border guards and technical assistance. Although innovative, this mechanism reveals interrogations regarding the eventual participation of non-Schengen member states. It therefore highlights the complexity and multiplicity of border management.

RABIT shall act within the framework of the Agency according to common rules defined by the proposal. They are composed of guest officers from national border forces which can be

⁸⁶ Ilkka Laitinen, *op. cit.*, note 52, p. 13.

⁸⁷ FRONTEX General Report for the year 2005, *op. cit.*, note 62, p. 7.

⁸⁸ Communication from the Commission to the Council and the European Parliament establishing a framework programme on 'Solidarity and Management of Migration Flows for the period of 2007-2013, Brussels: Commission of the European Communities, COM(2005) 123 final, 6 April 2005, p. 7.

⁸⁹ Legislative Resolution on the Proposal for a Council Regulation establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, Brussels: European Parliament, amendment 4, P5_TA(2004)0151, 24 February 2004.

⁹⁰ Presidency conclusions, Brussels European Council of 15-16 December 2005, 30 January 2006, 15914/1/05 REV I CONCL.3.

⁹¹ Proposal for a Regulation of the European Parliament and of the Council, Proposal of Regulation of the European Parliament and of the Council establishing a mechanism for the creation of Rapid Border Intervention Teams and amending the Council Regulation (EC) No. 2007/2004 as regards that mechanism, Brussels, 19 July 2006, COM(2006) 401 final.

deployed at a member state's request within five working days. In this respect, RABIT are clearly distinct from Joint Support Teams taking part in joint operations or pilot projects as they are tailored to specific situations and their costs shall be solely borne by the Community. Therefore, this mechanism is envisaged to further promote solidarity between the member states.

In 2006, the Finnish Presidency drew specific attention to take forward the adoption of the proposal⁹² which is a major component to give “new impetus to the development of (...) a common integrated management system for the Union's external borders” and to provide FRONTEX with “political guidelines and support”.⁹³ The Commission indeed presented its RABIT proposal during the first JHA Council meeting⁹⁴ under the Finnish Presidency in Brussels on 24 July 2006.

The establishment of a common core curriculum

The main objective of the Agency as regards training is to improve professionalism of authorities responsible for border management. The Training Centre for Border Guards in Vienna has already developed a common core curriculum for certain officers and has established a permanent network of national training academies for border guards. In this respect, several *in situ* training programmes have been set up in some member states with a view to teaching appropriate legal and linguistic vocabulary to operational forces prior to their participation in a joint operation. Furthermore, training programmes are also developed as regards fundamental rights and on the management of people crossing external borders.

Article 5 of Council Regulation No. 2007/2004 provides for the most important horizontal task of the Agency, that is to say the establishment of a common core curriculum for training of border guards. Its task is based on the existing common rules developed by the Vienna centre – now placed under the responsibility of FRONTEX – in order to “offer seminars and additional training for officers of the national border guards”.⁹⁵ The common core curriculum builds upon results of risk analyses⁹⁶ with a view to display guidelines for border guards performing their tasks notably as regards “enforcement measures/sanctions, control activities, investigation activities, administration, operations equipment and methods and personality development”.⁹⁷ In this respect, the European Parliament voted to introduce the possibility for local agents, not necessarily related to the Agency but operating on the territory of the concerned member states, to attend these training seminars if requested from their local administration.⁹⁸ Although this amendment was not taken up in the revised proposal, a more general statement on “training activities in cooperation with the member states in their territory” is provided in the FRONTEX Regulation.

⁹² Markku Hassinen, interview, op. cit., note 44.

⁹³ Finnish Minister of Interior Kari Rajamäki, Hearing at the LIBE Committee, Brussels, 13 July 2006 (see www.eu2006.fi/news_and_documents/speeches/vko28/fr_FR/163730).

⁹⁴ Council of the European Union, 2746th session of JHA Council meeting, Brussels, 24 July 2006, 11556/06 (Press 216).

⁹⁵ COM(2003) 687 final, op. cit., note 40, p. 11.

⁹⁶ Ilkka Laitinen, telephone interview, op. cit., note 56.

⁹⁷ Ibid.

⁹⁸ P5_A(2004)0151, amendment 23, op. cit., note 87. Christian Ulrik Von Boetticher (rapp.), report on the Proposal for a Council Regulation establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, Committee on Citizens' Freedoms and Rights, Justice and Home Affairs, Brussels: European Parliament, 24 February 2004, A5-0093/2004, p. 40.

A horizontal task of planning, research and development

Research and development are a crucial element of integrated border management. It is indeed essential to study the appropriate methods and techniques to efficiently plan joint operations at the external borders. Therefore, FRONTEX is entitled to closely follow developments of scientific research in the field of external border control and surveillance,⁹⁹ for example regarding patterns or devices for detection of illegal immigrants concealed in cars, lorries or trains.¹⁰⁰ On this basis, FRONTEX should then be able to assess its methods and techniques during operational situations. In order to develop this task, although FRONTEX cannot rely on connections with R&D sectors of private companies, the Agency can closely work with think-tanks, in particular the EU Joint Research Centre.

FRONTEX must systematically circulate recent research developments to the Commission and the member states, with the exception of the European Parliament which remains excluded from the dissemination of the information.

Data exchange and cooperation with other sectors closely connected to external border management

In its proposal establishing the Agency, the Commission drew attention to the necessity of exchanging ‘non-personal’ data containing only general information on the relevant field and on methods and means of illegal immigration. However, Article 13 of Council Regulation No. 2007/2004 referred to general cooperation “with Europol and the international organisations competent in matters covered by [the] Regulation in the framework of working arrangements”. The Commission proposal also insisted on horizontal cooperation with closely related sectors, such as customs, as key element of the concept of integrated border management. Disappointingly, the FRONTEX regulation does not refer to such cooperation. However, Article 31 holds provisions for cooperation with OLAF as regards fight against fraud.

Data exchange with Europol¹⁰¹ and international organisations such as Interpol as well as cooperation with others sectors like customs and frauds are crucial components for the successful implementation of integrated border management. Therefore, they are essential to FRONTEX’s activities of coordination of operational cooperation especially data collection for risk analysis. In practice, the relationship with Europol works smoothly, close cooperation has been set up since November 2005 and information exchange occurs only on the basis of operational data.¹⁰²

An original assignment of assisting return operations

Article 9 of Council Regulation No. 2007/2004 authorises the Agency to “provide the necessary assistance for organising joint return operations of member states”. However, the article does not mention whether third countries can take part (or not) in these operations and projects. This original competence is the most widely discussed assignment of the Agency,¹⁰³ especially as

⁹⁹ Council Regulation No. 2007/2004, Article 6, op. cit., note 6.

¹⁰⁰ COM(2003) 687 final, p. 11, op. cit., note 40.

¹⁰¹ Europol has actively taken part in the work within the scope of the former External Border Practitioners Common Unit.

¹⁰² Ilkka Latinen, telephone interview, op. cit., note 56.

¹⁰³ Dan Van Raemdonck, “Surveillance et expulsion des étrangers pour garantir la liberté de circulation des européens? Inauguration de l’Agence des frontières extérieures de l’UE: l’AEDH exprime à nouveau son inquiétude”, Brussels: Association européenne de défense des droits de l’homme, 8 July 2005. Yann

regards human rights, the increasing number of expulsions and the lack of common EU policy in immigration and asylum. Initially, the Commission proposal worded the definition of the task as ‘coordination’ of operational cooperation in the field of return operations. It notably referred to the establishment of a network of contact points, of a register to record existing resources and infrastructures or of guidelines and specific recommendations.¹⁰⁴ Moreover, as the adoption of general provisions as regards return policy is not among the competences that can be borne by the Agency, the question of providing FRONTEX with a task of coordination/organisation of joint return operations was highly politicised and criticised – especially by the European Parliament. Indeed, the latter argued that it was premature to set up an operational structure in charge of return operations as there is not yet any EU common policy in asylum and immigration, in particular concerning the refugee status. Hence, the revised proposal no longer referred to any task of coordination or organisation. Finally, the FRONTEX regulation only mentioned the provision of ‘necessary assistance’, such as technical support or identification of best practices in the field of return operations and issuance of travel documents. However, the objective of the FRONTEX Agency is not to define a common return policy through the implementation of its task of assistance. In fact, this assignment concerns only a handful of operations per year,¹⁰⁵ which are carefully registered.

Article 14 of Council Regulation No. 2007/2004 provides for the facilitation of operational cooperation with third countries within the framework of the EU external relations policy. As regards Article 9, no mention of cooperation with third countries is worded. Subsequently Article 14 allows for such cooperation with “competent authorities of third countries in the matters covered by [the] Regulation” – hence in the field of joint return operations. In practice, such relations with third countries have been set up, in particular with the Russian service for border security¹⁰⁶ notably in the fight against corruption¹⁰⁷. The FRONTEX work programme for 2006 asserted the assistance of the Agency to four joint return operations, the first one during the Austrian Presidency and the last three launched during the Finnish Presidency.¹⁰⁸ “Priority [was] given to those countries which in terms of illegal immigration are source countries or countries of transit”,¹⁰⁹ that is to say Ukraine and the Mediterranean Sea area with which FRONTEX foresees signing working arrangements. These instruments are crucial because, if well managed and enhanced, they may influence relations with neighbouring countries and the EU’s external relations related to border management. It could therefore contribute to fostering mutual trust through ‘face to face contacts’ and disseminating best practices.

In addition, cooperation with international organisations and Europol are indispensable elements to implement an integrated border management of which FRONTEX is the cornerstone.

Richard, *Les frontières improbables de l’espace migratoire européen*, 8 July 2005 (www.peuplesmonde.com).

¹⁰⁴ COM(2003) 687 final, p. 12, op. cit., note 40.

¹⁰⁵ Ilkka Laitinen, Telephone interview, op. cit., note 56.

¹⁰⁶ Permanent EU-Russia Partnership Council, Ministerial meeting: Justice and Home Affairs, Luxembourg: EU Council, 12-13 October 2005, 12998/05 (Press 257).

¹⁰⁷ Jukka Nortio, op. cit., note 69.

¹⁰⁸ Ilkka Laitinen, op. cit., note 52, p. 4.

¹⁰⁹ *Ibid.*, p. 3.

3. The ‘cornerstone’ of integrated border management?

3.1 Substantial ‘challenges’ and problems to overcome

In speaking about the problems that FRONTEX has to face in its activities, Mr Laitinen said: “when I speak about problems, I have given order to my staff not to speak about problems but to speak about challenges instead”.¹¹⁰ Indeed, the challenges are multiple, especially due to the large panel of attributed competences in a vast sphere of action. However, some ‘challenges’ remain highly problematic with regards to democratic accountability.

A large panel of competences

Firstly, the Agency is charged with six tasks, most of which were taken up from the competences of the former external border practitioners common unit, which it implements within a wide scope of action. Therefore, this large panel of tasks could potentially undermine in practice the efficiency of FRONTEX’s activities. This question was raised at the House of Lords and directed at Mr Laitinen who replied that the multi-functionality of the Agency could challenge its activities to a certain extent but did not undermine its efficiency. The major difficulty lies in the adequate management of human and financial resources and the selection of priorities.¹¹¹ Although the Agency is structured around clearly subdivided units in charge of the main tasks, its ability to remain a ‘light’ structure with few people in each subunit may be called into question. Indeed, FRONTEX must bear a large panel of missions which subsequently requires sharp human and technical expertise.

Secondly, with respect to training and establishment of a common core curriculum, it is regrettable that specific mention of linguistic seminars was not included in the regulation. According to Dr. Edward Johnson, expert in operational languages, knowledge of legal and linguistic vocabulary prior to a joint operation is an essential element for a successful operation.¹¹² In this respect, it has to be recalled that language was clearly an important issue in the Ulysses joint operation between Spain, France, Italy and Portugal. However, this argument can also be moderated in certain situations. In practice, police cooperation often occurs on a regional basis, for example between Scandinavian countries which have at least one commonly understandable language or between some Eastern European countries which cooperate using German.¹¹³ Furthermore, linguistic programmes are set up such as ‘LinguaNet’ which consists of the establishment of a communications system connecting networks of multilingual computers.¹¹⁴ Several projects are implemented in this field; hence it could be cost-efficient for FRONTEX to use this technology and to provide the member states during joint operations presenting potential linguistic issues.

Finally, the task of assisting the member states during joint return operations has certainly been discussed and criticised, especially by the European Parliament and among associations for the defence of fundamental rights. These associations asserted that the creation of the Agency reflected a migratory policy mechanism that placed more emphasis on security than on freedom

¹¹⁰ Ilkka Laitinen, *op. cit.*, note 52.

¹¹¹ *Ibid.*, p. 9.

¹¹² Edward Johnson, Minutes taken before the European Union Committee, House of Lords, London, Session 2002-03, 29th Report, 12 February 2003, p. 91.

¹¹³ Nils Hänninger, Interview, *op. cit.*, note 55.

¹¹⁴ Edward Johnson, *op. cit.*, note 112.

and justice which subsequently contributed to establishing an ‘expulsion agency’.¹¹⁵ In this respect, Mr Laitinen rather highlighted the character of ‘travel agency’¹¹⁶ than ‘expulsion agency’ as FRONTEX abides by its task of identification and compilation of best practices concerning travel documents. Besides, it has to be underlined that the Agency can only act if one or several member states require its assistance and provide it with information in terms of their needs for the joint return operation.

A financial cost to adjust

FRONTEX has only started its missions of coordination of operational cooperation less than a year ago which makes it hard to estimate its real financial cost for all of its actions. In 2005, FRONTEX did not have financial autonomy and its €6 million budget provided for administrative expenditure.¹¹⁷ In 2006, the Community subsidy practically doubled and it should amount to €20 million in the next few years. Therefore, the year 2006 was a turning point for the evaluation of the financial needs of the Agency which has recently started its activities. However, considering the large panel of its missions, especially regarding technical assistance to member states, the extent of the Community subsidy and the voluntary contributions of the member states in order to cover the cost of all foreseen activities can largely be questioned for the next years. As an example, although Europol is a wider structure notably in terms of personnel, it is granted an annual budget of €50 million.

A risk of ‘bureaucratisation’

Europol has indeed an extremely hierarchical structure with significant human resources which somehow constrains its scope of action, and hence its so-called ‘window-dressing’¹¹⁸ qualification. Conversely, FRONTEX was initially created with a view to remaining a ‘light’ structure with limited and independent personnel. However, it is unlikely that it will remain as such, considering the magnitude of its tasks and expectations from the EU institutions. Nevertheless, one can also argue that a very hierarchical structure could undermine its efficiency. In this respect, it can be noted that Scandinavian countries avoid setting up too hierarchical systems. Therefore, it is possible to envisage that, despite administrative organisation being decided by the management board, Mr Laitinen’s personality, experience and methods of management of human resources could benefit the Agency’s structure and governance.¹¹⁹

Regarding administrative practices, Council Regulation No. 2007/2004 does not mention the working language of the Agency. In practice, English is the language used for internal and external communication.¹²⁰ Although this issue is of much more importance for the management of databases, it is still interesting to underline it with reference to Europol’s experience with linguistic issues, which caused substantial negative repercussions for its activities.¹²¹

¹¹⁵ Dan Van Raemdonck, *op. cit.*, note 102.

¹¹⁶ Ilkka Laitinen, *op. cit.*, note 52, p. 5.

¹¹⁷ FRONTEX General Report for the year 2005, *op. cit.*, note 62, p. 6.

¹¹⁸ Adam Townsend, *op. cit.*, note 29, p. 43.

¹¹⁹ Nils Hänninger, Interview, *op. cit.*, note 55.

¹²⁰ Ilkka Laitinen, Telephone interview, *op. cit.*, note 56.

¹²¹ Jacques Floch (rapp.), Délégation pour l’Union Européenne, “L’avenir d’Europol: Vers une police criminelle européenne?”, Paris: Sénat, Rapport d’information No. 819, mai 2003.

Discussed repressive powers highlighting problematic democratic control

In the initial Commission proposal, the Agency was reputed not to bear any repressive or executing powers. However, Article 10 of Council Regulation No. 2007/2004 provides that executive powers of its staff “acting on the territory of another member State shall be subject to the national law of that member state”. The wording and the meaning of Article 10 are therefore questionable taking into account that the staff is not supposed to be invested with repressive or executive powers. However, it seems that these competences should be understood as allowing FRONTEX’s personnel to exercise the powers conferred by the requesting member state(s) according to its national law for operations taking place on its territory. Indeed, FRONTEX’s ‘executive powers’ are linked to operations on the spot and cannot go beyond competences granted by national law.¹²²

Nonetheless, provisions of Article 18 of Council Regulation No. 2007/2004 regarding the application to the Agency’s staff of the Protocol on privileges and immunities of the European Communities remain problematic. In fact, the application of such regime would be hardly acceptable if some member states invest the Agency’s staff with repressive powers.¹²³ It is indeed a matter of great concern as the FRONTEX Agency’s activities clearly impact on public order and individual freedoms. That is the reason why strengthening democratic control over its activities must be seriously envisaged to legitimise *in situ* tasks.

The necessity to improve procedures of democratic control

It is essential “that any EU body responsible for border controls should have a clear legal base and be subject to detailed accountability and data protection safeguards”.¹²⁴ The issue of democratic control has ever been a systematic pattern of external border management since the setting-up of structures for cooperation in this field. Indeed, the external border practitioners common unit which was an emanation of the SCIFA committee, has adopted 17 joint operations and pilot projects¹²⁵ since July 2002 with hardly any democratic control from the European Parliament or national parliaments. These ad hoc operations took place without a clear legal basis defining powers and responsibilities of the participants. In this respect, the institutionalisation of FRONTEX brought solid foundations in the EC Treaty and visibly identified competences in its constitutive regulation.

However, democratic control over the Agency’s tasks remain highly problematic, not only due to repressive powers eventually conferred on its staff, but also because the European Parliament is not associated with the follow-up of its activities (risk analysis, research and development), except when it acts as Budgetary Authority. It is clearly a major issue as FRONTEX was established as a regulatory agency fostering transparency in its actions, contrary to existing informal structures, and respecting rules related to transparency and communication.¹²⁶ The European Parliament should therefore be able to have access to all documents related to the Agency’s activities. Consequently, a democratic and appropriate control should be envisaged as its missions are closely linked to the exercise of public authority and fundamental freedoms.¹²⁷

¹²² Ilkka Laitinen, Telephone interview, op. cit., note 56.

¹²³ Thierry Mariani, *Vers une police européenne des frontières? L’Agence européenne pour la gestion de la coopération opérationnelle aux frontières extérieures*, Assemblée Nationale, Paris, Rapport d’information No 1477, 3 March 2004, p. 21.

¹²⁴ Select Committee on the European Union, op. cit., note 8, p. 24.

¹²⁵ Jörg Monar, op. cit., note 35, p. 6.

¹²⁶ Regulation No. 2007/2004, op. cit., note 6, Article 28.

¹²⁷ Thierry Mariani, op. cit., note 123, p. 20.

In its 29th Report, the House of Lords referred to EUROJUST which could embody a model for the Agency.¹²⁸ Indeed, EUROJUST has a clear legal basis precisely stating the extent of its competences, its tasks and its responsibility. Furthermore, the European Parliament and national parliaments have to scrutinise each modification occurring in EUROJUST's mandate.

As regards accountability of data exchange, "all common EU border control activities should be subject to effective protection standards, particularly if they involve risk assessment and profiling and intelligence sharing".¹²⁹ Such safeguard was asserted in the initial Commission proposal restricting data exchange with Europol and other international organisations to 'non personal data'. Although in practice information exchange with Europol seems to be limited to 'operational data',¹³⁰ such restriction is not worded in the regulation. Cooperation on data exchange is certainly desirable in order to implement an integrated border management at the external borders of the European Union but it has to occur according to data protection standards and with respect to human rights and fundamental freedoms. Such cooperation with Europol or Interpol is also necessary from a practical point of view in order to avoid overlapping information in data collection.

Finally, access to information is also a major question with respect to accountability and transparency. The Agency started its activities over a year ago and its website¹³¹ remained under construction until mid-October 2006. During this period, public access to information was problematic due to numerous 'declassified' documents. Most FRONTEX-related documents contained general information about its organisation or its competences such as the FRONTEX General Report for the year 2005 but, until recently, hardly any document specifically detailed the content of its past, current and foreseen operations. For example, the FRONTEX Work Programme for 2006 was adopted in 'restricted Council' at the JHA Council meeting in Luxembourg on 27-28 April 2006, hence the difficulty to access the information. In this respect, the Agency should definitely improve transparency and accountability of its activities. Nevertheless, it also could be explained by the Agency's anxiety, in the prospect of the activity report to be presented in 2007, to preserve a margin of manoeuvre regarding its nascent activities and to meet expectations regarding integrated border management.

3.2 A tailored institutional tool to implement integrated border management

"The creation of the Agency is an important step towards the implementation of an integrated border management".¹³² Its tasks of coordination, risk analysis and 'leader' of a network of national systems pave the way towards an effective cooperation in the management of external borders. Contrary to existing informal structures, its autonomous and professionalised character provides the Agency with an added value for the accomplishment of its burden-sharing and trust-building missions between the member states in the field of external border control and surveillance. Moreover, its legal provisions allow for adaptability of its competences.

¹²⁸ Select Committee on the European Union, *op. cit.*, note 8, p. 19.

¹²⁹ *Ibid.*, p. 24.

¹³⁰ Ilkka Laitinen, Telephone interview, *op. cit.*, note 56.

¹³¹ See <http://www.frontex.europa.eu>.

¹³² Thierry Mariani (in French in the text), "la création de l'agence marque une étape importante dans la mise en place d'une gestion intégrée des frontières extérieures", *op. cit.*, note 123, p. 23.

An autonomous and professionalised structure to coordinate operational cooperation at the EU's external borders

FRONTEX's most original competence as regards provision of know-how is the definition of a common core curriculum for training of border guards. Indeed, this general competence could durably benefit national services related to education and training in order to entail a better understanding of the Schengen *acquis* and how to implement it properly. Furthermore, it should be supported by the organisation of training seminars to promote this common understanding for all border related services. In this respect, it could then contribute to foster mutual trust between the member states on methods and techniques of border control, especially in the Mediterranean Sea area and the Balkans. FRONTEX takes up the work initiated by the Training Centre for Border Guards in Vienna. However, training provided by the Vienna centre focuses on instructor officers, not directly on national border guards. The FRONTEX regulation does not specify the content of the training programme, but it may take up this already-working training scheme directed at instructor officers who will therefore disseminate the know-how to their national border guards. Nonetheless, it should be noted that such seminars would certainly be useful to settle eventual linguistic issues prior to a joint operation. Provisions of Article 5 of Council Regulation No. 2007/2004 can provide the legal basis for the setting-up of training seminars in the territory of a member state, when requested by a local body for its agents even if they are not directly related to the Agency. This idea was voiced by the European Parliament and could certainly contribute to the dissemination of techniques and best practices to promote integrated border management.

The necessity to implement such an independent and professionalised structure is indeed a key element to ensure an effective border management. In this respect, the European Parliament severely criticised the initial Commission proposal to establish an Agency with such strong intergovernmental features as regards its composition (national experts, distinction between 'members' appointed by the Council and 'representatives of the Commission' composing the management board) and its voting rules. The regulation finally provides FRONTEX's organisation with an intergovernmental dimension regarding the fact that each member state appoints one representative, in addition to the two representatives of the Commission. However, this argument can be moderated as FRONTEX is governed by a majority ruling¹³³ which avoids possible blocking situations with regards the sensitiveness of the tackled issues.

It can also be noted that member states remain responsible for the management of their external borders and that FRONTEX can only act upon request from the member states. Nevertheless, the regulation asserts that "member states shall refrain from any activity which could jeopardise the functioning of the Agency or the attainment of its objectives".¹³⁴ They also have to report to FRONTEX all operational activities occurring "outside the framework of the Agency". Within the scope of its missions, Joint Support Teams can therefore provide technical assistance to member states, disseminate ideas, methods and best practices in order to attain the objective of uniform application of the Schengen rules. In this respect, the Agency will soon have a very efficient tool with the establishment of the forthcoming 'RABIT' teams for rapid response on the spot. The method of mutual evaluation could also be a great incentive to approximate national systems.¹³⁵

Considering the scope of FRONTEX's activities, although it could entail a voluntary technical dependence on FRONTEX's assistance or an eventual side effect on the EU budget regarding

¹³³ Council Regulation No. 2007/2004, op. cit., note 6, Article 24.

¹³⁴ Ibid., Article 2 § 2.

¹³⁵ Nils Hänninger, Interview, op. cit., note 55.

the financing of joint return operations, it could however contribute to increase the border guards' feeling of being part of a 'European border community'. Its tasks of collecting know-how and facilitating cooperation between member states could really involve a common and homogeneous rapid reaction to migratory pressures, if implemented efficiently. With experienced and fruitful practice, FRONTEX has definitely the potential to adapt and extend its competences.

A possible extension of its tasks

The establishment of the FRONTEX Agency, together with the adoption of a Community Border Code and the creation of the External Borders Fund, seems to root the premises of an integrated border management.

Article 7 of Council Regulation No. 2007/2004 provides the legal basis for an *efficient cooperation regarding data exchange*. FRONTEX has indeed the power to set up and keep centralised records of technical equipment belonging to member states that they are willing to provide a requesting member state with on a temporary basis. It entails that the Agency could create a specific database collecting relevant information on the member states' technical equipment. The Agency's national experts on the territory of member states could also gather information regarding the functioning of border related national services in conjunction with the dissemination of information to the Agency regarding the member states' needs in joint return operations. In this respect, Mr Laitinen stated that FRONTEX was currently seeking the way to efficiently canalise information flows arriving at the Agency.¹³⁶ Hence, it is questionable whether FRONTEX will probably set up a computerised database like Europol or SIS in the middle or the long term.¹³⁷ In fact, it could embody a central step towards integrated border management if this database framework is efficiently coordinated. Consequently, it could be inspired by existing successful models for customs cooperation since the mid-1980s, notably the SCENT customs database system.

Echoing the 2002 Communication on integrated border management,¹³⁸ the Council recently adopted the cornerstone of a 'common corpus of legislation', that is to say the Common Border Code.¹³⁹ This regulation aims at clarifying, consolidating and developing through an EU common framework the Schengen standards and procedures regarding control and checks of people at external borders. Its objective is also to recast and simplify the Common Manual, the Schengen Catalogue and other redundant non-legally binding sources. Moreover, the regulation establishing the Common Border Code is the first one voted using the co-decision procedure and majority voting ruling according to the provisions of the Hague Programme with respect to a Council Decision taken on 5 November 2004 and implemented in April 2005. In parallel, the Commission also presented to the Council a proposal establishing rules for local border traffic¹⁴⁰ aiming to facilitate relations with neighbouring countries. As tight border controls can endanger local economies, it is necessary to establish facilitated procedures for the issuance of specific

¹³⁶ Ilkka Laitinen, *op. cit.*, note 56, p. 4.

¹³⁷ Nils Hänninger, Interview, *op. cit.*, note 55.

¹³⁸ COM(2002) 233 final, *op. cit.*, note 33.

¹³⁹ OJ L 105, 13 April 2006, *op. cit.*, note 41.

¹⁴⁰ Proposal for a Regulation of the European Parliament and of the Council laying down rules on local border traffic at the external land borders of the Member States and amending the Schengen Convention and the Common Consular Instructions, Commission of the European Communities, Brussels, COM(2005) 56, 25 February 2005.

multiple-entry visas for local cross-border movements, as for example the facilitated visa regime implemented in Kaliningrad.¹⁴¹

Towards a ‘European Border Police’?

The creation of a ‘European Border Police’ has been a much discussed but redundant issue for a decade now. Initially, member states were very reluctant to create such European police for the management of external borders. This is the reason why they chose to establish ad hoc centres under the supervision of the Council. The idea to create a European Border Police progressively reaches the member states’ preoccupations but it hardly can make it to the top of the agenda in the next few years.¹⁴²

Moreover, this idea has always been voiced by the European Parliament through amendments of the FRONTEX Regulation, especially as regards investigations¹⁴³ but the Council did not take up on the European Parliaments’ recommendations. However, in the Council Conclusions on the Commission proposal to establish the FRONTEX Agency, it is stated that “possible extensions of the tasks of the Agency should be decided, at an appropriate moment”.¹⁴⁴ This open gate towards the possible extension of FRONTEX’s tasks reflects on the one hand, the necessity to take into account the constant development of external border-related challenges and on the other hand, the potential acknowledgement of a prospective evolution of the Agency towards a ‘European Border Police’. In this respect, the G5 summit between Spain, France, Germany, Italy and the United Kingdom held in Paris in May 2005, asserted the possibility to create a ‘European police’ in charge of external borders and able to provide rapid responses to crisis management. This border intervention force could then be the “precursor of a ‘European Border Guard’”.¹⁴⁵ The G5 countries also conveyed the idea to provide the FRONTEX Agency with direct operational assignments. Other examples of such creations have also been voiced, as for example the establishment of a “European Multinational Coast Guards Corps”¹⁴⁶ in order to efficiently face maritime-related issues.

Finally, FRONTEX’s patterns and specific task as well as the eventual extension of its competences show increasing trust from the member states to accept a developing EU intervention in the sphere of external border management. Therefore, FRONTEX could potentially embody a decisive step towards integrated border management. Its evaluation, which takes place in 2007, will then be a cornerstone for the assessment of its achievement and its ability to build trust between the member states.

¹⁴¹ Hélène Jorry, *Aux confins des relations entre l’Union européenne et la Russie: l’enclave de Kaliningrad face aux défis de l’élargissement de l’espace Schengen*, Grenoble: Institut d’Etudes Politiques, 2004.

¹⁴² Nils Hänninger, Interview, op. cit., note 55.

¹⁴³ P5_TA(2004)0151, amendments 14 and 15, op. cit., note 89.

¹⁴⁴ General Secretariat, Council Conclusions on the main elements of the Commission proposal for a Council Regulation establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, Brussels, 28 November 2003, 15446/03 FRONT 173 COMIX 732, CONCL. 2.

¹⁴⁵ Dominique De Villepin, French Minister of Interior in “EU big five envisage possible border intervention force”, 12 May 2005 (www.eubusiness.com).

¹⁴⁶ Giuseppe Callovi, op. cit., note 85, p. 7.

4. The Way Forward

“The new Union must work within its limits. Creating more secure borders is not about building a fortress or new walls. It is about making clear common rules and practices for legally crossing of the EU external borders. Thus, transparency, public awareness, quality and speed of service, and protecting the confidentiality of travellers should be high priorities”.¹⁴⁷ A new conceptualisation of external border control and surveillance is therefore at stake in order to find the effective means to tackle organised crime and terrorism as well as to ensure effective external border management while accommodating trust-building between the member states and the principle of sovereignty.

Hence, external border management should be intelligence-led ensuring coordination of data collection and exchange. Indeed, in a Union with 27 different legal orders, authorities, methods, techniques, languages and practices, the creation of a fertile ground for the implementation of an EU common policy is of major importance in order to coordinate operational cooperation between national border related forces. The establishment of FRONTEX represents an attempt to provide an adequate institutional response to these challenges by optimising coordination of operational cooperation while being careful in preserving the member states’ competences in external border management. It can appear as a more modest achievement compared to the former project of European Border Guard and one can doubt its capacity to deal with its large panel of tasks. Yet, it depends on its ability to successfully fulfil its tasks, especially in the field of return operations. Moreover, it has a clear legal base, contrary to the Europol Convention which requires ratification if modified. It allows for the prospect of evolution, especially if the Agency manages to gain trust from the member states.

In this respect, several recommendations could be addressed in the prospect of a common EU policy for external border management.

Policy-making recommendations. An upstream action of simplification in the policy-making should be sought. Although the creation of a sole ‘Frontier working group’ is not foreseeable due to the very technical sub-committees dealing with SIS issues, it could be envisaged to form a unique working group focused on issues of operational cooperation. Considering the powers of the FRONTEX Agency, they cannot be limited to the coordination of joint operations or pilot projects but should definitely be legally extended to direct operational assignments.

The necessity to promote trust-building. The field of security is indeed constructed by interaction and competition between security agencies which concomitantly challenge trust-building. However, fostering trust is a key element to the success of the Agency’s role in border management as trust is the basis for cooperation and that, “in the absence of trust, cooperation does not occur”.¹⁴⁸ Besides, such institutionalisation takes time to be trusted and valued, FRONTEX has then the complex task to promote trust between member states through the legitimisation of its activities. Face-to-face contacts and small joint operations teams diffusing best practices are among elements that can work this way and accommodate the multi-dimensionality of the border management system.

The necessity to enhance democratic accountability. Democratic control remains a highly problematic issue. The Agency’s criticised task of assistance in joint return operations added to its contested repressive powers may lead to the development of an ‘expulsion agency’ if no proper democratic control is established concerning the legitimisation and accountability of such operations. Furthermore, FRONTEX’s activities aim at promoting transparent activities and communication of documents. However, the European Parliament is still isolated from any

¹⁴⁷ Ibid., p. 8.

¹⁴⁸ Malcolm Anderson, 2002, op. cit., note 18, p. 37.

diffusion of information and of the follow-up of its activities. It is especially true with regards to risk assessments, which are not transmitted to the European Parliament despite being the fundamental basis on which FRONTEX builds its activities. It means that a large scope of border management activities escapes to the scrutiny of the European Parliament and the national parliaments. With regards to the legitimisation of its role in integrated border management, this issue of democratic control must be seriously addressed.

Fostering cooperation through standardisation of technology. To promote a better understanding of national practices as well as a uniform implementation of the Schengen *acquis*, standardisation of technology should be fostered as well as compatibility of technical equipment via the setting-up of a register and the dissemination of best practices through training seminars and linguistic seminars. Indeed, standardisation of advanced technology and coordinated databases embody instruments allowing for the moderation of the securitarian conception of border management (as a repressive strategy impacting on freedoms and targeted to unwanted people) because “technology-based and coherently structured controls will present no obstacle to licit travellers [and could] even speed up clearance procedures”.¹⁴⁹

To conclude, the creation of the FRONTEX Agency can surely be regarded as an innovative and tailored-made institutional reform in the field of external border control and surveillance. It has been designed as an essential tool of the EU common policy on external borders and therefore is carefully placed under the scrutiny of the member states. FRONTEX certainly faces high expectations that it has to meet with a large panel of competences in various sectors but still limited as regards direct operational powers. Nevertheless, it has the potential to overcome these issues and progressively gain confidence from the member states. The personality and the experience of its Executive Director will undeniably be determinant in this respect. FRONTEX has now the hard task to lay the foundation stone of an intelligence-led and technology-based EU common policy for border control and surveillance. And this can only be done within a global EU approach including evolution of immigration and asylum policies as well as other sectors such as customs and frauds closely related to border security in order to set up an ambitious EU model of integrated border management.

¹⁴⁹ Peter Hobbing, op. cit., note 34, p. 22.

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About CHALLENGE

The familiar world of secure communities living within well-defined territories and enjoying all the celebrated liberties of civil societies is now seriously in conflict with a profound restructuring of political identities and transnational practices of securitisation. **CHALLENGE** (Changing Landscape of European Liberty and Security) is a European Commission-funded project that seeks to facilitate a more responsive and responsible assessment of the rules and practices of security. It examines the implications of these practices for civil liberties, human rights and social cohesion in an enlarged EU. The project analyses the illiberal practices of liberal regimes and challenges their justification on the grounds of emergency and necessity.

The objectives of the **CHALLENGE** project are to:

- understand the convergence of internal and external security and evaluate the changing character of the relationship between liberty and security in Europe;
- analyse the role of different institutions in charge of security and their current transformations;
- facilitate and enhance a new interdisciplinary network of scholars who have been influential in the re-conceptualising and analysis of many of the theoretical, political, sociological, legal and policy implications of new forms of violence and political identity; and
- bring together a new interdisciplinary network of scholars in an integrated project, focusing on the state of exception as enacted through illiberal practices and forms of resistance to it.

The **CHALLENGE** network is composed of 21 universities and research institutes selected from across the EU. Their collective efforts are organised under four work headings:

- *Conceptual* – investigating the ways in which the contemporary re-articulation and disaggregation of borders imply a dispersal of practices of exceptionalism; analysing the changing relationship between new forms of war and defence, new procedures for policing and governance, and new threats to civil liberties and social cohesion.
- *Empirical* – mapping the convergence of internal and external security and transnational relations in these areas with regard to national life; assessing new vulnerabilities (e.g. the ‘others’ targeted and critical infrastructures) and lack of social cohesion (e.g. the perception of other religious groups).
- *Governance/polity/legality* – examining the dangers to liberty in conditions of violence, when the state no longer has the last word on the monopoly of the legitimate use of force.
- *Policy* – studying the implications of the dispersal of exceptionalism for the changing relationship among government departments concerned with security, justice and home affairs, along with the securing of state borders and the policing of foreign interventions.

The CHALLENGE Observatory

The purpose of the **CHALLENGE** Observatory is to track changes in the concept of security and monitor the tension between danger and freedom. Its authoritative website maps the different missions and activities of the main institutions charged with the role of protection. By following developments in the relations between these institutions, it explores the convergence of internal and external security as well as policing and military functions. The resulting database is fully accessible to all actors involved in the area of freedom, security and justice. For further information or an update on the network’s activities, please visit the **CHALLENGE** website (www.libertysecurity.org).

An Integrated Project Financed by
the Sixth EU Framework Programme

