

**UNIVERSITY OF TWENTE.**

*BACHELOR THESIS*

**“The Schengen Area in Crisis – Europe’s External Border Protection,  
its Flaws and its Prospects”**

by

*Tobias Steinbrecher*

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Supervisors: Prof. Ramses A. Wessel, Dr. Shawn Donnelly, Dr. Luisa Marin

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## I. Introduction – The Schengen Area in Crisis:

The Schengen Area is in crisis. The current observable and unprecedented influx of irregular migration flows into and through large parts of the European Union constitute the largest refugee crisis since the Second World War.<sup>1</sup> As a consequence to the Union's incapability to act commonly and in a decisive manner, various Member States have reintroduced national border controls. While the Schengen Border Code provides for the option for individual Member States to temporarily reintroduce national border controls in case the public order or internal security is deemed seriously threatened, it is not meant to be used as a suspension of the Schengen Agreement, but as temporary emergency measures only.<sup>2</sup> However, the exception seems to have become the rule. Since September 2015 eight<sup>3</sup> out of the 26 Schengen countries have reintroduced border controls. It should be noted that France, following the nationwide implementation of the state of emergency as a reaction to the November terrorist attacks in Paris, has also introduced border controls. While the Commission maintains that this implementation is unrelated to the current migration crisis,<sup>4</sup> this view can be contested since at least one of the terrorist used the Balkan Route to illegally enter EU territory.<sup>5</sup> In the light of this week's most recent terrorist attacks in Belgium's capital Brussels (March 22, 2016), one could expect this trend of increased internal border controls to intensify, heavily depending on the outcome of the following investigations with regards to the presumed terrorists' movements through Europe. It could therefore be argued that if not *de jure* then at least *de facto* the Schengen Agreement is currently for large parts suspended. As the free movement of goods, persons and services is one of the EU's fundamental core principles, its abolishment would jeopardise the European Idea as a whole and question the *raison d'être* of the Union and thus threaten its very existence. The European Commission expects immense economic, political and social costs for the EU and the Member States should the Schengen Area be dissolved and full scale national border controls between the Member States re-established. While the social and political costs are harder to

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<sup>1</sup> European Commission COM(2016) 120 final.

<sup>2</sup> Articles 23,24,25, Schengen Border Code.

<sup>3</sup> European Commission COM(2016) 120 final.

<sup>4</sup> Ibid.

<sup>5</sup> "Die Welt", 2015 „Ein Attentäter kam als Flüchtling über die Balkan Route“, retrieved March 21, 2016 from: <http://www.welt.de/politik/ausland/article148862574/Ein-Attentaeter-kam-als-Fluechtling-ueber-die-Balkanroute.html>

quantify, the Commission expects an annual economic damage ranging from €5 to €18 billion in additional costs.<sup>6</sup>

The return to the ordinary Schengen procedure seems therefore to be of paramount importance for the continuing existence of the European Union as we know it. Member States will only refrain from internal border controls, if the common external borders can and will be sufficiently protected. According to Article 77(1) of the Treaty on the Functioning of the European Union (hereinafter TFEU) “[t]he Union shall develop a policy with a view to: [...] carrying out checks on persons and efficient monitoring of the crossing of external borders [and] the gradual introduction of an integrated management system for external borders”. To this end the Commission has among other things created the *European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union*, better known under its short name Frontex. However, the current problematic situation has revealed certain systematic and institutional issues related to the cooperation of Member States on the European level. The Southern and South-eastern countries cannot cope with the scope of the migration flows, while at the same time European Cooperation does not seem to sufficiently compensate the national shortcomings. As a result, the Member States have taken unilateral action by reintroducing border controls, thus, contrary to the *European spirit*, de facto suspended the Schengen Agreement for large parts. As described above, the effective protection of the external borders has been identified as a crucial step in returning to the normal Schengen procedures. This research therefore aims at identifying institutional and systematic shortcomings in the European cooperation with regards to external border protection. This will be done by scrutinizing the structure and activities of the Frontex agency and by subsequently comparing these with the new proposed European Border and Coast Guard, to see to what extent they are likely to continue or stop under the new European Agency.

The overall research question of this paper can therefore be formulated in the following way:

*“To what extent does the current institutional set-up of the European border protection agency under the AFSJ contribute to the current shortcomings in the protection of the EU’s external borders and what needs to be done in order to improve it?”*

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<sup>6</sup> European Commission COM(2016) 120 final.

In order to be better able to shed light on the issue at hand, the overall research question will be answered by investigating four sub-questions, which are necessary components of the overarching theme. These sub-questions are constructed in a “consecutive” manner meaning that they each answer individual questions, while at the same time the following question takes into account the findings of the previous one. Each sub-question will be dealt with in a separate section.

1) “To what extent is the EU competent to take actions in the field of external border protection?”

2) “What are the EU’s current policies and practices with regards to the external border protection?”

3) “Are there problems concerning the EU’s policies and practices with regards to the external border protection?”

4) “What is suggested to improve potential problems concerning the EU’s policies and practices with regards to the external border protection and to what extent are these likely to resolve them?”

## **II. Theory – Academic State of the Art:**

There are certain social or political science theories and legal principles, which are beneficial for answering the four sub-questions as well as the overall research theme. The respective concepts will be briefly outlined in this section by referring to the already existing literature and findings of other scholars. Throughout the paper references will be made to other scholars and their findings to depict the academic state of the art.

### *Securitization Theory:*

One of these applicable theories is the securitization theory. The theory refers to the notion that certain problematic situations or issues, in this case the issue of migration, are extremely politicised and subsequently presented as security concerns, as supposed to merely societal problems.<sup>7</sup> Generally speaking, this theory can be divided into two different streams; the Copenhagen School and the Paris School. According to Léonard<sup>8</sup> it was Ole Wæver in collaboration with other scientists, which later became known as the “Copenhagen School”, who originally developed the securitization theory. It assumes that the world as such, including security concerns, is a social construct. Hence, it is ultimately never possible to doubtlessly determine whether a threat is real or only presumed. As a consequence, science should focus on the process or discourse through which an issue becomes a security threat. According to the Copenhagen School this is predominantly done by the “act of speech”, in which the securitizing actor dramatizes and prioritizes an issue, thus creating a sense of threat. The successful securitizing process enables then the securitizing actor “to move a particular development into a specific area, and thereby [to] claim a special right to use whatever means are necessary to block it”.<sup>9</sup> The Paris School, on the other hand, builds upon the Copenhagen school, but disagrees in one fundamental aspect. Bigo, a leading figure in the Paris School, suggests that “[i]t is possible to securitize certain problems without speech or discourse [...] The practical work, discipline and expertise are as important as all forms of discourse”.<sup>10</sup> In a nutshell, he argues that the actions of actors are equally, if not predominantly, contributing to the securitizing process. Léonard further develops on this basis and argues that there are two types of practices conducted by public actors. Firstly, practices which are usually deployed to tackle issues that are widely considered to be a security threat (e.g. terrorism, foreign military strikes etc.) and secondly, so-called “extraordinary” practices. These refer to measures that have not been previously applied to a specific issue in a given political context and can therefore be considered as “thinking outside the box”. In her article, Léonard concludes that both practices are observable regarding the six main

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<sup>7</sup> Léonard, S. (2010) “EU border security and migration into the European Union: FRONTEX and securitisation through practices”, *European Security*, 19:2, 231-254, DOI: 10.1080/09662839.2010.526937

<sup>8</sup> Ibid.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

activities of Frontex and that the agency can thus be seen as a securitizing actor in the case of migration (even though the exact extent of Frontex' role in the securitizing process of migration remains unclear).

The academic discourse between the two strands of the securitization theory will be elaborated on in a later section. This theoretical framework will be applied on the new proposal of the European Commission to investigate to what extent they hold true for the proposed *European Border and Coast Guard*.<sup>11</sup>

#### *Core Legal Principles of the European Union:*

When it comes to the analysis of legal documents, especially in the context of the European Union, it becomes indispensable to regard them with respect to certain legal theories or principles.

One of these principles is the principle of conferral. All EU legislation needs to be in accordance with this principle, since it establishes whether and to what degree the Union exercises competences in the respective policy fields. The notion of conferral is further defined in Article 5 (2) of the Treaty on the EU (hereinafter TEU). It states: "Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States". Another principle, which can also be seen as one of the fundamental principles of EU legislation, is the principle of subsidiarity. The word itself originates in the military milieu. Derived from the Latin word *subsidium* it referred to a military aid or assistant that stayed in the background. In the context of political philosophy, it represents the principle that "a central authority should have a subsidiary function, performing only those tasks which cannot be performed effectively at a more immediate or local level".<sup>12</sup> While the principle of subsidiarity has been more or less obvious visible in the EU (or its predecessor's structures) action, it was not until the Maastricht Treaty of 1992 this principle was codified in the EU treaties. Article 5 (3) of the Treaty on the European Union therefore states: "Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union

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<sup>11</sup> European Commission COM(2015) 671 final 2015/0310 (COD)

<sup>12</sup> R. Schütze, *An Introduction to European Law*, (New York: Cambridge University Press 2012), p. 43

shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level [...]”. Closely connected to the principle of subsidiarity is the principle of proportionality. According to Article 5 (4) TEU the “Union action shall not exceed what is necessary to achieve the objectives of the Treaties [...]”. The direct applicability and direct effect of European primary and secondary law are also vital concepts in European law. Direct applicability refers to the *internal* effect of a European norm within the national legal orders, whereas direct effect refers to the *individual* effect of a binding norm in specific cases.<sup>13</sup> Since part of the research will be the analysis of European regulations and/or proposed European regulations, which according to Article 288 (2) TFEU “[...] shall be binding in its entirety and directly applicable in all Member States”, these concepts will be used to assess existing and proposed legislation.

#### *Principle-Agent Theory:*

In order to assess the performance of public agencies and to understand potential conflicts between the initial purpose and the actual outcomes of agency action, one theory of political science is of particular value: The principal-agent theory. First of all, a comprehensive working definition of a principal, an agent and the theory’s inherent working mechanisms is needed, to further elaborate the issue at hand. Thatcher and Stone Sweet<sup>14</sup> apply these mechanisms on what they call *non-majoritarian institutions*, which are described as “governmental entities that (a) possess and exercise some grant of specialized public authority, separate from that of other institutions, but (b) are neither directly elected by the people, nor directly managed by elected officials”. Although Thatcher and Stone Sweet acknowledge that delegation can also occur in private political domains, they restrict their framework to the aforementioned type of agencies with a public authority emphasis and agencies dealing primarily or exclusively with public governance. Governance in this respect, is seen as “the process through which the rule systems in

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<sup>13</sup> R. Schütze, *An Introduction to European Law*, (New York: Cambridge University Press 2012), p. 112.

<sup>14</sup> Thatcher, M., Stone Sweet, A., (2002) “Theory and Practice of Delegation to Non-Majoritarian Institutions”, *West European Politics*, 25:1, 1-22, DOI: 10.1080/713601583



place in any human community are adapted, on an ongoing basis, to the needs and purposes of those who live under them”, which ultimately also includes “administrative officials, operating under a grant of statutory authority, interpret in order to apply the law in concrete situations”. Finally, delegation is perceived as an “authoritative decision, formalized as a matter of public law, that (a) transfers policy making authority away from established, representative organs (those that are *directly elected*, or are managed *directly* by *elected* politicians), to (b) a *non-majoritarian institution*, whether public or private”<sup>15</sup> (emphasis added). Having defined these concepts, and thus regarding principals as those political officials who use their authority to establish these non-majoritarian institutions (agencies) through a public act of delegation, and agents as those who govern by exercising these delegated powers, principals in general establish these agents to help them to:

- Resolve commitment problems (helping to enhance the credibility of promises made)
- Overcome information asymmetries in technical areas of government (by developing and exercising expertise in their respective field)
- Enhance the efficiency of rule making
- Avoid taking blame for unpopular policies.<sup>16</sup>

In order for the agent to carry out its given task, it is additionally required that the agent is provided with some discretion. It is generally assumed that the principal is aware of the possibility that its agent might develop interests of its own, which diverge from the originally intended given objectives, or the agency perceives the issue’s environment differently, and contrary to the principal. This gap between the intended outcomes and the actual outcomes is referred to by Thatcher and Stone Sweet as the “*zone of discretion*”.

Having identified and defined the core features of the theoretical framework it now becomes important to take a closer look at why agencies may behave in a certain way. According to the principal-agent theory, as outlined above, the objectives of the agent (the agency) may diverge from the original intended purpose or the interests of the principal, that is the establishing and supervising public body (in a national context usually one or several ministries), in general. The principal-agent theory is based on the assumption that the agent carries out specific tasks for the principal. These are usually further defined within a contractual framework, meaning that the

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<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

agent represents the principal's interest by taking actions, in return for some kind of payment. However, there is never a 1:1 relationship between the actions of the agent and the relevant outcomes for the principal, as indicated by Thatcher's and Stone Sweet's discretion zone. Since agents are put at "arm's length" to the supervising ministry there is an inherent information asymmetry in the principal-agent relationship. Only the Agent really knows what is going on. This creates an opportunity for the agent to "shirk" certain responsibilities, at least to some extent, and to thus create an agenda of its own, which may be in opposition to the one of the principal. This results in a situation where the principal is always at a loss. Even if the agent produces the intended outcome, it still could have taken actions that did not contribute to the successful outcome, but to a "hidden" objective of the agent. In this case the principal would fund the agent for actions that it did envisage for. If, on the other hand, the agent produces an outcome not intended by the principal, the loss for the principal is obvious, no matter which actions were taken. In either case, the principals face potential losses, which can be called "failure costs".<sup>17</sup> This leaves the principal three options. Persuade the agent to take the right actions, improve the incentive structure for the agent to take the right actions, or reduce the discretion of the agent, by limiting its powers. However, this in return will increase the costs for the agent, since it will take additional "man-power" and other resources to persuade and/or monitor the agent. The principal is thus in a situation in which it needs to weigh these prevention costs against the failure costs.

A similar logic applies to the agent. With full delegation of power and no (or little) interference from the principal, the agent has the full opportunity to shirk. Any prevention or inspections measures taken by the principal will hence result in a loss for the agent (i.e. less shirking possible). This creates an incentive for the agent to either "bond" with the principal (diverting/providing more information to the principal) or to enhance the concealment of its "unauthorized" actions. Therefore, the agent is in a comparable situation with the principal's. It has to weigh its diversion costs against its concealment costs in order to minimize principal intervention.<sup>18</sup>

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<sup>17</sup> Groenendijk, N. (2014) "Principal-Agent Models: A Short Introduction", lecture material for module 1.3 Policy Making, EPA-Program, University of Twente.

<sup>18</sup> Ibid.

This rather basic outline of the principal-agent theory indicates that the principal faces the potential threat that its agent may develop a “live of its own”, which results from the favoured “at arm’s length” and structural disaggregation characteristics of a public agency.

With reference to the already existing literature on the Frontex agency the principal agent-theory, as depicted above will be applied on Frontex. Additionally, this theoretical framework will be applied on the proposed new agency by the Commission, to see to what extent it is applicable to these new proposed structures.

### **III. Methodology:**

Since this research is not based on quantitative data but can rather be seen as a case study of the EU’s external border protection policies no conclusions will be able to be drawn based on statistical inferences. Therefore, the used methodology will be:

- Literature review/analysis (including: academic articles/journals, academic books, credible media reports etc.)
- Analysis of legal provisions/documents
- Analysis of official documents and communications of government actors on all levels (regional, national, EU)
- Comparative analysis of the already existing structures and the new proposed agency

All research questions will be answered separately and subsequently “receive” their own conclusions. However, given the order in which the questions are asked the following question will always be answered based on the findings of the previous one(s). In a concluding chapter all sub conclusions will be used for an overall conclusion which will ultimately answer the main research question. Additionally, these findings will be put in a broader context aiming to help restoring trust in the core and fundamental ideas/principles of the European Union.

#### **IV. The Protection of the EU External Borders – The Union’s competences with regards to external border protection:**

*The origins of the abolishment of internal borders:*

In order to fully comprehend the EU’s competences with regards to external border protection it becomes of vital importance to take a closer look at the development of the Area of Freedom, Security and Justice, as stipulated in Title V of the TFEU, as well as the development of the Schengen Area.

The initial idea of creating an area of free movement of persons arose in the course of debates during the 1980s between the Member States of the then European Economic Community. The Single European Act, which was signed in 1986 and thus revised the founding Treaty of Rome, envisaged the completion of a single European market, which would consequently entail the free movement of goods and persons.<sup>19</sup> However, while certain Member States believed the principle of free movement should only apply to nationals of Member States, which would still include the retention of internal border controls in order to distinguish between Member States nationals and non-Member States nationals, others favoured the introduction of free movement for all, which would ultimately mean the abolishment of internal border checks altogether. Since the dissent on this matter seemed unresolvable in the short and medium run, the governments of France, Germany, Belgium, Luxembourg and the Netherlands went ahead and decided in 1985 to create a territory without internal borders, which became known as the *Schengen Area*, named after the town in Luxembourg in which the agreement was first signed. During the completion and subsequent entering into force of the Treaty of Amsterdam in 1999, this intergovernmental agreement between the original founders of the Schengen Area was incorporated into the EU legal framework.<sup>20</sup> Throughout the years the Schengen Area was gradually expanded and now includes most of the EU Member States,<sup>21</sup> as well as a few non-EU countries.<sup>22</sup> Nevertheless, the

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<sup>19</sup> EUR-Lex, ‘The Single European Act’, (26 October 2010), available at <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3Axy0027>>

<sup>20</sup> EUR-Lex, ‘The Schengen area and cooperation’ (3 March 2009), available at <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3A133020>>

<sup>21</sup> EU Member States that are *not* part of the Schengen Area: United Kingdom, Ireland; EU Member States that are *currently working* on the accession to the Schengen Area, but are not part yet: Bulgaria, Croatia, Cyprus, Romania

<sup>22</sup> *Non-EU* Member States that are part of the Schengen Area: Iceland, Liechtenstein, Norway, Switzerland

Treaty of Amsterdam also includes provisions with regards to the participation, either partially or fully, of EU-Member States that have not signed the Schengen Agreement, provided that the Schengen Member States and the government in question unanimously decide to do so within the Council. Notably, the United Kingdom and Ireland joined parts of the Schengen Agreement in 1999 and 2002, namely in the areas concerning police and judicial cooperation in criminal matters, the fight against drugs and the Schengen Information System.<sup>23</sup> Denmark constitutes another special case. Even though it has signed the Schengen Agreement it has acquired the right to choose not to participate in any *new* measures taken under Title IV of the EC treaty (now TFEU), with the exception of certain common visa policies.<sup>24</sup>

The Schengen Area thus currently comprises an area of 26 European countries that has abolished systematic passport controls at its internal borders and therefore provides a space of free movement of persons, goods and services. As a logic consequence, the disappearance of mutual national frontiers within the Schengen Area fundamentally increases the importance of the Schengen Area's (for the purpose of simplicity hereinafter the EU's) external borders.

#### *Treaty Provisions and different types of Union Competence:*

Having briefly outlined the historic origins of the free movement of persons, goods and services, it is now necessary to elaborate on the EU's competence to take action in the field of the external border protection. However, to better understand the issue of potentially conflicting competences of the Union on the one hand and the Member States on the other, it is helpful to examine the different types of competences as laid down in the treaties.

The issue of competence is closely intertwined with the principle of conferral, as outlined above. Unlike, for instance, the national parliaments, the EU needs to justify its legal acts, since it does not enjoy the full powers, which are inherent in the idea of a *sovereign* parliament in a *sovereign* state. Considering the fact that the EU is neither sovereign nor a state, the Union cannot claim to possess inherent powers.<sup>25</sup> It can only legislate acts in those fields that has been conferred upon the Union. As already mentioned, Article 5(2) TEU, codifying the principle of conferral in the

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<sup>23</sup> EUR-Lex, 'The Schengen area and cooperation' (3 March 2009), available at <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3A133020>>

<sup>24</sup> Ibid.

<sup>25</sup> R. Schütze, *An Introduction to European Law*, (New York: Cambridge University Press 2012), p. 59

EU legal framework, states that the competences of the Union are limited to those areas, that have been conferred upon the Union by the treaties. However, the EU treaties do not provide a single list that entails all of the Union's competences. Instead, 'they attribute legal competence for each and every Union activity in the respective Treaty title. Each policy area contains a provision – sometimes more than one – on which Union legislation can be based'.<sup>26</sup>

Additionally, the Lisbon Treaty codified different types of competences, which were already "established" by the European Court of Justice by providing precedence, despite the fact that the treaties of the pre-Lisbon area do not differentiate or specify the relationship between Union and national competence.<sup>27</sup>

Title I of the TFEU therefore entails the four different types of Union competences, which are:

- Exclusive Competences
- Shared Competences
- Coordinating Competences
- 'Complementary Competences'.<sup>28 29</sup>

The question which now arises is under which of these categories the protection of external borders falls, if under any at all. Article 4(2)(j) TFEU names the area of Freedom, Security and Justice as a *shared competence* between the Member States and the Union.

Art. 2(2) TFEU defines a shared competence as a conferred competence, in which *both* the Member States and the Union may take legislative action. However, Member States may only exercise their competence to the extent the Union has *not* exercised its competence or to the extent the Union has decided to *cease* exercising its competence in this field, meaning that the Union may adopt legal acts in this area, while simultaneously leaving Member States' legal actions possible *only to the extent the Union has not yet taken legislative action* in this field.

Proceeding to the area of Freedom, Security and Justice itself, and subsequently in accordance with Art. 4(2)(j) TFEU, Article 67(2) TFEU becomes of special importance for resolving this section's issue. It states that '[the Union] shall ensure the absence of internal border controls for

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<sup>26</sup> R. Schütze, *An Introduction to European Law*, (New York: Cambridge University Press 2012), p. 60

<sup>27</sup> *Ibid.*

<sup>28</sup> The term *complementary competence* is not actually used in the treaty. Instead Art. 2(5) TFEU states that '[i]n certain areas and under the conditions laid down in the Treaties, the Union shall have competence to carry out actions to support, coordinate or supplement the actions of Member States [...]' As Schütze notes, the term *complementary* is not used in this provision, but may best refer to the notions *support, coordinate or supplement*.

<sup>29</sup> For a complete and comprehensive overview of the different types of competences, please consult Title I TFEU and R. Schütze, *An Introduction to European Law*, (New York: Cambridge University Press 2012), pp. 75-82.

persons and *shall frame a common policy* on asylum, immigration and *external border control*, based on solidarity between Member States [...]’ (emphasis added). Additionally, Article 77(1) TFEU states that ‘[t]he Union shall develop a policy with a view to: [...] (b) carrying out checks on persons and efficient monitoring of the crossing of external borders (c) the gradual introduction of an integrated management system for external borders [...]’.

*The Union’s competence to act in the field of external border protection:*

Given the historic development of the Schengen Agreement and the preceding Single European Act and its inherent notion of the abolishment of internal frontiers, as well as the legal nature of a shared competence and the Treaty regulations with regards to the area of Freedom, Security and Justice, especially Art. 4(2)(j), Art. 67(2) and Art. 77(1)(b)(c) TFEU, it can be concluded that the European Union indeed does possess the competence to legislate in the field of external border protection, acknowledging its shared nature. How this shared competence works in practice, especially in relation with the Member States will be illustrated by looking at the EU Frontex Agency in the next section.

## **V. EU’s policies and practices with regards to external border protection – The Frontex Agency:**

*The Creation of Frontex:*

One of the best ways to analyse the EU’s policies and practices with regards to external border protection is to take a closer look at the Frontex agency, which has been established for that precise purpose. The historic development of Frontex provides additional insights on how the importance of external border protection gradually increased over time.

Frontex was created on 26 October 2004<sup>30</sup> with ‘a view to improving the integrated management of the external borders of the Member States of the European Union’<sup>31</sup> (The notion of Integrated Border Management will be further elaborated on later in this section). However, the EU’s role

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<sup>30</sup> Council Regulation (EC) No 2007/2004

<sup>31</sup> Art. 1(1) Council Regulation (EC) No 2007/2004

and activities in border protection predates the establishment of Frontex. As indicated above, the cooperation between certain Member States in the field of border cooperation evolved during the process of the Schengen Area from 1985 onwards, resulting in the adoption of EU cooperation on asylum and migration matters into the Maastricht Treaty in 1993, the entry into force of the Schengen Convention in 1995 and the incorporation of the Schengen Acquis into the EU legal framework with the Amsterdam Treaty in 1999. In the same year the European Council held a special meeting in Tampere concerning the establishment of an Area of Freedom, Security and Justice in the EU.<sup>32</sup> The Tampere Programme, which was concluded at this summit, called for the EU to 'develop common policies on asylum and immigration, while taking into account the need for consistent control of external borders to stop illegal immigration and to combat those who organise it and commit related crimes'.<sup>33</sup> Léonard also identifies three prompting factors, that led to the creation of Frontex, in order to fulfil the provision concluded in these agreements and programmes. Since the 1990s and the conflicts in the Balkans with its subsequent refugee flows to Middle and Western Europe, the issue of migration has experienced an immense increase in attention. Member States suddenly started to examine ways of reinforcing their national border protection, fearing an uncontrolled rush of asylum seekers. The 2004 enlargement of the EU and the inherent shift of its external borders to the East can also be seen as a prompting factor. Member States, especially Middle and Western European countries, expressed concerns regarding the new Members' capabilities of meeting the Schengen standards and effectively protection the new external borders. Thirdly, the terrorist attacks on 11 September 2001 amplified the homeland security debate, which was particularly visible in the Hague Programme of 2004, since it explicitly addressed the issue of terrorism.<sup>34</sup> However, before Frontex was established as an agency, there were a few preceding institutional cooperation frameworks, either planned or indeed realised. Notably, in 2001 Germany and Italy introduced a joint initiative aiming to establish a 'European Border Police' to the Council. This proposal, however, did not receive the necessary support from the other Member States, even though most agreed on strengthening cooperation on external border controls, yet did not favour

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<sup>32</sup> European Council, [http://www.europarl.europa.eu/summits/tam\\_en.htm](http://www.europarl.europa.eu/summits/tam_en.htm)

<sup>33</sup> European Council (1999), as cited in S. Léonard, (2010), 'EU border security and migration into the European Union: FRONTEX and securitization through practice', *European Security*, Vol 19, No 2, pp.231-254.

<sup>34</sup> S. Léonard, (2009) The Creation of Frontex and the politics of Institutionlisation in the EU External Borders Policy, *Journal of Contemporary European Research*, Vol. 5, No. 3, pp.371-388.



the subsequent centralisation in this policy field. In 2002 the European Commission published a Communication entitled ‘Towards Integrated Management of the External Borders of the Member States of the European Union’, which called for the establishment of a ‘European Corps of Border Guards’, whose establishment was once again not feasible in the short run, due to Member States’ resistance. Instead, the Commission then suggested to form so-called ‘External Borders Practitioners Common Unit’, which should develop from the SCIFA (Strategic Committee for Immigration, Frontiers, and Asylum), with the aim of gathering ‘managers and practitioners carrying out the full range of tasks concerning external borders security, that is, “the police, judicial and customs authorities and EUROPOL”’.<sup>35</sup> These units would then execute four main tasks:

- Acting as a ‘head’ of the common policy on management of external borders to carry out common integrated risk analysis;
- Acting as ‘leader’ coordinating and controlling operational projects on the ground, in particular in crisis situations;
- Acting as a manager and strategist to ensure greater convergence between national policies in the field of personnel and equipment;
- Exercising a form of power of inspection, in particular in the event of crisis or if risk analysis demands it.<sup>36</sup>

The Seville European Council approved this plan and the Common Unit was created under SCIFA+, which entailed the SCIFA in addition to the heads of national border guards. However, soon after the creation of the Common Unit the European Commission and the Member States questioned its effectiveness. The institutional arrangements of the SCIFA+, according to a Commission report, proved to possess structural limits. The Commission thus proposed to create a new body entrusted with border management on a more systematic level, including charging the new body with operational tasks and the daily management and coordination with regards to external border protection.<sup>37</sup> The Presidency of the Council released a report on the same day, criticising that SCHIFA+’s activities were hampered by severe

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<sup>35</sup> Ibid.

<sup>36</sup> Commission of the European Communities 2002: 14, as cited in Léoard, (2009) The Creation of Frontex and the politics of Institutionlisation in the EU External Borders Policy, *Journal of Contemporary European Research*, Vol. 5, No. 3, pp.371-388.

<sup>37</sup> S. Léonard, (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.

deficiencies concerning planning, preparation, evaluation, operational coordination and the treatment of difficulties arising during the implementation of projects, as well as the commitment of the participating countries.<sup>38</sup>

The Commission subsequently suggested to establish an agency, in order to better coordinate operational cooperation among the Member States. It argued that ‘[...] the Agency will be in a better position than even the Commission itself to accumulate the highly technical know-how on control and surveillance of the external borders that will be necessary [...]. Moreover, the establishment of an Agency is expected to led to increased visibility for the management of external borders in the public and cost-savings with regard to the operational cooperation [...]’<sup>39</sup>

The proposed agency (Frontex) should have the following functions:

- Coordinating the operational cooperation between Member States on control and surveillance of the external borders,
- Assisting Member States in training national border guards,
- Conducting risk assessments,
- Following up on the development of research concerning external borders control and surveillance,
- Assisting member States in circumstances requiring increased assistance at the external borders,
- Coordinating operational cooperation between Member States on the removal of illegal third country residents.<sup>40</sup>

Despite the fact that initially most Member States refused the creation of a centralised structure, the underperformance of the previous cooperation framework, predominately due to SCIFA+’s structural flaws, has convinced the Member States to go beyond purely intergovernmental cooperation and to eventually agree to the Commission’s calls for the establishment of an agency.

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<sup>38</sup> Ibid.

<sup>39</sup> Commission of the European Communities 2003b: 7, as cited in S. Lenoard, (2009) The Creation of Frontex and the politics of Institutionlisation in the EU External Borders Policy, *Journal of Contemporary European Research*, Vol. 5, No. 3, pp.371-388.

<sup>40</sup> Ibid.

*Frontex' legal basis – Art. 77, and Art. 74 TFEU in practice and the problematic notion of Integrated Border Management:*

One of the biggest changes that the Lisbon Treaty amendments have brought about concerning external border protection in comparison with the pre-Lisbon treaty provision's (especially Art. 62(2) EC),<sup>41</sup> is the newly assumed power of the EU to frame a common policy framework in the field of the external border protection. As stated above, Art. 77(1) TFEU states that 'the Union shall develop a policy with a view to [...] (c) the gradual introduction of an integrated management system for external borders'. In their December 2006 meeting, the Justice and Home Affairs Council attributed five core features to the Integrated Border Management: criminal law, policing, expulsion, customs cooperation and internal security.<sup>42</sup>

However, the term Integrated Border Management (hereinafter IBM) is not defined in the treaties, which has led to different interpretations among scholars.<sup>43</sup> Mungianu (2013)<sup>44</sup> argues that the JHA's council definition of the IBM is too broad, and that IBM should subsequently be interpreted to entail only those activities that are directly connected to the management of the external borders. He relies on the argument of prof. Steve Peers<sup>45</sup> who claims that for each of the five aforementioned policy fields, the treaties provide for different legal bases subject to different rules, and that therefore Art. 77(c) TFEU "should be understood to cover the regulation of the link *between external border control* and the activities regulated pursuant to *other provisions of the Treaty*" but with a separation when the activity carried out falls within a field different from the management of the borders'<sup>46</sup> (emphasis added).

Border protection has arguably also an external affairs component, since it also involves cooperation with non-EU countries, for instance in return operations. However, these external affairs matters are covered in a different Title of the TFEU, therefore the concept of IBM should

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<sup>41</sup> For more on that compare R. Mungianu (2013), 'Frontex: Towards a Common policy on External Border Control', *European Journal of Migration and Law*, 15, pp. 359-385.

<sup>42</sup> 2768th Justice and Home Affairs Council Meeting 4-5 December 2006, 15801/2006, available at [http://europa.eu/rapid/press-release\\_PRES-06-341\\_en.htm?locale=en](http://europa.eu/rapid/press-release_PRES-06-341_en.htm?locale=en)

<sup>43</sup> For more on that compare R. Mungianu (2013), 'Frontex: Towards a Common policy on External Border Control', *European Journal of Migration and Law*, 15, pp. 359-385

<sup>44</sup> R. Mungianu (2013), 'Frontex: Towards a Common policy on External Border Control', *European Journal of Migration and Law*, 15, pp. 359-385

<sup>45</sup> S. Peers (2011), 'EU Justice and Home Affairs Law', *Oxford University Press*, p.157. as seen in R. Mungianu (2013), 'Frontex: Towards a Common policy on External Border Control', *European Journal of Migration and Law*, 15, pp. 359-385.

<sup>46</sup> Ibid.

be seen as a *connecting link* between the five different fields of IBM, which all have their legal bases in different parts of the Treaties. As Mungianu correctly points out, this interpretation seems to be supported by Art. 21(3) TFEU, which demands to ‘ensure consistency between the different areas of its external action and between these and its other policies’, especially since Art. 14 of the Frontex regulation requires Frontex to facilitate operational cooperation with third countries ‘within the framework of the external-relations policy of the Union’.<sup>47</sup>

Additionally, Art. 74 TFEU states that ‘the Council shall adopt measures to ensure administrative cooperation between the relevant departments of the Member States in the areas covered by this Title [Area of Freedom, Security, and Justice], as well as between those departments of the Commission.’

Those two articles, in addition to the somewhat unclear conception of Integrated Border Management, can thus be seen as the legal foundation on which the Frontex founding regulation and its activities are based on. The next part of this section will take a closer look on some of Frontex main activities in the light of the securitization theory.

#### *Frontex’ Activities in the Light of Securitisation:*

The basic assumption of the securitisation theory, as indicated in the theory part, is the notion that threats as such are not objectively determinable, but are rather socially constructed.

According to Ole Wæver,<sup>48</sup> who originally developed this theory, securitisation is predominately done by acts of speeches, or through a discursive process, which politicises and dramatizes political issues until they are perceived as threats. To use the definition of Buzan et al.: ‘when a securitising actor uses a rhetoric of existential threat and thereby takes an issue out of what under those conditions is “normal politics”, we have a case of securitisation’.<sup>49</sup>

There are subsequently five underlying core concepts to this theory. There is the ‘securitising actor (i.e. the agent who presents an issue as a threat through a securitization move), the ‘referent subject’ (i.e. the entity that is threatening), ‘the referent object’ (i.e. the entity that is threatened),

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<sup>47</sup> Art. 14 Regulation (EC) No. 2007/2004.

<sup>48</sup> Léonard, S. (2010) “EU border security and migration into the European Union: FRONTEX and securitisation through practices”, *European Security*, 19:2, 231-254, DOI: 10.1080/09662839.2010.526937

<sup>49</sup> B. Bulzan et al. (1998) ‘Security: A New Framework for Analysis, pp.24-25, as cited in T. Balzacq, S. Léonard, J. Ruzicka, “Securitization” revisited: Theory and cases’.

‘the audience’ (i.e. the agreement of which is necessary to confer an intersubjective status to a threat) and the ‘context and the adaption of distinctive policies’.<sup>50</sup> According to this strand of the Securitisation Theory (Copenhagen School), an issue is successfully securitised, if the securitising actor manages to convince the audience (e.g. the public or a government) by means of discursive acts that extraordinary measures are necessary in order to face the securitised issue. The notion of convincing implies the explicit assent of the audience for an issue to be successfully securitised.<sup>51</sup>

However, some scholars argue that in the specific case of the EU there is no explicit assent by the audience necessary.<sup>52</sup> This idea is supported by Neal who argues that securitisation in a European context is not the same as in a national context and should thus be seen differently. For instance, the communication between the securitising actor and the audience is different. Neal uses the example of 9/11, arguing that the EU institutions just like the US government issued communications and statements relating to terrorism. However, in the European case they were simply not as widely reported by the media. Instead, the European publics seem to have been more attentive to what their national governments communicated. Therefore, the link between the EU as a securitising actor and the European public(s) is more uncertain and more narrowed down to a specialized audience.<sup>53</sup> This is also closely intertwined with the fact that the EU is not a single polity. This raises the question of who the securitising actor in the European context is and who the audience, since Neal argues that there is no methodological prescription saying that the audience necessarily has to be the public. In the European context, the securitising actor (the Commission, the Council etc.) might as well just address an audience consisting of bureaucrats, experts and political professionals.<sup>54</sup>

Securitisation in the European context should thus probably rather been seen in the light of the Paris School, a strand of the securitisation theory that builds upon the Copenhagen School. The biggest difference between these two strands is that the Paris school emphasises the securitising effects of practices rather than those of speeches or discursive acts. Bigo notes in this respect that

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<sup>50</sup> Ibid.

<sup>51</sup> S. Léonard, (2010), ‘EU border security and migration into the European Union: FRONTEX and securitization through practice’, *European Security*, Vol 19, No 2, pp.231-254.

<sup>52</sup> T. Balzacq (2008) ‘The Policy Tools of Securitization: Information Exchange, EU Foreign and Interior Policies’, *JCMS 2008 Vol. 46, No. 1, pp.75-100*

<sup>53</sup> A.W. Neal (2009), ‘Securitization and Risk at the EU Border: The Origins of FRONTEX’, *JCMS 2009 Vol. 47, No. 2, pp.333-346*.

<sup>54</sup> Ibid.

“[i]t is possible to securitize certain problems without speech or discourse [...] The practical work, discipline and expertise are as important as all forms of discourse”.<sup>55</sup> He therefore suggests that the policy measures taken by the securitising actors may be of greater importance than the discursive acts they undertake. Léonard (2010) differentiates between two types of practices that can be analysed. Firstly, practices that have traditionally been associated with activities concerning migration and asylum, such as measures combating drug-trafficking and terrorism and secondly, activities that are exceptional, in terms of that they have never been used with regards to asylum and migration in general, or in the European context in particular.

Having briefly discussed the two different strands within the securitization theory and following Neal’s argumentation that suggests that the securitization on a European level cannot adequately be explained by the securitization by speech alone (Copenhagen School) and Bigo’s assumption of securitization without a discursive act, the next part of this section will apply the Paris School approach of this concept on the activities of Frontex in order to see to what extent these activities and practices contribute to the securitisation of asylum and migration in a European context. As outlined above, the Frontex Regulation charges the agency with six tasks, however, due to spatial constraints this paper can only discuss some of these activities. Therefore, this paper focuses on Frontex’ main task, which organizing and conducting joint operations, as well as its risk assessments and its rapid border interventions.<sup>56</sup>

Since Frontex is predominately a coordinating agency,<sup>57</sup> its most prominent task is to organise the coordination of operational cooperation between the Member States. According to Article 3 of the Frontex Regulation the agency has the power to launch joint operations in agreement with the Member State(s) concerned. Those joint operations can be of airborne and seaborne nature, as well as conducted on the ground. The Poseidon Sea operation, for instance, is a seaborne joint operation to ‘implement coordinated operational activities at the external sea borders of the Eastern Mediterranean region in order to control irregular migration flows towards the territory of the Member States of the EU and to tackle cross-border crime’.<sup>58</sup> Operations such as these can be seen as a securitising practice for two reasons: Firstly, naval operations were and are

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<sup>55</sup> D. Bigo (2002) as cited in S. Léonard (2010), ‘EU border security and migration into the European Union: FRONTEX and securitization through practice’, *European Security*, Vol 19, No 2, pp.231-254.

<sup>56</sup> For a complete and comprehensive overview of Frontex’ activities please refer to Art. 3 of Council Regulation (EC) 2007/2004.

<sup>57</sup> Compare Recital 4 Council Regulation (EC) 2007/2004.

<sup>58</sup> Frontex, Archive of Operations, available at <http://frontex.europa.eu/operations/archive-of-operations/Lq8P8c>

traditionally conducted to face conventional security threats, such as naval military attacks from third countries. Thus, using naval operations to deal with issues arising from migration elevates the issue of migration and asylum to a level that the public usually associates with war related security threats, especially if images of *battleships* rescuing migrants from sinking boats are being transmitted by the media to the public. Even if unarmed ships are deployed, certain participating actors, such as the Italian *Guardia di Finanza* and the Spanish *Guardia Civil* have semi-military status in their countries, which contribute to the militarization of the migration issue. Secondly, naval (partly) military operations can also be seen as *extraordinary* measures, since it is usually the police who is charged with border protection.<sup>59</sup>

Next to the organization of joint operations, Frontex is also charged with conducting so-called risk analyses, with the aim to ‘prepare both general and tailored risk analyses, [which are] to be submitted to the Council and the Commission’.<sup>60</sup> Throughout its existence, Frontex gradually increased and sophisticated its risk analysis methods. Léonard points out that while not mentioned in the Frontex Regulation, the agency continuously uses the term ‘intelligence’ in its documents, instead of rather neutral sounding words such as ‘data’ or ‘information’, which according to her contributes to the securitisation of asylum and migration as well.<sup>61</sup> It can additionally be argued, that next to its more militarised use of language, Frontex has contributed to the securitization of migration by creating the ‘Frontex Situation Centre’ (FSC), which assesses and analyses potential threats at EU borders in constantly updated pictures, ‘as near to real time as possible’.<sup>62</sup> Those ‘real time’ surveillance systems are usually more known in the military realm, such as 24/7 air space surveillance on the national level or integrated into the NATO structures. The German *Luftwaffe*, for instance, maintains two so-called Control and Reporting Centres, which monitor the German air space around the clock. Should a military threat arise, those centres are able to deploy military airplanes within 15 minutes.<sup>63</sup> Additionally, since 2013 the Agency can also make use of the EUROSUR information exchange framework, which is a system of satellites and other surveillance systems, such as drones, to detect migration movements at the

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<sup>59</sup> S. Léonard, (2010), ‘EU border security and migration into the European Union: FRONTEX and securitization through practice’, *European Security*, Vol 19, No 2, pp.231-254

<sup>60</sup> Article 4 Regulation (EC) No. 2007/2004.

<sup>61</sup> S. Léonard, (2010), ‘EU border security and migration into the European Union: FRONTEX and securitization through practice’, *European Security*, Vol 19, No 2, pp.231-254

<sup>62</sup> Frontex, available at <http://frontex.europa.eu/intelligence/information-management/>

<sup>63</sup> Bundeswehr, available at [www.bundeswehr.de](http://www.bundeswehr.de) (German source).

EU's external borders. In order to complete the risk analyses, each participating State has set up so-called National Coordination Centres (NCCs). The NCCs main task is to collect local and national information about migration movements at the respective national borders, which thus creates the 'national situational picture' and is subsequently transmitted to EUROSUR. These information are to be shared with the other Member States as well as with Frontex, in order to provide additional information for 'near real time picture'.<sup>64</sup> Given the fact that Frontex has established an intelligence gathering system similar to those of armed forces, it can be argued that this practice contributes as well to the securitisation (and militarisation) of asylum and migration, considering that these issues usually are within the mandate of police forces. With regards to rapid border intervention, Art. 8 of the Frontex regulation states that if 'one or more Member States [are] confronted with circumstances requiring increased technical and operational assistance [...] [it] may request the agency for assistance'. The 2007 amendment of the Frontex regulation, however, strengthened Frontex assisting role by creating so-called RABITs (Rapid Border Intervention Teams). Those teams were established, since the Commission believed that the ordinary assistance provided by Art. 8 was not sufficient.<sup>65</sup> The establishment of RABITs is particularly extraordinary in the light of the securitization theory. While Member States' participation in joint operations is voluntary, all Member States must contribute forces to the Rapid pool, from which the RABIT units are drawn and then are later deployed on request. The shift from voluntary participation to mandatory contributions strengthens the securitization of migration and asylum.<sup>66</sup>

The section above has described the historic development of Frontex. The preceding cooperation framework under the SCIFA+ scheme proved to be ineffective, which ultimately convinced to Member States to agree to the establishment of a European agency coordinating common efforts in the field of external border protection. While Article 74 and 77 TFEU provide a clear legal basis for the creation of Frontex and its tasks, the literature review has shown that the concept of Integrated Border Management, in which Frontex is supposed to play a part, is not adequately defined in legal terms. Following the argumentation of Léonard and Neal, this section also puts

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<sup>64</sup> Frontex, EUROSUR, available at: <http://frontex.europa.eu/intelligence/eurosur/>

<sup>65</sup> Compare recital 5 of Regulation (EC) No 863/2007

<sup>66</sup> S. Léonard, (2010), 'EU border security and migration into the European Union: FRONTEX and securitization through practice', *European Security*, Vol 19, No 2, pp.231-254



forward the assumption that securitization in the European context can better be seen in the light of securitization of migration through practices, rather than political discourse alone. The policies and practices of the EU with regards to the external border protection, embodied in the Frontex agency, are contributing factors to the securitization of migration, at least to the extent they were analysed in this paper. While mostly relying on the findings of Léonard, the analysis of more recent developments in the activities of Frontex, such as EUROSUR, support her arguments.

## **VI. Frontex' Activities in the Greek-Turkish Border Region – Structural Deficiencies?**

### *Frontex' Activities in the Greek-Turkish Border Region:*

Having analysed Frontex' legal background and seen how its actions can be understood as contributing factors in the securitisation process of migration and asylum, it now becomes important to take a closer look at Frontex' institutional setup to see whether some of its deficiencies can be related to its internal structures.

However, due to Frontex' vast spectrum of tasks and operations this analysis will focus on some of Frontex' activities in the geographic area of the Greek-Turkish border region. Due to Greece's geographic location it is exceptionally exposed to migration flows, since it not only shares a land border with Turkey, but its numerous islands scattered in the Eastern Mediterranean also constitute vast opportunities for irregular migration by small boats. Therefore, this area has been and still is one of Frontex' main focal points for its activities. Various air, land and sea operations have taken place along the Greek-Turkish border as well as Frontex' first RABIT deployment in 2010.<sup>67</sup> However, as Burrige notes, there is little official information available on the ongoing joint operations in the Greek-Turkish border region, such as joint operation Poseidon.<sup>68</sup> Potential shortcomings with regards to joint operations will thus be dealt with in broader terms, by looking at Frontex' joint operations more generally.

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<sup>67</sup> Archive of Frontex Operation, available at: <http://frontex.europa.eu/operations/archive-of-operations/>

<sup>68</sup> A. Burrige, 2012, 'The "added value" of RABITS: Frontex, Emergency Measures and Integrated Border Management at the External Borders of the European Union', Consortium for Comparative Research on Regional Integration and Social Cohesion (RISC).

Frontex itself assesses the first RABIT deployment generally as a success.<sup>69</sup> Ilkka Laitinen, the Executive Director of Frontex between 2005 and 2014, even describes the RABIT deployment as something that ‘will be remembered as a milestone in the history of Frontex’.<sup>70</sup>

As stated above, the RABITs are Frontex Rapid Border Intervention Teams, created by Frontex’ first amendment in 2007, which can be deployed on a special request by one of the Member States, if it find itself ‘under urgent and exceptional pressure’.<sup>71</sup> Such circumstances seemingly occurred in 2010, since the Greek government sent a letter dated 24 October 2010, in which it called ‘for European solidarity and for further European assistance in the field of operational border cooperation’.<sup>72</sup>

For the first time in the history of the agency Article 8d, inserted into the Frontex regulation by the 2007 amendment, was therefore put in action. According to this article the Executive Director has to inform the Management Board about the Member State’s request and decides within five days if RABITs are deployed or not, while taking into account Frontex’ own risk assessment. The final decision whether RABITs are deployed lays thus with the Executive Director. Immediately afterwards, if the Executive Director agrees to the deployment, Frontex and the requesting Member State have to agree on an operational plan, specifying the conditions of the deployment, such as the duration and the composition of the teams (as laid down in Art. 8e). All Member States shall subsequently make the border guards available for deployment at the request of the agency, ‘unless they are faced with an exceptional situation substantially affecting the discharge of national tasks’.<sup>73</sup>

With regards to Member State’s obligations to participate, this is where the RABIT mechanism fundamentally differs from the “common” Joint Operations. Article 3 of the Frontex Regulation, defining joint operations and pilot projects, states that ‘[t]he Agency may itself, and in *agreement* with the Member State(s) concerned, launch initiatives for joint operations and pilot projects in cooperation with Member States’ [emphasis added]. The formulation *in agreement* with Member States highlights the coordinating nature of Frontex, namely to organize joint operations in which certain Member States can chose to participate or not. Even more, Article 20(3)<sup>74</sup> states that the

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<sup>69</sup> Compare Frontex, 2011, “RABIT Operation 2010 Evaluation Report”,

<sup>70</sup> Ibid.

<sup>71</sup> Art. 1 Regulation (EC) No. 863/2007

<sup>72</sup> European Commission, available at [http://europa.eu/rapid/press-release\\_MEMO-11-130\\_en.htm](http://europa.eu/rapid/press-release_MEMO-11-130_en.htm)

<sup>73</sup> Article 8d(8) Regulation (EC) No. 863/2007

<sup>74</sup> Article 20(3) Council Regulation (EC) No. 2007/2004.

Management Board can only adopt proposals for decisions on specific activities to be carried out at the external border of any particular Member States, if the representative of that specific country in the Management Board is in favour of this adoption. In other words, a Member State can always veto Frontex activity at its border or in its immediate vicinity.

The legal phrasing of the RABIT mechanism on the other hand, suggests that Member States have to provide border protection experts to the national ‘rapid pool’, which each state has to create. The rapid border intervention teams are then drawn from these national pools, should Frontex decide to deploy RABITs. Article 8b<sup>75</sup> states that all ‘[...] Member States shall, at the request of the Agency, immediately communicate the number, names and profiles of border guards from their national pool which they are able to make available within five days to be members of teams. Member States shall make the border guards available for the deployment at the request of the Agency [...]’. Here, the legal text points to a clearer obligation of Member States to participate, by making experts from their national pools available.

While Frontex claims to have conducted a successful first RABIT deployment and states in its evaluation report<sup>76</sup> that one of the political outcomes was that participants identified political *cooperation* and *solidarity* as key elements of the operation as well as an increased visibility of the problems at the European level, this view is contested within the academia.

Carrera and Guild,<sup>77</sup> for instance, argue that the very nature of the RABIT mechanism in fact reveals several issues with regards to Member States’ commitment to participate in Frontex’ operations. Even though the RABIT mechanism was introduced in 2007 it was only activated twice, in 2010 and in 2015 both in response to escalating situations in the Greek-Turkish border region. While the 2010 deployment concentrated on the Greek-Turkish land border around the Evros river, the 2015 deployment had its focus on maritime borders between the two countries.<sup>78</sup> The rare activation of the RABIT mechanism underlines its sole *intervening* factor, which is also noticeable in its short durations. The first RABIT deployment only lasted for four months.<sup>79</sup> To use the words of Carrera and Guild, the RABITs ‘are therefore far from providing a long-

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<sup>75</sup> Regulation (EC) 863/2007

<sup>76</sup> Frontex, 2011, “RABIT Operation 2010 Evaluation Report”, p. 10

<sup>77</sup> S. Carrera, E. Guild (2010), “‘Joint Operation RABIT 2010’ – FRONTEX Assistance to Greece’s Border with Turkey: Revealing the Deficiencies of Europe’s Dublin Asylum System’, CEPS Liberty and Security in Europe, Centre for European Policy Studies.

<sup>78</sup> Frontex 2015, available at: <http://frontex.europa.eu/news/frontex-accepts-greece-s-request-for-rapid-border-intervention-teams-amcPjC>

<sup>79</sup> Frontex, 2011, “RABIT Operation 2010 Evaluation Report”, p. 7

standing and permanent response by the Union'.<sup>80</sup> Frontex' incapability of providing an effective long-standing and permanent European response to the escalating situation in the Turkish-Greek border region is therefore visible in these short term operations, despite the fact that in absolute terms speaking the deployment may be considered as a success. According to Frontex' own operation evaluation report, a total of '11,809 irregular migrants were apprehended for illegally crossing the green border in the operational area, as well as 34 facilitators'.<sup>81</sup>

Carrera and Guild subsequently conclude that the introduction of the RABIT mechanism therefore does not live up to the stipulated principle of solidarity and fair sharing of responsibility (as laid down in Art. 80 TFEU), since according to the Dublin Agreement it is still the Member State of first entrance, that has to process and 'take care' of the Asylum Seeker.<sup>82</sup> RABIT can thus be seen as simply a drop in the ocean.

Similar criticism is expressed by Burridge, who questions the role of emergency measures such as RABIT in managing EU borders and the claimed 'added value' by Frontex.<sup>83</sup>

However, it is not just in the RABIT mechanism that certain shortcomings become obvious, but also in Frontex' 'ordinary' joint operations.

According to certain media reports<sup>84</sup> the agency is struggling with a certain lack of commitment by the Member States. As already mentioned, Frontex is predominately of coordinating nature. As recital 4 of the Frontex regulation states: 'The responsibility for the control and surveillance of external borders lies with the Member States'.<sup>85</sup> All its operations therefore depend on the willingness of Member States to dispatch border guards and equipment and to participate in the proposed joint operations. Frontex merely borrows the Member States personnel and equipment for which it reimburses the participating states, but does not generally own heavy assets.<sup>86</sup> The

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<sup>80</sup> S. Carrera, E. Guild (2010), "' Joint Operation RABIT 2010" – FRONTEX Assistance to Greece's Border with Turkey: Revealing the Deficiencies of Europe's Dublin Asylum System', CEPS Liberty and Security in Europe, Centre for European Policy Studies, p. 6

<sup>81</sup> Frontex, 2011, "RABIT Operation 2010 Evaluation Report", p. 10

<sup>82</sup> S. Carrera, E. Guild (2010), "' Joint Operation RABIT 2010" – FRONTEX Assistance to Greece's Border with Turkey: Revealing the Deficiencies of Europe's Dublin Asylum System', CEPS Liberty and Security in Europe, Centre for European Policy Studies

<sup>83</sup> A. Burridge, 2012, 'The "added value" of RABITS: Frontex, Emergency Measures and Integrated Border Management at the External Borders of the European Union', Consortium for Comparative Research on Regional Integration and Social Cohesion (RISC).

<sup>84</sup> Euobserver, (2015) 'Frontex resource limitations put agency in straitjacket', available at: <https://euobserver.com/investigations/130281>

<sup>85</sup> Council Regulation (EC) No. 2007/2004

<sup>86</sup> Ibid.

report states that Frontex ‘struggles to operate in the straitjacket imposed by the collective failure of [M]ember [S]tates and Brussels to fully commit and cooperate with it - despite the current crisis’.<sup>87</sup> Notwithstanding the fact that the budget for Frontex has been increased by €2.6m, in order to strengthen the efforts of the agency in search and rescue matter in April 2015, some of the money had to be returned since Member States failed to provide enough equipment and personnel.<sup>88</sup> Additionally, Frontex’ appeal to the EU Commissioner for Migration, Home Affairs and Citizenship, who subsequently wrote a letter to all 28 interior ministers urging for help, went unheard by the Member States. The report finds that Frontex is used by the Member States as a ‘convenient smokescreen for political inaction on migration’, since the existence of the agency ‘gives the appearance of collective operations without the resources and remit to be meaningful.’<sup>89</sup>

It can therefore be argued that Frontex suffers from a lack of commitment on behalf of the Member States.

#### *The Commitment Problem and Frontex’ Internal Structure – the Principal-Agent Approach:*

The question that remains is whether it is possible that this commitment problem is the result, or partially caused by the agency’s internal structures. The next part of this section hence sets out to take a closer look at the internal management of Frontex and its relation to the Member States, the European Commission and the European Parliament.

A useful way to do so is the principal agent theory. As outlined in the theory section, the principal agent theory’s basic notion involves a ‘principal’ which delegates certain tasks to an ‘agent’, in the hope that the agent executes the tasks in a more efficient manner.

While the notion of delegation of power is also observable in the standard model of parliamentary democracy (the people delegate its sovereignty to the parliament by means of elections),<sup>90</sup> this paper uses the logics of the principal agent theory in a narrower sense, namely by focusing on non-majoritarian institutions.

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<sup>87</sup> Ibid.

<sup>88</sup> Ibid.

<sup>89</sup> Ibid.

<sup>90</sup> Thatcher, M., Stone Sweet, A., (2002) “Theory and Practice of Delegation to Non-Majoritarian Institutions’, West European Politics, Vol. 25, No.1, pp. 1-22.  
to Non-Majoritarian Institutions”, West European Politics, 25:1, 1-22, DOI: 10.1080/713601583

Those non-majoritarian institutions are defined as “governmental entities that (a) possess and exercise some grant of specialized public authority, separate from that of other institutions, but (b) are neither directly elected by the people, nor directly managed by elected officials”.<sup>91</sup> Frontex fits this definition of an agency for the following reasons: The founding Frontex regulation clearly defines Frontex tasks and aims and allocates certain specialized public authority to the agency, namely enhancing cooperation among border control authorities by its various activities and practices (see above) and most notably by organizing joint operations. Taking a look at Frontex’ management structure also shows that it fits Thatcher and Stone Sweet’s definition of a non-majoritarian institution. Article 20 of the Frontex Regulation states that the ‘agency shall have a management board’, charged with the tasks of *inter alia* appointing an Executive Director, establishing procedures for taking decisions related to operational tasks, exercise disciplinary authority over the Executive Director.<sup>92</sup> The Management Board consists of one representative of each Member State as well as two representatives of the European Commission.

The daily functioning and operational responsibility of Frontex however is entrusted with the Executive Director, who is appointed by the Management Board prior to his/her proposition by the European Commission.<sup>93</sup> His or her duties include the implementation of the Management Boards decisions and adopted programmes, taking all necessary steps to ensure the functioning of the agency by adopting internal administrative instructions and certain others.<sup>94</sup> Finally, the Executive Director is accountable for his/her activities to the Management Board.<sup>95</sup> Frontex therefore constitutes an entity that is neither directly elected by the people nor directly managed by elected officials, since the Management Board and the Executive Director are either directly or indirectly appointed by the Member States and the European Commission.

In order to further investigate Frontex in the light of the Principal Agent Theory it necessary to shed more light on the inherent logic and mechanisms of this theoretical framework. The first question that arises is why should a principal allocate power to another entity? Within the vast literature dealing with the principal agent theory several logics were proposed, however, due to

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<sup>91</sup> Ibid.

<sup>92</sup> Art. 20 Council Regulation (EC) No. 2007/2004

<sup>93</sup> Art. 26(1) Council Regulation (EC) No. 2007/2004

<sup>94</sup> For more compare Art. 25(3) Council Regulation (EC) No. 2007/2004

<sup>95</sup> Ibid.

spatial constraints, four reasons, described by Thatcher and Stone Sweet as ‘common rationales for delegation’,<sup>96</sup> will be used for this research and subsequently applied on Frontex. One of those common rationales is the *resolve of commitment problems*. The principal is making a promise or a commitment to show the public that a problem is taken seriously and respective measures are taken to resolve them. In the case of Frontex this commitment is quite obvious. After the abolishment of internal border controls the Member States have identified uncontrolled migration as a problem and thus, in combination with the Commission, decided to establish Frontex to satisfy the detected collective action problem. Secondly, agencies are established to *overcome information asymmetries in technical areas*. By developing and adopting common training curricula and standard procedures for the Member States Frontex helps to overcome these information asymmetries and provides thereby the principal with input for better border protection policies. Frontex also seeks to overcome this information asymmetry by engaging in its risk analyses and the operation of the EUROSUR system, as described in one of the previous sections. Agents are also created in the hope to *enhance the efficiency of rulemaking*. Since agencies are not always necessarily single purposed, they are nevertheless expected to respond to a specific issue or problem. While dealing with these issues they need to develop precise procedures and report back to the agent, who can then, based on the experience of the agent, update the general terms of policy. The two amendments of the Frontex regulation can be seen in this regard, in particular the 2007 amendment,<sup>97</sup> which established the RABITs. Lastly, agencies are also established to *avoid taking blame for unpopular policies*. Agents are expected to maximize policy achievements that may be considered unpopular among certain stakeholders or society more generally.<sup>98</sup>

The establishment of an agency and the subsequent delegation of power, however, comes at a cost for the principal. Keleman describes two problems the principal is facing when designing a new agency. Bureaucratic drifts and political drifts. The former refers to the possibility that the ‘agent develops and pursues a policy agenda differing from that of its political principal’,<sup>99</sup> while the latter deals with the concerns of current power holders that in the future new holders of

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<sup>96</sup> Thatcher, M., Stone Sweet, A., (2002) ‘Theory and Practice of Delegation to Non-Majoritarian Institutions’, West European Politics, Vol. 25, No.1, pp. 1-22.

<sup>97</sup> Regulation (EC) No 863/2007

<sup>98</sup> Ibid.

<sup>99</sup> D.R. Keleman, (2002), ‘The Politics of ‘Eurocratic’ Structure and the New European Agencies’, West European Politics, Vol. 25, No.4, p.96.

political power will engage in ‘dismembering their agency and reversing their preferred policy’.<sup>100</sup> The principal can take a variety of measure to prevent those types of drifts, such as appropriation powers, appointment powers, limits on agency jurisdiction and authority as well as judicial review to control the agent.<sup>101</sup> As we shall see later in this section, numerous European actors engage in these types of principal action.

Having seen the rationales for creating an agency and understood Frontex’ agency character as a non-majoritarian institution raises the fundamental question of *who* actually is the principle of Frontex. At first glance it appears to be the Member States. As noted above, each Member States sends one representative to the Management Board, which controls the activities of the agency. The Executive Director, appointed by the Management Board on the proposal by the European Commission, is accountable for his or her actions to the Management Board.<sup>102</sup> The clearly defined accountability of the agency’s leading official to the Management Board (or in other words the Member States), shows that the overseeing body of the agency is the Management Board. The Management Board’s approval is also needed for any action that Frontex seeks to carry out.<sup>103</sup> The accountability of the Executive Director to the Management Board and the needed approval for Frontex operations indicate that the principal of the agency indeed is the Member States, represented in the Management Board. However, while the regulation demands that each representative of the Board is appointed on the basis of their degree of high level relevant experience and expertise in the field of operational cooperation on border management,<sup>104</sup> such as high ranking officers of the national border guard agencies, some Member States have appointed representatives from national ministries. Taking a closer look at the precise composition of the Management Board suggests this claim. Taking all 32 Board Members (including the two representatives from the European Commission) who either have full voting rights or partial voting rights (i.e. Schengen Countries that are not EU Member States)<sup>105</sup>, while excluding Ireland and the UK (who only have observatory status and no voting rights at all), eight Members of the Management Board do not originate from a national border or

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<sup>100</sup> Ibid.

<sup>101</sup> Ibid

<sup>102</sup> Article 25(4) Council Regulation No. 2007/2004

<sup>103</sup> Compare Art. 20 Council Regulation (EC) No. 2007/2004.

<sup>104</sup> Art. 21(2) Council Regulation (EC) No 2007/2004

<sup>105</sup> Liechtenstein, Norway, Switzerland, Iceland



police agency. Instead they are representatives of the respective Ministries of the Interior.<sup>106</sup> As a result, Board discussions are still tilted towards political issues.<sup>107</sup>

The fact that the Management Board partially consists of political figures rather than experts, seems to contradict the inherent notion of de-politicization, which is part of the principal agent theory. By creating an agency and subsequently delegating power to it, the principal hopes to foster the expertise of the agency, as well as to grant some independence to it, in order to fully execute its task. However, if the managing body partially consists of political figures and the Board discussion are thus tilted to political deliberations, then this composition of the Management Board in its present form constitutes a structural flaw within the agency. Additionally, national political preferences are more likely to persist, if the respective representative stems from a highly political environment, such as a ministry, as opposed to a more technical and administrative environment, for instance a national border or police agency. Considering the different backgrounds of the Management Board's members as well as the different political views of the Member States and Schengen Associated Countries on the issue of migration, it could therefore be argued that the principal (the Member States) does not speak with "one" voice, which would explain why the level of commitment between the Member States varies and persists, despite the general notion of an ongoing crisis. The German news network n-tv, for instance, reported in February 2016 based on a statement from Fabrice Leggeri, the current Executive Director of Frontex, that a Frontex mission of 100 border guards at the Greek-Macedonian border could not take place, due to the Member States unwillingness to contribute forces.<sup>108</sup>

But it is not only the Member States that assert influence on Frontex. A closer look into the regulation shows that the European Union holds certain budgetary powers. Article 29<sup>109</sup> describes the budget of Frontex. It technically consists of four strands, namely a subsidy from the European Union, a contribution from the associated countries, fees for services and voluntary contribution from the Member States. The biggest contributor, however, is the European Union.

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<sup>106</sup> Belgium, Bulgaria, Croatia, France, Germany, Italy, Lithuania, Slovenia. Source: Frontex, available at <http://frontex.europa.eu/about-frontex/organisation/management-board/>

<sup>107</sup> S. Wolff, A. Schout, 2012, 'FRONTEX: More of the Same?', EUSIM – The Governance of Asylum and Migration in the European Union, University of Salford, Centre for European Security, p. 11

<sup>108</sup> n-tv (2016), 'Frontex stößt an seine Grenzen', available at <http://www.n-tv.de/politik/Frontex-stoesst-an-seine-Grenzen-article17062411.html>

<sup>109</sup> Council Regulation (EC) No 2007/2004

Taking the amended budget of 2015 as an example the Schengen Associated Countries contributed €8,852,000, whereas the European Union contributed €133,528,000.<sup>110</sup> This gives the European Parliament a considerable amount of influence on the activities of the agency. In the past the Parliament has made use of its leverage on Frontex. In 2007 the Budget Committee of the European Parliament approved an increase of €30 million of Frontex, but at the same time voted to put in reserve up to 30 percent of the administrative budget. The decision to put in reserve some of the administrative budget of Frontex was justified on the basis that the Agency had to improve its accountability and effectiveness.<sup>111</sup> This example shows the power and the willingness of the European Parliament to use its leverage on the Agency to express and pursue its demands. While the Frontex regulation states that the Executive Manager is accountable to the Management Board,<sup>112</sup> the European Parliament is also entitled to invite him or her to a hearing, reporting on his or her carrying out of his or her duties (the Council may do the same).<sup>113</sup>

The European Commission itself also plays an influential role in the governance of the agency. As stated above, not only the Member States send representatives to the Management Board, but also the Commission. Interestingly enough, the Commission's interests are expressed by two representatives, while each Member States only has one vote in the Management Board. Another clearly visible aspect of the Commission's influence on the agency is the fact that the Commission itself proposes a candidate for the position of the Executive Director. By proposing a candidate that is in line with the Commission's political views, the Commission is able to place a loyal person in the leading office of Frontex. While the Management Board, and thus the Member States, need to approve the suggested candidate, Carrera concludes that 'it seems clear that [the Commission's] influence over the actual activities of the agency is rather substantial'.<sup>114</sup>

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<sup>110</sup> Frontex Amended Budget 2015 N3, available at:

[http://frontex.europa.eu/assets/About\\_Frontex/Governance\\_documents/Budget/Budget\\_2015\\_N3.pdf](http://frontex.europa.eu/assets/About_Frontex/Governance_documents/Budget/Budget_2015_N3.pdf)

<sup>111</sup> S. Lenoard, (2009) The Creation of Frontex and the politics of Institutionisation in the EU External Borders Policy, *Journal of Contemporary European Research*, Vol. 5, No. 3, pp.371-388.

<sup>112</sup> Article 25(4) Council Regulation No. 2007/2004.

<sup>113</sup> Article 25(2) Council Regulation No. 2007/2004.

<sup>114</sup> S. Carrera, (2007), 'The EU Border Management Strategy: FRONTEX and the Challenges of Irregular Migration in the Canary Islands', CEPS Working Document No. 261/March 2007, available at <https://www.ceps.eu/publications/eu-border-management-strategy-frontex-and-challenges-irregular-immigration-canary>

The above analysis shows that Frontex operational activities suffer from a certain lack of commitment on behalf of the Member States. Therefore, the success or failure of an operation, even whether it takes place in the first place, heavily depends on the willingness of the Member States to participate and contribute forces to the operations. Each Member State can block the deployment of a Frontex operation at its borders or in its close vicinity. Additionally, no Member State is obliged to participate in joint operations. Even when Member States' participation is mandatory, as in the case of RABIT deployments, this type of operation cannot be seen as a long term adequate EU response to the ongoing tense situation at the Greek-Turkish border, despite its effectiveness in absolute terms. The RABIT mechanism is characterised by its emergency and intervening nature, most notably visible in its short durations, which can hence not be seen as a procedure that adequately lives up to the notion of 'solidarity and fair sharing of responsibility'.<sup>115</sup> The analysis of Frontex' internal structures and relationships to other key stakeholders in the light of the principle-agent theory reveals certain institutional deficiencies. While many European Actors assert influence on the Agency, such as the Commission in its powerful role to determine the Executive Director and the European Parliament with its budgetary authority, the main principle of the agency are the Member States in the form of the Management Board. The clearly defined accountability of the agency's leading official (Executive Director) to the Management Board, as well as the needed approval for joint operations represents a clear principal-agent relationship. The already mentioned opt-out possibility for Member States in the planning of joint operations and even the veto power of the Member State that is concerned shows that the agency's principal is not an entity that represents one will, but rather speaks with different voices that can lead to the blocking of Frontex operations. The inconsequent application of Art. 21(2) of the Frontex Regulation (members of the Management Board shall be appointed based on their expertise and experience in the field of operational cooperation on border management)<sup>116</sup> has created a situation where certain Member States have sent political figures instead of technical experts, which results in the fact that Management Board discussion are tilted towards political issues. The agency's independence as well as its de-politicization is therefore blurred, and contributes to the fragmentation of the principal.

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<sup>115</sup> Article 80, TFEU

<sup>116</sup> Council Regulation (EC) No. 2007/2004

However, it should be noted that the principal agent approach might be less applicable to the European context. The theory in its classical framework originated and developed in the American political science,<sup>117</sup> which fundamentally differs from the supranational nature of the European Union. As described above, Frontex is subject to influence from many actors and the ‘split voice’ of its principal is one these fundamental differences between the EU and the US context. Some scholars have therefore suggested to use other theoretical approaches to investigate European agencies, such as Frontex.<sup>118</sup>

## **VII. The Commission’s proposal – A European Border and Coast Guard**

### *General Overview of the Commission’s Proposal:*

To investigate what needs to be done in order to combat the deficiencies identified in the sixth section of this paper, a closer look at what the European Commission’s proposal entails is needed. By comparing the proposed regulation for a new agency with the already existing agency Frontex, the following analysis will show to what extent the new agency’s internal structure is likely to stop or continue the identified structural deficiencies. Additionally, this section sets out to determine to what extent the additional tasks of the new proposed agency are likely to contribute to the securitization of migration, after its legal basis is briefly elaborated on. However, at first a general overview of the proposed agency is needed to understand its far reaching implications for the future of the EU’s external border protection.

On 15<sup>th</sup> December 2015 the European Commission issued ‘a Proposal for a regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC’. The somewhat cumbersome name of the proposal already indicates that this time not a simple amendment to the Frontex regulation is envisaged, but instead the founding

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<sup>117</sup> Thatcher, M., Stone Sweet, A., (2002) ‘Theory and Practice of Delegation to Non-Majoritarian Institutions’, *West European Politics*, Vol. 25, No.1, pp. 1-22.

<sup>118</sup> Pollak and Slomanski, for instance, argue that viewing Frontex in through the lens of an experimentalist approach is more promising, compared to using the principal agent theory. For more on that see: J. Pollak, P. Slomanski, (2009), ‘Experimentalist but not Accountable Governance? The Role of Frontex in Managing the EU’s External Borders’, *West European Politics*, Vol. 32, No. 5, pp. 904-924.

regulation, as well as its amendments are being repealed, and a new agency is set up. The overall aim of the proposal is to create a European Border and Coast Guard as well as a European Border and Coast Guard Agency. According to this proposal the European Border and Coast Guard shall consist of the European Border and Coast Guard Agency, as well as all national authorities which are responsible for border management, including coast guards to the extent they carry out border control guards. In the proposal's explanatory memorandum, the Commission notes that 'since all national border guards [...] implement the European integrated border management, they are *European Border and Coast Guards at the same time as they are national border guards and coast guards.*'<sup>119</sup> (emphasis added). This notion is remarkable in the sense that the previous Frontex regulation, as well as its amendments, do not explicitly contain the notion of a *dual identity* of the national border and coast guards. If the proposal is adopted by the Council and the Parliament in this form, a German Federal Police officer would also be a European Border and Coast Guard, as soon as he or she engages in his or her duties regarding border protection.

While national border protection authorities form one part of the European Border and Coast Guard, the proposed establishment of the European Border and Coast Guard Agency will be the second part, which is to be formed from Frontex. Frontex therefore is to be renamed and will be equipped with significantly more competences and powers, in order to 'establish an operational and technical strategy for the implementation of an integrated border management at Union level [...]'.<sup>120</sup> A second striking difference compared to the Frontex regulation is that the term *integrated border management* is described in legal terms. As noted above, the term itself has caused some uncertainty within the academic community, since the treaties of the EU, while demanding its implementation, do not define it. However, not only researchers have trouble with this undefined terminology. Frontex' most recent external evaluation report<sup>121</sup> states that 'there is a persistent need to establish a common and perhaps updated understanding of the concept of

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<sup>119</sup> European Commission, (2015), COM (2015) 671 final, 2015/0310 (COD), 'Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC, p. 9.

<sup>120</sup> Ibid.

<sup>121</sup> External Evaluation of the Agency under Art. 33 of the Frontex Regulation – Final Report, (2015), available at: [http://frontex.europa.eu/assets/Publications/General/Final\\_Report\\_on\\_External\\_Evaluation\\_of\\_Frontex.pdf](http://frontex.europa.eu/assets/Publications/General/Final_Report_on_External_Evaluation_of_Frontex.pdf)

Integrated Border Management and clarify Frontex' role in implementing it'.<sup>122</sup> The Commission's proposal takes into account this recommendation, since Art.4 provides a legal definition of what is to be understood by the concept of 'European integrated border management'. Due to spatial constraints this paper cannot provide a comprehensive elaboration on this concept,<sup>123</sup> but the fact that after 12 years of Frontex operations the concept 'European integrated border management' is finally defined in legislative terms, as well as the notion that national border guards henceforth are also to be seen as officers of the European Border and Coast Guard Agency, instead of simply viewing them as a national contribution to a Frontex operation, indicate the far reaching aspirations of this proposed regulation. The rest of this section will analyse the proposed European Border and Coast Guard Agency (hereinafter the new agency) in a similar way as Frontex has been elaborated on in the previous parts of this paper. Firstly, the legal basis for the creation of the new agency is analysed. Secondly, some of the new agency's enhanced activities will be seen through the lens of the securitization theory and lastly, the principal agent approach will be applied on new agency's structure in the same way it has been applied on Frontex in section VI.

### *Legal Basis for the European Border and Coast Guard Agency – In Accordance with the European Treaties?*

The European Commission uses the same legal foundation it used in order to create Frontex, by referring to Art. 77 and Art. 79 TFEU.<sup>124</sup> As noted above Art. 77(2) TFEU provides that the 'Union shall develop a policy with a view to carrying out checks on persons and efficient monitoring of the crossing of external borders [...]'. Art. 79 TFEU authorises the European Parliament and the Council to adopt measures in the area of irregular migration and unauthorised

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<sup>122</sup> External Evaluation of the Agency under Art. 33 of the Frontex Regulation – Final Report, (2015), p. 102 available at:

[http://frontex.europa.eu/assets/Publications/General/Final\\_Report\\_on\\_External\\_Evaluation\\_of\\_Frontex.pdf](http://frontex.europa.eu/assets/Publications/General/Final_Report_on_External_Evaluation_of_Frontex.pdf)

<sup>123</sup> Article 4 ascribes eight types of components to be part of the integrated border management concept, including border control activities, different types of risk analysis, inter-agency cooperation, cooperation with third countries, technical and operational measures, return of illegal third-country persons, using state of the art technology and quality control mechanisms to ensure the proper implementation of Union legislation. For more detailed information, consult Article 4 and the Commission's explanatory memorandum of the proposed regulation.

<sup>124</sup> European Commission, (2015), COM (2015) 671 final, 2015/0310 (COD), 'Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC, p. 5.

residence, including removal and repatriation of persons residing without authorisation. Here again, the Commission refers to the principle of subsidiarity, by noting that ‘[...] the objectives of this proposal cannot be sufficiently achieved by the Member States, and can be accomplished at the level of the Union [...]’.<sup>125</sup>

However, the objectives of this proposal differ in a fundamental respect from those stipulated in the Frontex regulation, which raise certain legal questions. While the Frontex regulation still entailed the notion that ‘the responsibility for the control and surveillance of external borders lies with the Member States’<sup>126</sup> such a statement cannot be found in the proposed regulation for the new agency. The competences of the new agency are instead enhanced in a crucial way, which can be seen by looking at one of the new tasks, namely the conduction of vulnerability assessments. The Executive Director will determine, based on these so-called vulnerability assessments, the necessary measures a Member State has to take, in order to ensure the overall functioning of the agency, which are binding on the Member State concerned. He or she will additionally set a time frame in which these measures need to be taken. Should these actions not be taken in the set time limit, the Executive Director will refer the matter to the Management Board, which will then adopt a decision requiring the Member State concerned to take the necessary measures. If the Member State is still not complying to the requested measures, thus putting the Schengen Area at risk, the case will be brought to the attention of the Commission, which then in turn may adopt an implementing decision for direct intervention by the agency.<sup>127</sup> Article 18 of the proposed regulation states ‘[...] [o]n duly justified imperative grounds of urgency relating to the functioning of the Schengen area, the Commission shall adopt immediately applicable implementing acts in accordance with the procedure referred to in Article 79(5)<sup>128</sup>’.

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<sup>125</sup> European Commission, (2015), COM (2015) 671 final, 2015/0310 (COD), ‘Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC, p. 6.

<sup>126</sup> Recital 4, Regulation (EC) No 2007/2004

<sup>127</sup> European Commission, (2015), COM (2015) 671 final, 2015/0310 (COD), ‘Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC, pp. 9-10.

<sup>128</sup> Article 79(5) states that ‘[w]here reference is made to this paragraph, Article 8 of Regulation (EU) No 182/2011, in conjunction with Article 5 thereof, shall apply’. The referred Regulation ‘lays down the rules and general principles governing the mechanisms which apply where a legally binding Union act [...] identifies the need for uniform conditions of implementation and requires that the adoption of implementing acts by the Commission be subject to the control of Member States’ (Art. 1 Regulation (EU) No 182/2011). Consult these articles and regulation to obtain more information on the exact legal procedure of legally binding Union acts.

Article 18(6) further states that ‘[t]he Member State concerned shall comply with the Commission decision and for that purpose it shall immediately cooperate with the Agency and take the necessary action to facilitate the implementation of that decision [...]’.

In other words, on the demand of the Commission, the new agency will have the power in circumstances requiring urgent action, to impose measures on a certain Member State, even against its explicit will. This can be considered as a severe interference into a Member State’s sovereignty, since the measures the Agency is entitled to impose on a reluctant Member State would also include joint operations and rapid interventions. Therefore, a Member State may find itself in a situation where “foreign” European forces operate in close vicinity or even on its territory, without its consent.

Additionally, while the first amendment of the Frontex regulation states that Member States may opt-out from Rapid Interventions, if ‘faced with an exceptional situation substantially affecting the discharge of national tasks’,<sup>129</sup> this is no longer the case in the new agency, at least not in *situations at the external borders requiring urgent action*, as defined in Art. 18.

Art 19, describing the composition of the European Border and Coast Guard Teams, still entails the opt-out clause for joint operations and rapid interventions, however, in situations *requiring urgent action*, Art. 18(7) provides that the ‘[...] The Member States may *not* invoke the exceptional situation referred to in Article 19(3) and (6)’ (emphasis added).

The new provision therefore provides for a situation in which Member States can no longer refuse to participate in an operation, even in cases of domestic exceptional situations that would usually allow a Member State to opt out from a proposed operation.

Whether these severe interventions in the sovereignty of a Member States are justified under Article 77 and 79 TFEU remains questionable. Mungianu,<sup>130</sup> already noted in an article published in 2013 that further supra-nationalization and further implementation of a common policy on external border control requires changes in the European Treaties, if such a European System of Border Guards would take over certain national prerogatives, since this in turn would be in violation of Art. 72 TFEU.<sup>131</sup> The Commission apparently believes that its proposal is

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<sup>129</sup> Article 8d(8) Regulation (EC) No. 863/2007

<sup>130</sup> R. Mungianu (2013), ‘Frontex: Towards a Common policy on External Border Control’, *European Journal of Migration and Law*, 15, pp. 359-385

<sup>131</sup> Art. 72 TFEU states: ‘This Title shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security’.



covered by the TFEU and should a dispute arise concerning the application of Art. 18 of the proposed regulation, the European Courts will ultimately have to find answer to this. It should be noted though, that the procedure described in Art. 18 of the proposed regulation is relatively unlikely to occur, since in the past Member States experiencing exceptional pressure on their external borders usually called for more European sovereignty and asked Frontex for the deployment of RABITs, thus rendering a ‘forced’ deployment unnecessary.

*The additional tasks of the European Border and Coast Guard Agency in the light of the Securitization Theory:*

The most striking aspect when comparing the tasks of Frontex and the new agency as laid down in their respective regulations is that the new agency’s tasks significantly increased in numbers. While Art. 2 of Frontex’ founding regulation envisages 6 tasks for Frontex, Art.7 of the proposed regulation stipulates 18 tasks for the European Border and Coast Guard Agency. However, due to spatial constraints this analysis will focus on only some of the new agency’s enhanced tasks, by comparing them with those of Frontex and by analysing to what extent they are likely to contribute to the securitization of migration.<sup>132</sup>

Section V of this paper describes how one of Frontex tasks is to conduct risk analyses and it has shown how this activity contributes to the securitization of migration. These risk analyses are also to be continued in the new agency,<sup>133</sup> but are complemented by the already mentioned vulnerability assessments. These vulnerability assessments are to be conducted by the new agency and ‘[...] shall assess the technical equipment, systems, capabilities, resources and contingency plans of the Member States regarding border control [...]’.<sup>134</sup> Member States are therefore obliged to transmit the requested information to the new agency, as well as the staff and financial resources each Member States allocates to its border protection agencies. This corresponds with the ‘General obligation to exchange information’ imposed on all Member

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<sup>132</sup> For a complete and comprehensive overview of the proposed tasks of the European Border and coast Guard Agency, please consult Art. 6 of the ‘Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC’.

<sup>133</sup> Compare Article 10 of the ‘Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC’.

<sup>134</sup> Article 12(1) of the same proposed regulation.

States, as stipulated by Art. 9. Such a general obligation to exchange information constitutes another novelty, since the Frontex regulation does not contain such an explicit obligation. Art. 12(3) stresses the importance of the vulnerability assessments especially for those countries which are exceptionally exposed to migration flows, since their capabilities or lack thereof have consequences for the functioning of the Schengen Area as a whole. The results of the vulnerability assessments are to be submitted to the Supervisory Board, which advises the Executive Director on what measures and actions need to be taken, in order to correct the detected vulnerabilities. The subsequent decision of the Executive Director, consisting of the necessary measure and a set time limit for its implementation, has binding effect on the Member State concerned. If the Member State does not comply with the correctional measures, the matter is referred to the Management Board, which again shall adopt a decision depicting the necessary actions, obliging the Member State concerned to implement them. If the Member State still refuses to implement the requested measures, the Commission shall adopt an immediately applicable implementation act, as described above, thus constituting a situation requiring urgent action.<sup>135</sup> The vulnerability assessments play hence a crucial role in procedure stipulated by Art. 18. While the same risk assessment actions and their subsequent securitizing factors as carried out by Frontex are to be continued by the new agency, the additional vulnerability assessments are likely to contribute to the securitization of migration for the following reasons: The fact that each Member State now receives not only a risk analysis, depicting the *external* risks it faces, but also an assessment that points out to *internal* shortcomings can be seen as an exceptional practices, since such assessments have not been used in the field of European external border protection before. While each Member State might have national assessments aiming to detect their own vulnerabilities and shortcomings, such systematic assessments conducted by a European agency have never been applied in the area of external border protection, thus constituting an exceptional practice as defined by Léonard. Moreover, the fact that correctional measures adopted by the new agency have binding effect on the Member States, additionally suggests to the audience that the matter of migration has become such a threat that one country alone can no longer adequately detect its own vulnerabilities, since it now takes a European agency to take and enforce the necessary correctional measures.

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<sup>135</sup> Article 12 ‘Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC’.

While the procedures for joint operations remain generally the same, Art. 14 of the proposed regulation stipulates a slightly different procedure with regards to the initialisation of rapid border interventions, as compared to Art. 8a of the Frontex regulation. The new agency's Executive Director will have the right to recommend to a Member State to carry out rapid border interventions, while under the Frontex regulation such interventions can only be initiated upon the request of the concerned Member State. Additionally, the responding time of the Executive Director to decide whether he or she agrees to a requested rapid border intervention is shortened. While the Frontex Regulation states that the Executive Director shall decide within no later than five working days (Art. 8d(4)), the proposed regulation of the new agency requires the Executive Director to take a decision within two working days (Art. 16(4)). However, the more significant difference is the already stated declaration of a situation at the external borders requiring urgent action, as defined in Art. 18. The coercive nature of the measures taken under this article and its legal implications are already explained in an earlier part of this section. Such rapid border interventions can be seen as a securitizing practice for the following reasons. First of all, the shortened responding time of the Executive Director to decide whether or not to grant a request for a rapid border intervention is likely to increase the overall notion of an emergency. Decisions that formerly could have been elaborated on in a longer period of time, but now have to be decided in only a fraction of that period, are likely to suggest to the audience that migration has become such a security threat, that it no longer allows for 'extensive' considerations. Secondly, and more importantly, the forced rapid border intervention against the will of the Member State concerned, portrays to the audience that migration now also involves the necessity of coercion. These forced measures constitute an exceptional practice, since the coercion of a Member State to accept and cooperate with foreign armed forces in the vicinity of its borders or even on its territory is a practice that has never been implemented in the area of external border protection. Furthermore, these forced rapid border interventions are likely to create the image that migration now requires external forces and no matter if such an intervention is desired by the audience's domestic government or not, the threat has become of such an existential dimension, that it can justify the forced deployment of external forces.

It can therefore be argued that at least these mentioned enhanced activities and their changed legal nature are likely to contribute to the securitization of migration. However, to what extent

the practices of the new agency will indeed foster the securitization process, needs to be subject to future research, since there is no empirical data available yet.

*The Internal Structure of the European Border and Coast Guard:*

The internal structure of the European Border and Coast Guard generally corresponds with the structures of Frontex. The influence of the European Parliament and the Commission on the new agency are therefore likely to remain at the same extent they are currently on Frontex. The 2011 amendment of the Frontex Regulation<sup>136</sup> created additional entities within Frontex that were not envisaged in the original Frontex regulation. These additional structures, namely a Consultative Forum and a Fundamental Rights Officer, both of which are supposed to assist the Management Board and the Executive Director in fundamental rights matters, will also be part of the structure of the new agency. The European Border and Coast Guard Agency will thus have a Management Board, an Executive Director, a Consultative Forum and a Fundamental Rights Officer.

However, the administrative and management structure of new agency will be added by another body, namely a Supervisory Board.

In the administrative and management structure of the new agency the Member States remain the main principal, represented in the Management Board, which composes the same members as the Management Board of Frontex. However, the proposed regulation and its inherent enhanced tasks of the new agency lead to a stronger role of the Executive Director and weakens the direct influence of the Management Board, at least with regards to the enhanced tasks that were discussed in this paper. As indicated above, it is the Executive Director that will, based on the outcome of the vulnerability assessment, determine the necessary binding correctional measures, which the Member States have to implement to address the detected vulnerabilities.<sup>137</sup> The Management Board will only become active, if the Member State concerned does not comply with the implementation requested by the Executive Director. However, in order to at least assert a certain degree of influence on the Executive Director's decision, the Supervisory Board will be installed. This new body will *advise* the Executive Director on decisions regarding the

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<sup>136</sup> Council Regulation (EU) No 1168/2011

<sup>137</sup> Article 67(3) 'Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC'.

correctional measures (and other issues), however, the proposed regulation does not state that the Supervisory Board's approval is needed.<sup>138</sup> Therefore, it remains to be seen to what extent the Executive Director's decisions with regards to the binding correctional measures will be influenced by the Supervisory Board.

With reference to the principal agent theory as applied in the previous section, it could hence be argued that the new agency's structural set-up provides for an increased delegation of power. In order to ensure the proper functioning of the agency, the principal allows the agent to take decisions more independently and gives him or her thus more discretion, since neither the Supervisory Board's nor the Management Board's approval is needed to impose the correctional binding measures on the Member States. This argument can be supported by an additional provision. Namely, the provision determining the composition of the Supervisory Board, which will presumably at least assert a certain degree of influence on the Executive Director's decision, since it provides it advise. Article 69 states that 'the Supervisory Board shall be composed of the Deputy Executive Director, four other senior officials of the Agency to be appointed by the Management Board and the one of the representatives of the Commission to the Management Board'. One of the detected structural deficiencies of Frontex identified in section VI is that the Management Board partially consists of political figures instead of technical experts, which results in situations in which the discussions of the Management Board are tilted towards political issues. However, the Supervisory Board will consist of the Deputy Executive Director and four senior officials from *within* the agency, as well as one of the Commission's representative. This composition of technical experts instead of political figures (with the exemption of the Commission representative) is likely to ensure the de-politicized nature of the Supervisory Board.

With regards to the general functioning of the Management Board, the respective Article in the proposed regulation now entails a paragraph requiring the Management Board to 'adopt internal rules for the prevention and management of conflicts of interest in respect of its members'. Seeing this provision in the light of another identified structural flaw in section VI of this paper, namely the fragmentation of the principal, it appears that the proposed regulation tries to go against this fragmentation, by stating that the Management Board shall adopt internal rules for

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<sup>138</sup> Article 69(1) 'Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC'.

the prevention of conflicts of interests. Since the European Border and Coast Guard is not yet established and therefore no empirical data is available with regards to the exact functioning of these internal rules, it cannot be assessed to what extent this provision actually helps to prevent the fragmentation of the principal and whether it will help to create an environment in which the principal speaks with 'one voice'. However, the fact that this provision was included in the proposed regulation shows that the problem was detected and can thus be seen as an improvement in the legislative formulation.

The identified overall commitment problem is also tackled in another respect. Article 37 of the proposed regulation states that the new agency may '[...] acquire, itself or in co-ownership with a Member State, or lease technical equipment [...]'. This will decrease the agency's dependence on the willingness of the Member State to participate in the proposed operations, and gives it the possibility to conduct operations more independently.

The above analysis shows that the proposed regulation by the Commission sets out to create a type of a European system of border guards, by establishing the European Border Coast Guard, consisting of a European Border and Coast Guard Agency and all national border guard authorities. While the Commission maintains the same legal basis for the new agency it has used to create Frontex, it remains questionable whether the new agency's enhanced competence and the subsequent interferences with the sovereignty of a Member State are covered by Art. 77 and 79 TFEU. Especially the new agency's practices with regards to the vulnerability assessment and the following binding correctional measures, as well as the Commission's power to instruct the new agency to intervene in a Member State, if the Member State concerned does not implement the required correctional measures and a situation requires urgent action, prove the new agency's different character. These new tasks and competences can subsequently be seen as securitizing practices, since they constitute exceptional practices as defined by Léonard, resulting in an overall perceived increased notion of urgency. The administrative and management structure of the new agency are likely to diminish some of the detected structural flaws of Frontex, since the discretion of the agent to take action is increased. First and most importantly, by the Executive Director's power to decide on the binding correctional measures and secondly, by his or her right to recommend the initialisation of joint operations and rapid border interventions to the Member State concerned. Measures are also taken to unify the principal's 'voice' by requiring the

Management Board to adopt internal rules for the prevention of conflicts of interest. In combination with the new agency's abilities to purchase its own equipment, these changes are likely to diminish the detected overall commitment problem to a certain extent. Additionally, a certain degree of de-politicization is trying to be achieved, given the Supervisory Board's 'technical' nature.

It can thus be argued that the proposed European Border and Coast Guard Agency is likely to improve some of the detected shortcomings. If it is implemented in the way the Commission has proposed it in its proposal, the Union will have the capability to take decisive action in extraordinary circumstance and situations requiring urgent actions, even against the reluctance of the respective Member State. The vulnerability assessments and the subsequent binding correctional measures are additionally likely to ensure certain common standards, which will increase the overall capabilities of the Member States to strengthen the protection of the EU's external borders. However, joint operations, the agency's normal day to day business, is still on a voluntary basis. While certain measures are taken to foster the Member States' willingness to express one uniform will, the future will show to what extent this will actually increase the Member States' participation. The coercive measures, described in Article 18 of the proposed regulation, is a response to emergency situations alone. Carrera and Guild's criticism with regards to the RABIT procedure, claiming that RABIT's emergency driven nature is far from 'providing a long-standing and permanent response by the Union',<sup>139</sup> can subsequently also be applied on the proposed European Border and Coast Guard Agency. Since the migration flows on the Greek borders in the Eastern Mediterranean and its land borders with Turkey have been a continuing phenomenon for the previous years, the new agency and the Member States will have to find a better way to provide a longstanding answer to the ongoing crisis.

## **VIII. Conclusion:**

The crisis of the Schengen area is visible in the huge influx of migration streams from third countries into the European Union, whereby the Greek-Turkish border region plays a fundamental role in finding an appropriate answer to the ongoing crisis, due to its geographic

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<sup>139</sup> S. Carrera, E. Guild (2010), "' Joint Operation RABIT 2010" – FRONTEX Assistance to Greece's Border with Turkey: Revealing the Deficiencies of Europe's Dublin Asylum System', CEPS Liberty and Security in Europe, Centre for European Policy Studies, p. 6.

exposure to the EU's external borders. The European Union, currently affected by multiple crises, has identified the return to the ordinary Schengen procedure as an imperative in order to regain public trust in the principle of free movement. The European Union was hit by yet another major political blow during the course of the creation of this paper. On 23<sup>rd</sup> June 2016 the British people decided in a referendum to leave the EU. While the exact extent of the consequences deriving from the UK's departure from the EU are not yet foreseeable for both the United Kingdom and the remaining 27 Member States, it appears in first political analyses that the immigration of refugees as well as the free movement of persons from Eastern Member States have played a crucial role in the decision making process of the British people.<sup>140</sup> Regaining public trust into the reasons and rationales of having an area of free movement of persons, goods and services, such as the Schengen area, seems thus to be of greater importance than ever, in order to preserve the European Union as a whole.

As the Commission has pointed out in its European Agenda on Migration an area of free movement without internal borders can only be sustained if the external borders are effectively protected. It has therefore put forward its proposal on the creation of a European Border and Coast Guard, consisting of all Member States' authorities charged with border protection and a new European Border and Coast Guard Agency, which is to be built from the already existing Frontex agency. Section IV of this paper has shown how the EU's competence to act in the field of external border protection is derived from the European Treaties. Especially, Title V of the TFEU, the Area of Freedom, Security and Justice, defines the external border management as a shared competence between the Union and the Member States. Based on Art. 67, 77 and 79 TFEU the EU created Frontex, whose tasks are among others to coordinate joint operations, conduct risk analyses and provide special support by means of rapid border intervention. Section V of this paper has shown how these activities contribute to the securitization of migration according to the securitization theory focusing on practices instead of discursive acts alone.

The analysis of Frontex' internal administrative and management structure, as well as its relations to other European players, such as the European Parliament, the European Commission and the Member States in the light of the principal agent theory have revealed certain shortcomings in the current institution (Frontex) set up under the AFSJ. Most notably, a certain

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<sup>140</sup> Der Spiegel, (2016), 'England und die Gründe: Ist Merkel schuld am Brexit?', online version, available at: <http://www.spiegel.de/politik/deutschland/ist-angela-merkel-schuld-am-brexite-kolumne-a-1099970.html>



lack of commitment on behalf of the Member States has been identified. Since Frontex' mandate is characterized by its coordinating nature, Member States cannot be forced to participate in joint operations. The agency's principal, which are the Member States represented in the Management Board, additionally does not speak with a uniform voice, which is also visible in its composition of partly political figures. This appears to increase the identified lack of commitment.

These shortcomings are likely to be partially resolved by the new European Border and Coast Guard Agency. While it is based on the same legal basis as Frontex, it is disputable to what extent its far reaching intervening rights into the sovereignty of individual Member States are covered by the European Treaties. The coercive measures described by Article 18 of the proposed regulation as well as the vulnerability assessments and the subsequent binding correctional measures, are likely to improve to external border protection performance of the agency, at least in circumstance requiring urgent action. However, since the joint operations are still based on a voluntary basis future research needs to investigate to what extent the changes identified in section VII of this paper, also with regards to provision calling the Management Board to implement rules avoiding conflict of interests, will actually help to resolve the overall commitment problem of the Member States with regards to ordinary joint operations.

It can therefore be argued that the proposal of the European Commission to establish a European Border and Coast Guard can be considered as a step into the right direction of improving the Unions policies and practices with regards to the protection of the external borders. A more effective protection of the external borders is likely to help regaining some of the lost public trust into the area of free movement of persons. Following this argumentation, the proposed European Border and Coast Guard can hence be seen as an important and vital step in resolving the crisis of the Schengen Area.

## IX. References:

A. Burrige, 2012, 'The "added value" of RABITS: Frontex, Emergency Measures and Integrated Border Management at the External Borders of the European Union', Consortium for Comparative Research on Regional Integration and Social Cohesion (RISC).

A.W. Neal (2009), 'Securitization and Risk at the EU Border: The Origins of FRONTEX', *JCMS 2009 Vol. 47, No. 2*, pp.333-346.

Archive of Frontex Operation, available at: <http://frontex.europa.eu/operations/archive-of-operations/>

B. Bulzan et al. (1998) 'Security: A New Framework for Analysis, pp.24-25, as cited in T. Balzacq, S. Léonard, J. Ruzicka, "'Securitization" revisited: Theory and cases'.

Bundeswehr (2016), available at [www.bundeswehr.de](http://www.bundeswehr.de) (German source).

Council Regulation (EC) No. 2007/2004.

Council Regulation (EC) No. 863/2007

Council Regulation (EU) No 1168/2011

D.R. Keleman, (2002), 'The Politics of 'Eurocratic' Structure and the New European Agencies', *West European Politics*, Vol. 25, No.4, p.96.

Der Spiegel, (2016), 'England und die Gründe: Ist Merkel schuld am Brexit?', online version, available at: <http://www.spiegel.de/politik/deutschland/ist-angela-merkel-schuld-am-brexite-kolumne-a-1099970.html>

Die Welt, (2015). „Ein Attentäter kam als Flüchtling über die Balkan Route“, retrieved March 21, 2016 from: <http://www.welt.de/politik/ausland/article148862574/Ein-Attentaeter-kam-als-Fluechtling-ueber-die-Balkanroute.html>

Euobserver, (2015) 'Frontex resource limitations put agency in straitjacket', available at: <https://euobserver.com/investigations/130281>

European Commission (2016), "Communication from the Commission to the European Parliament, the European Council and the Council - Back to Schengen - A Roadmap", Brussels, 4.3.2016, COM(2016) 120 final.

European Commission, (2015), COM (2015) 671 final, 2015/0310 (COD), 'Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC.

European Commission, available at [http://europa.eu/rapid/press-release\\_MEMO-11-130\\_en.htm](http://europa.eu/rapid/press-release_MEMO-11-130_en.htm)

Frontex, (2015) 'External Evaluation of the Agency under Art. 33 of the Frontex Regulation – Final Report', available at:

[http://frontex.europa.eu/assets/Publications/General/Final\\_Report\\_on\\_External\\_Evaluation\\_of\\_Frontex.pdf](http://frontex.europa.eu/assets/Publications/General/Final_Report_on_External_Evaluation_of_Frontex.pdf)

Frontex, 2011, "RABIT Operation 2010 Evaluation Report",

J. Pollak, P. Slomanski, (2009), 'Experimentalist but not Accountable Governance? The Role of Frontex in Managing the EU's External Borders', *West European Politics*, Vol. 32, No. 5, pp. 904-924.

Justice and Home Affairs Council Meeting 4-5 December 2006 2768<sup>th</sup> meeting , 15801/2006, available at [http://europa.eu/rapid/press-release\\_PRES-06-341\\_en.htm?locale=en](http://europa.eu/rapid/press-release_PRES-06-341_en.htm?locale=en)

M. Thatcher, A. Stone Sweet, (2002) “Theory and Practice of Delegation to Non-Majoritarian Institutions”, *West European Politics*, Vol. 25, No.1, pp. 1-22.

N., Groenendijk, (2014) “Principal-Agent Models: A Short Introduction”, lecture material for module 1.3 Policy Making, EPA-Program, University of Twente.

n-tv (2016), ‘Frontex stößt an seine Grenzen’, available at <http://www.n-tv.de/politik/Frontex-stoesst-an-seine-Grenzen-article17062411.html>

R. Mungianu (2013), ‘Frontex: Towards a Common policy on External Border Control’, *European Journal of Migration and Law*, 15, pp. 359-385.

R. Schütze, *An Introduction to European Law*, (New York: Cambridge University Press 2012).

S. Carrera, (2007), ‘The EU Border Management Strategy: FRONTEX and the Challenges of Irregular Migration in the Canary Islands’, CEPS Working Document No. 261/March 2007, available at <https://www.ceps.eu/publications/eu-border-management-strategy-frontex-and-challenges-irregular-immigration-canary>

S. Carrera, E. Guild (2010), “‘Joint Operation RABIT 2010’ – FRONTEX Assistance to Greece’s Border with Turkey: Revealing the Deficiencies of Europe’s Dublin Asylum System’, *CEPS Liberty and Security in Europe*, Centre for European Policy Studies.

S. Léonard, (2009) The Creation of Frontex and the politics of Institutionlisation in the EU External Borders Policy, *Journal of Contemporary European Research*, Vol. 5, No. 3, pp.371-388.

S. Léonard, (2010), ‘EU border security and migration into the European Union: FRONTEX and securitization through practice’, *European Security*, Vol 19, No 2, pp.231-254.

S. Peers (2011), ‘EU Justice and Home Affairs Law’, *Oxford University Press*, p.157. as seen in R. Mungianu (2013), ‘Frontex: Towards a Common policy on External Border Control’, *European Journal of Migration and Law*, 15, pp. 359-385.

S. Wolff, A. Schout, 2012, ‘FRONTEX: More of the Same?’, *EUSIM – The Governance of Asylum and Migration in the European Union*, University of Salford, Centre for European Security, p. 11

T. Balzacq (2008) ‘The Policy Tools of Securitization: Information Exchange, EU Foreign and Interior Policies’, *JCMS 2008 Vol. 46, No. 1, pp.75-100*