

University of Warsaw  
Faculty of Law and Administration  
Seminar: *Towards European Constitutionalism*  
Summer Semester 2015/2015

## **A little more action**

Development of FRONTEX towards a new quality in the area of the EU  
external borders protection

**Tomasz Pietrzak**

Index No. 290569

Interdisciplinary Individual Studies of Humanities

[tomaszpietrzak@student.uw.edu.pl](mailto:tomaszpietrzak@student.uw.edu.pl)

**Table of Contents**

1. Introduction.....2  
2. Origins of FRONTEX.....4  
3. Main tasks of FRONTEX .....7  
4. European Border and Coast Guard – a new institution with old problems?.....13  
5. Bibliography.....15

**1. Introduction**

In recent years questions of immigration and asylum policy of the European Union and protection of the EU’s external borders dominated the debate on the area of freedom, security and justice. Pictures of thousands of people with all their belongings pushing forward through land and sea from North Africa and Middle East towards Europe made already a permanent stay in European newspapers and TV channels. Many Europeans got used to the news on hundreds of migrants and refugees from Syria, Iraq, Pakistan, Somalia or Eritrea drowned by the coasts of Lampedusa and Lesbos and do not wonder anymore hearing about people from the South trying desperately to reach the borders of the better life in the North. The phenomenon of migration from the underdeveloped or conflicted areas of the world to Europe is not new but begun to increase in the 90’s and later after the 09/11 attacks, which triggered the following “wars on terrorism” in Afghanistan and Iraq. After the rise of Islamist groups in Somalia and Mali and later - after the Arab revolutions in Tunisia, Egypt, Libya and Yemen in 2011 - it burgeoned significantly and culminated with the beginning of the civil war in Syria. All these events induced the European Union to reform its immigration policy and reconsider the possible difficulties with the protection of a border-free Europe. The reaction to the increase of immigrants arriving in Europe can be described with two terms: cooperation and securitisation. The need of a broader and more intensive cooperation between the Member States of the EU on the field of border protection came out at the European Council in Laeken in December 2001, shortly after the 09/11 attacks on WTC. Following years, until 2004, were a time of reflection and negotiation between the Member States, the European Commission and the Council of the European Union. As an effect, the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (called FRONTEX) has been created. Initially FRONTEX was not a tool of a securitisation policy, understood as introduction of controversial measures limiting civil

rights in order to protect the value of public security<sup>1</sup>. The main goals of the Agency were to collect information on the level of risk on the external borders and protection capacities of the Member States, distribute them to the EU institutions and the states, coordinate trainings and ensure exchange of experience for the practitioners of border protection. The later events on the southern and eastern shore of the Mediterranean created a challenge to the Agency and their initial purpose. Therefore it is necessary to consider the question, if the current tasks of FRONTEX push the Agency into the securitisation policy? And if we'd agree on a positive answer, the question would be: is such kind of policy as well moral and efficient. The widespread criticism on the activities of FRONTEX in recent years from the side of human rights defenders and whistleblowers points to the conclusion, that FRONTEX, which was not created as a tool of security policy in Europe, joined the ranks of other organisations, which realise such policy. Moreover, in 2007 FRONTEX was equipped with new tools designed for fulfilling its operational duties. The Regulation No 863/2007 of the European Parliament and of the Council of 11 July 2007 amended the Regulation 2007/2004, which established FRONTEX and created the Rapid Border Intervention Teams (RABIT). Since then, the Agency fulfilled duties which were not intended initially for her functionaries. This activity of the Agency led to not only to an intense critic on respecting fundamental rights but, as the dramatic accidents on the Mediterranean Sea and on Southern Balkans in recent months showed, did not prevent the death and mistreatment of many migrants and refugees on Europe's borders. The only answer to these events from the side of the EU institution was the articulation of the need to establish a new, more powerful and better equipped institution, which would deal with these problems.

The article consists of three parts. The first part examines the initial thoughts, which led to the creation of FRONTEX and traces the roots of the conceptual disagreements which later effected in the current shape of the Agency and the model of border protection. The second part describes the main tasks of FRONTEX focusing on two areas- the intelligence area and the operational area of activity of the Agency. The last part lays open question on the Agency's efficiency and shortly describes the new proposition of the European Border and Short Guard as a supposed remedy to the old-new problems.

---

<sup>1</sup> Neal, A. W. (2009), 'Securitization and Risk at the EU Border: The Origins of FRONTEX', *Journal of Common Market Studies*, Vol. 47, No. 2, pp. 333–356.

## 2. Origins of FRONTEX

The creation of the border free zone inside of Europe was completed in 1985 by signing the Schengen Agreement and successfully implemented in seven European countries ten years later. It was a part of the broader project of the common European market and a fulfilment of a long dream about the free movement of citizens without border checks. The Agreement shifted the burden of control on the external borders of the Schengen Area<sup>2</sup>. It had to be carried out by national guards of the Member States but the Agreement underlined the importance of mutual cooperation and coordination of efforts of the Member States. The cooperation meant particularly exchange of information, harmonization of law and promotion of standard training<sup>3</sup>. From this time the development of the common border surveillance and control system continued inside the Schengen Group. Even though the Treaty of Amsterdam, which was implemented in 1999, plugged the *acquis* Schengen into the EU Law, the notion of external borders as a realm reserved for the members of the Schengen Area became respected and is such until today.

The second milestone of the development came with the beginning of the 21<sup>st</sup> century and the rise of the global threat of terrorism, which became apparent after the WTC attacks of 09/11. As an answer on this threat, the EU institutions organised on the 20 September 2001 an Extraordinary Meeting of the Justice and Home Affairs Council of the EU. This summit linked the question of asylum and migration policy of the EU directly with the problem of global security and identified “a tension between the demands of security on the one hand and rule compliance on the other“<sup>4</sup>. These problems were not raised in 2001 for the first time ever. A working group composed of senior officials from the member states called SCIFA (Strategic Committee on Immigration, Frontiers and Asylum) did already exist 1999 and was later (in 2002) developed into a group of heads of national border guards services responsible

---

<sup>2</sup> Article 17 of the *Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders*, (Official Journal L 239, 22/09/2000 P. 0013 – 0018, hereinafter as Schengen Agreement): “With regard to the movement of persons, the Parties shall endeavour to abolish checks at common borders and transfer them to their external borders”.

<sup>3</sup> Article 7 of the *Convention Implementing the Schengen Agreement*, (Official Journal L 239 , 22/09/2000 P. 0019 – 0062): “The Contracting Parties shall assist each other and shall maintain constant, close cooperation with a view to the effective implementation of checks and surveillance. They shall, in particular, exchange all relevant, important information, with the exception of personal data, unless otherwise provided for in this Convention. They shall as far as possible harmonise the instructions given to the authorities responsible for checks and shall promote standard basic and further training of officers manning checkpoints. Such cooperation may take the form of an exchange of liaison officers”.

<sup>4</sup> Andrew W. Neal, *Securitization...*, p. 339.

for monitoring joint operations and pilot projects (the so called “SCIFA+”)<sup>5</sup>. The global panic on the threat of terrorism and the rise of southern EU borders migration led to the need of further discussion. The next possibility of exchange of views between European politicians in this area was the Conference in Laeken in December 2001. The Conference, although from today’s perspective seems to be inconclusive regarding the problem of external borders surveillance, in fact, paved the path for the future development of common efforts. Earlier in 2001 Italy and Germany proposed a project of creating the European Border Guard, which would be a international service of armed functionaries and practitioners of border control, which would ensure security of the external borders of the Schengen Area. The project was initially supported by other European countries like Belgium, France and Spain but the United Kingdom stayed sceptical to such a solution, rising arguments on national sovereignty and the national monopoly on border control<sup>6</sup>. Nevertheless the House of Lords acknowledged need of a stronger cooperation between the states in this area. This lack of unity found expression in the final Laeken Agreement which mentioned the need of a deeper cooperation between the Member States, preventing trans-national crime and support of candidate states of the EU in fulfilling the norms of control on their future external border. The Council asked the European Commission to institutionalise the risk control mechanisms but the name “European Border Guard” did not occur in the document<sup>7</sup>. The controversies on the idea of a common border guard lasted through the first half of 2002<sup>8</sup>, when the Council, pressed by the incoming Seville European Council in June 2002, which had to be dominated by discussions on illegal immigration and policing maritime borders issued an “Action Plan”. The Plan underlined the necessity of creation of a common operational co-ordination and co-operation mechanisms and common integrated risk analysis, providing personnel and inter-operational equipment, establishing a common body of legislation and determine burden-sharing between the Member States and the Union<sup>9</sup>. The plan chilled the integrating tendencies of the Commission and some Member States, dropped the idea of a European Border Guard and focused on

---

<sup>5</sup> Wolff, S., Schout, A. (2013), ‘Frontex as Agency: More of the Same?’, *Perspectives on European Politics and Society*, Vol. 14, No. 3, pp. 305–324. SCIFA + was strongly criticised in 2003 for its lack of achievements and it was a direct impulse for the creation of FRONTEX in the aftermath.

<sup>6</sup> Leonard, S. (2009), ‘The Creation of FRONTEX and the Politics of Institutionalisation in the EU External Borders Policy’, *Journal of Contemporary European Research*, Vol. 5, No. 3, pp. 371–388.

<sup>7</sup> House of Lords (2003), *European Union twenty-ninth report. Proposals for a European Border Guards*, 1 July 2003, p.11.

<sup>8</sup> The European Commission presented in the meantime in May 2002 to the Council and the European Parliament a Communication “Towards an integrated management of external borders”, which delineated the way to the “European Corps of Border Guards” through a codification of common rules and practices. Its reception was mostly positive although several Member States rejected the Commission’s view that integrated border management should ultimately lead to the creation of a Corps of European Border Guards (ibidem, p.11).

<sup>9</sup> ibidem, p. 12.

establishing a network of national practitioners who would be able to exchange information and experience. This network has been called External Borders Practitioners Common Unit and it was the germ of a network system which will be later used by FRONTEX to coordinate local programs and operations. A group of states under the leadership of Finland began to prepare a system which would enable a dynamic risk assessment on the borders. The system, which is until now used by FRONTEX, was in 2003 called Common Integrated Risk Analysis Model (CIRAM) and the body, which was established in order to conduct the permanent risk analysis, affiliated by the Finnish Border Guard was called Risk Analysis Centre<sup>10</sup>. Similar initiatives were established in other parts of Europe: “International Airports Plan” led by Italy, and joints operations at the maritime borders such as “Operation Ulysses” under Spanish leadership and “Operation Triton” led by Greece. Ad hoc centres were also created, including the Centre for Land Borders (Germany) and the Centre of Excellence at Dover for developing new surveillance and border control technologies (United Kingdom)<sup>11</sup>.

On the Council Summit in Thessaloniki in June 2003, which concluded the Presidency of Greece, it has been raised that the existing structure of SCIFA+ did not satisfy the demands of a common coordination between the Member States and the EU in the area of external borders control. That is why the European Commission has been obliged to present a conception of an institutional structure of the Communities, in order to stimulate operational coordination in the area of external borders management<sup>12</sup>. After intensive work and consultation, the Commission presented in November 2003 a proposition of creating the European Agency for the Management of Operational Cooperation at the External Borders (FRONTEX). "The Commission argued that the Agency should have the following functions: (1) coordinating the operational cooperation between Member States on control and surveillance of the external borders, (2) assisting Member States in training national border guards, (3) conducting risk assessments, (4) following up on the development of research concerning external borders control and surveillance, (5) assisting Member States in circumstances requiring increased assistance at the external borders, and (6) coordinating operational cooperation between Member States on the removal of illegal third country residents"<sup>13</sup>. Finally, on the 1 May

---

<sup>10</sup> Gruszczyk A. “Zadania wywiadowcze agencji Frontex: prawo – procedury – efekty”, pp. 13-33 in: Kuś, A., Kosińska, A., Szachon-Pszenny, A. (2015), *Agencja FRONTEX w strefie Schengen: 10 lat doświadczeń*, Prawo i Polityka Migracyjna, Lublin, Wydawnictwo KUL.

<sup>11</sup> Leonard, S. (2009), ‘The Creation of FRONTEX...’, p. 379.

<sup>12</sup> Parol A. „Status prawno-ustrojowy FRONTEX-u w systemie instytucjonalnym Unii Europejskiej”, in: Kuś, A., Kosińska, A., Szachon-Pszenny, A. (2015), *Agencja FRONTEX...*, pp. 35-54.

<sup>13</sup> Commission of the European Communities, “Proposal for a Council Regulation

2005 the Agency has been established<sup>14</sup> and she achieved full operational ability on the 3 October of the same year. According to the decision of the Council, the headquarter of the Agency is based in Warsaw.

### **3. Main tasks of FRONTEX**

The main tasks of the Agency can be reflected and described on two levels: one level can be described as the intelligence area of the Agency. In this area FRONTEX works with the term „risk analysis“, collects information, assesses it and delivers to the Member States and takes part in the scientific development of the research on border management. On the second level the Member States can receive operational support of the Agency while conducting local border operations (e.g. the Spanish operation on the costs of the Canary Islands in March and April 2006 which was supported by FRONTEX functionaries) or during joint return operations. The operational area of the Agency contains as well the duty of developing “a common core curriculum for border guards’ training and provide training at European level for instructors of the national border guards of Member States”<sup>15</sup>. In this part of the article, the main tasks of the Agency will be described according to these two main plains of activity of FRONTEX.

#### **1) Intelligence activities of FRONTEX**

“The Agency shall develop and apply a common integrated risk analysis model. It shall prepare both general and tailored risk analyses to be submitted to the Council and the Commission. For the purpose of risk analysis, the Agency may assess, after prior consultation with the Member States concerned, their capacity to face upcoming challenges, including present and future threats and pressures at the external borders of the Member States, especially for those Member States facing specific and disproportionate pressures. To that end, the Agency may assess the equipment and the resources of the Member States regarding border control. The assessment shall be based on information given by the Member States concerned, and on the reports and results of joint operations, pilot projects, rapid interventions

---

Establishing a European Agency for the Management of Operational Cooperation at the External Borders”, COM (2003) 687, 20 November 2003 quoted after: Leonard, S. (2009), ‘The Creation of FRONTEX...’, p. 379-389.

<sup>14</sup> COUNCIL REGULATION (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union: Regulation 2007/2004, text with later amendments in: *Official Journal of the European Union*.

<sup>15</sup> Art. 5, Regulation No 2007/2004.

and other activities of the Agency. Those assessments are without prejudice to the Schengen evaluation mechanism. The results of those assessments shall be presented to the Management Board. For the purposes of this Article, Member States shall provide the Agency with all necessary information regarding the situation and possible threats at the external borders.

The Agency shall incorporate the results of a common integrated risk analysis model in its development of the common core curricula for the training of border guards referred to in Article 5”<sup>16</sup>. This rather general and vague regulation sets out the principles of risk analysis activity of the Agency but does not describe how these tasks have to be fulfilled. In fact the term “risk analysis” contains a much broader set of actions which include preparing general analysis and detailed analysis adjusted to genuine needs. The assessment of risk is conducted in a middle- and long-time perspective and includes as well observation of short-time elements and events<sup>17</sup>. A broader analysis of the situation and tendencies in the irregular migration and pressure on the external borders of the EU is delivered by the strategic analysis, which takes into consideration long-range processes, which can have a significant but not a direct impact on the security policy. Once a problem is identified, a proposition of a joint operation can be issued as well from the side of FRONTEX and from the Member State. This is followed by detailed planning in close cooperation with those Member States and Schengen-Associated Countries that are invited to participate<sup>18</sup>. This operational analysis differs from the permanent risk analysis and the broad strategic analysis, mostly by narrowing the scope of research to those very aspects of the situation which engage directly border guards and FRONTEX functionaries during the operation. The whole palette of analysis tools is used by the Risk Analysis Unit (RAU), which is one of the most important bodies of the Agency. The predecessor of RAU was the above mentioned Risk Analysis Centre in Helsinki, which developed the proper methodology and a systematic structure for the risk analysis even before FRONTEX was established. The Risk Analysis Unit creates situation picture in order to prevent trans-national crime, human and drug trafficking and prepares the period analysis papers and reports. A similar role plays another organ of the Agency, namely the FRONTEX Situation Centre (FSC), which operates 7 days a week, around the clock, in order to prepare a up- to- date situation picture and provide a contact point for regional services and operational support for the Member States. The main task of the FSC is to anticipate risk occurrences and

---

<sup>16</sup> Art. 4, Regulation 2007/2004.

<sup>17</sup> Gruszcak A. “Zadania wywiadowcze...”, pp. 17-20.

<sup>18</sup> *Frontex | Strategic analysis*, available at: [frontex.europa.eu/intelligence/strategic-analysis/](http://frontex.europa.eu/intelligence/strategic-analysis/).

alarm proper services early<sup>19</sup>. By conducting the risk analysis both the RAU and the FSC use information stemming from different sources - in first line these pieces of information which stem from own FRONTEX functionalities operating on the borders and data provided by the Member States of the Schengen Area. The Member States provide statistical data by using the FRAN (FRONTEX Risk Analysis Network) which is the basic platform of information exchange between the Member States and the Agency. In every Member State is a liaison officer present, who is responsible for handing the data from the state authority to the Agency over. Other sources of information include data from the EU institutions and agencies. FRONTEX cooperates closely with the European Commission and other organs like EUROPOL, the European Union Satellite Centre, the European Asylum Support Office (EASO), the European Intelligence Analysis Centre. Some data stems as well from the Centre de Coordination de la Lutte Anti-drogue en Méditerranée (Ce-CLAD-M), from the European Maritime Security Agency (EMSA), the European Anti-Fraud Office (OLAF) and Eurostat<sup>20</sup>. Other sources of information are the third countries, which have signed with the Agency agreements on special cooperation. Such agreements have been signed with 17 countries among them states of South-Eastern Europe, Turkey, Russia, Ukraine, Belarus and agreements with 7 countries are still in process of negotiation<sup>21</sup>. Frontex did as well sign partnership agreements with 10 other international organisations such as IOM (International Organisation for Migration), UNHCR (United Nations High Commissioner for Refugees), International Criminal Police Organisation (Interpol). The subject of these agreements is the exchange of statistic data and analytic products.

Another field of intelligence analysis of FRONTEX is the exchange of information between the Agency, the European Commission and the immigration services of the Member States via IT networks. FRONTEX is responsible for a maintaining a constant, dependable and secure fluctuation of data within the Schengen Community. The Agency is entitled to personal data processing of persons who are crossing the EU external borders or being subjected to a return operation. FRONTEX can even process personal data collected by the border guards of the Member States during their operational activity<sup>22</sup>. To ensure a proper level of security of personal data and a constant flow of information FRONTEX uses many IT

---

<sup>19</sup> Gruszczyk A. "Zadania wywiadowcze...", pp. 20-22.

<sup>20</sup> ibidem, pp. 22-29.

<sup>21</sup> <http://frontex.europa.eu/partners/third-countries/>. The mutual cooperation between the Agency and African countries is conducted within the Intelligence Community Africa-Frontex, which was established in 2010. Currently 18 states of Western Africa and 5 states of North Africa are part of the Community (FRONTEX Publication, *Africa-FRONTEX Intelligence Community- AFIC*, ed. Roman Fantini, 2013).

<sup>22</sup> Art. 11-11d of the amended Regulation No. 2007/2004.

systems such as ICONet (and ICONet Return – for data collected during joint return operations), FOSS (Frontex-One-Stop-Shop) and JORA (Joint Operation Reporting Application). Of utmost importance is the responsibility of managing and developing the EUROSUR (European Border Surveillance System). EUROSUR was established in order to “improve the operational and technical ability of the Agency and the Member States to detect such small vessels and to improve the reaction capability of the Member States, thereby contributing to reducing the loss of lives of migrants”<sup>23</sup>. It is not easy to define what exactly EUROSUR is and some authors describe it as a “specialised structure within FRONTEX (...) which creates a technical framework for information exchange between the Member States and the Agency”<sup>24</sup>. The Regulation defines EUROSUR as “a common framework for the exchange of information and for the cooperation between Member States and the Agency in order to improve situational awareness and to increase reaction capability at the external borders of the Member States of the Union (‘external borders’) for the purpose of detecting, preventing and combating illegal immigration and cross-border crime and contributing to ensuring the protection and saving the lives of migrants (‘EUROSUR’)”<sup>25</sup>. No matter how we define this complex tool, it is a part of FRONTEX main activity to provide information and conduct risk analyses on the basis of it.

## 2) Operational activities of FRONTEX

To the operational activity of the Agency counts the support of the Member States in fulfilling their duties of protection of the external borders and the organisation of return operations of irregular migrants. The supplementary role of the Agency in the operational area is an outcome of the initial political disagreement between the Member States and the Commission. As it was said before, until the beginning of the 21<sup>st</sup> century, European states did not conduct a consistent migration policy. For long decades every state did pursue its own asylum and migration policy and any attempt of law harmonization in this matter met a sceptical approach of those politicians, who raised the argument of sovereignty of the state in the area of border security. Such events as the Arab Spring in 2011 and the connected Lampedusa crisis, with many vessels overcrowded with refugees and migrants drowning on the outskirts of Europe,

---

<sup>23</sup> Motive 2 from the REGULATION (EU) No 1052/2013 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 22 October 2013 establishing the European Border Surveillance System (Eurosur), Official Journal of the European Union L 295/11, vol 256, 06.11.2013.

<sup>24</sup> Szachóń-Pszenny A., Wantuch N., *Celowość budowy i charakter prawny EUROSUR-u* in: Kuś, A., Kosińska, A., Szachóń-Pszenny, A. (2015), *Agencja FRONTEX ...*, pp. 76-83.

<sup>25</sup> Art. 1 of the Regulation No. 1052/2013.

set an argument in favour of a delegation of more power to the EU institutions. Only they were able to organise and coordinate huge humanitarian actions and deal with big-scale border pressure. Nonetheless, from the very beginning of FRONTEX, delegates of the Member States had majority in the Board of the Agency and many authors underline that the Agency is politically dependent from the will of the Member States. That created a immanent inertia in the core of the construction of FRONTEX, because from one side, the Member States and the Commission wanted to shift much of the responsibility for border policy on the Agency and from another side, they wanted to protect their scope of sovereignty in these matters. Although FRONTEX did have some operational competences from the beginning, which were enshrined in the 2007/2004 Regulation<sup>26</sup> they seemed to be insufficient in the context of a major increase of refugee flow. FRONTEX was criticised concerning quick interventions, level of internal coordination of the Member States, and the efficient answer on the crisis on the southern maritime borders of Europe<sup>27</sup>.

The first amendment of the Council Regulation establishing FRONTEX came in 2007 and was a step towards a more operational Agency. The Regulation No. 863/2007 established Rapid Border Intervention Teams. The motive which inspired the creation was openly described in the preamble: *“The current possibilities for providing efficient practical assistance with regard to checking persons at the external borders and the surveillance of the external borders at European level are not considered sufficient, in particular where Member States are faced with the arrival of large numbers of third-country nationals trying to enter the territory of the Member States illegally”*<sup>28</sup>. The RAPID Teams were entitled to take part in the border control in a joint operation only on request of the Member State but as soon as this would happen, the functionaries of FRONTEX were allowed to carry and use weapons, issue orders to the local border guards and recommend its observations and instructions to the liaison officer of the host Member State<sup>29</sup>. The Regulation on RAPID border teams was the first sign, that FRONTEX is an Agency which can be used as a super-national quasi-military

---

<sup>26</sup> E.g. Art. 8 of the 2007/2004 Regulation: *“Without prejudice to Article 64(2) of the Treaty, one or more Member States confronted with circumstances requiring increased technical and operational assistance when implementing their obligations with regard to control and surveillance of external borders may request the Agency for assistance. The Agency can organise the appropriate technical and operational assistance for the requesting Member State(s)”*. FRONTEX was from the beginning responsible for the coordination of the joint return operations (acc. to Art. 9 of the 2007/2004 Regulation).

<sup>27</sup> Liszczyk D., Gostyńska A., ‘Reforma zarządzania granicami (w)Unii Europejskiej’, *Biuletyn Polskiego Instytutu Spraw Międzynarodowych*, Vol. 838, no. 89, pp. 2522.

<sup>28</sup> Motive no. 5 of the REGULATION (EC) No 863/2007 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers, *Official Journal of the European Union*, 31.07.2007, L 199/30.

<sup>29</sup> Art. 5 and 6 of the 863/2007 Regulation.

force in service of securitisation, but it was as well the beginning of real problems of the Agency and the rise of its “black legend”.

Almost from the beginning of the existence of the Agency, its reputation was endangered by criticism of violation of fundamental rights and mistreatment of migrants. Such criticism was unavoidable taking into consideration that FRONTEX has to reconcile contrary interests. The need of controlling the external borders of Europe and a humanitarian challenge of offering to refugees and irregular migrants a safe shelter for the time of investigation of their asylum claims are value which can be hardly brought together<sup>30</sup>. Since the introduction of RAPID Teams in 2007 until the major reform of FRONTEX in 2011 the Agency has been densely criticised by different human rights defenders and organisations advocating migrant’s rights<sup>31</sup>. The most often violated rights, according to the critics were: the right to asylum, the *non-refoulement* rule (Art. 31 of the *Geneva Convention*), the right to leave the country of origin (Art. 13 of the *Universal Declaration of Human Rights*), prohibition of torture and degrading treatment (Art. 3 of the *European Convention on Human Rights*), right to privacy and protection of personal data (Art. 7 and 8 of the *EU Charter of Fundamental Rights*) and, finally, prohibition of discrimination (Art. 21 *EU Charter of Fundamental Rights*)<sup>32</sup>.

FRONTEX did not stay unconcerned by the critique and responded on the 31 of March with the adoption of a Fundamental Rights Strategy, which was endorsed by the Management Board<sup>33</sup>. A few months later, in November 2011, the European Parliament and the Council enacted the next amendment of the FRONTEX Regulation. The Regulation No. 1168/2011<sup>34</sup> went into two opposite directions. From one side it was inspired by the global panic connected with the state collapse in North and Sub-Saharan Africa (Tunisia, Libya, Egypt, Mali), and from the other, by the critique of FRONTEX as a violator of fundamental rights. That is, why the act which was designed as the major step towards a more humanitarian approach of the EU to the migration crisis, became as well a reform granting FRONTEX

---

<sup>30</sup> Such a view has been expressed by A. Gajda in her article “Przestrzeganie praw podstawowych w działalności FRONTEX-u” in: Kuś, A., Kosińska, A., Szachon-Pszenny, A. (2015), *Agencja FRONTEX...*, pp. 95-96.

<sup>31</sup> Amnesty International and the European Council on Refugees and Exiles, *Briefing on the Commission proposal for a Regulation amending Council Regulation (EC) 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX)*, September 2010; Migeurop, *Frontex Agency: Which guarantees for human rights?*, March 2011, Human Rights Watch, *Europe’s Dirty Hands. Frontex Involvement in Ill-Treatment of Migrant Detainees in Greece*, September 2011.

<sup>32</sup> Gajda A., „Przestrzeganie praw podstawowych...”, p. 96.

<sup>33</sup> *Frontex Fundamental Strategy*

([http://frontex.europa.eu/assets/Publications/General/Frontex\\_Fundamental\\_Rights\\_Strategy.pdf](http://frontex.europa.eu/assets/Publications/General/Frontex_Fundamental_Rights_Strategy.pdf)).

<sup>34</sup> REGULATION (EU) No 1168/2011 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, *Official Journal of the European Union*, 22.11.2011, L 304/1.

more operational latitude. The Regulation delegated to the Agency new powers, which had to support these Member States, which were the most affected by the migrants wave from North Africa – Spain, Italy, Greece and Malta. Even more functionaries and officers were transferred into operational service on the borders (*European Border Guard Teams*) and the Agency became the possibility to purchase or rent operational accessory<sup>35</sup>. At the same time many positive regulations were adopted in this act: the post of a Fundamental Rights Officer and a Consultative Forum were established in order to consult the projects of the operations from the humanitarian perspective. The Executive Director can even stop or finish a joint operation or a pilot project in case he receives reports on fundamental rights violations<sup>36</sup>.

To sum up, it is visible that the need of the Member States to protect its borders was stronger than the tendency to keep the state's monopoly on this area of public affairs. Shifting the responsibility on FRONTEX resulted in broadening the competencies of the Agency in the operational direction. This led to a serious threat of neglecting the humanitarian guarantees and deterioration of the situation of refugees and migrants. The final model of the Agency, which survived the process of legal reshaping looks rather far from the initial establishment in 2004. FRONTEX is now a major EU Agency, financially and politically dependent on the Member States and the Commission but still in the orbit of the Council, with multiple tasks in different areas. The intelligence activity of the Agency constitutes still the essence of its duties but much more effort and pecuniary assets are spent on the operational aspect. The provisions enshrined in the 2011 amendment of the 2007/2004 Regulation are still not enough to close the controversies around FRONTEX and a dense critique from the side of different organisations and social activists is still a challenge to the Managers of the Agency and politicians in Brussels.

#### **4. European Border and Coast Guard – a new institution with old problems?**

The events on the southern borders of the EU – in Greece, Hungary, Bulgaria and Austria, which happened in 2015, called in public media with the lapidary term “migration crisis” exposed the lack of proper mechanisms in case of a real flood of people passing through many countries and heading towards Europe. Even though the FRONTEX Agency was preparing and training the border services of the Member States in order to prepare them on such scenarios, the real scale of this social phenomenon exceeded any expectation. A short

---

<sup>35</sup> Motive 9, Art. 3b, Art. 8a of the 1168/2011 Regulation.

<sup>36</sup> Art. 3 point 1a of the 1168/2011 Regulation.

quotation from the Communication of the Commission to the European Parliament and Council from December 2015 describes the events in a rather dramatic way: *“The crisis has exposed weaknesses and gaps in existing border management mechanisms, which have proved insufficient to guarantee effective and integrated border management. Some Member States have not been able to ensure effective border control and the identification and registration of irregular migrants. And the crisis has shown that the limitations of Frontex – inadequate resources in terms of staff and equipment, an inability to initiate and carry out return or border management operations and the absence of an explicit role to conduct search and rescue operations – have hindered its ability to effectively address and remedy the situation. Between January and November 2015, more than 1.5 million illegal border crossings were detected, representing an all-time peak of arrivals in the EU. Third-country nationals have been able to cross the external borders of the EU illegally and then continue their journey across the EU, without having been first identified, registered and subject to adequate security checks. The scale of these huge secondary movements of migrants within the EU has fundamentally put into question the coherence of the Schengen area, and, as a result, some Member States have chosen to reintroduce temporary controls at their internal borders – a situation that cannot and should not endure in the long term”*<sup>37</sup>.

The new Agency, which model has been proposed by the Commission by the end of 2015 is from the first view a project of a much stronger body than it was in the case of the initial project of FRONTEX. In fact, it is rather a realisation of the very early idea of a common European Border Guard, which was sceptically rejected before the establishment of FRONTEX. The principle idea of the European Border and Coast Guard (hereinafter EBCG) is the integrated management of the borders. This term contains much more than just border checks, a diligent control and exchange of information between the Member States. It envisions the cooperation with neighbouring third countries, the use of modern technology (drones, satellites) and the establishment of a network of well prepared intervention teams. The initial project describes enthusiastically but a bit general the new duties of the EBCG which are more-less analogous to those of FRONTEX but from now should be fulfilled in a more efficient way. A few innovations are being planned as the unifications of the Schengen Border Code, a complaint mechanism of the third country nationals to the Agency (the lack of

---

<sup>37</sup> European Commission, *Communication from the Commission to the European Parliament and the Council. A European Border and Coast Guard and effective management of Europe's external borders*, 15.12.2015, COM (2015) 673, p. 2.

it was until now a hard point of critique of FRONTEX) and a implementation of the hotspot systems to the close cooperation with services of the third countries.

All these propositions seem to bring something like a *FRONTEX* + instead of a truly new spirit in the area of external borders protection. It is very likely that the new EBCG will face the same problems as the old Agency and deal with them in a similar way. Is there really something new behind the proposition of the Commission than just the simple demand: “A little more action”? Does the new institution focuses on solving the causes of the migration crisis or only on coping with the symptoms in a more organised and determined way?

## 5. Bibliography

### Legal acts:

Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, *Official Journal*, L 239, 22/09/2000 P. 0013 – 0018.

Convention Implementing the Schengen Agreement, *Official Journal* L 239, 22/09/2000 P. 0019 – 0062.

REGULATION (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union: Regulation 2007/2004, text with later amendments in: *Official Journal of the European Union*.

REGULATION (EC) No 863/2007 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers, *Official Journal of the European Union*, 31.07.2007, L 199/30.

REGULATION (EU) No 1168/2011 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a

European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, *Official Journal of the European Union*, 22.11.2011, L 304/1.

REGULATION (EU) No 1052/2013 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 22 October 2013 establishing the European Border Surveillance System (Eurosur), *Official Journal of the European Union*, L 295/11, Vol. 256, 06.11.2013.

Other sources:

Amnesty International and the European Council on Refugees and Exiles, *Briefing on the Commission proposal for a Regulation amending Council Regulation (EC) 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX)*, September 2010.

Amnesty International (2014), *The Human Cost of Fortress Europe: Human Rights Violations Against Migrants and Refugees at Europe's Borders*, London, Peter Benenson House.

Amnesty International (2014), *Greece: Frontier of Hope and Fear: Migrants and Refugees Pushed Back at Europe's Border*, Peter Benenson House.

European Commission, *Communication from the Commission to the European Parliament and the Council. A European Border and Coast Guard and effective management of Europe's external borders*, 15.12.2015, COM (2015) 673.

*Frontex | Eurosur*, available at: [frontex.europa.eu/intelligence/eurosur/](http://frontex.europa.eu/intelligence/eurosur/).

*Frontex | Information management*, available at: [frontex.europa.eu/intelligence/information-management/](http://frontex.europa.eu/intelligence/information-management/).

*Frontex | Operational analysis*, available at: [frontex.europa.eu/intelligence/operational-analysis/](http://frontex.europa.eu/intelligence/operational-analysis/).

*Frontex | Risk analysis*, available at: [frontex.europa.eu/intelligence/risk-analysis/](http://frontex.europa.eu/intelligence/risk-analysis/).

*Frontex | Strategic analysis*, available at: [frontex.europa.eu/intelligence/strategic-analysis/](http://frontex.europa.eu/intelligence/strategic-analysis/).

House of Lords (2003), *European Union twenty-ninth report. Proposals for a European Border Guards*, 1 July 2003.

Human Rights Watch (2011), *The EU's Dirty Hands: Frontex Involvement in Ill-Treatment of Migrant Detainees in Greece*.

Kuś, A., Kosińska, A., Szachon-Pszenny, A. (2015), *Agencja FRONTEX w strefie Schengen: 10 lat doświadczeń*, Prawo i Polityka Migracyjna, Lublin, Wydawnictwo KUL.

Leonard, S. (2009), 'The Creation of FRONTEX and the Politics of Institutionalisation in the EU External Borders Policy', *Journal of Contemporary European Research*, Vol. 5, No. 3, pp. 371–388.

Liszczyk D., Gostyńska A., 'Reforma zarządzania granicami (w)Unii Europejskiej', *Biuletyn Polskiego Instytutu Spraw Międzynarodowych*, Vol. 838, no. 89.

Migeurop, *Frontex Agency: Which guarantees for human rights?*, March 2011.

Neal, A. W. (2009), 'Securitization and Risk at the EU Border: The Origins of FRONTEX', *Journal of Common Market Studies*, Vol. 47, No. 2, pp. 333–356.

Peers, S. (2016), *EU Law Analysis: The Reform of Frontex: Saving Schengen at Refugees' Expense?*, available at: [eulawanalysis.blogspot.com/2015/12/the-reform-of-frontex-saving-schengen.html](http://eulawanalysis.blogspot.com/2015/12/the-reform-of-frontex-saving-schengen.html).

Wawrzyk, P. (cop. 2012), *Przestrzeń wolności, bezpieczeństwa i sprawiedliwości Unii Europejskiej*, Europeistyka, Warszawa, Wydawnictwo Poltext.

Wolff, S., Schout, A. (2013), 'Frontex as Agency: More of the Same?', *Perspectives on European Politics and Society*, Vol. 14, No. 3, pp. 305–324.