



## ARTICLES

### THE EXTERNALISATION OF EU MIGRATION POLICIES IN LIGHT OF EU CONSTITUTIONAL PRINCIPLES AND VALUES

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#### THE ACTIVITIES OF FRONTEX ON THE TERRITORY OF THIRD COUNTRIES: OUTSOURCING BORDER CONTROLS WITHOUT HUMAN RIGHTS LIMITS?

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ABSTRACT: The aim of this *Article* is to examine the role played by Frontex in the process of externalisation of EU migration policies. It is not surprising that the external dimension of Frontex's powers has been reinforced in the successive reforms of its legal framework. There is a common agreement between Member States on the need to intensify international cooperation with third countries in order to face current challenges in the area of migration. The deployment of border management teams on the territory of third countries raises complex legal and political questions as regards the legal regimen applicable and the delimitation of responsibilities between the different actors involved in the extraterritorial operations. The allegations of fundamental rights violations in which Frontex was reportedly involved in the Aegean Sea show that it will be very difficult to clarify the role of Frontex in any wrongdoing that will happen in the context of operations implemented on the territory of third countries.

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KEYWORDS: externalisation of migration policies – EU agencies – cooperation between Frontex and third countries – status agreements – fundamental Rights – management of borders.

## I. INTRODUCTION

In the last years, the EU has intensified the externalisation of migration policies with the aim of preventing the access of irregular migrants and persons in need of international protection to the territory of the Member States. Externalisation often amounts to a policy of deterrence preventing third countries' nationals from entering into direct contact with EU or Member States' authorities.<sup>1</sup> Extraterritorial immigration control has been increasingly used by States aiming to prevent flows of migrants and asylum seekers towards their territory.<sup>2</sup> The failure to reach an agreement between the Member States on the reform of the Common European Asylum System (CEAS) has led the EU to intensify the externalisation process.<sup>3</sup>

The EU has tried to reinforce the cooperation with third countries in the management of migration, including Turkey, Libya and the Sahel countries in order to externalize migration controls.<sup>4</sup> The EU has provided third countries with financial assistance, equipment, training and it has even deployed liaison officers on the ground.<sup>5</sup> The externalisation of migration policies may also lead the EU and its Member States to exercise directly effective control over migrants and persons in need of international protection on the territory of third countries on the basis of the agreements concluded with them.<sup>6</sup>

<sup>1</sup> See S Lavanex, 'Shifting Up and Out: The Foreign Policy of European Immigration Control' (2010) *West European Politics* 329-350; JJ Rijpma, 'External Migration and Asylum Management: Accountability for Executive Action Outside EU-territory' (2017) *European Papers* [www.europeanpapers.eu](http://www.europeanpapers.eu) 571.

<sup>2</sup> See V Guiraudon, 'Before the EU Border: Remote Control of the Huddle Masses' in K Groenendijk, E Guild and P Minderhoud (eds), *In Search of Europe's Borders* (Kluwer Law International 2003); V Mitsilegas, 'Extraterritorial Immigration Control, Preventive Justice and the Rule of Law in Turbulent Times: Lessons from the Anti-Smuggling Crusade' in S Carrera, J Santos Vara and T Strik (eds), *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis. Legality, Rule of Law and Fundamental Rights Reconsidered* (Edward Elgar Publishing 2019).

<sup>3</sup> See JA González Vega, 'Non-Refoulement at Risk? Asylum's Disconnection Mechanisms in Recent EU Practice' in S Carrera, J Santos Vara and T Strik (eds), *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis* cit.

<sup>4</sup> J Santos Vara, *La dimensión exterior de las políticas de inmigración de la Unión Europea en tiempos de crisis* (Tirant lo Blanch 2020) 71-76; J Santos Vara, 'Soft International Agreements on Migration Cooperation with Third Countries: A Challenge to Democratic and Judicial Controls in the EU' in S Carrera, J Santos Vara and T Strik (eds), *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis* cit.

<sup>5</sup> See P García Andrade, *La acción exterior de la Unión Europea en materia migratoria* (Tirant lo Blanch, 2015); P García Andrade, I Martín and S Mananashvili, *EU Cooperation with Third Countries in the Field of Migration* (Study for the LIBE Committee 2015) [www.europarl.europa.eu](http://www.europarl.europa.eu).

<sup>6</sup> On the constitutional challenges of EU external cooperation on migration with third countries, see T Strik, 'EU External Cooperation on Migration in Search of the Treaty Principles' (2023) *European Papers* [www.europeanpapers.eu](http://www.europeanpapers.eu) 905.

The externalisation of EU migration policies has also involved an expansion in the number of European actors involved in migration cooperation and border controls with third States. EU agencies are called to play a key role in developing the cooperation between the EU and third countries in this field, which increasingly leads to the externalisation of the management of migration and protection obligations.<sup>7</sup> A good example in this regard is the increased role played by Frontex in practical and operational cooperation with third countries, including on return and readmission, the fight against human trafficking, the provision of training and technical assistance to authorities of third countries for the purpose of border management. It is explicitly laid down in the 2019 European Border and Coast Guard (EBCG) Regulation that the Agency may cooperate, to the extent required for the fulfilment of its tasks, with the authorities of third countries.<sup>8</sup>

The weakness of the Frontex legislative framework has been the source of a fierce debate as regards the implications of the Agency's activities for fundamental rights since its establishment in 2005. This continuing controversy seems to have intensified in light of the new powers conferred on Frontex by the 2016 and 2019 versions of its founding Regulation, in particular the establishment of the standing corps with executive powers. At the same time, the Agency and its compliance with human rights has been under scrutiny from multiple angles, including the European Parliament, the European Ombudsman, the European Court of Auditors (ECA) and the European Anti-Fraud Office (OLAF). The expanded mandate and powers of Frontex has not been accompanied by adequate accountability mechanisms.<sup>9</sup> It has been argued that the fact that Frontex is systematically involved in fundamental rights breaches has led to the emergence of a rule of law crisis in European border management.<sup>10</sup>

Frontex is expected to help EU Member States secure external borders and externalize migration controls. Third countries are not obliged to respect the fundamental rights of the persons affected by the Frontex extraterritorial operations in accordance with EU law. The increasing cooperation with third countries takes place without clarity as regards the applicable legal framework and human rights safeguards. As a consequence, the Agency risks becoming involved in the commission of illegal acts. It is not surprising that

<sup>7</sup> S Carrera, J Parkin and L den Hertog, 'The Peculiar Nature of EU Home Affairs Agencies in Migration Control: Beyond Accountability versus Autonomy' (2013) *European Journal of Migration and Law* 337-358; D Fernández Rojo, *EU Migration Agencies the Operation and Cooperation of FRONTEX, EASO and EUROPOL* (Edgar Elgar Publishing 2021); J Santos Vara, 'The External Activities of AFSJ Agencies: The Weakness of Democratic and Judicial Controls' (2015) *European Foreign Affairs Review* 118-136; J Santos Vara, *La gestión de las fronteras exteriores de la UE: los nuevos poderes de la Agencia Frontex* (Tirant lo Blanch 2021).

<sup>8</sup> Art. 73(1) of Regulation 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624.

<sup>9</sup> M Gkliati, 'The New European Border and Coast Guard: Do Increased Powers Come with Enhanced Accountability?' (17 April 2019) *EU Law Analysis eulawanalysis.blogspot.com*.

<sup>10</sup> L Marin, 'Frontex and the Rule of Law Crisis at EU External Borders: A Question of Legal Design?' (5 September 2022) *Verfassungsblog verfassungsblog.de*.

the external dimension of Frontex's powers has been reinforced in the successive reforms of its Regulation. There is a common agreement between the Member States on the need to intensify international cooperation with third countries in order to face current challenges in the area of migration. The European Council has recently called for the rapid conclusion of negotiations on new and revised status agreements between the EU and third countries on the deployment of Frontex as part of the efforts to strengthen cooperation on border management and migration.<sup>11</sup>

The aim of this *Article* is to examine the role played by Frontex in the process of externalisation of EU migration policies. First, the establishment of the EBCG in 2016 will be examined taking into account the evolution of the Agency in the successive amendments of its legal framework. Second, the main implications of new powers conferred on Frontex will be analysed paying particular attention to the new tasks entrusted to the standing corps. Third, the cooperation developed between the Agency and third countries will be explored. Frontex is probably the EU agency that has experienced the greatest increase of powers in the relations with third countries, in particular through the deployment of liaison officers and the signing of working arrangements. Finally, the operations implemented on the territory of third States raise complex legal and political issues, in particular from the perspective of the protection of fundamental rights. The possibility to carry out extraterritorial activities, including executive powers, is one of the most relevant innovations introduced by the recent reforms of the Frontex legal framework. The extraterritorial activities of the Agency should be framed in the current process of externalisation of EU migration policies.

## II. THE ESTABLISHMENT OF THE EUROPEAN BORDER AND COAST GUARD

Frontex was established with the aim of coordinating and assisting Member States' actions in the surveillance and control of the external borders of the EU.<sup>12</sup> Frontex has been characterized as an agency with a dual character.<sup>13</sup> On the one hand, it assists Member States in the implementation of a common integrated management of the external borders through the provision of technical support. On the other hand, Frontex is entrusted with the coordination of joint operations between Member States' national border guards. Since its establishment, Frontex has coordinated many joint operations covering the air, land and sea borders of the Member States and has experienced a substantial increase in its powers.<sup>14</sup>

<sup>11</sup> European Council Conclusions of 9 February 2023 para. 23.

<sup>12</sup> Council Regulation 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

<sup>13</sup> J Rijkma, 'Hybrid Agencification in the Area of Freedom, Security and Justice and its Inherent Tensions: The Case of Frontex' in M Busuioc, M Groenleer and J Trondal (eds), *The Agency Phenomenon in the European Union: Emergence, Institutionalisation and Everyday Decision-making* (Manchester University 2012).

<sup>14</sup> See Regulation (EC) No 863/2007 of the European Parliament and of the Council of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council

The establishment of the EBCG in 2016 was one of the main initiatives adopted by the EU to deal with the asylum and migration “crisis”.<sup>15</sup> The creation of the EBCG and the transformation of Frontex into the Agency of the EBCG did not amount to establishing a real European Border and Coast Guard System that replaced national authorities in charge of border management in each Member State. Even though the Regulation on the EBCG has significantly reinforced the tasks conferred upon Frontex, these innovations did not entail a real transformation of its legal nature. Member States continue to retain the primary responsibility for the management of the external borders.<sup>16</sup> According to de Bruycker, the EBCG is essentially “a new model built on an old logic”.<sup>17</sup> As it was pointed out by Carrera and den Hertog, the 2016 Frontex Regulation led to transform the former Agency into a “Frontex+”.<sup>18</sup> The changes introduced in the configuration of the Agency could not be qualified as revolutionary but more as a natural evolution in the process initiated in 2004 with the creation of Frontex.<sup>19</sup> It should be acknowledged that the exact division of responsibility between the Member States and the Agency remains unclear in practice.

The reliance on voluntary Member States’ contributions of staff and equipment resulted in persistent gaps affecting the support that the Agency could offer to Member States. Less than two years after the adoption of the Regulation establishing the EBCG, the Commission proposed an updated version of the Regulation on the EBCG.<sup>20</sup> The new Regulation on the EBCG was adopted by the Council on 8 November 2019.<sup>21</sup> These

Regulation (EC) 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers and Regulation 863/2007 of the European Parliament and of the Council of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers.

<sup>15</sup> Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC.

<sup>16</sup> *Ibid.* Recitals 6 and 5 of the Preamble.

<sup>17</sup> P De Bruycker, ‘The European Border and Coast Guard: A new Model Built in an Old Logic’ (2016) European Papers [www.europeanpapers.eu](http://www.europeanpapers.eu) 559.

<sup>18</sup> S Carrera and L den Hertog, ‘A European Border and Coast Guard: What’s in a Name?’ (2016) Centre of European Policy Studies; S Carrera and others, ‘The European Border and Coast Guard: Addressing Migration and Asylum Challenges in the Mediterranean?’ (2017) Centre of European Policy Studies.

<sup>19</sup> See J Rijpma, ‘The Proposal for a European Border and Coast Guard: Evolution or Revolution in External Border Management?’ (European Parliament 2016); J Santos Vara, ‘La transformación de Frontex en la Agencia Europea de la Guardia de Frontera y Costas: ¿Hacia una centralización en la gestión de las fronteras?’ (2018) *Revista de Derecho Comunitario Europeo* 143.

<sup>20</sup> Proposal for a Regulation COM(2018) 631 final of the European Parliament and of the Council on the European Border and Coast Guard and repealing Council Joint Action n°98/700/JHA, Regulation (EU) n. 1052/2013 of the European Parliament and of the Council and Regulation (EU) n° 2016/1624 of the European Parliament and of the Council A contribution from the European Commission to the Leaders’ meeting in Salzburg on 19-20 September 2018.

<sup>21</sup> Regulation 2019/1896 cit.

developments point to the gradual emergence of an increasingly “integrated European administration” as its powers have been significantly expanded, in particular in the areas of border management and returns.<sup>22</sup>

It seems that the successive amendments to the Agency’s legal framework in a short period of time are “symptomatic of a lack of strategic thinking on the future of border management at EU level”.<sup>23</sup> According to a special report published by the ECA in June 2021, Frontex has not been sufficiently effective in helping Member States in managing the EU’s external border.<sup>24</sup> The auditors considered that the Agency’s support is not adequate to combat illegal immigration and cross-border crimes. As well as concluding that Frontex has not fully implemented the mandate that it received in 2016, ECA also cast doubt on its capacity to effectively implement the new operational role that has been assigned to it. ECA held that “the Agency responded to its new responsibilities in an *ad hoc* fashion and only began to address its needs in a systematic way in 2019”.<sup>25</sup>

### III. THE ENHANCEMENT OF THE AGENCY’S MANDATE

The evolution of the Agency should be framed within the process of *agencification* that the Area of Freedom, Security and Justice (AFSJ) has experienced over the last years.<sup>26</sup> EU agencies, in particular Frontex and the EU Asylum Agency (EUAA), are called to play an increasing role to respond to the challenges that the EU is facing in the areas of migration, asylum and border management. They are presented by the institutions as instruments to reinforce the implementation of EU law, to enhance solidarity between the Member States and to implement cooperation between the EU and third countries. The 2016 and 2019 Regulations on the EBCG involve a substantial reinforcement of Frontex as regards

<sup>22</sup> See P de Bruycker, ‘The European Border and Coast Guard’ cit.; J Santos Vara, ‘La transformación de Frontex en la Agencia Europea de la Guardia de Frontera y Costas’ cit.

<sup>23</sup> Meijers Committee, ‘CM1817 Comments on the draft for a new Regulation on a European Border and Coast Guard, (COM (2018) 631 final) and the amended proposal for a Regulation on a European Union Asylum Agency (COM (2018) 633 final)’ (November 2018).

<sup>24</sup> ECA, ‘Special Report 08/2021: Frontex’s Support to External Border Management: Not Sufficiently Effective to Date’ (7 June 2021).

<sup>25</sup> *Ibid.* 36.

<sup>26</sup> See E Bernard, ‘Accord sur les agences européennes: la montagne accouche d’une souris’ (2012) *Revue du Droit de l’Union Européenne* 399-446; M Busuioc, ‘Accountability, Control and Independence: The Case of European Agencies’ (2009) *ELJ* 599-615; M Chamon, *EU Agencies: Legal and Political Limits to the Transformation of EU Administration* (Oxford University Press 2016); E Chiti, ‘An Important Part of the EU’s Institutional Machinery: Features, Problems and Perspectives of European Agencies’ (2009) *CMLRev* 1395-1442; E Vos, ‘EU Agencies: Features, Framework and Future’ (Maastricht Faculty of Law, Working Paper 3-2013); S Carrera, L den Hertog and J Parkin, ‘The Peculiar Nature of EU Home Affairs Agencies in Migration Control: Beyond Accountability versus Autonomy’ (2013) *European Journal of Migration and Law*; J Santos Vara, ‘The External Activities of AFSJ Agencies’ cit.

tasks, human and financial resources with the aim to strengthening the protection of the external borders and restoring the normal functioning of the Schengen area.

### III.1. THE CONFERRAL OF EXECUTIVE POWERS ON THE AGENCY'S STAFF

The conferral of executive power on the Agency's staff is one of the main innovations introduced by Regulation 2019/1896. The establishment of a Rapid Reaction Pool of 1.500 border guards by Regulation 2016/1624 was considered a positive step to address emergency situations at the external borders. The creation of the standing corps of 10.000 operational staff by 2027 is the main innovation introduced by the new Frontex Regulation. The standing corps should enable the Agency to deploy border guards where needed and therefore enhance the Agency's capacity to support Member States in securing external border controls.<sup>27</sup> The enhancement of human and financial resources of individual Member States through Frontex can be perceived as a tool of EU solidarity and fair sharing.<sup>28</sup>

The members of the standing corps, including the operational staff of the Agency, are conferred executive powers.<sup>29</sup> Providing the Agency's own staff with executive powers is questionable since the primary responsibility for the management of the external borders lies primarily with the Member States. It can be argued that art. 77(2)(d) TFEU provides the legal basis for any measure necessary for the gradual establishment of an integrated management system for external borders. It is true that the members of the teams may only exercise executive tasks under the command and control of the host Member State and as a rule in the presence of border guards or staff involved in return-related tasks of the host Member State. However, such tasks may be performed by the Frontex operational staff in the case that they have been authorized by the host Member State to act on its behalf.<sup>30</sup>

Frontex is entering uncharted waters with the conferral of executive powers.<sup>31</sup> This new task raises serious concerns as regards judicial control in the case that fundamental

<sup>27</sup> Art. 54 Regulation 2019/1896 cit.

<sup>28</sup> D Fernández Rojo, 'The Umpteenth Reinforcement of FRONTEX's Operational Tasks: Third Time Lucky?' (4 June 2019) EU Law Analysis [eulawanalysis.blogspot.com](http://eulawanalysis.blogspot.com); B Parusel, 'Should They Stay or Should They Go? Frontex's Fundamental Rights Dilemma' Swedish Institute for European Policy Studies (December 2022) [www.sieps.se](http://www.sieps.se).

<sup>29</sup> The statutory staff of the Agency may perform executive tasks such as the verification of the identity and nationality of persons, the authorisation or refusal of entry upon border check, the stamping of travel documents, issuing or refusing of visas at the border, border surveillance, or registering fingerprints. See arts 54(3) and 55(7) of Regulation 2019/1896 cit.

<sup>30</sup> Art. 82 Regulation 2019/1896 cit.

<sup>31</sup> J Santos Vara, 'The European Border and Coast Guard in the New Regulation: Towards Centralization in Border Management?' in S Carrera, D Curtin and A Geddes (eds), *20 Year Anniversary of the Tampere Programme. Europeanisation Dynamics of the Area of Freedom, Security and Justice* (European University Institute 2020).

rights violations are committed in the context of operations involving Frontex teams. The substantial autonomy enjoyed by AFSJ agencies and, in particular Frontex, in developing their activities does not mean that they are immune to judicial controls. The Treaty of Lisbon expressly introduced in art. 263 TFEU the possibility of taking legal action to annul legal acts of the agencies. However, there is sometimes uncertainty as regards the distribution of responsibility between Frontex and the Member States involved in the agencies' activities. It can be difficult sometimes to understand who does what and who is responsible for what. This situation is particularly worrying because its operations can have a serious impact on the fundamental rights of migrants and refugees. A good illustration are the hotspots set up to manage the massive arrival of refugees to Italy and Greece where EUAA, Frontex and Europol work together on the ground with the authorities of Member States to help them to fulfill their obligations under EU law.<sup>32</sup> The broadening of powers conferred on Frontex by the new Regulation may exacerbate the problems facing individuals who are victims of human rights violations and try to obtain judicial redress.

### III.2. THE EMERGENCE OF A SUPERVISORY ROLE

The Agency is called to supervise the effective functioning of the national external borders and detect deficiencies in their management. There is a hierarchical relationship placing Frontex above national authorities. Both the 2016 and 2019 EBCG Regulations have equipped the Agency with a mechanism to assess vulnerabilities in the Member States' capacities to face challenges at the external borders.<sup>33</sup> In case of non-compliance with the recommendations made by the Executive Director and the decisions taken by the Management Board of the Agency to address the deficiencies identified at the external borders, the vulnerability assessment may lead to the so called "right to intervene". If the Member State concerned does not cooperate with the Agency, the Council, acting on the basis of a proposal from the Commission, may adopt a decision by means of an implementing act identifying the measures needed to mitigate those risks and requiring the Member State concerned to cooperate with the Agency.<sup>34</sup> The implementing power to adopt such a decision is conferred on the Council because of the potentially politically sensitive nature of the measures to be decided. However, if a Member State is opposed to the application of certain measures, Frontex does not have at its disposal any means to impose them. In practice, intervention will not consist in sending teams from the EBCG to take over the responsibilities or tasks of a particular Member State in managing its borders, but in suspending the

<sup>32</sup> EL Tsourdi, 'Bottom-up Salvation? From Practical Cooperation Towards Joint Implementation Through the European Asylum Support Office' (2016) European Papers [www.europeanpapers.eu](http://www.europeanpapers.eu) 987 and 'Hotspots and EU Agencies: Towards an integrated European Administration?' (26 January 2017) EU Migration and Asylum Law and Policy [eumigrationlawblog.eu](http://eumigrationlawblog.eu).

<sup>33</sup> Art. 32 Regulation 2019/1896 cit.

<sup>34</sup> *Ibid.* art. 42.



application of Schengen in relation to the Member State concerned insofar as the persistent deficiencies relating to the external borders constitute a serious threat to public policy or internal security within the area without internal borders.<sup>35</sup> There is an underlying tension between the new operational tasks bestowed upon Frontex and, in particular, the executive powers and the conferral of a supervisory and intervention role. Frontex is called to play a double role since it is involved in implementing EU external border policy and monitoring policy implementation.<sup>36</sup> There is a risk of politicization of the Agency when conducting the vulnerability assessment and identifying the weaknesses in a particular sector of the external border. AFSJ agencies and, in particular Frontex, are not independent from the Member States and are not immune to political influences. Member States are represented at the Management Board of Frontex which plays a key role in operationalizing its mandate. It should be further reflected how to ensure the independence of the Agency when supervising the implementation of EU external border policy by the Member States.

#### IV. COOPERATION WITH THIRD COUNTRIES IN THE FRAMEWORK OF THE EUROPEAN BORDER AND COAST GUARD REGULATION

Once the evolution of the Frontex legal framework has been analysed, it is possible to examine the role played by the Agency in the externalization of border control activities. The activities carried out by AFSJ agencies in the relations with third countries are very diverse, and have continued to expand in recent years.<sup>37</sup> International cooperation is one of the core dimensions of the European integrated border management. Frontex is probably the EU agency that has experienced the greatest increase of powers in the relations with third countries.<sup>38</sup> In order to facilitate operational cooperation with third countries, Frontex has been allowed to implement a number of cooperation activities. The instruments provided for in both the 2016 and 2019 EBCG Regulations to carry out the cooperation with third States are the same as those that have been developed in previous years. However, the EBCG Regulation regulates this set of instruments in more detail and pays greater attention to the protection of fundamental rights and, in particular, to the principle of *non-refoulement*.

<sup>35</sup> See art. 29 Regulation 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (codification).

<sup>36</sup> L Tsourdi, 'Monitoring and Steering through FRONTEX and EASO 2.0: The Rise of a New Model of AFSJ Agencies' (29 January 2018) EU Migration and Asylum Law and Policy eumigrationlawblog.eu.

<sup>37</sup> See C Billet, 'Le contrôle des relations extérieures des agences ELSJ après Lisbonne' in C Flaesch-Mougin and L Serena Rossi (dirs), *La dimension extérieure de l'espace de liberté, de sécurité et de justice de l'Union Européenne après Lisbonne* (Bruylant 2013) 95-129; A Ott, 'EU Regulatory Agencies in EU External Relations: Trapped in a Legal Minefield Between European and International Law' (2008) *European Foreign Affairs Review* 515-540; J Santos Vara, 'The External Activities of AFSJ Agencies' cit.

<sup>38</sup> The reforms introduced by Regulation 1168/2011 attempt to provide legal support for the practices developed in relations with third States. See art. 14 of Regulation 1168/2011 cit.

Firstly, the Agency may deploy liaison officers in third countries and receive liaison officers from third countries on a reciprocal basis, with a view to contributing to the prevention of and fight against irregular immigration and the return of irregular migrants. It is foreseen that priority for the deployment of liaison officers shall be given to those third countries which, on the basis of a risk analysis, constitute a country of origin or transit regarding illegal immigration.<sup>39</sup> In recent years, Frontex has deployed liaison officers to Turkey, Niger, Senegal and in the Western Balkans (Belgrade and Tirana). It is explicitly laid down in the 2019 Regulation that the liaison officers will be involved in the field of return by providing technical assistance in the identification of third-country nationals and the acquisition of travel documents.<sup>40</sup> In order to sustain the growing network of Frontex liaison officers, the Agency collaborates with the Commission, the European External Action Service (EEAS) and other EU actors. Frontex also has experts deployed to the Common Security and Defence Policy (CSDP) missions and operations.<sup>41</sup> Since 2017, a Frontex expert is supporting the EU Border Assistance Mission in Libya (EUBAM) on the ground.<sup>42</sup> Frontex has exchanged experts acting as liaison officers with EU NAVFOR Med Sophia and the NATO Operation in the Aegean Sea. The 2019 Frontex Regulation introduced for the first time a legal framework for implementing the cooperation with CSDP missions that has developed in practice in the last years.<sup>43</sup> The EU has also strengthened Frontex's activities in Niger by signing a working arrangement with the CSDP mission EUCAP Sahel Niger and it is planned to finalise a similar partnership with EUBAM Libya.<sup>44</sup> It has been questioned the need for and added value of the coordination of liaison officers with CSDP missions because the military purposes of the latter operations are different Frontex's mandate in the field of border management.<sup>45</sup>

<sup>39</sup> Art. 77(3) Regulation 2019/1896 cit.

<sup>40</sup> *Ibid.*

<sup>41</sup> On the relation between migration and CFSP, see P García Andrade, 'Tackling Migration Externally Through the EU Common Foreign and Security Policy: A Question of Legal Basis' (2023) *European Papers* www.europeanpapers.eu 959.

<sup>42</sup> Council Decision (CFSP) 2013/233 of 22 May 2013 on the European Union Integrated Border Management Assistance Mission in Libya (EUBAM Libya).

<sup>43</sup> Council Decision (CFSP) 2015/972 of 22 June 2015 launching the European Union military operation in the southern Central Mediterranean (EUNAVFOR MED).

<sup>44</sup> Frontex, 'Frontex signs Working Arrangement with EUCAP Sahel Niger' (15 July 2022) www.frontex.europa.eu. See also Mécanisme opérationnel de coordination des actions pour la dimension externe des migrations, Action file Niger (8 February 2022) and Statewatch, 'Frontex to Boost Border Control Efforts in Niger, Algeria and Libya' (10 March 2022) www.statewatch.org.

<sup>45</sup> European Council on Refugees and Exiles, 'ECRE Comments on the Commission Proposal for a Regulation on the European Border and Coast Guard, (COM (2018) 631 final)' (November 2018); M Estrada-Canamares, 'Operation Sophia Before and After UN Security Council Resolution no 2240 (2015)' *European Papers* www.europeanpapers.eu 185; V Moreno-Lax and E Papastavridis (eds), *Boat Refugees and Migrants at Sea: A Comprehensive Approach. Integrating Maritime Security with Human Rights* (Brill 2016).

Second, Frontex may invite observers from third countries to participate in its activities at the external borders, return operations, return interventions and training. The new 2019 Regulation expands the possibility of inviting observers from EU institutions, bodies and agencies, including other international organizations and CSDP missions “to the extent that their presence is in accordance with the objectives of those activities, may contribute to the improvement of cooperation and the exchange of best practices, and does not affect the overall safety and security of those activities”.<sup>46</sup> In addition, the bilateral agreements concluded by the Member States with third States may include provisions on the role of the Agency in the framework of joint operations implemented on the territory of third States.<sup>47</sup> Furthermore, the Agency may receive Union funding in accordance with the provisions of the relevant instruments supporting third countries and activities relating to them. It may launch and finance technical assistance projects in third countries regarding matters covered by the Frontex Regulation and in accordance with the financial rules applicable to the Agency.<sup>48</sup>

Third, Frontex has resorted very often to negotiate working arrangements with the authorities of third countries “to the extent required for the fulfilment of its tasks”.<sup>49</sup> Working arrangements constitute a very important instrument to implement and develop the operational cooperation of Frontex with third States. Frontex has made extensive use of this prerogative by entering into agreements with a large number of States and even with various international organisations.<sup>50</sup> The content of the working arrangements is quite similar, including undertakings in the field of information exchange and the creation and coordination of joint operational measures and pilot projects, as well as cooperation in risk analysis, technical development of border procedures and training. There is a need to cooperate with third countries in order to promote EU standards and practices in the field of border management, including the respect for fundamental rights.

As regards the procedure for negotiating working arrangements with third countries, the Director of the Agency has to follow the guidelines established by the Management Board and the Commission is fully involved in the negotiation process. Working

<sup>46</sup> Art. 78(1) Regulation 2019/1896 cit.

<sup>47</sup> The agreement concluded between Spain and Cape Verde in 2009 introduced a legal framework that allowed the cooperation between Frontex and the African country (Acuerdo entre España y Cabo Verde sobre vigilancia conjunta de los espacios marítimos bajo soberanía y jurisdicción de Cabo Verde, BOE núm. 136 (5 Junio 2009), 47545).

<sup>48</sup> Art. 73(6) Regulation 2019/1896 cit.

<sup>49</sup> *Ibid.* art. 73(1).

<sup>50</sup> See M Fink, ‘Frontex Working Arrangements: Legitimacy and Human Rights Concerns Regarding “Technical Relationships”’ (2012) *Utrecht Journal of International and European Law* 20-35; J Santos Vara, ‘Análisis del marco jurídico-político de la dimensión exterior de la Agencias del Espacio de Libertad, Seguridad y Justicia’ in M Pi Llorens and E Zapater Duque (coords), *La dimensión exterior de las agencias del espacio de libertad, seguridad y justicia* (Marcial Pons 2014) 7-36.

arrangements are usually based on a model previously drawn up by the Commission.<sup>51</sup> Before the Management Board approves any working arrangement, the Agency is obliged to notify them to the Commission that has to give its prior approval.<sup>52</sup> The participation of the European Parliament in the process of negotiating working arrangements has been gradually reinforced in the successive reforms of the Frontex Regulation. Since the reform introduced by Regulation 2019/1896, the Agency is obliged to provide the Parliament with detailed information as regards the parties to the working arrangement and its envisaged content before they are concluded.<sup>53</sup> As the working arrangements may have serious implications for human rights, it has been pointed out that they should be subject to prior approval by the Parliament.<sup>54</sup> However, it seems logical that the signing of mere administrative agreements agreed with the border services of third countries is not dependent on the previous approval by the Parliament.<sup>55</sup> Furthermore, the democratic control of all Frontex activities has been substantially strengthened since the adoption of Regulation 2016/1624.<sup>56</sup> All working arrangements contain a similar provision highlighting that they are deprived of binding legal effects and that the implementation of its provisions does not amount to the fulfilment of international obligations.

In conclusion, before 2016, the Agency could deploy liaison officers in third countries and receive them from third countries on a reciprocal basis, launch technical assistance and exchange information with third countries within the framework of working arrangements. However, the Agency was not allowed to implement joint operations on the territory of third countries that involve the deployment of EU border guards. As it will be shown in the following section, the deployment of border management teams on the territory of third countries raises complex legal and political issues.

## V. THE IMPLICATIONS OF THE EXTRATERRITORIAL FRONTEX JOINT OPERATIONS

### V.1. THE DEPLOYMENT OF BORDER MANAGEMENT TEAMS ON THE TERRITORY OF THIRD COUNTRIES

The 2016 Regulation introduced the possibility of carrying out operations on the territory of neighbouring third countries subject to a prior agreement concluded by the EU and

<sup>51</sup> Art. 76(2) Regulation 2019/1896 cit.

<sup>52</sup> *Ibid.* art. 76(4).

<sup>53</sup> *Ibid.*

<sup>54</sup> Parliamentary Assembly of the Council of Europe, 'Frontex: Human Rights Responsibilities' Doc. 13161 (8 April 2013).

<sup>55</sup> J Santos Vara, 'La transformación de Frontex en la Agencia Europea de la Guardia de Frontera y Costas' cit. 175.

<sup>56</sup> See J Santos Vara, 'The EU's Agencies. Ever more Important for the Governance of the Area of Freedom, Security and Justice' in F Trauner and A Ripoll Servent (eds), *The Routledge Handbook of Justice and Home Affairs Research* (Routledge 2018) 445-457.

the third country concerned (so-called status agreements). The geographical scope of the cooperation with third countries is substantially expanded in the 2019 Regulation since the Agency can develop operational cooperation with any third country. Arts 73 and 74 EBCG Regulation provide the legal basis for launching joint operations on the territory of third state territories. The cooperation between the Agency and authorities of third countries may concern all aspects of European Integrated Border Management, including border control and return activities.<sup>57</sup> Frontex may support third countries by providing financial technical assistance, sending technical equipment and deploying personal on the ground. The personnel are drawn from the European Border and Coast Guard standing corps. The status agreements may also include the establishment of antenna offices in third countries in order to facilitate and improve coordination of operational activities.<sup>58</sup>

When the deployment of border management teams from the standing corps to a third country involves the use of executive powers, a status agreement has to be concluded by the EU with the third country concerned on the basis of art. 218 TFEU.<sup>59</sup> The negotiations with third countries are based on a model status agreement previously developed by the Commission as provided for in art. 76(1) of Regulation 2019/1896.<sup>60</sup> Each status agreement can serve as an umbrella under which multiple operational activities can be carried out. After the entry into force of the 2016 EBCG Regulation, priority was given to negotiate the first agreements with the Balkan countries. So far, status agreements have been concluded with Albania (2019), Montenegro and Serbia (2020), North Macedonia (2022) and it is pending finalization of the agreement with Bosnia Herzegovina (initialled in 2019).<sup>61</sup> In March 2022, a status agreement was signed with Moldova in order to support this country to address the challenges arising from the invasion of Ukraine by

<sup>57</sup> Art. 73(1) Regulation 2019/1896 cit.

<sup>58</sup> See *ibid.* arts 73(3) and 60.

<sup>59</sup> *Ibid.*

<sup>60</sup> Communication COM(2021) 829 final from the Commission to the European Parliament and the Council of 21 December 2021 on the Model status agreement as referred to in Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624, COM/2021/829 final.

<sup>61</sup> Council Decision 2019/267 of 12 February 2019 on the conclusion of the Status Agreement between the European Union and the Republic of Albania on actions carried out by the European Border and Coast Guard Agency in the Republic of Albania; Council Decision 2020/729 of 26 May 2020 on the conclusion of the Status Agreement between the European Union and Montenegro on actions carried out by the European Border and Coast Guard Agency in Montenegro; Council Decision 2020/865 of 26 May 2020 on the conclusion of the Status Agreement between the European Union and the Republic of Serbia on actions carried out by the European Border and Coast Guard Agency in the Republic of Serbia; and Council Decision (EU) 2022/1350 of 29 July 2022 authorising the opening of negotiations on a status agreement between the European Union and the Republic of North Macedonia on operational activities carried out by the European Border and Coast Guard Agency in the Republic of North Macedonia.

Russia.<sup>62</sup> Since the beginning of the Russian war of aggression against Ukraine in February 2022, Moldova has received the highest number of refugees per capita in the region. The provisional application of the agreement allowed the immediate deployment of Frontex staff on the ground.

The first joint operation outside the territory of the Member States was launched in Albania on 21 May 2019 at the Albanian-Greek border and is still ongoing.<sup>63</sup> In 2020, two operations were launched in Montenegro: the first operation at the border with Croatia and a second one aimed at tackling cross-border crime at the country's sea borders (including the smuggling of drugs and weapons, smuggling of migrants, trafficking in human beings and terrorism).<sup>64</sup> Serbia is the third country in the Western Balkans to host a fully-fledged Frontex operation helping to detect criminal activities such as people smuggling, trafficking in human beings, document fraud and smuggling of stolen vehicles, illegal drugs, weapons and excise goods, as well as potential terrorist threats.<sup>65</sup>

The extraterritorial exercise of executive powers, including the use of force, is one of the most sensitive aspects included in the status agreements.<sup>66</sup> The agreements concluded so far explicitly allow to perform all tasks and executive powers required for border control and return operations, such as verification of the identity and nationality of a person or patrolling a border.<sup>67</sup> However, only the agreement concluded with Albania includes a definition of executive powers as “the powers necessary to perform the tasks required for border control and return operations which are conducted [...] during a joint action as included in the operational plan”.<sup>68</sup> The deployed teams may be authorised to use force, including service weapons ammunition and equipment, with the consent of the home State.<sup>69</sup> In addition to joint operations and rapid border interventions, the status agreements refer also to return operations from Member States to the respective

<sup>62</sup> Council Decision 2022/544 of 4 April 2022 on the conclusion of the Agreement between the European Union and the Republic of Moldova on operational activities carried out by the European Border and Coast Guard Agency in the Republic of Moldova; Agreement between the European Union and the Republic of Moldova on operational activities carried out by the European Border and Coast Guard Agency in the Republic of Moldova.

<sup>63</sup> Frontex, ‘Frontex Launches First Operation in Western Balkans’ (21 May 2019) [www.frontex.europa.eu](http://www.frontex.europa.eu).

<sup>64</sup> Frontex, ‘Frontex Launches Second Operation in Montenegro’ (14 October 2020) [www.frontex.europa.eu](http://www.frontex.europa.eu).

<sup>65</sup> Frontex, ‘Frontex Expands Presence in Western Balkans with Operation in Serbia’ (16 June 2021) [www.frontex.europa.eu](http://www.frontex.europa.eu).

<sup>66</sup> See F Coman-Kund, ‘The Territorial Expansion of Frontex Operations to Third Countries: On the Recently Concluded Status Agreements in the Western Balkans and Beyond...’ (6 February 2020) [Verfassungsblog verfassungsblog.de](http://Verfassungsblog.verfassungsblog.de).

<sup>67</sup> Council Decision 2019/267 cit.; Council Decision 2020/729 cit.; Council Decision 2020/865 cit. and Council Decision (EU) 2022/1350 cit.

<sup>68</sup> Art. 2 of Council Decision 2019/267 cit.

<sup>69</sup> Art. 4(5–6) of Council Decision 2019/267 cit.; art. 5(5– 6) of Council Decision 2020/729 cit.; art. 5(5–6) of Council Decision 2020/865 cit.

third country. However, the Commission acknowledges that a status agreement would not be the appropriate instrument to be used to organise return operations.<sup>70</sup>

The parties complement the status agreement with the adoption of an operational plan for each operation that is launched. The operational plan specifies the operational aim and objectives, the implementation plan, the command and control arrangements, specific instructions to deployed personnel and the provision in respect of fundamental rights compliance. The operational plans are binding on the Agency, the third state concerned and the participating Member States.<sup>71</sup> Operational plans are not publicly available and also not made accessible — not even in part or for past operations — upon request.<sup>72</sup>

The legal framework laid down in the status agreements requires the members of the team operations to respect the laws and regulations of the host third State. Therefore, command and control structures on the ground during joint operations implemented on the territory of third States are similar as those developed within the EU Member States. The teams deployed, including the officers from the EBCG standing corps, may only perform tasks and exercise powers on the territory of third countries under the instructions from the authorities of the third countries. It is specified in all status agreements that the host authorities may authorise the deployed teams to act on its behalf “as long as the overall responsibility and command and control functions remain with the border guards or other police officers [...]” of the host State.<sup>73</sup> The Agency, in turn, only retains the power to communicate its views on those instructions to the third country or suspend/terminate the operation altogether.<sup>74</sup> All status agreements concluded so far follow the same model as regards the powers conferred on the actors involved on the ground.<sup>75</sup> As it has been argued, when team members act on behalf of third countries, “this leaves potentially considerable powers to team members to externalise the EU’s border control and prevent irregular migration towards the EU far beyond its physical borders, without independent oversight”.<sup>76</sup>

The status agreements with Balkan countries should be framed in the current process of accession to the EU that are at various stages of approximating domestic law with

<sup>70</sup> Communication COM(2021) 829 final cit.

<sup>71</sup> Art. 74(3) in conjunction with art. 38(3) of Regulation 2019/1896 cit.

<sup>72</sup> The European Ombudsman has recently criticized the lack of transparency of the operational plans, as well how Frontex takes decisions on suspending, terminating or not launching activities due to fundamental rights concerns (European Ombudsman, ‘How the European Border and Coast Guard Agency (Frontex) complies with its fundamental rights obligations and ensures accountability in relation to its enhanced responsibilities’ CASE OI/4/2021/MHZ, 18 January 2022).

<sup>73</sup> Art. 5(3) of Council Decision 2020/865 cit.

<sup>74</sup> *Ibid.* See also art. 74(3) in conjunction with arts 43(1–2) and 46 of Regulation 2019/1896 cit.

<sup>75</sup> Art. 4(3) of Council Decision 2019/267 cit.; art. 5(3) of Council Decision 2020/729 cit.; art. 5(3) of Council Decision 2020/865 cit.

<sup>76</sup> ECRE, ‘Comments on the Commission Proposal for a Regulation on the European Border and Coast Guard, (COM (2018) 631 final)’ cit. 17.

the EU *acquis*. This process involves substantial amendments to their migration and asylum internal systems. As a result of the reinforced mandate of Frontex introduced by the 2019 Regulation, the Commission is willing to strengthening cooperation on border management with the Balkan countries. In October 2022, the Commission adopted a recommendation to the Council to authorise the opening of negotiations of upgraded Frontex's status agreements between the EU and Albania, Serbia, Montenegro, as well as with Bosnia and Herzegovina.<sup>77</sup> Under the currently existing status agreements between Frontex and Albania, Serbia and Montenegro, the deployment of the standing corps may only take place at the countries' borders with the EU and without exercising executive powers. Under the new legal framework, the status agreement will allow Frontex standing corps to be deployed in the third country both at the EU border and at the borders with other third countries and exercise the executive powers.

In the case of Serbia, the negotiation of the status agreement led to a fierce political debate at the internal level in Serbia. It seems that the fact that Serbia cooperates with the EU to close the so-called Balkan route and on border security management put Serbia in a better bargaining position for EU accession. The political parties opposing the agreement in Serbia argued that the cooperation with Frontex would undermine Serbian sovereignty. The EU is willing to conclude also status agreements with African countries, in particular Morocco, Senegal and Mauritania. In July 2022, the Council authorized the opening of negotiations on status agreements with Senegal and Mauritania that would allow Frontex to carry out operational activities on the territory of both countries.<sup>78</sup> The intended status agreements with Mauritania and Senegal will lead to further externalize migration controls and create serious risks for the respect of fundamental rights because the level of protection in Mauritania and Senegal is lower than in the EU. The Commission has also proposed to reach a comprehensive migration partnership with Morocco, including a status agreement to implement operational activities by Frontex officials.<sup>79</sup>

Apparently, Frontex status agreements look quite similar to the status of forces agreements (SOFAs) and status of mission agreements (SOMAs) that the EU usually concludes in the context of its military operations and civilian missions implemented on the territory of third countries. However, the command and control framework foreseen is

<sup>77</sup> European Commission, 'EU Increases Support for Border and Migration Management in the Western Balkans' (25 October 2022).

<sup>78</sup> Council Decision 2022/1169 of 4 July 2022 authorising the opening of negotiations on a status agreement between the European Union and the Republic of Senegal on operational activities carried out by the European Border and Coast Guard Agency in the Republic of Senegal; and Council Decision 2022/1168 of 4 July 2022 authorising the opening of negotiations on a status agreement between the European Union and the Islamic Republic of Mauritania on operational activities carried out by the European Border and Coast Guard Agency in the Islamic Republic of Mauritania.

<sup>79</sup> Commission services to Delegations of 18 February 2021 on Operationalization of the Pact – Action plans for strengthening comprehensive migration partnerships with priority countries of origin and transit - Draft Action Plan: Morocco.



not comparable to CSDP operations where command always remain with an EU commander.<sup>80</sup> The fact that the Frontex joint operations are under the command of a third state has major practical implications. As it has correctly been pointed out, “it severely limits the possibilities of Frontex and the Member States to direct the course of action on the ground and thus also their means to ensure fundamental rights compliance during a joint operation”.<sup>81</sup>

## V.2. THE DELIMITATION OF RESPONSIBILITIES BETWEEN THE ACTORS INVOLVED IN JOINT OPERATIONS

The deployment of border management teams on the territory of third countries raises complex legal and political questions as regards the legal regimen applicable and the delimitation of responsibilities between the different actors involved in the operations. This issue can become very problematic in the event that human rights violations are reported during the implementation of the operations on the territory of third countries.<sup>82</sup> It has been very difficult to establish the delimitation of responsibility between the different actors involved in the operations that take place on the territory of the Member States. Frontex joint operations have become increasingly complex involving the Agency itself, officers from the Member State, third states, private parties and other EU agencies like EUAA or Europol. As it has been pointed out, “multi-actor situations like these are unavoidably challenging when it comes to allocating responsibility for wrongdoing”.<sup>83</sup>

The involvement of third country authorities adds a layer of complexity to the already unclear division of responsibility between Frontex and Member States’ border guard authorities in the implementation of joint operations on the territory of the Member States. In the past, the Agency has always argued that the responsibility for human rights violations lies with Member States because it merely exercises a coordinating role and Frontex teams were deprived of executive powers. Since the mandate, powers and operational capacity of

<sup>80</sup> F Naert, ‘The International Responsibility of the Union in the Context of its CSDP Operations’ in MD Evans and P Koutrakos (eds), *The International Responsibility of the European Union: European and International Perspectives* (Hart Publishing 2013).

<sup>81</sup> M Fink and N Idriz, ‘Effective Judicial Protection in the External Dimension of the EU’s Migration and Asylum Policies?’ in E Kassoti and N Idriz (eds), *The Informalisation of the EU’s External Action in the Field of Migration and Asylum* (Springer 2022) 117-146.

<sup>82</sup> See M Fink, ‘Salami Slicing Human Rights Accountability: How the European Border and Coast Guard Agency may Inherit Frontex’ Genetic Defect’ (10 March 2016) EJIL Talk [www.ejiltalk.org](http://www.ejiltalk.org); D Fernández Rojo, ‘Reglamento 2016/1624: de Frontex a la Guardia Europea de Fronteras y Costas’ (2017) *Revista General de Derecho Europeo*; J Santos Vara and L Pascual Matellán, ‘The Externalisation of EU Migration Policies: The Implications Arising from the Transfer of Responsibilities to Third Countries’ in WTh Douma and others (eds), *The Evolving Nature of EU External Relations Law* (Asser Press/Springer 2020).

<sup>83</sup> M Fink, ‘Why it is so Hard to Hold Frontex Accountable: On Blame-Shifting and an Outdated Remedies System’ (26 November 2020) EJIL Talk [www.ejiltalk.org](http://www.ejiltalk.org).

the Agency have been enhanced, in particular after the amendment of the EBCG Regulation in 2019, this argument is increasingly unsustainable. The delimitation of the respective areas of responsibility between the actors involved has to be specified in the operational plan of each operation that is developed in collaboration with the respective third State. However, the EBCG Regulation does not clarify the legal value of the operational plans agreed with third countries, nor whether they can be obliged to comply with them.<sup>84</sup>

As a result of the status agreements negotiated so far, Frontex teams can exercise extra-territorial activities in the field of border control and return operations which may affect the fundamental rights of third country nationals. Neither the participation of officers from third States in the operations, nor the development of joint patrols with a third country exonerates the Member States and Frontex from their responsibility in the event that human rights violations are committed. It is not excluded the possibility that operations will be developed on the territory of third countries with a questionable human rights record.

As it was pointed out above, the members of the operation perform their duties under the instructions of the third country concerned, and as a general rule in the presence of local border guards or other police officers. Granting such a degree of control to a third State over the members of the deployed teams may lead to a situation where the Agency and the Member States involved are unable to issue the relevant instructions. This issue is especially problematic because third states are not bound by EU law or the Charter of Fundamental Rights.<sup>85</sup> The fact of working under the instructions of the host third country can limit the capacity of the Agency to fulfil its fundamental rights obligations. In these circumstances, it will not be easy to determine the possible responsibility of the actors involved in the extraterritorial operations of the Agency since the members of the Frontex teams will theoretically be under the control of third States. It is understandable that it has been claimed that the extraterritorial Frontex operations should be limited to the territory of the Member States of the ECHR.<sup>86</sup>

All status agreements include rather detailed provisions with regard to the privileges and immunities of the members of the teams. According to the status agreements negotiated with the Balkan countries, the members of the team enjoy immunity from the criminal and civil jurisdiction of the host Member State in respect of the acts performed in the exercise of their official functions in the course of the actions carried out in accordance with the operational plan.<sup>87</sup> Before the initiation of any judicial proceeding, the Executive Director has to certify whether or not the act in question was performed by members of the team in the exercise of their functions.<sup>88</sup> There are some differences between the

<sup>84</sup> J Rijpma, 'The Proposal for a European Border and Coast Guard' cit.

<sup>85</sup> ECRE, 'Comments on the Commission Proposal for a Regulation on the European Border and Coast Guard, (COM (2018) 631 final)' cit. 17

<sup>86</sup> J Rijpma, 'The Proposal for a European Border and Coast Guard' cit. 26; Proposal for a Regulation COM(2018) 631 final cit. 17.

<sup>87</sup> Art. 6(3) of Council Decision 2019/267 cit. and Art. 7(3) of Council Decision 2020/729 cit.

<sup>88</sup> Art. 6(3) of Council Decision 2019/267 cit.

status agreements concluded so far as regards the legal effects of the waiver extended by the Executive Director. While in the agreements with Albania, Montenegro and North Macedonia it is stated that the certification produced by the Director is binding upon the authorities of the host State, no similar provision is included in the agreements with Serbia and Bosnia-Herzegovina.

The immunity of the officers may be waived by the home Member State.<sup>89</sup> It is not clear in the status agreements negotiated so far if this possibility can be extended to the members of the standing corps. While the staff from the Member States will remain criminally and civilly liable under the laws of their home Member State, there is some uncertainty as regards the officers from the Frontex own statutory staff.<sup>90</sup> The Frontex staff members do not depend on a specific Member State so there is a gap when it comes to demanding criminal responsibility.

### V.3. REDRESS IN CASE OF FUNDAMENTAL RIGHTS BREACHES

It is explicitly stated in all status agreements concluded so far that the team members fully respect fundamental rights and freedoms, “including as regards access to asylum procedures, human dignity and the prohibition of torture, inhuman or degrading treatment, the right to liberty, the principle of non-refoulement and the prohibition of collective expulsions, the rights of the child and the right to respect for private and family life”.<sup>91</sup> The European Parliament regretted that the agreements do not include “specific measures for the operationalisation of human rights as part of border management, and do not ensure that material support and training to third countries is not given to perpetrators of human rights violations”.<sup>92</sup> Since the cooperation with third countries may have serious fundamental rights implications, there is a clear need to carry out a fundamental rights assessment prior to engaging in operational cooperation.

The status agreements concluded so far fail to clearly regulate accountability for potential human rights violations. It is only specified that each party will have a complaints mechanism to handle allegations of infringements of fundamental rights committed by its staff in the performance of their official tasks and in the exercise of their powers. The 2016 EBCG Regulation introduced a new complaints mechanism to monitor and ensure respect for fundamental rights.<sup>93</sup> Any person who is directly affected by the actions or failure to act on the part of staff involved in a Frontex operation can submit a complaint

<sup>89</sup> *Ibid.* Art. 6(4).

<sup>90</sup> See Meijers Committee, ‘CM1817 Comments on the draft for a new Regulation on a European Border and Coast Guard, (COM (2018) 631 final) and the amended proposal for a Regulation on a European Union Asylum Agency (COM (2018) 633 final)’ cit.

<sup>91</sup> Art. 8 of Council Decision 2019/267 cit.

<sup>92</sup> European Parliament ‘Report on Human Rights Protection and the EU External Migration Policy’ Rapporteur: Tineke Strik, A9-0060/2021 (25 March 2021).

<sup>93</sup> See art. 109 Regulation 2019/1896 cit.

to the Agency.<sup>94</sup> The procedure brought a positive development to address human rights violations since the victims have at their disposal a complaints mechanism. However, it is an administrative procedure that cannot substitute the right to an effective judicial remedy under art. 47 of the Charter of Fundamental Rights. The individual complaints mechanism remains an internal oversight that is not impartial or independent.

The status agreements with the Balkan countries allow the host states to authorise members of the team to consult national databases if necessary for reaching the operational aims specified in the operational plan and for return operations. The access to the data is limited to what is necessary for performing their tasks and exercising their powers. It is expected that the conditions are further developed in the operational plans. The processing of personal data is subject to the EU legal framework, in particular to Regulation 2018/1725, Directive 2016/680 and the General Data Protection Regulation (GDPR).<sup>95</sup> In case that the processing of data involves the transfer to third countries, the Agency and the Member States have to indicate any restrictions on access and use. It has been rightly argued that “the scarcity of provisions regarding data subject rights and effective legal remedies suggests that these agreements might fall short of providing appropriate safeguards regarding protection of fundamental rights at EU standards”.<sup>96</sup> The European Data Protection Supervisor has to be consulted on the provisions of the status agreement related to the transfer of data “if those provisions differ substantially from the model status agreement”.<sup>97</sup> It would not be an easy task to determine whether or not the legal framework negotiated with a particular country differs substantially from the model status agreement. Regulation 2019/1896 requires the Commission to consult the following relevant actors before adopting a model for the new status agreements: Member States, the Agency, FRA and the European Data Protection Supervisor.<sup>98</sup>

The allegations of fundamental rights violations in which Frontex was reportedly involved in the Aegean Sea show that it will be very difficult to clarify the role of Frontex in any wrongdoing that will happen in the context of operations implemented on the

<sup>94</sup> *Ibid.* Art. 111 Regulation 2019/1896 cit.

<sup>95</sup> Regulation 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC; Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA; Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

<sup>96</sup> F Coman-Kund, ‘The Territorial Expansion of Frontex Operations to Third Countries’ cit.

<sup>97</sup> Art. 76(1) Regulation 2019/1896 cit.

<sup>98</sup> See *ibid.* Art. 73(3).

territory of third countries. Frontex and Operation Poseidon have been the subject of numerous criticisms throughout the years.<sup>99</sup> A joint investigation by Bellingcat, Light-house Reports, Der Spiegel, ARD and TV Asahi revealed in October 2020 that the Agency was involved in push backs operations in the Greek-Turkish border.<sup>100</sup> The allegations were that the Greek authorities forced little boats with potential refugees on board from Greek islands back to Turkish waters. It was considered that the Agency was carrying out joint border surveillance operations in the area where the alleged pushbacks took place and did nothing to ensure compliance with legal obligations.<sup>101</sup> In essence, Frontex remained inactive even though it was aware of the serious and continuous violations. As a result of the public attention paid to these events, the Management Board established in November 2020 a Working Group on Fundamental Rights and Legal Operational Aspects of Operations (WG FRaLO) to investigate the alleged involvement of Frontex with pushbacks in the Eastern Mediterranean. In its final report published in March 2021, the Management Board concluded that there was no sufficient evidence to consider that Frontex was involved in violations of fundamental rights.<sup>102</sup> The report of the Frontex Management Board found that, of the 13 incidents examined, 8 of them did not amount to illegal pushbacks and that 5 incidents required further investigation.<sup>103</sup> Only in two cases the facts presented support an allegation of possible violation of fundamental rights and, in particular, the principle of non-refoulement. The Management Board committed to improve the reporting mechanisms and the possibility to monitor follow up actions by national authorities. In addition, the Management Board requested a legal opinion from the Commission on the nature and extent of Frontex's obligations in the context of its implementation of joint maritime operations.<sup>104</sup>

As a result of the alleged fundamental rights violations, the European Parliament decided to establish the Frontex Scrutiny Working Group (FSWG) of the LIBE Committee on 23 February 2021 with the aim to permanently monitor all aspects of the functioning of Frontex.<sup>105</sup> The FSWG concluded that there was not clear conclusive evidence that the

<sup>99</sup> See Migreurop, 'Frontex, 15 Years of Impunity: The Outlaw Agency must Disappear!' (8 December 2020) [migreurop.org](http://migreurop.org); N Nielsen, 'Why Frontex won't Leave Greece like it Left Hungary' (27 April 2022) EU-observer [euobserver.com](http://euobserver.com); Human Rights Watch, 'Frontex Failing to Protect People at EU Borders: Stronger Safeguards Vital as Border Agency Expands' (23 June 2021) Human Rights Watch [www.hrw.org](http://www.hrw.org).

<sup>100</sup> Bellingcat, 'Frontex at Fault: European Border Force Complicit in 'Illegal' Pushbacks' (23 October 2020) [www.bellingcat.com](http://www.bellingcat.com).

<sup>101</sup> *Ibid.*

<sup>102</sup> Fundamental Rights and Legal Operational Aspects of Operations in the Aegean Sea, *Final Report of the Frontex Managements Board Working Group* [www.frontex.europa.eu](http://www.frontex.europa.eu).

<sup>103</sup> *Ibid.*

<sup>104</sup> European Commission of 3 March 2021 'The nature and extent of Frontex's obligations in the context of its implementation of joint maritime operations at the Union's external sea borders'.

<sup>105</sup> Other investigation initiatives have been launched by the EU Ombudsman, the EU Court of Auditors, and OLAF. See European Ombudsman, 'Ombudsman opens Inquiry to Assess European Border and Coast Guard Agency (Frontex) "Complaints Mechanism"' (1 May 2020) [www.ombudsman.europa.eu](http://www.ombudsman.europa.eu); Politico, 'EU

Agency was involved in the pushbacks and collective expulsions under scrutiny.<sup>106</sup> However, it held that “the Agency found evidence in support of allegations of fundamental rights violations in Member States with which it had a joint operation, but failed to address and follow-up on these violations promptly, vigilantly and effectively”.<sup>107</sup> Therefore, Frontex did not prevent the alleged fundamental rights violations nor establish adequate mechanisms to monitor, report and assess fundamental rights situations and developments.<sup>108</sup> After years of intense media reporting on violations on its alleged role in pushbacks in Greece and elsewhere and an investigation by the EU’s anti-fraud office OLAF, the Director Executive of Frontex, Fabrice Leggeri, resigned from his position at the end of April 2022. OLAF found evidence of serious misconduct that weakens its capacity to monitor compliance with fundamental rights in its activities at the external borders.<sup>109</sup>

The limits and risks that Frontex has experienced in practice to fulfil its fundamental rights obligations within the framework of the operations implemented on the territory of the Member States can be substantially increased in the extraterritorial operations. In addition, the members of the Frontex teams are confronted very often with complex geopolitical circumstances. For example, the Agency had to face several aggressive actions by officials of the Turkish Coastguard in the Aegean Sea in the last years. There is a need to ensure that third countries are willing to cooperate with Frontex to investigate alleged fundamental rights violations committed in the operational area of the Agency. Frontex is under an obligation to guarantee the protection of fundamental rights in the performance of its tasks whether the operations take place on the territory of the Member States or extraterritorially.<sup>110</sup>

Since the establishment of Frontex, the question of human rights responsibility has been a source of controversy.<sup>111</sup> The new Regulation does not give an adequate solution

Watchdog opens Investigation into Border Agency Frontex: Organization faces Allegations of Harassment, Misconduct and Migrant Pushback’ (11 January 2021) [www.politico.eu](http://www.politico.eu); Special Report 08/2021 by the Court of Auditors of 7 June 2021 ‘Frontex’s support to external border management: not sufficiently effective to date’.

<sup>106</sup> Frontex welcomed the report and its conclusions which, according to the agency, “reaffirmed that there is no evidence of the Agency’s involvement in any violation of human rights”. See Frontex, ‘Frontex welcomes Report by the Scrutiny Working Group’ (15 July 2021) [www.frontex.europa.eu](http://www.frontex.europa.eu).

<sup>107</sup> European Parliament, ‘Report on the Fact-finding Investigation on Frontex Concerning Alleged Fundamental Rights Violations LIBE Committee’ Rapporteur: Tineke Strik (14 July 2021).

<sup>108</sup> See T Strik, ‘European Oversight on Frontex: How to Strengthen Democratic Accountability’ (8 September 2022) [Verfassungblog.verfassungsblog.de](http://Verfassungblog.verfassungsblog.de).

<sup>109</sup> This report was not officially published, but was leaked to media. See for example G Christides and S Lüdke, ‘Why Der Spiegel Is Publishing the EU Investigative Report on Pushbacks’ (13 October 2022) [Der Spiegel www.spiegel.de](http://Der Spiegel www.spiegel.de).

<sup>110</sup> Art. 80 Regulation 2019/1896 cit.

<sup>111</sup> See M Gkliati, ‘The First Steps of Frontex Accountability: Implications for its Legal Responsibility for Fundamental Rights Violations’ (13 August 2017) [EU Migration and Asylum Law and Policy eumigrationlawblog.eu](http://EU Migration and Asylum Law and Policy eumigrationlawblog.eu); M Fink, ‘Frontex: Human Rights Responsibility and Access to Justice’ (30 April 2020) [EU Migration and Asylum Law and Policy eumigrationlawblog.eu](http://EU Migration and Asylum Law and Policy eumigrationlawblog.eu); B Parusel, ‘Should They Stay or Should They Go?’ cit.

to the question of responsibility for fundamental rights violations occurred in the course of joint operations coordinated by Frontex. In a recent case, the General Court was confronted with the non-contractual liability of the Union when the Agency carries out joint operations together with Member States in the areas of border management and return of third country nationals. On 6 September 2023, the General Court delivered its landmark judgement in *WS and others v Frontex*.<sup>112</sup> The applicants were a group of Syrian refugees that were expelled from Greece to Turkey in 2016 and claimed a compensation for the damages suffered since Frontex was involved in the return operation that led to the violation of the principle of non-refoulement. On the basis of art. 340 TFUE, the non-contractual liability of the EU may arise when three cumulative conditions are met: a sufficiently serious breach of an EU rule conferring rights on individuals, damage caused as a result and causal link between the alleged conduct and the damage. The General Court opted for changing the order in which the conditions are usually analysed and concluded that there was not a direct link between the damage in question and the conduct of the Agency. The General Court followed the mantra held always by Frontex that it only provides technical operational support to the Member States and Greece had exclusive responsibility for examining applications for international protection and adopting return decisions.<sup>113</sup> The General Court failed to acknowledge the role played by Frontex in the implementation of joint operations coordinated by the Agency and, in particular, in the return of third country nationals.<sup>114</sup> The joint liability of the EU agencies and Member States has not yet found a satisfactory solution in the EU legal order as it was also pointed out in the recent case *Kočner v Europol* that it is currently under appeal.<sup>115</sup> The judgement in *WS and others v Frontex* can likewise be appealed before the Court of Justice. There is also another interesting case pending before the General Court concerning an action for damages against Frontex regarding the pushbacks at the Aegean Sea.<sup>116</sup> The intervention of the Court of Justice will be an excellent opportunity to do justice to the applicants because the argument that Frontex systematically escapes non-contractual responsibility is untenable. The enhancement of the Agency's mandate is leading to a system of shared administration in the management of external borders between Member States and Frontex. In the context of extraterritorial operations implemented by the Agency, the exercise of executive powers entailing a wide margin of discretion by Frontex may

<sup>112</sup> Case T-600/21 *WS and others v Frontex* ECLI:EU:T:2023:492.

<sup>113</sup> *Ibid.* paras 64 and 66.

<sup>114</sup> See G Davies, 'The General Court finds Frontex Non Liable for Helping with Illegal Pushbacks: It was Following Orders' (11 September 2023) European Law blog [europeanlawblog.eu](http://europeanlawblog.eu); M Fink and JJ Rijpma, 'Responsibility in Joint Return after *WS and Others v Frontex*: Letting the Active By-Stander Off the Hook' (22 September 2023) EU Law Analysis [eulawanalysis.blogspot.com](http://eulawanalysis.blogspot.com); T Molnár, 'The EU General Court's Judgment in *WS & Others v Frontex*: What Could International Law on the Responsibility of International Organizations Offer in Grasping Frontex' Responsibility?' (22 October 2023) EJIL: Talk! [www.ejiltalk.org](http://www.ejiltalk.org).

<sup>115</sup> Case C-755/21 *Kočner v Europol* (pending). See case T-528/20 *Kočner v Europol* ECLI:EU:T:2021:631.

<sup>116</sup> Action brought on 10 March 2022, case T-136/22 *Hamoudi v Frontex*.

exacerbate the problems facing individuals who are victims of human rights violations and try to obtain judicial redress.

The deployment of extraterritorial joint Frontex operations raises also the question of the attribution of responsibility for breaches of human rights that might take place on the territory of third countries. The concept of jurisdiction is not framed today exclusively in territorial terms. The European Court of Human Rights (ECtHR) held that the responsibility of a Contracting Party could arise when as a consequence of military action it exercises effective control of an area outside its national territory.<sup>117</sup> It is also admitted that a State exercises jurisdiction over individuals held on its military bases, detention centres, or other closed facilities controlled<sup>118</sup> or on board crafts or vessels which are registered in that State.<sup>119</sup> The jurisdiction of a State can be also established when their agents exercise authority or direct control over an individual in the absence of a spatial element of control.<sup>120</sup> This expansive notion of extraterritorial jurisdiction imposes relevant legal constraints on migration policies.<sup>121</sup>

There is no doubt that when a State is exercising public authority on the territory of a third country or effective control over migrants the situation does not raise any doubt from a legal perspective. In the case of *Hirsi Jamaa and Others v Italy*, the ECtHR dealt with an application made by eleven Somali nationals and thirteen Eritrean nationals, who were intercepted by Italian ships on the high seas and forced to return to Libya.<sup>122</sup> The Court sustained that “whenever the State through its agents operating outside its territory exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms”.<sup>123</sup> The ECtHR held that there has been a violation of art. 3 of the ECHR on account of the fact that the applicants were exposed to the risk of being subjected to ill-treatment in Libya.

As it has been exposed before, command and control functions remain with the host third country. The fact that Frontex joint operations are carried out on the territory of third countries does not absolve the EU and its Members States from its obligations

<sup>117</sup> ECtHR *Loizidou v Turkey* App n. 15318/89 [23 March 1995] para. 62.

<sup>118</sup> ECtHR *Al-Saadoon and Mufdhi v the United Kingdom* App n. 61498/08 [2 March 2010] paras 135, 140 and 155.

<sup>119</sup> See ECtHR *Bankovic v Belgium* App n. 52207/99 [12 December 2001] para. 73, and ECtHR *Hirsi Jamaa v Italy* App n. 27765/09 [23 February 2012] para. 81.

<sup>120</sup> ECtHR *Al-Skeini v United Kingdom* App n. 55721/21 [7 July 2011] paras 135-142. See also ECtHR *Banković and Others v Belgium and Others [GC]* App n. 52207/99 [12 December 2001] paras 59-73. See T Gammeltoft-Hansen and J C Hathaway, ‘Non-Refoulement in a World of Cooperative Deterrence’ (2015) *ColumJTransnatlL* 235-283.

<sup>121</sup> M Savino, ‘Refashioning Resettlement: From Border Externalization to Legal Pathways for Asylum’ in S Carrera and others (eds), *EU External Migration Policies in an Era of Global Mobilities: Intersecting Policy Universes* (Brill Nijhoff 2017).

<sup>122</sup> ECtHR, *Case of Hirsi Jamaa and others v Italy* App n. 27765/09 [23 February 2012].

<sup>123</sup> *Ibid.* para. 74.



under the ECHR.<sup>124</sup> It may be argued that the cooperation and support of Frontex to third countries amount to “assistance” according to the Draft Articles on the Responsibility of International Organizations (ARIO).<sup>125</sup> Art. 14 of ARIO states that an international organization which aids or assists a State or another international organization in the commission of an internationally wrongful act by the State or the latter organization is internationally responsible if “the former organization does so with knowledge of the circumstances of the internationally wrongful act”. It is not easy to demonstrate that the cooperation established by the Agency with third countries is developed with the intention of facilitating the violation of migrants’ rights. Nevertheless, it is held that a State exercises extraterritorial jurisdiction “when, through the consent, invitation or acquiescence of the Government of that territory, it exercises all or some of the public powers normally to be exercised by that Government”.<sup>126</sup> The decision of the Committee against Torture in *JHA v Spain* is very relevant in the case of Frontex extraterritorial operations. The Committee considered that Spain exercised jurisdiction over the applicants because it “exercised, by virtue of a diplomatic agreement concluded with Mauritania, constant de facto control over the alleged victims during their detention in Nouadhibou”.<sup>127</sup>

In sum, in the framework of extraterritorial Frontex joint operations, limiting responsibility only to third countries would create a gap in the rule of law. The fact that the command and control of the Frontex teams lies with the host third country does not exonerate the Agency from its obligations as regards fundamental rights. Frontex cannot be held responsible for the lack of protection of refugees or the ineffectiveness of the asylum systems in third countries, but it has an obligation to ensure the respect of human rights obligations in the operations implemented on the territory of third countries. There is a risk that the refugees intercepted by Frontex on the territory of third countries will be denied the right to apply for asylum.

## VI. CONCLUSIONS

EU agencies, in particular Frontex, are called to play an increasing role to respond to the challenges that the EU is facing in the areas of migration, asylum and border management. They are presented by the Union institutions as instruments to reinforce the implementation of EU law, to enhance solidarity between the Member States and to implement cooperation between the EU and third countries. The successive amendments of

<sup>124</sup> See Commissioner of Human Rights – Council of Europe, ‘Letter to the Minister of the Interior of Italy, CommHR/INM/sf 0345-2017’ (28 September 2017).

<sup>125</sup> On state responsibility in cooperative border management scenarios, see T Molnár, ‘EU Member States’ Responsibility Under International Law for Breaching Human Rights When Cooperating with Third Countries on Migration: Grey Zones of Law in Selected Scenarios’ (2023) European Papers [www.europeanpapers.eu](http://www.europeanpapers.eu) 1013.

<sup>126</sup> *Al-Skeini v United Kingdom* cit.

<sup>127</sup> UN Committee against Torture (CAT) of 10 November 2008 CAT/C/41/D/323/2007 *JHA v Spain (Marine I)* Decision of the Committee, para. 8(2).

the Agency's mandate show a lack of a common vision on how the European administration of border management at EU level should develop. The 2019 Regulation does not take the definitive step that will lead in the future to the establishment of a true European system of border and coast guards. Despite the fact that the Commission refers constantly to the Agency as a fully-fledged European border and coast guard system, the EU has not yet developed a real European administration in this area. The new EBCG Regulation does not create a genuine integrated border and coast guard that replaces national border guards and provides for genuine solidarity in the management of external borders. The EU should progress towards a more centralized model that includes more solidarity among Member States in the management of external borders. However, without developing a common asylum and migration policy, the constant amendments of the Agency's mandate will not be the adequate solution in times of crisis and the failures of the Agency could lead to more frustration and a lack of credibility of the EU.

The dynamic evolution of the tasks undertaken by the AFSJ agencies, in particular, by Frontex in the last years, has not led the Union institutions to admit that the agencies' activities may have potential fundamental rights implications. It is considered that these agencies were mainly set up in order to facilitate and coordinate operational cooperation between the authorities of the Member States. Frontex and the Commission have always held that the responsibility for fundamental rights breaches lies exclusively with the Member States. In the case of extraterritorial operations implemented on the territory of third countries, it will be difficult to sustain in the future that the responsibility as regards infringements of fundamental rights lies exclusively with third states. For this reason, it should be further explored how to develop adequate mechanisms for ensuring the protection of fundamental rights in the case of operations implemented on the territory of third countries. Future status agreements should establish with more clarity who will be responsible for the infringement of fundamental rights: the Agency itself, the Member States involved in the operation or the third State. The responsibility of Frontex regarding violations of human rights has not yet found a satisfactory solution. The fact that the operations can be developed on the territory of third countries raises additional concerns for fundamental rights. It is still too early to assess the added value of the Frontex extraterritorial operations. This kind of instruments should not be used to outsource the control of EU external borders without paying due attention to the protection of fundamental rights and the situation of people in need of international protection. The EU should avoid concluding status agreements with third countries that do not offer a satisfactory protection of fundamental rights.

The EU has constantly argued that the reinforcement of its external borders should not prevent access to the territory of the EU Member States of persons in need of international protection. The emphasis put by the EU on the cooperation with third countries may result in a model that prioritizes the prevention of migration flows over the protection of human rights. The cooperation developed by Frontex with third countries may

lead in practice to preventing migrants from reaching the territory of the EU Member States and result in migrants being stranded in countries where their human rights are at risk. The implementation of Frontex joint operations on the territory of third countries does not exonerate the EU and its Member States from the infringements of human rights that might take place on the territory of third countries. The ECtHR has accepted that a contracting party can exercise its jurisdiction extraterritorially in a broad range of circumstances. If the violations of human rights occurred as a result of the cooperation established with the EU, it could be considered responsible on the basis of the criteria laid down in the Project of ARIOs.

