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Implementation of the EU Charter of Fundamental Rights and its Impact on EU Home Affairs Agencies

Frontex, Europol and the European Asylum Support Office

STUDY

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CIVIL LIBERTIES, JUSTICE AND HOME AFFAIRS

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Abstract

This study sets out to examine the impact and implementation of the EU Charter of Fundamental Rights with respect to three EU Home Affairs agencies: Frontex, Europol and EASO. It assesses the relevance of the EU Charter when evaluating the mandates, legal competences and practices of these agencies, particularly in the fields of external border control and the management of migration.

After identifying specific fundamental rights guaranteed in the EU Charter that are potentially put at risk by the actions of these three agencies, and judicial obstacles that prevent individuals from obtaining effective legal remedies in cases of alleged fundamental rights violations, we present a set of policy recommendations for the European and national parliaments.

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LIST OF ABBREVIATIONS

AFSJ	Area of Freedom Security and Justice
ARA	Annual Risk Analysis
CEAS	Common European Asylum System
CIREFI	Centre for Information, Discussion and Exchange on the Crossing of Frontiers and Immigration
CJEU	Court of Justice of the European Union
COI	Country of Origin Information
CPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
DG	Directorate General
EASO	European Asylum Support Office
EBF	European Borders Fund
ECHR	European Convention on Human Rights
EComHR	European Commission on Human Rights
ECtHR	European Court of Human Rights
EDPS	European Data Protection Supervisor
ENU	Europol National Unit
EP	European Parliament
EU	European Union
Europol	European Police Office
FOO	Frontex Operational Office
FRA	Fundamental Rights Agency
FRAN	Frontex Risk Analysis Network
FREMP	Working Group on Fundamental Rights and Citizenship
Frontex	European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (from *Frontières extérieures*)
HRW	Human Rights Watch
ICCPR	International Covenant on Civil and Political Rights

ICO-Net	Information and Coordination Network for Member States' Migration Management Services
JHA	Justice and Home Affairs
JIT	Joint Investigation Team
JO	Joint Operation
JRO	Joint Return Operation
JSB	Joint Supervisory Body
LIBE	Civil Liberties, Justice and Home Affairs (EP Committee)
NATO	North Atlantic Treaty Organisation
NGO	Non-Governmental Organisation
OCTA	Organised Crime Threat Assessment
OSI	Open Society Institute
RABIT	Rapid Border Intervention Team
RAU	Risk Analysis Unit
SBC	Schengen Border Code
SIENA	Secure Information Exchange Network
TEC	Treaty establishing the European Community
TE-SAT	Terrorism Situation and Trend Report
TFEU	Treaty on the Functioning of the European Union
TFTP	Terrorist Finance Tracking Programme
UDHR	Universal Declaration of Human Rights
UNHCR	United Nations High Commissioner for Refugees

EXECUTIVE SUMMARY

Background

The European Union's Area of Freedom, Security and Justice (AFSJ) has experienced an institutional re-shaping which has involved the emergence of EU regulatory agencies such as Frontex (the EU external border control agency), Europol (European Police Office) and EASO (European Asylum Support Office).

The mandates and activities of these three particular agencies make them distinct in the field of EU regulatory agencies: their 'home affairs' focus links their spheres of action with EU policy responses to irregular immigration, external border control and asylum protection, making their activities directly relevant to (and having effects on) the fundamental rights of individuals, and particularly the rights of non-EU nationals 'on the move' (commonly categorised in European law as 'third country nationals').

With the entry into force of the Treaty of Lisbon in December 2009, the EU Charter of Fundamental Rights was proclaimed as the binding bill of rights for the Union. The EU Charter is now directly legally binding on all EU institutions, bodies and agencies and EU Member States' actions within the scope of EU law.

It is therefore timely and necessary to examine the emergent powers and operational competences of these three EU Home Affairs agencies in the areas of asylum, border and migration control, in view of their changing relationship with the set of rights and principles stipulated in the EU Charter. This imperative is given additional urgency in view of the challenges to democratic, legal, judicial and public accountability identified (to different degrees and fashions) in the functioning of Frontex, Europol and EASO, and in the obstacles and potential sensitivities to their effective delivery of fundamental rights.

Aim

This study sets out to examine the impact and implementation of the EU Charter on three EU Home Affairs agencies: Frontex, Europol and EASO. It assesses the relevance of the EU Charter in evaluating the mandates, legal competences and practices of these agencies in the fields of external border controls and the management of 'mixed flows' of people entering the EU. We place the non-EU (or third country) national 'on the move' at the heart of our analysis by identifying specific fundamental rights provisions inside the EU Charter that are potentially put at stake by the tasks and interventions performed (individually or jointly) by these agencies, and by highlighting the legal and judicial obstacles to effective legal remedies and justice in cases of alleged fundamental rights violations in the scope of the agencies' fields of action.

KEY FINDINGS

- EU home affairs agencies have confirmed themselves as distinct forms of EU regulatory agency. Their scope of action and tasks are not fully predetermined and defined in their founding regulations, at times allowing for the flexible accommodation, and sometimes extension, of their competences to new domains on an ad hoc basis. The three agencies have been granted important operational tasks that go beyond mere 'regulatory activities'. Yet their dominant framing as depoliticised 'coordinators' or 'facilitators' of Member State actions has increased their relative autonomy, in some cases preventing a proper democratic scrutiny of the nature and impact of their activities and evading questions of accountability, responsibility and liability in cases of alleged unlawful actions, including potential fundamental rights breaches and risks. These observations are particularly pronounced in the cases of Frontex and Europol. It remains to be seen the extent to which the functioning and activities of EASO will follow a similar pattern.

- Certain activities performed by Frontex, Europol and EASO as foreseen in their legal remits or developed through informal (de facto) practices present a sensitive relationship with specific fundamental rights provisions foreseen in the EU Charter. This is particularly relevant as regards three categories of actions common to each agency: 1) operational activities, 2) the exchange and processing of information and, in the case of Frontex and Europol, personal data (and the subsequent uses of this information) and 3) relations, cooperation (including so-called 'capacity building') and exchange of information with third countries through working arrangements and 'soft law'. Inter-agency cooperation between Frontex, Europol and potentially in the future EASO, further magnifies the scope, and opens up new venues for, breaches of fundamental rights.

- The relationship between Frontex, Europol (and to some extent) EASO and fundamental rights is further strained by their 'home affairs focus' and the legacy of cross-pillarisation which affects their policies, practices and political ambitions. A conflation of irregular migration with 'insecurity' and 'threat' legitimises the adoption of coercive policies which, together with a culture of secrecy and lack of transparency, exacerbates the vulnerable status of individuals targeted by the actions of these agencies.

- There is a profound 'knowledge gap' concerning the added value, nature and impact of the activities by Frontex, Europol and EASO on the ground, as well as their full compatibility or coherency with EU internal and external policy priorities and legal frameworks. This report reveals a severe lack of information and monitoring of their actions, especially those of an 'operational' nature, which lead to legal uncertainties and accountability gaps that put the agencies at odds with the EU Charter and general rule-of-law principles of the European legal regime.

- Finally, there is an anachronistic relationship between the overly-politicised nature of some of these EU home affairs agencies as a result of pressures applied by certain EU Member States and the European institutions to demonstrate the practical application of 'the principle of solidarity' and 'mutual trust-based cooperation' at EU level, and their weak democratic and public accountability. It is

paradoxical that, despite the political drivers which steer the activities of EU Home Affairs agencies, their framing as 'technical' rather than political actors prevents a full and plural debate and accountability of their actions.

RECOMMENDATIONS

Recommendation 1: A new 'model of agency-building' should be ensured and mainstreamed across current and future EU Home Affairs agencies. The model should act as a 'standard setter' against which the European Parliament and national parliaments can evaluate and scrutinise the performance and functioning of agencies, while still respecting agencies' specific characteristics. Given the dynamic evolution of EU Home Affairs agencies, the model could be taken into account if and when the legal mandates of the agencies are opened for re-negotiation. The components and features of this model should include:

- A more direct involvement of the European Parliament in the appointment of agency Executive Directors by requiring a binding approval from the Parliament for selected candidates.
- A stronger representation of the European Commission on the Management Boards of agencies (a minimum of 5 Commission representatives, increased weighting of their votes and the granting of veto rights for certain fundamental rights sensitive issues.)
- Advisory boards or 'consultative forums' should be established in all EU Home Affairs agencies as an integral part of their governance structure.
- Time limits on the confidential status of documents pertaining to agency activities, which oblige the automatic release of such documents to the public within a set time frame should be put in place to promote transparency and public accountability.
- Institutional structures for individuals to access effective legal remedies in cases of fundamental rights violations should be revised and developed.
- Codes of conduct and comprehensive training in fundamental rights for all staff involved in agency activities, particularly operational actions, should be streamlined across all Home Affairs agencies.
- Mechanisms to strengthen compliance with fundamental rights obligations on the ground should be included in the legal mandates of EU Home Affairs agencies: fundamental rights strategies and implementation plans, an in-house fundamental rights officer and independent monitor responsible for initiating disciplinary measures in case of misconduct.
- To support internal accountability an independent Board of Appeals could be established composed of independent lawyers. Any challenged actions should be frozen while under consideration by the Board of Appeals.
- EU Home Affairs agencies should have the competence to suspend or terminate activities if violations of fundamental rights occur in the course of those activities.

- Clear legal definitions should be provided for key concepts related to agency tasks; agency actions should not exceed their legal remits and competences.

- Comprehensive provisions on data protection should be integral to the legal mandates of EU Home Affairs agencies accompanied by independent supervisory bodies empowered to issue binding opinions.

Recommendation 2: The Inter-Institutional Working Group (IIWG) charged with identifying rules to support a global framework for regulatory agencies should explicitly recognise the fundamental rights-related accountability gaps identified by this report in the activities of EU Home Affairs agencies and take these into account it its final declaration.

Recommendation 3: A closer democratic scrutiny of agencies functioning, planning and work should be ensured through the creation of a permanent inter-parliamentary body or committee dealing specifically with regulatory agencies. The body should be run by the European Parliament's LIBE Committee and include representatives from the corresponding committees of national parliaments.

Recommendation 4: In order to improve access to justice and effective remedies for individuals regardless of their nationality and/or location, subject to actions by EU Home Affairs agencies, a new branch of the Court of Justice should be established – an Agencies Tribunal – following the same format as the EU Civil Service Tribunal. This body would deal with admissibility claims and complaints of a legal and administrative nature against the agencies and national authorities participating in agencies' operations and activities.

Recommendation 5: the Commission should have the competence to freeze Agency activities in cases of actual, suspected or imminent breaches of fundamental rights, while the legality of the case is being examined in detail. For such an ex ante procedure to be fully effective, careful attention should be paid to ensuring its overall objectivity, impartiality and democratic accountability. The procedure would be activated by the European Commission (on its own initiative or that of the European Parliament) on the basis of evidence provided by impartial actors such as the EU Agency on Fundamental Rights (FRA) or a new external network of independent and interdisciplinary experts/academics working in close cooperation with civil society organisations based in the different member states.

Recommendation 6: A new piece of secondary law should be adopted specifying the access to rights and to justice by third country nationals subject to new border and migration controls (including those taking place 'extraterritorially'). The tasks and competences of the EU Home Affairs agencies call for more legal certainty. Their remits and activities and allocation of responsibilities should be clearly defined in law. Any experimental governance activities should be avoided in order to ensure respect for the principles of legal certainty and accountability.

Recommendation 7: Particular attention should be paid to the practical implementation of EASO's mandate, given the particularly sensitive nature of some of the agency's tasks from a fundamental rights viewpoint. Guaranteeing the right to asylum envisaged in Article 18 of the EU Charter of Fundamental Rights should constitute an explicit priority for EASO and the agency's work should be focused first and foremost around this objective.

Recommendation 8: The fundamental rights sensitivities of Europol's work and safeguards should be taken into account when Europol's mandate is re-opened for negotiation in 2013. DG Justice should play an active role during the preparation of the Commission's proposal for a Europol Regulation to conduct a fundamental rights proof-reading of the new legislation. Moreover, the European Parliament should ensure that the new 'model of agency-building' proposed in Recommendation 1 of this report would be mainstreamed to Europol to the largest extent.

Recommendation 9: The European Parliament should call upon Frontex to no longer conduct any joint operation in the maritime territory of third states, as the consistency of this practice is not only questionable with respect to the rule of law principles of legal certainty and accountability, but it is also at odds with fundamental rights foreseen in the EU Charter.

1. INTRODUCTION: SCOPE, RESEARCH QUESTIONS AND METHODOLOGY

The European Union's Area of Freedom, Security and Justice (AFSJ) has been the focus of dynamic policy-making and legislative initiatives during the last 12 years of European integration. In addition to a rapidly evolving normative framework, the AFSJ has experienced a progressive institutional reshaping due to the proliferation of supranational actors in the form of EU regulatory agencies. These EU agencies, a unique and peculiar component of the political elements of the EU which move beyond the traditional EU institutional framework are increasingly playing a central role in the implementation and development of EU policies on security and external border control as well as migration and asylum matters. Actors like Frontex (the EU External Border Agency), Europol (European Police Office) and EASO (European Asylum Support Office) now stand at the heart of the institutional foundations of the EU's AFSJ. The 2009 third multiannual programme on the EU's AFSJ – The Stockholm Programme: An Open and Secure Europe serving and protecting Citizens – identified the 'operational maturity' reached by agencies like Europol and Frontex and the creation of EASO as significant steps forward in the development of the AFJS, and signalled as challenges the need to enhance their internal coordination, coherency with internal and external Union policies and oversight.[1]

The mandates, remits and activities make these actors a special kind of EU agency in the wider European landscape of regulatory agencies. Their 'home affairs' focus not only determines their priorities and guiding approaches when contributing to the progressive nature and implementation of Member States' and EU policy responses on irregular immigration, external border controls and asylum protection. Their ever-evolving fields of action are inherently linked with, and have several repercussions for, fundamental human rights of non-EU nationals 'on the move' (commonly categorised in European law as 'third country nationals') as well as on general rule of law principles constituting the premises of the entire EU project.

With the entry into force of the Treaty of Lisbon at the end of 2009, the EU Charter of Fundamental Rights (hereinafter the EU Charter) was proclaimed as a binding bill of rights for the Union.[2] The Charter is now directly legally binding for all the EU institutions, bodies and agencies and for the EU Member States' actions within the scope of EU law. In this way, respect of fundamental rights has been positioned at the heart of the EU's multi-level governance activities and legal framework. When studying the emerging powers and operational competences of EU Home Affairs agencies such as Frontex, Europol and EASO in the areas of border and migration control and asylum, a central issue is their changing relationship with the set of rights and principles stipulated in the EU Charter.

A majority of the tasks performed by these actors formally follows from their legal mandates. Some tasks, however, (in the cases of Frontex and Europol), are either subject to flexible interpretations due to the nuances characterising the scope and definition of their tasks, or subject to factual or 'experimental' practices and policy tools taking them into originally unforeseen domains of intervention. The three EU Home Affairs agencies under study in this report commonly share (to varying degrees) direct or indirect competences in the management of human mobility through the common EU external

[1] European Council, The Stockholm Programme – An open and secure Europe serving and protecting citizens, OJ C 115/01, 04.05.2010.
[2] Charter of Fundamental Rights of the European Union, OJ C 83/02, 30.03.2010.

borders. Some of these competences are of a strong policy and operational nature going beyond mere technical support or assistance to the EU Member States. In the case of Frontex and Europol in particular, due to their de facto (informal) powers and degrees of autonomy, the classical State power structures and practices on 'border checks' and the features delineating EU policies in these domains are being fundamentally transformed through their input in new transnational border control activities (some of which are taking place 'extraterritorially' in the maritime territories of third countries), increasing inter-EU agency cooperation; relations and working arrangements with third countries; and data processing (including in some cases personal data).

Inter-EU cooperation between Home Affairs agencies in migration management and exchange of information is also reinvigorating a nexus between migration and various forms of insecurities and criminalities. The security of the Union and its Member States, as perceived, becomes the driving force behind individual and joint activities between agencies like Europol and Frontex. Immigration is constructed as a 'threat' and linked with 'risk', hence justifying the application of police-led and coercive control policy measures and operations. Another peculiarity of these EU agencies, especially Frontex and EASO, is the way in which their activities and support (especially through the deployment of Rapid Border Intervention Teams – RABITs – and asylum support teams), are generally presented as fundamental elements putting into practice the (much debated) new Article 80 of the Treaty on the Functioning of the European Union (TFEU). The latter states that EU policies falling within the scope of the EU's AFSJ shall be governed by "the principle of solidarity and fair sharing of responsibility" between the Member States in policies related to border checks, asylum and immigration.

A number of concerns have been raised in academic and policy-making circles concerning the active development on the part of EU Home Affairs agencies of their mandates, activities and budgets, which has not been always been matched with a sound framework of accountability. Nor has sufficient attention been given to a regime of fundamental rights protection capable of adapting satisfactorily to their dynamic fields of action and 'experimental' governance strategies, i.e. new ways of governance going beyond their original mandates and legal competences and sometimes taking them into unforeseen areas of intervention, thorough the enactment of 'soft' law and policy and informal practices. The vulnerabilities characterising their framework of legal, political, administrative and public accountability have been said to affect most directly the access to effective legal remedies and justice by individuals facing their (liberal or illiberal) actions in the areas of external border and migration controls. Two of the most problematic cases in point here have been the practices of extraterritorial border and migration controls and personal data processing of third country nationals, which are given special attention in this report.

The Lisbon Treaty also introduced other innovations to the framework structuring European cooperation in the domains of borders, asylum and immigration. For the first time the Treaties envisage in Article 263 TFEU the possibility that the acts of EU agencies might produce 'legal effects' to be scrutinised by the Court of Justice in Luxembourg. The practical delivery of fundamental rights envisaged by the EU Charter, however, constitutes one of the main challenges across the Union. Problems of awareness and accessibility of individuals have been identified as major obstacles in making the EU Charter effective in practice and a reality in the daily lives of individuals. In the area of immigration and border control, third country nationals are in a particularly weak position in terms of being made aware of and having access to the means of redress when attempting to challenge traditional and 'experimental' border control practices by EU agencies potentially in tension

with fundamental rights protection. The provision of adequate relief and effective access to legal remedies and asylum procedures is particularly problematic (if not currently impossible) in the scope of exterritorial migration control measures and practices.

The difficult relationship between EU Home Affairs agencies and the principles of accountability and transparency makes it extremely pertinent to identify and clarify the determination of responsibility and liability in cases of risk and/or actual breaches of fundamental rights. There have been numerous reports and independent studies in recent years by civil society groups, journalists and academics providing evidence on the multifaceted sensitivities raised by some border control practices in Europe as well as the implications of EU agencies' work, in particular those of Frontex and Europol, from a fundamental rights point of view. The current events in the Mediterranean resulting from the revolutions in North Africa and the ongoing war in Libya reveal the open questions and 'grey areas' concerning the effective assurance of fundamental rights protection in EU border and migration control activities. The current scenario is one characterised by a nebulous web of interconnected actions and multi-level actors involved in 'policing migration'. For instance, there is little knowledge and selective public information as regards 'who is doing what' in the current joint operation HERMES 2011, which has run since February 2011 under the coordination of Frontex and with the active participation of Europol. Similar uncertainties and lack of information arise concerning the exact nature and rules applying to EASO's first deployment of an asylum support team in Greece. The dramatic events reported by the UK press attributing responsibility to the North Atlantic Treaty Organisation (NATO) for the deaths of hundreds of migrants in the Mediterranean Sea is still unresolved due also to the difficulties of establishing responsibility and ascertaining the actual facts of the case.

The 'knowledge gap' of the actions and division of labour performed by EU Home Affairs agencies stands not only potentially in tension with the EU Charter, but also with the Union's human rights commitments in the Council of Europe and the European Convention on Human Rights and Fundamental Freedoms (ECHR). The EU legal framework on fundamental rights protection is firmly tied to the European Convention of Human Rights and the jurisprudence of the Strasbourg Court. The Union is currently fine-tuning the last legal steps for its formal accession as a high contracting party to the ECHR. Accession to the Convention will impose clear obligations with regard to those acts, measures or omissions of its institutions and agencies. The wider effects due to an ineffective and weak delivery of fundamental rights protection in the scope of EU border and migration controls beyond the Union context has been revealed by the case *of Hirsi and others v. Italy*, which is currently being decided before the Strasbourg Court and which is expected to shed light on the legality of the so-called 'Italian push-backs' to Libya in 2009.[3]

The progressive 'agencification' construction processes in EU freedom, security and justice policies arrives in a phase of European integration when the role of the European Parliament and national parliaments has been significantly enhanced in the degree and scope of democratic scrutiny of AFSJ-related policies. The European Parliament has been qualified as one of the 'winners' of the innovative inputs introduced by the Lisbon Treaty. It has indeed seen its position as co-legislator consolidated and strengthened in all immigration, border, security and asylum policy domains. This has coincided with the recognition of the enhanced function played by national parliaments in the evaluation (subsidiarity and proportionality test) and accountability of Union policies and actors. The

[3] See the case *Hirsi and others v. Italy*, Application No. 27765/09, European Court of Human Rights.

priority given by the 2011 Brussels Declaration[4] on the parliamentary oversight of security and intelligence actors, including the political monitoring by national parliaments of Europol's structure, functioning, planning and work, illustrates the centrality of national and EU democratic scrutiny over the work of EU Home Affairs agencies, and its compatibility with fundamental rights and rule of law, beyond 'ideological' games and struggles.

This report focuses on the 'home-affairs' activities of Europol, Frontex and EASO and their inter-agency cooperation in the management of the EU external borders and 'mixed migration flows'. It examines the impact of the EU Charter over the legal remits/competences and de facto activities of these three agencies. Our assessment takes as the starting point the position of the individuals who are affected by (or who encounter) these activities. It explores the availability of mechanisms for ensuring accountability of the agencies' actions and the challenges and opportunities faced by individuals in gaining access to justice in cases of fundamental rights violations. It studies the conditions under which individuals can refer to and make use of the Charter in the context of a number of fundamental rights-sensitive activities carried out by Frontex, Europol and EASO falling directly or indirectly within the scope of 'mobility control'. The report assesses the barriers that third country nationals may face when attempting to procure effective legal remedies for challenging EU agencies' security practices alleged to be in breach of specific fundamental rights provisions as foreseen by the EU Charter. In particular, the following specific research questions will guide our assessment:

- What are the legal mandates and de facto competences/tasks of Frontex, Europol and EASO? Which ones fall within the domains of external borders and migration controls? What are their governance structures and accountability frameworks?

- What are the main consequences of the legally binding nature of the EU Charter for the work of the EU Home Affairs agencies? How have Frontex, Europol and EASO incorporated the EU Charter into their remits and work?

- What specific provisions of the EU Charter are most directly relevant to the activities of Frontex, Europol and EASO in the management of flows of people? Which fundamental rights envisaged in the EU Charter are more affected by their actions in the scope of border controls and migration and asylum activities? To whom does the EU Charter apply? What limitations can be placed on EU Charter rights? Is the Charter applicable in an extraterritorial context? What is the relationship between the interpretation of the Charter's rights and the body of case law developed in the context of the ECHR?

- What is the impact of the EU Charter on EU agencies operating in the EU's AFSJ and how is it relevant for the individual? What are the implications of the legally binding nature of the EU Charter for EU Home Affairs agencies, in particular Frontex, Europol and EASO? How has the Treaty of Lisbon changed the accountability framework of Frontex, Europol and EASO? What are the challenges and opportunities facing individuals when challenging (accessing effective legal remedy) activities potentially affecting or breaching their fundamental rights?

- Which are the cross-cutting issues and gaps characterising the changing relationship between EU Home Affairs agencies and the EU Charter? What are the main

[4] "Declaration of Brussels", 6th Conference of the Parliamentary Committees for the Oversight of Intelligence and Security Services of the European Union Member States, Brussels, 1 October 2010.[4]

commonly shared factors and shortcomings affecting their activities from the perspective of accountability and effective access to legal remedies in cases of alleged fundamental rights violations?

Aside from this first introductory section, this report contains six additional sections: section 2 outlines the mandates, tasks and governance and accountability frameworks pertaining to the three EU Home Affair agencies under study. Section 3 moves into an assessment of the ways in which the EU Charter becomes relevant for individuals falling within the scope of EU law and/or actions, independently of their nationality and location, and its formal application and relevance for the work of EU institutions since the Treaty of Lisbon took effect. Section 4 provides an in-depth study of a set of specific provisions within the scope of the EU Charter that can be considered to be the most contentious in the scope of activities and practices carried out by Frontex, Europol and EASO. This section examines the status of each article, the interpretative tools available for each of them and the relevant jurisprudence by the Strasbourg Court. Section 5 analyses the specific impact that the EU Charter has over EU Home Affairs agencies in the areas of border control as well as immigration and asylum-related activities. It identifies areas that are more 'sensitive' from a fundamental rights perspective, namely: operational activities, data processing, cooperation with third states, the effects of the EU Charter on inter-agency cooperation and the barriers to and current modalities for individuals to have access to an effective remedy. Section 6 identifies cross-cutting issues emerging from the relationship between EU Home Affairs agencies and the EU Charter. It provides an analysis of commonly shared factors, gaps and shortcomings characterising Frontex, Europol and EASO, which are central to acquiring a comprehensive understanding of the barriers and deficiencies affecting access to justice by individuals subject to harm as a result of the agencies' actions. The final section offers general conclusions and puts forward a set of policy recommendations.

The methodology used in this report consisted of two main elements. It first entailed research of the relevant primary and secondary sources related to the three EU agencies under study. This has in particular involved an in-depth examination of the current discussions in the academic literature and EU policy debates related to EU AFSJ agencies and the EU Charter and a review of the main legal discussions and case law of the Court of Justice in Luxembourg and the jurisprudence of the European Court of Human Rights that are of fundamental importance to our analysis. During this phase, the research gathered all the publicly available information and documentation related to Frontex, Europol and EASO from both official and civil society sources. In those cases where official documents were classified or not made public, a request for disclosure of information to the relevant actors was carried out. This did not always yield results, for instance a request for a copy of EASO's Operating Plan covering the deployment of asylum support teams in Greece received from the Commission's DG Home Affairs a referral to EASO, while no response had been received from EASO at the time of writing. In a second stage, the literature gathered was then supplemented by a wide range of semi-structured interviews conducted with relevant policy-makers and practitioners, including representatives from Europol, Frontex, representatives from the LIBE Committee and advisors of different political groups in the European Parliament, DG Home Affairs and DG Justice of the European Commission, the General Secretariat of the Council of the EU, as well as the Brussels offices of Amnesty International, Open Society Institute (OSI) and the United Nations High Commissioner for Refugees (UNHCR). It should be taken into account that, in the case of EASO, the relative newness of this agency meant that there was substantially less empirical evidence on this agency's functioning and practical activities compared with Frontex and Europol. We have therefore drawn on the available information to make our analysis, namely EASO's legal

mandate and the little official documentation available, as well as lessons that can be drawn from Frontex and Europol, in order to anticipate the potential challenges that EASO may face when fulfilling obligations to respect fundamental rights under the EU Charter in the future.

Finally, we have taken care when dealing with the sensitive concepts and terminology associated with migration and mobility, in recognition that much of the language and labels attached to this phenomenon imply their own inherent preconceptions and biases. For instance, while this report makes use of the term, 'mixed migration flows', a concept established in the academic and policy literature to refer the increasingly complex patterns of migration and refugee flows,[5] it also acknowledges that such labels can magnify the dichotomy in certain discourses between 'genuine'/'bogus' asylum seekers, legitimate/illegitimate migrants and legal travellers/criminals on the move. The use of such labels, and the individual practices and inter-agency cooperation developed by EU home affairs agencies on these conceptual bases, should be treated with caution as they can serve to detach individuals from their status as fundamental rights holders.

2. OVERVIEW OF THE EU HOME AFFAIRS AGENCIES: REMITS, COMPETENCES, GOVERNANCE AND ACCOUNTABILITY

Before entering into an analysis of Frontex, Europol and EASO under the EU Charter and the impact the latter has over their mandates, legal competences and de facto activities, it is first necessary to introduce the role of the three agencies at the heart of this study. It is of particular importance to ascertain the status and functions performed by these three EU Home Affairs agencies by looking at what they 'do', the degree of autonomy and powers they exercise, and 'who' is taking part in their governance structures and strategies. The purpose of this section is to briefly sketch out the legal mandate, competences and tasks accorded to each agency, laying the foundation for section 5 of this study, which elaborates on those activities that are most 'sensitive' from a fundamental rights perspective. Even the short overview provided in this section reveals how the experimental practices of actors like Frontex and Europol in particular have enabled these bodies to harness and expand upon the powers originally granted by their formal legal mandates and founding regulations, highlighting the potential for dynamic development inherent to EU agencies' powers and actions. As we will argue, a similar path could be expected to be taken by EASO. The various mechanisms put in place to guarantee accountability – both democratic scrutiny and public accountability of agencies' actions – are also explored.

2.1. Frontex

Frontex, the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union,[6] was established in 2004 as a 'first pillar' agency[7] with the aim of coordinating and assisting Member States' actions in the surveillance and control of the external borders of the EU.[8] The agency became officially operational on 1 May 2005, with headquarters in Warsaw, Poland. Frontex has

[5] See for instance R. Zetter, "More Labels, Fewer Refugees: Remaking the Refugee Label in an Era of Globalization" *Journal of Refugee Studies*, Vol. 20, No. 2 (2007), pp. 172-192.

[6] For more information, see the Frontex website (http://www.frontex.europa.eu).

[7] Its original legal bases were the former Arts. 62.2 and 66 of the Treaty establishing the European Community, which fell under the remits of the old Title IV, "Visas, Asylum, Immigration and Other Policies related to the Free Movement of Persons"; see section 6.3 of this report.

[8] Council of the European Union, Council Regulation No. 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 349/1, 25.11.2004(a), hereinafter referred to as the '2004 Frontex Regulation'.

experienced a dynamic growth since its creation. Staff numbers have risen from 43 to 300 since 2005 while the agency's budget has increased from €6 million in 2005 to €86 million in 2011.[9] At the end of 2010, Frontex established a pilot regional office, Frontex Operational Office (FOO) in Piraeus, Greece.[10] The new legal mandate for Frontex presented by the European Commission in the beginning of 2010,[11] represents the most recent step in the continuing expansion of the agency's powers and activities. Political agreement on the amended text of the Regulation has been reached between the Council and the European Parliament and the draft currently awaits formal approval by the Parliament and Council.[12]

2.1.1. Mandate

According to its founding Regulation, Frontex is mandated to improve the integrated management of the external borders and promote solidarity between Member States.[13] In negotiating its mandate, Member States were careful to impose limitations over Frontex's competences. The Regulation thus clarifies that "the responsibility for the control and surveillance of external borders lies with the Member States".[14] The agency's role is therefore formally limited to "facilitat[ing] the application of existing and future Community measures relating to the management of external borders by ensuring the coordination of Member States' actions in the implementation of those measures".[15] While formally the agency has been restricted to a coordinating role, in practice its activities have taken it beyond mere 'facilitation' and towards tasks of a more operational nature.

2.1.2. Tasks

The tasks of the agency are set out in Article 2 of the 2004 Frontex Regulation and include the following principal activities: coordinating operational cooperation between Member States in the management of external borders; providing human and technical support, including through intelligence gathering and risk analysis; and assisting Member States with organising joint return operations.[16]

One of the most visible ways through which Frontex is involved in strengthening operational cooperation between Member States is the agency's coordination of joint operations. A Member State can make a request to the agency to initiate a joint operation (subject to approval by the agency) or Frontex itself may launch initiatives for joint operations, in agreement with the Member States.[17] Requests for the launch of joint

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9 Council of the European Union, "Strengthening the European external borders agency Frontex – Political Agreement between Council and Parliament", 11916/11, Presse 192, Brussels, 23 June 2011(a).

10 Frontex, "Frontex Operational Office Opens in Piraeus", News Release, Frontex, Warsaw, 1 October 2010(a) (http://www.frontex.europa.eu/newsroom/news_releases/art76.html).

11 European Commission, *Proposal for a Regulation of the European Parliament and the Council amending Regulation No. 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union*, COM(2010) 61 final, Brussels, 24 February 2010(f).

12 Council of the European Union, *Proposal for a Regulation of the European Parliament and the Council amending Council Regulation (EC) No. 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX) – Analysis of the final compromise text with the view to agreement*, 12341/11, Brussels, 5 July 2011(e).

13 Art. 1.1 of the 2004 Frontex Regulation.

14 Ibid., Art. 1.2 and Recital 4.

15 Ibid., Recital 4.

16 Ibid., Art. 2.

17 Ibid., Art. 3.

operations tend to be ad hoc and incident-led, often prompted by political pressures and media reports concerning flows of irregular migrants.[18]

The joint operation is grounded in an operational plan, drawn up by Frontex on the basis of a risk analysis (see below), and including the inputs and agreement of the participating states. The operation is coordinated by Frontex, although it is led by the Member State hosting the operation (host Member State). The agency co-finances operations with grants from its budget,[19] which provides an important incentive for Member States to involve the agency in joint operational activity.[20]

Since its establishment and up to 2011, Frontex has coordinated a large number of joint operations covering the EU's air, land and sea borders. Approximately two-thirds of the agency's total operational expenditure is taken up by sea operations.[21] One of the components of joint operations at sea involves the practice of maritime interception to deter or stop migrants from crossing sea borders. The practice has taken Frontex joint operations beyond Member State territorial waters to patrols in high seas and in some cases the territorial waters of third countries, which is part of a broader trend towards the extra-territorialisation of the EU's border management strategy whereby migration control measures are established in areas beyond state territory (for further discussions of extra-territorial border controls see sections 4.3, 5.1 and 6.2). As Frontex itself has no competence to conclude agreements with third countries for the purpose of allowing joint operations to take place on their territory, action relies instead on bilateral agreements between the Member States engaged in the joint operation and the third countries concerned.[22]

There is some ambiguity concerning the exact scope of Frontex's role and activities during joint operations. This is partly due to the fact that the agency's founding Regulation contains no rules on how operations under Frontex should be prepared and conducted, nor a definition of a joint operation. As noted by the Commission in its impact assessment, this leads to a situation where:

> The Agency takes on a different role during different operations, depending on ad hoc arrangements. While the Agency does draw up an operational plan for each operation such a plan is not foreseen in the legal basis. Neither, as a consequence, does the legal basis specify what the Agency can or should do to ensure that the plan is actually agreed and properly implemented.[23]

Furthermore, it could be argued that operations underway in the high seas or territorial waters of third countries take the agency beyond its mandate of managing the EU's

[18] S. Carrera, *The EU Border Management Strategy: FRONTEX and the Challenges of Irregular Immigration in the Canary Islands*, CEPS Working Paper No. 261, CEPS, Brussels, March 2007.

[19] Art. 34 of the Frontex Regulation.

[20] J.J. Rijpma, "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: Manchester University Press, forthcoming.

[21] See A. Baldaccini, "Extraterritorial Border Controls in the EU: The Role of Frontex in Operations at Sea", in B. Ryan and V. Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges*, Leiden: Martinus Nijhoff Publishers, 2010.

[22] See for example the arrangements in the HERA joint operation, for which Spanish bilateral agreements formed the basis for action.

[23] European Commission, *Impact Assessment accompanying the Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No. 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the*

external borders.[24] There is currently no legal basis in its founding Regulation for Frontex to be involved in border control operations in the territory of third countries.

In 2011, the Commission put forward proposals to amend the Schengen Borders Code to explicitly allow for joint border controls on third state territory,[25] stipulating that bilateral agreements with third countries should be compatible with, and would fall under the domain of, EU law. If adopted, this amendment could provide a legal basis under EU law for certain practices falling within the scope of extraterritorial border control.[26]

Frontex's operational character was reinforced by the 2007 amendment to the Frontex Regulation, which established a mechanism for the creation of Rapid Border Intervention Teams (RABITs) to assist Member States faced with an excessive flow of irregular migrants.[27] At the request of a Member State faced with a "situation of urgent and exceptional pressure", the agency may deploy for a limited period RABITs on the territory of the requesting Member State for the appropriate duration.[28] RABITs differ from other Frontex operations in that officers taking part are given more extensive law enforcement powers, are able to perform tasks of border police and are no longer restricted to an advisory function. They also differ from other Frontex operations (where participation is on a voluntary basis) in that RABITs rely on the concept of 'compulsory solidarity', where Member States are obliged to contribute human and technical resources unless they are faced with "an exceptional situation substantially affecting the discharge of national tasks".[29] The RABIT mechanism has only been employed on one occasion, on Greece's external land border with Turkey on 2 November 2010.[30]

Finally, on the operational side, the Frontex Regulation also mandates the agency to assist in the organisation of joint return operations (JROs) by Member States – with the aim to "maximise efficiency and cost effectiveness" in the forcible repatriation of third country

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European Union (FRONTEX), Commission Staff Working Document, SEC(2010) 149, 24 February 2010(e), p. 16.

[24] See for instance A. Baldaccini, "Extraterritorial Border Controls in the EU: The Role of Frontex in Operations at Sea", in B. Ryan and V. Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges*, Leiden: Martinus Nijhoff Publishers, 2010.

[25] European Commission, *Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No. 562/2006 of the European Parliament and of the Council establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) and the Convention implementing the Schengen Agreement*, COM(2011) 118 final, Brussels, 10 March 2011(e).

[26] The proposed amendment explicitly leaves open the possibility of extra-territorial control; ibid., Art. 1.1.4.3 of amended Annex VI to the Schengen Borders Code. There is some amibuity under the current Annex VI of Schengen Borders Code as to whether it could allow for extraterritorial border controls. See Annex VI, Art. 3.1.1, first para. of European Parliament and Council of the European Union, Regulation (EC) No. 562/2006 of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ L 105/1, 13.4.2006. Yet the Standing Committee of Experts on International Immigration, Refugee and Criminal Law states unequivocally that "the instrument of pre-border controls falls outside the scope of the Schengen borders code", see the Committee's Comment on Proposal for a Regulation establishing a Mechanism for the Creation of Rapid Border Intervention Teams and amending Council Regulation 2007/2004 as regards that mechanism, COM(2006) 401, 24 October 2006. For conclusions on the extra-territorial effects of the Schengen Borders Code, see A. Fischer-Lescano, T. Lohr and T. Tohidipur, "Border Controls at Sea: Requirements under international human rights and refugee law", *International Journal of Refugee Law*, Vol. 21, No. 2, 2009, p. 28. The proposed amendment explicitly leaves open the possibility of extra-territorial control; ibid., Art. 1.1.4.3 of amended Annex VI to the Schengen Borders Code.

[27] European Parliament and of the Council of the European Union, Regulation (EC) No. 863/2007 of the European Parliament and of the Council of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No. 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers (RABIT Regulation), OJ L 199/30, 31.07.2007(b).

[28] Art. 4 of the RABIT Regulation.

[29] Art.8(b) of the RABIT Regulation.

[30] For a critical analysis of the first deployment of the RABIT, see S. Carrera and E. Guild, *'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 Series, CEPS, Brussels, November 2010.

nationals.[31] Again, in implementing JROs, Frontex activities appear to have expanded beyond the formal competences laid down in its founding Regulation. Indeed, the Commission has highlighted the "mismatch between the legal basis and reality: while the legal basis only talks about Frontex "assisting" Member States, the agency has already, and successfully, taken on a "coordinating" role".[32] Furthermore, Frontex processes personal data in the context of Joint Return Operations, an action that currently has no legal basis.[33]

In addition to its operational tasks, risk analysis and intelligence gathering (as provided in Articles 4 and 11 of the Frontex Regulation) comprise the core activities of the Frontex agency and form the basis for much of its operational actions.[34] The agency's Risk Analysis Unit (RAU) produces an annual general risk assessment (ARA) as well as specific assessments for particular events (e.g. major sporting events) or problems (e.g. particular immigration routes).[35]

To exploit all possible information resources and facilitate information exchange with a range of different actors, Frontex has developed the Frontex Risk Analysis Network (FRAN) through which it receives monthly updates and statistics from the Member States on "illegal border crossings, refusals of entry, asylum applications, detections of illegal stay, use of forged documents and detections of facilitators".[36] Frontex also has access, and is a contributor to, ICO-Net, a web-based information and coordination network for national migration authorities.[37] The fact that Frontex took over the work of CIREFI (Centre for Information, Discussion and Exchange on the Crossing of Frontiers and Immigration), a Council working group that collected statistics and facilitated information exchange between Member States on irregular immigration,[38] has cemented Frontex's authority as a source of data on irregular migration 'threats' at the EU's external border. A recent questionnaire showed that Member States are interested in a further expansion of this new role played by Frontex suggesting *inter alia* the increased sharing of 'satellite images'.[39]

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31 See Art. 9 of the Frontex Regulation; see also "Tasks" on the Frontex website (http://www.frontex.europa.eu/origin_and_tasks/tasks/).

32 European Commission, *Impact Assessment accompanying the Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No. 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX)*, Commission Staff Working Document, SEC(2010) 149, 24 February 2010(e), p. 16.

33 European Data Protection Supervisor (EDPS), Opinion on a notification for Prior Checking received from the Data Protection Officer of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX) concerning the "collection of names and certain other relevant data of returnees for joint return operations (JRO)", Case 2009-0281, EDPS, Brussels, 26 April 2010(c).

34 See for instance the Frontex Programme of Work 2009, p. 24: 'Frontex operational activities are intelligence driven and based on threat and risk analysis carried out by Frontex' Risk Analysis Unit (RAU) on an ongoing (regular) and ad hoc basis.'

35 Frontex RAU, Extract from the Annual Risk Analysis 2010 (http://www.frontex.europa.eu/download/Z2Z4L2Zyb250ZXgvZW4vZGVmYXVsdF9ha3R1YWxub3NjaS8xMDYvMTMvMQ/frontex_ara2010_public_version.pdf.)

36 Council of the European Union, New JHA Working Structures: Abolition of CIREFI and transfer of its activities to FRONTEX and the Working Party on Frontiers, 6504/10, Brussels, 22 February 2010(f), p. 2.

37 European Commission, "Reinforcing the fight against illegal immigration – Secure web-based network for the coordination and exchange of information on irregular migration", Press Release IP/06/57, Brussels, 20 January 2006(a).

38 See the description on the European Commission website, "Centre for Information, Discussion and Exchange on the Crossing of Frontiers and Immigration (Cirefi)" : (http://europa.eu/legislation_summaries/other/l33100_en.htm). See also Council of the European Union, Conclusions on the organisation and development of the Centre for Information, Discussion and Exchange on the Crossing of Frontiers and Immigration (Cirefi), Brussels, 30 November 1994.

39 Council of the European Union, 'Implementation of Council Conclusions on 29 Measures for reinforcing the protection of the external borders and combating illegal immigration: analysis of the replies to the questionnaire on 'MS needs and capacities regarding Common Pre-Frontier Intelligence Picture (CPIP)'', Doc. 12542/11, Brussels, 6 July 2011, pp. 8-9.

For this reason, Frontex has been granted a central role in the allocation of the European Borders Fund (EBF). As stipulated by the EBF Decision, Frontex risk analyses help determine the allocation of the fund, and the agency is consulted by the Commission on Member States' multi-annual spending programmes.[40]

Furthermore, Frontex has been allocated further responsibilities in a recent proposal tabled by the Commission for a visa safeguard clause, an amendment that that would temporarily suspend countries from the visa waiver list if there is a sudden increase in asylum applications or irregular stays. According to the proposal, Frontex reports would contribute to determining whether the situation in a particular Member State justifies the activation of the visa safeguard clause.[41]

Regarding relations between Frontex and third parties, Article 13 of the Frontex Regulation authorises cooperation between Frontex and Europol, and early on, Frontex established (informal) links with the European Police Office, through regular meetings and the production of joint reports. In 2008 Frontex and Europol established a formal cooperation agreement, which among other activities covers the exchange of information.[42] While this agreement currently excludes personal data, this is set to change with the formal adoption of the new Frontex Regulation which foresees the exchange of personal data between Frontex and Europol.[43] Frontex also signed a working arrangement with CEPOL (the European Police College) in 2009, primarily focused on training activities, with the stated aim to "support the harmonisation of police and border guards officers training."[44]

Information exchange also forms a component of Frontex's relations with third countries, for which the agency has set up regional networks, such as the Western Balkans Risk Analysis Network.[45] The Frontex Regulation gives the agency the competence to cooperate with third states on the basis of working agreements,[46] and Frontex has so far concluded working agreements with the authorities of 14 third countries,[47] with negotiations for a further eight currently underway.[48] Information exchange with third countries is just one element of Frontex's wider external relations strategy which encompasses capacity-building in third countries, such as cooperation in training, but also extends to joint operations and pilot projects, with the officers of third country authorities potentially involved in a range of operational activities.[49] Furthermore, Frontex cooperation with third countries also takes

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40 Art. 15 and Recital 17, Decision No. 574/2007/EC of the European Parliament and of the Council of 23 May 2007 establishing the External Borders Fund for the period 2007 to 2013 as part of the General Programme 'Solidarity and Management of Migration Flows', OJ L 144/22, 06.06.2007(a).

41 European Commission, *Proposal for establishing a visa safeguard clause for suspending visa liberalisation*, COM(2011) 290, Brussels, 24 May 2011(f).

42 Refer to the Strategic Cooperation Agreement between the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union and the European Police Office, Warsaw, 28 March 2008 (https://www.europol.europa.eu/sites/default/files/flags/frontex.pdf). Refer also to Europol, "Strategic Cooperation Agreement between Frontex and Europol", Press Release, Europol, The Hague, 2 April 2008.

43 Art. 11(c) of Council of the European Union, *Proposal for a Regulation of the European Parliament and the Council amending Council Regulation (EC) No. 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX) – Analysis of the final compromise text with the view to agreement*, 12341/11, Brussels, 5 July 2011(e).

44 Frontex Press Release, "Frontex signs working arrangement with CEPOL", 2nd July 2009.

45 See the Frontex website article, "External Relations, Background" (http://www.frontex.europa.eu/external_relations/).

46 Art. 14 and Recital 12 of the Frontex Regulation.

47 These 14 are the Russian Federation, Ukraine, Croatia, Moldova, Georgia, the Former Yugoslav Republic of Macedonia (FYROM), Serbia, Albania, Bosnia and Herzegovina, the US, Montenegro, Belarus, Canada and Cape Verde. Source: Frontex website.

48 The eight countries with which Frontex is conducting negotiations for working agreements are Turkey, Libya, Morocco, Senegal, Mauritania, Egypt, Brazil and Nigeria. Source: Frontex website.

49 Frontex, *Frontex General Report 2009*, Frontex, Warsaw, 2009(b), p. 9.

place within the scope of Mobility Partnerships, and encompasses information exchange, capacity-building, technical cooperation in border control, joint operational measures and 'pilot projects', although the latter are not defined.[50] The EU has established Mobility Partnerships with Moldova, Cape Verde, Georgia and Senegal, with further partnerships with Armenia and Ghana currently in the pipeline.

The new Frontex Regulation, once formally adopted, is set to strengthen the agency's capacities in a number of areas. The main new elements include:

- A co-leading role in joint operations and pilot projects, as well as a stronger role to coordinate and organise joint return operations (Article 9)

- The possibility for Frontex to buy or lease its own equipment, or to buy such equipment in co-ownership with a member state (Article 7)

- The introduction of a centralised technical equipment pool and mechanism to provide for more formalised arrangements for member states contribution to the pool and deployment of equipment for specific operations (Article 7)

- The introduction of more systematic and formalised mechanisms for the secondment of border guards and the name "European Border Guard Teams" to be used for teams deployed during Frontex operations (Article 3b)

- More detailed provisions on the Operational Plans, including respective tasks and responsibilities, evaluation and reporting mechanisms, etc. (Article 8(e))

- The possibility to process personal data collected during joint operation, joint return operations, pilot projects and rapid interventions (Article 11), and to transfer personal data to other EU agencies on the basis specific working agreements (Article 13)

- Reinforced tasks concerning risk analysis, including the possibility to make assessments regarding the capacity of member states to deal with pressures at the external border (Article 4).

- A reinforced external role, with the possibility for Frontex to launch technical assistance projects and deploy liaison officers in third countries (Article 14)

- A set of provisions designed to strengthen the compliance of Frontex activities with fundamental rights (further explored in section 3.3.1)

However, the new Regulation is unlikely to signal the culmination of Frontex's development. Indeed, the Commission intends to undertake an evaluation of the agency in 2013 to feed

[50] See the Annex to Council of the European Union, Joint Declaration on a Mobility Partnership between the European Union and Georgia, 16396/09, Brussels, 20 November 2009(c); Annex to Council of the European Union, Joint Declaration on a Mobility Partnership between the European Union and the Republic of Cape Verde, 9460/08, Brussels, 21 May 2008; Annex to Council of the European Union, Joint Declaration on a Mobility Partnership between the European Union and the Republic of Moldova, 9460/08, Brussels, 21 May 2008.). For a political evaluation of the EU's mobility partnerships, see European Commission, *Mobility partnerships as a tool of the global approach to migration*, Commission Staff Working Document, SEC(2009) 1240, Brussels, 18 September 2009(b).

into the "long term debate on the development of Frontex",[51] which will include a feasibility study on the creation of a 'European system of border guards'.[52]

2.1.3. Governance and accountability

The Frontex Management Board is responsible for the strategic control of the agency, and regularly adopts strategic guidelines. It also takes operational decisions, such as on the deployment of a rapid intervention when an application is filed by a Member State (following a proposal from the Executive Director).[53] The Management Board consists of one representative per Member State (usually operational heads of national services responsible for border guard management)[54] and two representatives from the Commission.[55]

The Frontex Executive Director and Deputy Director are responsible for the day-to-day management of the agency.[56] Both are appointed by the Management Board on the basis of proposals from the Commission and are directly accountable to the Management Board. Although the Frontex Executive Director is responsible for ensuring that Frontex activities are 'within the limits specified by [the Frontex] Regulation, its implementing rules and applicable law',[57] the Commission has noted the difficulty of ensuring proper procedures are followed, especially during Frontex joint operations, concluding that "the Agency is in no position to ensure that operations are launched and carried out in line with the overall objectives of the Agency and of the overall border management policy of the Union".[58]

Here, it should be noted that the 2010 Decision regulating maritime surveillance operations which contains rules and non-binding guidelines, including on fundamental rights compliance,59 may bring additional legal certainty in this respect (see section 3.3.1). Likewise the new Frontex Regulation now contains an explicit reference to the Schengen Borders Code, which was previously absent from the agency's founding Regulation.60 The new Regulation also contains more detailed provisions on the operational plans, including

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51 Council of the European Union, The Stockholm Programme: An Open and Secure Europe serving and protecting citizens, 5731/10, Brussels, 3 March 2010(h), pt. 5.1.

52 Art. 33.2(a) of the new Frontex Regulation: Council of the European Union, *Proposal for a Regulation of the European Parliament and the Council amending Council Regulation (EC) No. 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX) – Analysis of the final compromise text with the view to agreement*, 12341/11, Brussels, 5 July 2011(e).

53 Art. 4.2 of the RABIT Regulation.

54 E. Papastavridis, "'Fortress Europe' and Frontex: Within or Without International Law?", *Nordic Journal of International Law*, Vol. 79, No. 1, 2010, p. 77.

55 Representatives of the Schengen states also sit on the Management Board, but hold limited voting rights.

56 Art. 25 of the Frontex Regulation.

57 Ibid., Art. 25.3(a).

58 European Commission, *Impact Assessment accompanying the Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No. 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX)*, Commission Staff Working Document, SEC(2010) 149, 24 February 2010(e), p. 16.

59 Council of the European Union, Decision 2010/252/EU of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 111/20, 04.05.2010(c).

60 Art. 1 of the agreed text of Council of the European Union, *Proposal for a Regulation of the European Parliament and the Council amending Council Regulation (EC) No. 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX) – Analysis of the final compromise text with the view to agreement*, 12341/11, Brussels, 5 July 2011(e).

the respective tasks and responsibilities and more stringent reporting mechanisms,[61] which could improve the overall governance and control of Frontex joint operations.

Concerning democratic accountability, the European Parliament is the main budgetary authority and thus has considerable influence in the financing of Frontex. However, the Parliament has only weak powers to scrutinise Frontex's activities, including its compliance with fundamental rights. Supervisory powers of the European Parliament are limited to receiving Frontex's annual general report and the work programme.[62] The Parliament is not consulted before the conclusion of working agreement with third countries. Moreover, the Parliament is not party to important Frontex information, such as risk analyses, which are presented to the Commission.[63] No parliamentary hearing is required for the prospective Executive Director before his or her appointment. Although the European Parliament is entitled to summon the Executive Director to report and answer questions before the Committee on Civil Liberties Justice and Home Affairs (LIBE Committee), there is no formal requirement for this in the law – the Parliament may only 'invite' the Director to report on carrying out his or her tasks.[64] Indeed, it has been noted that in the past senior Frontex officials have declined to participate in a hearing organised on the specific question of the management of the southern maritime border.[65]

It is also worth highlighting that Frontex is not obliged to inform or report to national parliaments. In general, the lack of an institutional mechanism of prompt democratic oversight for the operational activities of Frontex has been the target of criticism.[66]

Public accountability is also somewhat limited, in large part due to the lack of transparency that surrounds Frontex activities. The Frontex Regulation explicitly includes an article on transparency, including the right to access documents.[67] Yet aside from the little information available on the Frontex website and in the annual reports, it is very difficult to obtain detailed information regarding Frontex's activities. Joint operational plans, as well as working agreements with third countries are kept confidential. This secrecy surrounding the work of the agency makes it very difficult for the public and civil society to monitor the actions of Frontex.

An independent evaluation of Frontex (as required by Article 33 of the Frontex Regulation) published in 2009 could have functioned as an external accountability mechanism.[68] However, the report, which was carried out by the consultancy firm COWI, did not examine the agency's compliance with fundamental rights or rule of law. The new Frontex Regulation now includes an explicit requirement in Article 33.2(b) that the next evaluation of Frontex to be carried out "shall include a specific analysis on the way the Charter of Fundamental Rights was respected pursuant to the application of the Regulation".

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61 Ibid., Art. 3(a) of the agreed text.
62 Art. 20.2 of the Frontex Regulation.
63 J. Pollack and P. Slominski, "Experimentalist but not Accountable Governance? The Role of Frontex in Managing the EU's External Borders", *West European Politics*, Vol. 32, No. 5, September 2009, p. 917.
64 Art. 25.2 of the Frontex Regulation.
65 See A. Baldaccini, "Extraterritorial Border Controls in the EU: The Role of Frontex in Operations at Sea", in B. Ryan and V. Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges*, Leiden: Martinus Nijhoff Publishers, 2010, p. 236.
66 See *ibid.*, pp. 229-255.
67 Art. 28 of the Frontex Regulation.
68 Consultancy within Engineering, Environmental Science and Economics (COWI), *External Evaluation of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union: Final Report*, COWI, Brussels, January 2009 (www.frontex.europa.eu/download/.../cowi_report_final.doc).

2.2. Europol

Europol (European Police Office) is the EU's law enforcement agency headquartered in The Hague, the Netherlands, and employing a staff of around 700 persons.[69] During its 15 years of existence, Europol has developed from an intergovernmental body established by agreement between the Member States[70] into an EU actor, with the adoption of the Council Decision of 6 April 2009 establishing the European Police Office (hereafter referred to as the Europol Council Decision), which legally established Europol as an EU agency, financed from the EU budget.[71] Nevertheless, the Council Decision is a (former) third-pillar instrument, something which, despite the entry into force of the Lisbon Treaty and abolition of the pillar system, continues to have implications for Europol's working methods and governance structure. In recent years, Europol's law enforcement objectives have been seen to overlap with efforts for migration control, with both Europol's operational actions and information-related tasks revealing an increasing focus on crimes related to mobility, such as 'human trafficking and smuggling'. In 2013, the Commission is scheduled to come forward with a proposal for a Regulation on Europol to replace the Europol Council Decision.[72]

2.2.1. Mandate

Europol's formal objective, as laid down in the Europol Council Decision and echoed in Article 88 of the Lisbon Treaty, is to "support and strengthen action by the competent authorities of the Member States and their mutual cooperation in preventing and combating organised crime, terrorism and other forms of serious crime affecting two or more Member States."[73] Europol has no executive powers and its mandate is to act primarily as a support service for the Member States. Consequently Europol is not mandated to exercise traditional police powers such as the right to arrest, to perform houses searches or to conduct wiretaps. Nevertheless, since its inception, the Council has progressively extended Europol's remit by expanding the types of crimes it is competent to handle and the kind of activities it may engage in.[74] Europol now has competence over "organised crime, terrorism and other forms of serious crime", provided those crimes affect two or more Member States and require a common approach by the Member States.[75] Although the forms of crime over which Europol has gained competence are listed in the Annex to the Europol Council Decision, there is currently no definition provided of 'serious crime' which leaves some room for interpretation and a wider range of activities. With respect to control of the external EU borders, the most relevant crimes for which Europol engages are "illegal immigrant smuggling" and "trafficking in human beings".[76]

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[69] Europol, *Europol Review: General Report on Europol Activities, January–December 2009*, Europol, The Hague, 2010.

[70] Europol began as the Europol Drugs Unit established by a Council Joint Action in 1995. Europol officially began operations on 1 July 1999, following the entry into force of the 1995 Europol Convention in 1998.

[71] Council of the European Union, Decision 2009/371/JHA of 6 April 2009 establishing the European Police Office (Europol), OJ L 121/37, 15.05.2009(a).

[72] European Commission, Communication on Delivering an Area of Freedom, Security and Justice for Europe's Citizens: Action Plan Implementing the Stockholm Programme, COM(2010) 171, Brussels, 20 April 2010(b), p. 32.

[73] Art. 3 of the Europol Council Decision.

[74] See A. De Moor and G. Vermeulen, "The Europol Council Decision: Transforming Europol into an Agency of the European Union", *Common Market Law Review*, Vol. 47, No. 4, 2010(b), pp. 1089-1121; M. Groenleer, *The Autonomy of European Union Agencies: A Comparative Study of Institutional Development*, Delft: Eburon Academic Publishers, 2009; see also S. Peers, "Europol: The final step in the creation of an 'investigative and operational' European police force", Statewatch Analysis, Statewatch, New York, NY, January 2007 (http://www.statewatch.org/news/2007/jan/europol-analysis.pdf).

[75] Art. 4.1 of the Europol Council Decision.

[76] See the Annex to the Europol Council Decision.

2.2.2. Tasks

Europol's core activity is to facilitate the exchange of information between Member States and to develop criminal intelligence. In recent years it has also been granted operational powers. Europol's principal *information*-related tasks are to collect, store, process, analyse and exchange information and intelligence, to notify Member States of any information on criminality concerning them and to develop strategic analyses, including threat assessments.[77] To facilitate the exchange of information, each Member State has established a Europol National Unit (ENU) within their territory which functions as the liaison body between Europol and the national law enforcement authorities. In turn, Europol liaison officers are seconded from the ENUs to Europol.[78]

Largely due to the reluctance of national authorities to share intelligence more widely, a large proportion of information is exchanged between national liaison officers stationed at Europol on a bilateral basis. A legacy of a policy domain traditionally dominated by secrecy and intergovernmental cooperation, this means that information is often exchanged without the involvement of Europol and without being processed by Europol's system of collected information. It has long been the case that these bilateral exchanges also cover crimes outside the competence of Europol,[79] a previously informal practice that has now been given a legal basis in the Europol Council Decision.[80]

To facilitate information processing, Europol relies on two computerised systems: the Europol Information System and Analysis Work Files.[81] The Europol Information System, operational since 2005, stores personal information on individuals convicted or suspected of having committed a crime.[82] This includes data on individuals presumed to be involved in facilitating human trafficking or irregular migration. It automatically detects any possible hits between different investigations and facilitates the sharing of this information. Europol has announced its intention for future versions of the Information System to provide functionalities to match biometric data such as DNA profiles, fingerprints and photographs.[83]

Analysis work files allow the storage of a broader range of data, including on victims and associates of (suspected) criminals and are opened for the purpose of providing analysis for investigations and operations carried out in the Member States.[84] In addition to these two tools, the Europol Council Decision also empowers Europol to establish new systems for processing personal data, to allow the agency to react to new developments in policing and crime.[85]

In addition to facilitating information exchange between Member States, Europol is also mandated to cooperate and engage in information exchange with third parties including EU agencies (such as Frontex), international organisations (including Interpol) and third countries, as well as receive information from private parties.[86] The exchange of

[77] Art. 5 of the Europol Council Decision.
[78] Ibid., Arts. 8 and 9.
[79] A. De Moor and G. Vermeulen, "The Europol Council Decision: Transforming Europol into an Agency of the European Union", *Common Market Law Review*, Vol. 47, No. 4, 2010(b), pp. 1089-1121.
[80] See Art. 9(3).
[81] The form and functioning of these systems is laid down in chapter II, "Information processing Systems" of the Europol Council Decision.
[82] Art. 11 of the Europol Council Decision.
[83] Europol, *The European Investigator: Targeting Criminals across Borders*, Europol, The Hague, 2011(d), p. 7.
[84] Art. 14 of the Europol Council Decision.
[85] Ibid., Art. 10.
[86] See chapter IV of the Europol Council Decision on "Relations with Partners".

information with these third parties takes place on the basis of cooperation agreements. Two types of agreement determine the nature of cooperation with third parties. Strategic agreements make it possible for the two parties involved to exchange all information with the exception of personal data. Operational agreements also allow the exchange of personal data.[87] The negotiations of agreements with third countries have come under criticism for their secretive nature, and for taking Europol beyond its legal mandate (see section 5.2.2.3).[88]

The Europol Council Decision requires the agency to prepare threat assessments, strategic analyses and general situation reports.[89] The most important of these is the Organised Crime Threat Assessment (OCTA), which plays a strategically important role in the EU-level fight against organised crime. Unlike the previous Organised Crime Situation Reports, the OCTAs provide "a more far-reaching predictive assessment" allowing "a forward-looking strategic and, in a second step, operational priority setting".[90] A large section of the 2011 OCTA is dedicated to "Facilitated illegal immigration" and human trafficking, including the identification of national and ethnic criminal groups.[91] The OCTAs, which incorporate inputs by national and EU level sources (including Frontex and Eurojust), form the basis for the Council's priorities and recommendations for Europol and in the broader policy field of organised crime at EU level.[92] In addition, Europol produces the annual Terrorism Situation and Trend Report (TE-SAT) based on input from Member States, as well as contributions from third countries, Eurojust and Interpol. The 2011 TE-SAT makes an explicit link between mobility and terrorism, highlighting that "the current and future flow of immigrants originating from North Africa could have an influence on the EU's security situation. Individuals with terrorism aims could easily enter Europe amongst the large numbers of immigrants."[93]

On a related note, Europol also, upon the request from Member States, provides intelligence and threat assessments in connection with major international events (e.g. large sporting events).[94] Although the Europol Council Decision now provides an explicit legal basis for this activity, Europol has provided threat assessments for international events for several years without a formal remit. These actions and their inclusion in the legal basis have been criticised for taking Europol beyond its formal mandate and into the domain of controlling public order.[95]

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87 See Arts. 22 and 23 Europol Council Decision. Currently Europol cooperates with 17 non-EU countries (listed in table 4 of this study),, 9 EU bodies and agencies and 3 international organisations. For the full list of third parties with which Europol has established cooperation agreements, see the Europol website (http://www.europol.europa.eu/index.asp?page=agreements).

88 See for instance, S. Peers, "The exchange of personal data between Europol and the USA", Statewatch Analysis No. 15, Statewatch, New York, NY, 2002 (http://www.statewatch.org/news/2002/nov/analy15.pdf).

89 Refer to Art. 5.1(f) of the Europol Council Decision. All reports are publicly available at the Europol website (http://www.europol.europa.eu/index.asp?page=publications).

90 As stated in M. Groenleer with reference to the Organised Crime Situation Report of 2005 – see M. Groenleer, *The Autonomy of European Union Agencies: A Comparative Study of Institutional Development*, Delft: Eburon Academic Publishers, 2009, p. 295.

91 See Europol, *EU Organised Crime Threat Assessment 2011*, Europol, The Hague.

92 Art. 4(2) of the Europol Council Decision.

93 Europol, *EU Terrorism Situation and Trend Report,* TE-SAT 2011, Europol, The Hague, 19 April 2011(b) (www.europol.europa.eu/publications/EU_Terrorism_Situation_and_Trend_Report_TE-SAT/TE-SAT2011.pdf).

94 Art. 5.1(e) of the Europol Council Decision.

95 See for instance, A. De Moor and G. Vermeulen, "The 'new' principal task for Europol to support Member States in connection with major international events: The blurring of boundaries between law enforcement and public order?", in A. Verhage, J. Terpstra, P. Deelman, E. Muylaert and P. Van Parys (eds), *Policing in Europe – Journal of Police Studies*, No. 16, 2010(a); see also S. Peers, "Europol: The final step in the creation of an 'investigative and operational' European police force", Statewatch Analysis, Statewatch, New York, NY, January 2007 (http://www.statewatch.org/news/2007/jan/europol-analysis.pdf).

Although Europol's core activity is information management, in the last years Europol has been granted operational powers, enabling it to request Member States to initiate criminal investigations[96] and to support the preparation and facilitate the coordination and implementation of investigative and operational actions of the Member States.[97] This includes a high proportion of operational activities focusing on irregular immigration (see section 5.2).

The clearest manifestation of the agency's operational powers is through its participation, since 2007,[98] in Joint Investigation Teams (JITs). These teams are made up of representatives of national police forces that carry out their tasks in accordance with the national law of the country in which they operate.

Europol officers may "assist in all activities and exchange information with all members of the joint investigation team" but, as stated in Article 88 of the Lisbon Treaty and reaffirmed in the Europol Council decision, they shall not take part in "coercive measures". However, no definition is provided of what such measures entail and the exact scope of competences of Europol officials remains unclear due to the wording in the legal basis which is open to several interpretations. While some consider Europol's role limited to providing coordination support, advice and analyses, it has been suggested that the wording of the legislation allows Europol officers to take part in operational work at the request of their national colleagues, thereby granting them de facto operational competences in the JIT.[99]

2.2.3. Governance and accountability

Europol's management board is composed of one representative from each Member State, and one representative of the Commission. The management board is called on to adopt a strategy for the agency and is charged with maintaining a "specific focus on strategic issues".[100] Governance within Europol has been criticised for suffering from a lack of transparency, and, unlike other agencies, the composition of Europol's management board is not made public.[101]

Europol's Executive Director is responsible for the daily operations of the organisation, including the drafting and implementation of the budget, the selection and recruitment of personnel, and the planning and programming of work. He is subject to several evaluative procedures, for example, reporting on the priorities defined by the Council and on Europol's external relations and submitting an annual activity report to the management board.

Europol is directly accountable to the Justice and Home Affairs Council. The Council receives core documents (annual reports, report on the implementation of the budget), it appoints the Directors and Deputy Directors and can also dismiss the Directors. The Council also approves the conclusion of Europol cooperation agreements with third countries, other EU bodies and international organisations.

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96 Art. 7 of the Europol Council Decision.
97 Ibid., Art. 6.
98 Council of the European Union, Council Act of 28 November 2002 drawing up a Protocol amending the Convention on the establishment of a European Police Office (Europol Convention) and the Protocol on the privileges and immunities of Europol, the members of its organs, the deputy directors and the employees of Europol, OJ C 312, 16.12.2002 (entered into force 29 March 2007).
99 See for instance, M. Groenleer, *The Autonomy of European Union Agencies: A Comparative Study of Institutional Development*, Delft: Eburon Academic Publishers, 2009; see also B. De Buck, "Joint Investigation Teams: The Participation of Europol Officials", *ERA Forum*, No. 8, 2007, pp. 253-264.
100 Art. 37 of the Europol Council Decision.
101 M. Busuioc, D. Curtin and M. Groenleer, "Agency growth between autonomy and accountability: The European Policy Office as 'living institution'", *Journal of European Public Policy*, forthcoming.

In the past it has been reported that the Council has also exercised a non-mandated control over Europol's activities, with Council working groups making informal requests to Europol outside the text of Europol's legislative framework.[102] This intervention even prompted Europol's management board to make an unprecedented complaint to the Article 36 Committee stating their "growing concern… that the legislative framework applicable to Europol and its work was not always applied… on several occasions Council working groups have asked Europol to carry out tasks originally not foreseen by its yearly work programmes and budgets."[103]

By contrast, accountability before the European Parliament is relatively weak, although it was strengthened significantly with the adoption of the Europol Council Decision in 2009. With Europol now funded from the EU budget, the Parliament's powers in terms of financial accountability have increased accordingly, with the Parliament acting as the main budgetary authority. The Parliament may also summon the Director, the chairman of the board and the Presidency of the Council to appear before hearings.[104] Nevertheless, ways to further strengthen parliamentary oversight of Europol's activities, both by the European and the national Parliaments, are currently being explored at EU level, [105] in line with the 2010 Declaration of Brussels which called for concrete measures to improve democratic oversight of the intelligence and security services in EU member states.[106]

2.3. EASO

The youngest of the EU's 'home affairs' agencies, EASO was formally established on 19 May 2010 with the adoption of the Regulation establishing a European Asylum Support Office (hereinafter referred to as the EASO Regulation).[107] The EASO Regulation contains several innovative features, particularly as regards EASO's governance and accountability aspects, and could be considered something of a model in EU agency-building in this regard. The agency, headquartered in Valletta, Malta, began part of its activities in November 2010 and became fully operational in June 2011.[108]

2.3.1. Mandate

EASO was established in order to "help to improve the implementation of the Common European Asylum System… to strengthen practical cooperation among Member States on asylum and to provide and/or coordinate the provision of operational support to Member States subject to particular pressure on their asylum and reception systems".[109]

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[102] M. Busuioc, "Accountability, control and independence: The case of European agencies", *European Law Journal*, Vol. 15, No. 5, 2009, p. 613.

[103] R. Roncini, "Relationship between Europol and Organs of the Council", Letter from the Chairman of the Europol Management Board to the Article 36 Committee, 12838/03, Brussels, 30 September 2003.

[104] Art. 48 of the Europol Council Decision.

[105] European Commission, Communication on the Procedures for the Scrutiny of Europol's Activities by the European Parliament together with National Parliaments, COM(2010) 776, Brussels, 17 December 2010(d). See also Conference of the Speakers of the Parliaments of the European Union, Presidency Conclusions, Brussels, 4-5 April 2011.

[106] One such measure is the launch of a network of European expertise relating to the monitoring of intelligence services (ENNIR – European Network of National Intelligence Reviewers) whose primary objective would be to improve the democratic control of the functioning of the security and intelligence services. See Conference of the Speakers of the Parliaments of the European Union, Presidency Conclusions, Brussels, 4-5 April 2011, p. 7.

[107] European Parliament and Council of the European Union, Regulation (EU) No. 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office, OJ L 132/11, 29.05.2010.

[108] European Commission, "The European Asylum Support Office is now fully operational", Press Release, Brussels, 17 June 2011(a).

[109] Art. 1 of the EASO Regulation.

Recital 14 of the EASO Regulation limits the agency to a non-decisional role, with no direct or indirect powers on the decisions by Member State authorities on individual applications for international protection. Rather the purpose of the agency is to "facilitate, coordinate and strengthen practical cooperation among Member States" on the implementation of the Common European Asylum System (CEAS),[110] to provide "operational support" to Member States subject to "particular pressure" on their asylum and reception centres,[111] and to provide "scientific and technical assistance", drawing on its role as an "independent source of information."[112] As will be shown, there is nevertheless scope within EASO's formal tasks to have a substantial impact on national asylum procedures and, by extension, the rights of individual asylum seekers.

2.3.2. Tasks

EASO's mandate consists of three principal tasks:

- Supporting practical cooperation among Member States on asylum
- Supporting Member States under 'particular pressure'
- Contributing to the implementation of the Common European Asylum System.

The first task, "Supporting practical cooperation on asylum"[113] primarily refers to activities enabling the exchange of information and the sharing of best practices in asylum matters between Member States. One of the most important tasks in this category is the gathering of information and preparing of reports on asylum seekers' countries of origin.[114] Sensitivities surrounding country of origin information and analysis, given its centrality for determining national asylum decisions, prompted the insertion in the EASO Regulation of a safeguard clause stipulating that country of origin analysis shall not purport to give instructions to Member States about the granting or refusal of applications for international protection.[115]

Under practical cooperation, EASO is also charged with supporting relocation within the EU, and developing training programmes. Although training programmes can include participants such as national judges, the Regulation is careful to maintain that training is "without prejudice to national systems and procedures".[116] Finally practical cooperation also extends to the external dimension of the CEAS, encompassing issues of regional resettlement and capacity-building in third countries.[117]

In the second task to support "Member States subject to 'particular pressure'", EASO will gather information to identify and formulate potential emergency measures, may set up an early warning system for detection of Member States under pressure and coordinate supporting actions, including the deployment of asylum support teams.[118] Asylum support teams, to some extent modelled on the RABITs in the Frontex Regulation (see above),[119] can be deployed on the territory of a Member State under pressure, to provide operational and technical assistance. Deployment is initiated by a request from a Member State, and

[110] Ibid., Art. 2(1).
[111] Ibid., Art. 2(2).
[112] Ibid., Art. 2(3).
[113] Ibid., section 1.
[114] Ibid., Art. 4.
[115] Ibid., Art. 4(e).
[116] Ibid., Art. 6.
[117] Ibid., Art. 7.
[118] Ibid., Arts. 8-10.

coordinated by EASO on the basis of an Operating Plan drawn up and signed by EASO's Executive Director and the requesting Member State.[120] Member states are obliged to make their experts available for deployment in asylum support teams.[121]

The first deployment of an EU asylum support team has already taken place in Greece. On 1 April 2011, the EASO Executive Director and the Greek Minister of Citizen Protection signed an Operating Plan which foresees the deployment of 23 teams to Greece (around 40–50 experts from EU Member States) over a two-year period.[122] They will provide assistance on areas including training, screening, backlog management, general management of asylum and reception facilities, expertise on vulnerable groups and IT expertise.[123]

The agency's third task, "contributing to the implementation of the CEAS" requires EASO to compile information on national asylum systems, including application of EU law, national legislation and case law and to draw up an annual report of asylum in the EU.[124] It also allows EASO to draw up technical documents on the implementation of EU asylum instruments, including guidelines and operating manuals.[125] It has been commented that this provision could, despite the limitations on the agency's mandate, enable EASO to have a certain influence on the asylum systems of Member States. Though framed as technical documents they fall within the category of 'soft' law and policy that ultimately might have a policy impact (see Section 6). By being formally adopted by EASO's management board, these technical documents could also potentially carry a legal value.[126]

In addition to the agency's three-part mandate, EASO may establish relations with third countries and cooperate with third countries concerning technical aspects of policy "within the framework of working arrangements concluded with those countries".[127] Further, the office is called upon to collaborate with Frontex, FRA, UNHCR and other international organisations.

In sum, and despite the inclusion of the safeguard clause in the EASO Regulation, in practice several activities within EASO's legal mandate (assistance in screening by asylum support teams, development of technical documents, provision of country of origin information reports and training of national experts, including members of the judiciary) imply that the agency could have an important influence on Member States' asylum systems, including (indirectly) individual asylum decisions, a possibility which will be explored further in Section 5.3. Such an impact could be further deepened should EASO follow the example of Frontex and Europol in progressively expanding its actual activities beyond the legal remit set down in its founding Regulation. Given the dynamism inherent to EU agencies, this would not be entirely unforeseen. Such an expansion may involve a

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[119] F. Comte, "A New Agency is Born in the European Union: The European Asylum Support Office", *European Journal of Migration and Law*, Vol. 12, No. 12, 2010, p. 400.
[120] Arts. 17 and 18 of the EASO Regulation.
[121] Ibid., Art. 16.
[122] European Commission, The European Asylum Support Office (EASO), MEMO/11/415, Brussels, 19 June 2011(g).
[123] European Asylum Support Office Work Programme, February 2011, p.12.
[124] Arts. 11 and 12 of the EASO Regulation.
[125] Ibid., Art. 12.
[126] See F. Comte, "A New Agency is Born in the European Union: The European Asylum Support Office", *European Journal of Migration and Law*, Vol. 12, No. 12, 2010, p. 402; see also Odysseus Network, *Setting up a Common European Asylum System – Report on the application of existing instruments and proposals for the new system,* Report for the European Parliament, Directorate-General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs, 2010, p. 36 *(http://www.statewatch*.org/news/2010/sep/ep-study-eu-asylum.pdf).
[127] Art. 49.2 of the EASO Regulation.

broadening of EASO's research activities to overlap (or substitute) those of the Fundamental Rights Agency (FRA), or alternatively, could transpire via inter-agency cooperation or relations with third countries. Both legal provisions covering inter-agency cooperation (e.g. with Frontex) and relations with third countries are relatively open and require further definition, leaving some scope for interpretation. For instance, a Commission Communication of 24 May 2011, adopted in response to the migration flows from the Southern Mediterranean in the first half of 2011, calls upon EASO to support capacity-building efforts by North African countries "for the efficient management of migration" as part of the conditions attached to the creation of Mobility Partnerships with those countries.[128]

2.3.3. Governance and accountability

While globally EASO follows the same governance structure as other EU agencies, there are a few noteworthy changes. As with Frontex and Europol, a Management Board is responsible for directing and managing the agency comprising one representative per Member State. As in the case of Frontex (but not Europol), the Commission has two votes. However, the UNHCR has also been granted a place on the management board of EASO, albeit as a member with no voting rights. It also participates in the agency's Consultative Forum (see below) and working groups, and is covered by a special budgetary provision.[129]

The management board appoints the Executive Director from a list of candidates drawn up by the Commission. In addition to the day-to-day running of the agency, their tasks include drafting country-of-origin information reports and managing the procedure for the deployment of asylum support teams.[130] However, the appointment procedure differs from most other agencies in terms of the strong degree of intervention by the European Parliament. Article 30.1 of the EASO Regulation states that, before appointment, the candidate selected by the management board shall be invited to make a statement before the European Parliament. The Parliament then delivers an opinion on the candidate and the management board is required to inform the Parliament of the manner in which that opinion is taken into account. This new formula, which could be seen as part of a new model for involving the Parliament in the governance of agencies, was inserted against a background of explicit inter-institutional efforts to improve the governance and accountability of EU agencies,[131] as well as a response to pressures stemming from civil society.[132]

Similar concerns have also given rise to another innovation in EASO's governance structure in the creation of a Consultative Forum comprising civil society organisations aimed to provide a formalised mechanism for dialogue between EASO and relevant stakeholders.[133]

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[128] European Commission, Communication on a Dialogue for Migration, Mobility and Security with the Southern Mediterranean Countries, COM(2011) 292 final, Brussels, 24 May 2011(c).
[129] Art. 50 of the EASO Regulation.
[130] Ibid., Arts. 30-31.
[131] To this effect, an inter-institutional working group was established by the European Parliament, the Council and Commission to "assess the coherence, effectiveness, accountability and transparency of regulatory agencies and to find common ground on how to improve their work". See European Commission, "EU starts discussions on European Agencies", Press Release IP/09/413, Brussels, 18 March 2009(a); see also Annex 1 of Council of the European Union, Position at first reading adopted by the Council on 25 February 2010 with a view to the adoption of a Regulation of the European Parliament and of the Council establishing a European Asylum Support Office – Statement of the Council's reasons, 16626/09, ADD 1 REV 1, Brussels, 3 February 2010(g).
[132] See for instance, European Council on Refugees and Exiles (ECRE), ECRE Comments on EU plans to establish a European Asylum Support Office (EASO), Ado5/12/2008/ext/AP, ECRE, Brussels, 2008 (http://www.ecre.org/topics/areas-of-work/protection-in-europe/129.html).
[133] Art. 51 of the EASO Regulation.

The Forum and its tasks are coordinated and supervised by the agency's Director,[134] and is scheduled to hold its first meeting in November 2011.[135] The agency can also set up expert working groups.[136]

The governance structure of EASO reflects clear efforts to improve accountability, and much progress on this account can be linked to the strong role of the European Parliament as co-legislator in the negotiations on the EASO Regulation and the active role of the rapporteur, Jean Lambert. Nevertheless, even in the case of a first-pillar EU agency such as EASO, it is possible to identify traces of inter-governmental ways of working. For instance, the composition of the management board, with two votes accorded to the Commission, still leaves the Commission in a minority and control primarily in the hands of the Member States. Moreover, the secrecy that has characterised the operations of agencies such as Frontex and Europol can also be detected, even at this early stage, in the actions of EASO. For instance, it appears that the Operating Plans that form the basis for the deployment of asylum support teams are not accessible to the public. A request submitted by the authors of this study for a copy of this document received no response from the agency.[137]

3. OVERVIEW OF THE CHARTER OF HUMAN RIGHTS

Having set out the remits and competences of the EU agencies under analysis, this section introduces the EU Charter of Fundamental Rights, with an explicit focus on how the Charter becomes important for individuals. It examines how individuals can access rights under the Charter (with special attention to the distinction the Charter makes between principles and rights), and includes specific reference to the Court of Justice of the European Union's (CJEU) approach to the Charter and its application. The approach of the EU institutions to the Charter and its implementation will be explored before turning to examine the ways in which the EU agencies (Frontex, Europol and EASO) have formally recognised and integrated the Charter in their mandates and activities.

3.1. Introduction to the Charter

The EU Charter of Fundamental Rights[138] was solemnly declared by the European Parliament, the Council and the Commission on 18 December 2000 at the Nice Summit. However, as a result of disagreement among the Member States the Charter was not, at that time, given legally binding effect within the EU order. The Charter was introduced as a bill of rights into the draft Constitutional Treaty which was proposed to the Member States for ratification in 2004, but it failed to garner sufficient popular support in two Member States.

When the Lisbon Treaty was adopted, Article 6(1) Treaty on European Union provides that the Charter will have the same legal value as the Treaties themselves. However, the same article provides that the Charter cannot extend, in any way the competences of the EU and further provides that the provisions of the Charter shall be interpreted in accordance with the general provisions of the Charter contained in its Chapter VII and with due regard to the explanations referred to in the Charter that set out the sources of the provisions contained in it.

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[134] Ibid., Art. 31.6.
[135] European Asylum Support Office Work Programme, February 2011, p.14.
[136] Art. 32 of the EASO Regulation.
[137] See also the EASO Monitor website article, "Document request denied by the Commission", EASO, Valetta, 2 May 2011 (http://easomonitor.blogspot.com/2011/05/document-request-denied-by-commission.html).
[138] Charter of Fundamental Rights of the European Union, OJ C 83/02, 30.03.2010.

We will examine the consequences of this provision below. Article 6(3) TEU provides that fundamental rights, as guaranteed by the European Convention on Human Rights (ECHR) and as they result from the constitutional traditions of the Member States, constitute general principles of Union law. In this way the Charter is firmly tied to the Council of Europe's ECHR, thus limiting the possibility for divergence between the two regimes of fundamental rights that would be detrimental to individual rights.

The transformation of the Charter from a document with persuasive authority for the implementation of fundamental rights for individuals in the European Union to a binding one is very important. It has often been noted that the EU has no other provision that guarantees the fundamental rights of individuals. Indeed, the EU, founded as it was for the purpose of economic convergence arrived relatively late to the issue of fundamental rights.[139] However one of the key challenges has been how to make the Charter a living document for those whose lives are touched by EU law.[140]

3.2. The Charter in the European institutions

It is now more than a year and a half since the Charter gained its new status as legally binding. In section 4 we will consider the provisions of the Charter that have the greatest impact on the activities of the EU agencies under consideration in this study. Here we will look at the application of the Charter from a more general perspective.

In October 2010, the Commission issued a Communication on a strategy for the effective implementation of the Charter.[141] The purpose of the Communication is to set out the Commission's approach to implementation of the Charter. It notes that the Charter applies primarily to the institutions and bodies of the Union,[142] although it also applies to the Member States when they are implementing Union law. The Commission is particularly clear in its Communication that the Charter is not an abstract document but "it is an instrument to enable people to enjoy the rights enshrined within it when they are in a situation governed by Union law."[143] The emphasis here on accessibility for individuals is particularly important. As guardian of the Treaties, the Commission has an important role in setting out the scope of the treaties and the meaning of their provisions. This is of course without prejudice to the interpretative obligations of the Court of Justice of the European Union.

The Commission is equally clear that the Charter not only applies to the internal policies of the EU but also to their external ones.[144] In all its actions, the Commission affirms, the EU must be above reproach when it comes to fundamental rights.[145] The Commission's Communication outlines how the Charter must be taken into account in the legislative process, when Member States are implementing EU law and how the public is to be made aware of their rights under the Charter. This final aspect of the Communication warrants some attention because of its relation to the central issue of this study. The Commission is

[139] From the vast literature on human rights as general principles of EU law, see B. de Witte, "Past and Future Role of the European Court of Justice in the Protection of Human Rights", in P. Alston (ed.), *The EU and Human Rights,* Oxford: Oxford University Press, 1999, and also T. Tridimas, *The General Principles of EU Law*, 2nd edition, Oxford: Oxford University Press, 2006, with further references.

[140] On account of protocols to the Treaty on European Union, both Poland and the UK have limited the power of their courts to interpret provisions of the Charter vis-à-vis national law.

[141] European Commission, Communication on a Strategy for the Effective Implementation of the Charter of Fundamental Rights by the European Union, COM(2010) 573, Brussels, 19 October 2010(g).

[142] Art. 51 of the Charter of Fundamental Rights of the European Union.

[143] European Commission, Communication on a Strategy for the Effective Implementation of the Charter of Fundamental Rights by the European Union, COM(2010) 573, Brussels, 19 October 2010(g), p. 3.

[144] Ibid., p. 4.

particularly concerned that the public is aware of the means of redress regarding breaches of Charter rights. It notes a Flash Eurobarometer report indicating that 80% of young people in the EU do not know how to defend their rights.[146] There is concern that people do not know where to go to get redress (the Communication indicates some frustration at the complaints the Commission receives where it is unable to do anything for the complainant not as a result of the inadequacy of the complaint but because of the lack of competence of the Commission). The Commission sets out its list of actions designed to remedy the situation of lack of information.

On 11 February 2011, the Council adopted its conclusions on the role of the Council in ensuring the effective implementation of the Charter.[147] The Council acknowledges its role as co-legislator to ensure that all EU legislation is Charter compatible.[148] It is particularly cognizant of the duty to ensure fundamental rights compliance in the full procedure of legislative actions including in the transparency of the process in order to facilitate civil society access to information about decision making.[149] The Council requires that the Member States ensure that any proposed amendments they intend to table at the Council are compliant with fundamental rights before their presentation.[150] If respected, this requirement would prevent debate in the Council of proposed legislative amendments that are unacceptable in any event because of their incompatibility with the Charter.

As regards the 'heavy lifting' on Charter rights, the Council created an ad hoc Working Group on Fundamental Rights and Citizenship (with the curious acronym of FREMP) which has been charged with producing methodological guidelines on the main aspects of human rights scrutiny by 30 June 2011.[151] The Council reaffirms its intention to take full account of the reports of the Fundamental Rights Agency (FRA) including on thematic issues and recommends FREMP to enter into cooperation with the FRA.[152] It is not made clear in the Conclusions what the legal basis would be for the FRA to enter into cooperation with an ad hoc working group of the Council which because of its own intermediate and ad hoc status may or may be reflect the positions or views of the Council on any particular issue.

The European Parliament has been the most outspoken supporter of the Charter from the launch of the proposal to create it. Not only has it participated fully in all the steps towards the incorporation of the Charter into EU law but it has never wavered in supporting the full and uncompromising application of the Charter to all EU law not least as applied by the EU institutions and the Member States (an aspect perhaps most noticeable by its absence from the Council's Conclusions). On 15 December 2010, the Parliament adopted a Resolution on the effective implementation of the Charter after the entry into force of the Lisbon Treaty.[153] In acknowledging the central role of fundamental rights as the core of democracy, the Parliament called on "all EU institutions, Member States' governments and parliaments to build on the new institutional and legal framework created by the Treaty of Lisbon to devise a comprehensive internal human rights policy for the Union which ensures

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145 Ibid.
146 Eurobarometer, *The Rights of the Child, Analytical Report,* Flash Eurobarometer No. 273, European Commission, Brussels, May 2009.
147 Council of the European Union, Draft Council Conclusions on the role of the Council of the European Union in ensuring the effective implementation of the Charter of Fundamental Rights of the European Union, 6387/11, Brussels, 11 February 2011(b).
148 Ibid., para. 4.
149 Ibid., para. 7.
150 Ibid., para. 10.
151 Ibid., para. 16.
152 Ibid., paras. 18–20.
153 European Parliament, Resolution on the situation of fundamental rights in the European Union (2009) – Effective implementation after the entry into force of the Treaty of Lisbon, T7-0483/2010, 15 December 2010.

effective accountability mechanisms, both at national and EU level, to address human rights violations."[154] The Parliament was particularly concerned about the everyday protection of fundamental rights and expressed its unflinching commitment to the individual's right to enjoy Charter freedoms.[155] The Parliament was adamant that all European agencies uphold their commitment to the protection of fundamental rights and integrate a fundamental-rights approach into all their activities and called on the EU to ensure full legal accountability of its agencies.[156] This resolution is accompanied by efforts of the Parliament to improve the democratic oversight of EU agencies, including by national parliaments.[157] To this end the Conference of the Parliamentary Committees for the Oversight of Intelligence and Security Services of the Member States of the EU adopted in October 2010 the Brussels Declaration,[158] calling for national parliaments to be able to monitor the activities of the security and intelligence services with a view to the protection of basic freedoms and rights. The first steps have started with Europol, with national parliaments proposing the establishment of an inter-parliamentary body to scrutinise the activities of this agency.[159] Taken together, these initiatives form the basis of the current study.

Following these developments, in March 2011, the Commission produced its first annual report on the application of the EU Charter.[160] The report sets out the concrete problems that people have encountered in the EU with Charter implications and what the EU institutions have done to resolve them.[161] It notes a rising interest in the Charter and in how to enjoy the rights that are promised therein have proven unavailable in practice. The Commission confirms its commitment to the full implementation of the Charter both by the EU and Member State institutions in the application of EU law.[162] The report notes issues about the Charter rights contained in the chapter on "Dignity", in relation to surveillance of the external sea borders, the proposed amendments to Frontex's mandate and airport scanner proposals.[163] Other key areas of concern regarding Charter compatibility that the report highlights include:

- Data protection
- Access to justice
- Treatment of Roma
- Equality between men and women
- Accession to the ECHR.

The importance of ECHR accession becomes particularly acute in light of the potential for discord between the decisions of the European Court of Human Rights on the correct interpretation of the ECHR and EU measures that are not clearly consistent with that interpretation.

[154] Ibid., para. 1.
[155] Ibid., para. 2.
[156] Ibid., para. 34.
[157] E. de Capitani, "The Democratic Accountability of the EU's Area of Freedom, Security and Justice Ten Years On", in E. Guild, S. Carrera and A. Eggenschwiler (eds), *The Area of Freedom, Security and Justice Ten Years On: Successes and Future Challenges under the Stockholm Programme*, CEPS, Brussels, 2010.
[158] "Declaration of Brussels", 6th Conference of the Parliamentary Committees for the Oversight of Intelligence and Security Services of the European Union Member States, Brussels, 1 October 2010.
[159] Conference of the Speakers of the Parliaments of the European Union, Presidency Conclusions, Brussels, 4-5 April 2011.
[160] European Commission, *2010 Report on the Application of the EU Charter of Fundamental Rights*, COM(2011) 160, Brussels, 30 March 2011(b).
[161] Ibid., p. 2.
[162] Ibid., p. 4.
[163] Ibid., p. 5.

Lastly but not least, the CJEU has been engaged in interpreting the Charter, although its engagement with the Charter commenced well before the entry into force of the Lisbon Treaty.[164] The importance of the CJEU's involvement is critical as it also affects the issue of access to justice. While access to justice must be ensured at the national level, the CJEU has a critical role in interpreting what this means for the EU. The Court's practice before the entry into force of the Treaty of Lisbon was to use the Charter as a secondary measure which could reaffirm rights that were already part of the general principles of EU law.[165] During this period it did not comment on the possibility of the Charter having any other more principal role. Since the entry into force of the Lisbon Treaty, the CJEU has repeated Article 6(1) TEU to the effect that the Charter has the 'same legal value' as the Treaties.[166] 26 CJEU judgments mention the substance of the Charter in the 17 months after the Treaty of Lisbon entered into force. This constitutes a very substantial increase in the importance the CJEU places on the Charter after the Lisbon Treaty. The General Court, which has only mentioned the Charter in three judgments in 2010,[167] has stuck with the prior practice of referring to the Charter only as a 'reaffirmation' of the general principles, and has continued with this approach in 2011 to date.[168]

3.3. The Charter and EU agencies

The Charter's legally binding status and the subsequent rise of fundamental rights on the EU agenda have not gone unnoticed in the activities of EU agencies. To varying degrees, steps have been taken to formally integrate a fundamental-rights approach into the founding regulations of Frontex, Europol and EASO. Although the integration of fundamental rights considerations into the agencies' work is to be welcomed, the central question remains of course to what extent fundamental rights principles are translated into practice.

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[164] The authors would like to thank Prof. Steve Peers of Essex University who shared some of his research, as yet unpublished, on the pronouncements by the Court of Justice of the European Union on the Charter.

[165] See the following cases: C-432/05, *Unibet* [2007] ECR I-2271, para. 37; C-303/05, *Advocaten voor de Wereld VZW* [2007] ECR I-3633, para. 46; C-438/05, *Viking Line ABP* [2007] ECR I-10779, para. 44; C-341/05, *Laval* [2007] ECR I-11767, para. 91; C-450/06, *Varec* [2008] ECR I-581, para. 48; C-244/06, *Dynamic Medien* [2008] ECR I-505, para. 41; C-402/05 P and C-415/05 P, *Kadi* [2008] ECR I-6351, para. 335; C-47/07 P, *Masdar* [2008] ECR I-9761, para. 50; C-385/07 P, *Der Grüne Punkt* [2009] ECR I-6155, para. 179; and C-12/08, *Mono Car Styling* [2009] ECR I-6653, para. 47. For a stronger reference, however, see C-275/06, *Promusicae* [2008] ECR I-271, para. 64. This list only includes cases in which the Court discussed the substance of the Charter. For a detailed overview, see V. Bazzocchi, "The European Charter of Fundamental Rights and the Courts", in G. De Federico (ed.), *The EU Charter of Fundamental Rights: From Declaration to Binding Instrument*, Dordrecht: Springer, 2011.

[166] "Refer to the following cases: Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08, *Abdulla et al.*, 2 March 2010; Case C-578/08, *Chakroun,* 4 March 2010; Joined Cases C-188/10 and C-189/10, *Melki and Abdeli*, 22 June 2010; Case C-407/08 P, *Knauf Gips*, 1 July 2010; Case C-400/10 PPU, *McB*, 5 October 2010; Joined Cases C-92/09 and C-93/09, *Volker and Schecke*, 9 November 2010; Case C-279/09, *DEB*, 22 December 2010; and Case C-236/09, *Test-Achats*, 1 March 2011, *Commission v. Germany* and *Kucukdeveci*. In *Test-Achats*, the Court did not refer expressly to Art. 6(1) TEU. See also the order in C-457/09, *Chartry*, 1 March 2011 (not yet reported), para. 24."

[167] In this regard, see the following cases: T-181/08, *Tay Za*, judgment of 19 May 2010, para. 141; T-111/07, *Agrofert Holdings*, judgment of 7 July 2010, para. 75; and T-49/07, *Fahas*, judgment of 7 December 2010 para. 59 and (more cogently) para. 63 (none yet reported). This compares with three references to the Charter in the judgments of the Court of First Instance (as it was then) in 2009, namely Cases T-404/06 P, *ETF v. Landgren* [2009] ECR II-2841, para. 148; T-437/05, *Brinks Security* [2009] ECR II-3233, para. 75; and T-390/08, *Bank Melli* [2009] ECR II-3967, para. 105.

[168] Refer to Cases T-117/07 and T-121/07, *Areva*, judgment of 3 March 2011, para. 224 and T-461/07, *Visa International*, judgment of 14 April 2011, para. 231 (neither yet reported).

3.3.1. Frontex

The most noticeable shift can be seen in the efforts made by Frontex. Following criticism and pressure by humanitarian organisations across the EU, Frontex has taken a number of steps to demonstrate its commitment to fundamental rights. In 2007, a liaison officer from the UN Refugee Agency (UNHCR) was appointed to work with Frontex to "help ensure that border management complies with the international obligations of EU Member States".[169] In June 2008, Frontex signed a Working Agreement with UNHCR. The agreement covers a number of areas of cooperation such as regular consultations, measures to integrate human rights into the training of border guards,[170] and even the cooperation with UNHCR during operational activities.[171]

In addition, Frontex has signed a Cooperation Agreement with the Fundamental Rights Agency (FRA) in May 2010.[172] Cooperation between the two agencies covers training, the sharing of expertise and development of good practices, including with respect to joint operations and Joint Return Operations. The agreement with the FRA also foresees collaboration in data collection and sharing of information on the situation at the EU's external borders.

It might also be noted that the 2010 Decision regulating maritime surveillance operations, which contains rules and non-binding guidelines, including on fundamental rights compliance,[173] came as a direct response to the criticism and questions surrounding Frontex operations at sea. Though non-legally binding, the fact that Frontex has indicated its commitment to incorporate the guidelines into its operational plans should strengthen their practical applicability.

In March 2011, these same pressures have led the agency's Management Board to go further still, adopting a Fundamental Rights Strategy which sets out the agency's commitment to fundamental rights and obligations under the Charter. The strategy lays down specific measures to operationalise these objectives, including the commitment to put in place effective monitoring and reporting systems to cover joint operations (JOs) and joint return operations (JROs), and to include staff with fundamental rights expertise in operations that are "particularly challenging from a fundamental rights point of view".[174] The strategy is to be followed by an Action Plan to be integrated into the agency's programme of work. Although the measures outlined above have been welcomed, they stop short of imposing legally binding obligations on the Frontex agency.

This criticism will be partly addressed with the adoption of the new Frontex Regulation. As Table 1 demonstrates, there has been a clear attempt, in the Commission proposal for the

[169] See the interview of 18 May 2010 with Michele Simone, the UNHCR's senior liaison officer with Frontex on the UNHCR's website (http://www.unhcr.org/4bf29c8b6.html).

[170] UNHCR, "UNHCR agreement with Frontex", Press Release, UNHCR, Geneva, 17 June 2008 (http://www.unhcr.org/4857939e2.html). For an example of one of the outcomes of this cooperation, see UNHCR, *Protection Training Manual for European Border and Entry Officials*, UNHCR, Geneva, 1 April 2011 (http://www.unhcr.org/4d948c736.html).

[171] For instance, during air border operations focusing on minors, the UNHCR cooperated to improve victim protection. See Frontex, *Frontex General Report 2011*, Frontex, Warsaw, 2011(f). p. 16.

[172] Cooperation Agreement between the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union and the European Union Agency for Fundamental Rights, 26 May 2010 (http://www.fra.europa.eu/fraWebsite/attachments/Cooperation-Agreement-FRA-Frontex_en.pdf).

[173] Council of the European Union, Decision 2010/252/EU of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 111/20, 04.05.2010(c).

new Frontex Regulation and in the European Parliament's amendments to the draft Regulation, to move fundamental rights considerations closer to the centre of the agency's activities. The draft Regulation contains an explicit article on the agency's Fundamental Rights Strategy (Article 26(a)), which now legally obliges Frontex to implement and monitor its fundamental rights strategy, to appoint a fundamental rights officer and to set up a consultative forum on fundamental rights that will assist the agency's management board. In addition, the Executive Director of Frontex will be empowered to suspend or terminate an operation should he/she identify a violation of the law or fundamental rights,[175] and the agency will develop a fundamental rights-compliant code of conduct to underpin its operational activities.[176] Further, and whereas the current Regulation includes only one standard reference to the Charter in Recital 22, the new Regulation includes several explicit references to respect for fundamental rights under the Charter, including in Article 1 on the establishment of the agency, with specific reference to the agency's obligations related to access to international protection.[177] However, the lack of independent and effective monitoring and reporting mechanisms in the final text of the Regulation raises questions as to the extent to which these fundamental rights aspirations will be realised in practice. The Council's refusal to accept the inclusion of such mechanisms (proposed by the European Parliament) has led to the decision of the European Greens to abstain from the final parliamentary vote on the Frontex Regulation.[178]

[174] Frontex, Frontex Fundamental Rights Strategy, Frontex, Warsaw, March 2011(e).
[175] See Art. 3.1(a) of the agreed text of Council of the European Union, *Proposal for a Regulation of the European Parliament and the Council amending Council Regulation (EC) No. 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX) – Analysis of the final compromise text with the view to agreement*, 12341/11, Brussels, 5 July 2011(e).
[176] Ibid., Art. 2(a).
[177] Ibid., Art. 1.2.
[178] The Greens/European Free Alliance in the European Parliament, "Révision Frontex: des garanties insuffisantes pour le nouveau mandat de l'agence", Press Release, 12 July 2011.

Table 1. Frontex and fundamental rights

Regulation *(2004)*	**Commission proposal** *(February 2010)*	**EP amendments** *(March 2011)*	**Agreed text** *(June 2011)*
General commitment to Charter rights in preamble	*Maintained* and in Articles	*Maintained* and in Articles	*Maintained* and in Articles
-	Specific commitment to non-refoulement	*Maintained*	*Maintained*
-	Code of conduct for JROs	*Maintained* and for all other operations	*Maintained* and for all other operations
-	-	Human Rights Advisory Board to assist in agency *activities with impact on fundamental rights* with *full access to information* (including access to evaluation reports of e.g. JOs) consulted for *development of* Code of Conduct and Common Core Curriculum and *shall consist of* inter alia EASO, FRA and UNHCR	*Not maintained:* Consultative Forum to assist in *fundamental rights matters* with *access to information concerning respect for fundamental rights*, consulted for *development and implementation* of Fundamental Rights Strategy, Code of Conduct, Common Core Curriculum; *with participation of inter alia* EASO, FRA and UNHCR
-	Cooperation with third States should respect fundamental rights	*Maintained*	*Maintained*
-	-	No operations under third State jurisdiction	Operations in third States territory in respect of EU legislation
-	-	General rule on embarkation: respect for non-refoulement and in accordance with EU and international law	*Maintained*
-	Agency may terminate operations if conditions are no longer fulfilled.	*Maintained* and agency to suspend operations in case of violations of fundamental rights or international	*Maintained* and Executive Director power to suspend/terminate operation in case of violations of fundamental rights or international

		protection obligations	protection obligations *if they are serious and likely to persist*
-	-	-	Fundamental Rights Officer
-	-	Guidelines for identification of persons in need of protection included in operational plan	*Not maintained*
-	Respect for fundamental rights, human dignity and non-discrimination in border guards work.	*Maintained* and respect for access to asylum	*Maintained* and respect for access to asylum
-	Personnel receives training on fundamental rights	*Maintained*	*Maintained*
-	JRO funding conditional on respect of the Charter	*Maintained*	*Maintained*
-	Independent monitoring of JROs	*Maintained*; and monitors full access to all facilities, including observers from international organisations	*Not maintained;* although monitoring maintained there is no reference to 'independent' or involvement of international organisations
-	Representatives of third countries, EU agencies and international organisations may be invited to participate in Frontex activities	*Maintained* but with the consent of participating Member States	*Maintained* but only if observers' presence is in accordance with activities' objectives, contribute to cooperation and exchange of best practices and does not affect safety; consent of participating Member States needed
No personal data competence	No personal data competence	Respect for principles of necessity and proportionality in personal data processing	*Maintained*

Sources: Council Regulation (EC) 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ 2004, L349/1; Commission, *Proposal for a regulation of the EP and the Council amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union*, COM(2010) 61 final; Council, Multicolumn document, 8707/11, 11 April 2011; Statewatch, *The Frontex Regulation - Consolidated text after 2011 amendments*.

3.3.2. Europol

The impact of the Charter on Europol's working methods has been less explicit. This is partly due to the fact that Europol's processing of personal data – the most sensitive activity of the agency from a fundamental rights perspective – is already covered by a relatively comprehensive system of data protection. Europol relies on its own internal data protection system composed of a Data Protection Officer and a Joint Supervisory Body (JSB). The latter was established in 1998 as an independent entity mandated to review Europol's activities where they concern the processing of personal data.[179] This body is composed of two representatives of each of the national supervisory bodies appointed by the Member States. The JSB fulfils a quasi-judicial function, considering citizens' complaints regarding access and correction of personal data held on Europol's systems. The JSB Appeals Committee's decisions on those matters are final and cannot be challenged in any other body. It also fulfils an advisory role, where it concerns the opening of analytical work files and agreements with third states and bodies.

While Europol's data protection regime has been commended for being particularly robust, there are nevertheless weaknesses in the framework, which will be explored in further detail in section 5.2 below.

Beyond data protection safeguards, there are tentative signals that Europol may be starting to take account of fundamental rights more generally in its working practices. The Europol Council Decision includes a specific provision (Recital 24) stating that the Decision "respects fundamental rights and observes the principles recognized in particular by the Charter of Fundamental Rights of the European Union". Europol also holds regular meetings, albeit on an informal, ad hoc basis, with the Fundamental Rights Agency, and is reportedly set to conclude a working agreement with the FRA in the near future. However, overall there is scant acknowledgement of fundamental rights considerations in the agency's publications, activity reports and press releases.

3.3.3. EASO

As the newest JHA agency, EASO incorporates some core mechanisms for the integration of fundamental rights considerations into its design. The most notable of these is the specific role allocated to the UNHCR by the agency. The EASO Regulation obliges the agency to:

> Act in close cooperation with the UN High Commissioner for Refugees… the roles of the UNHCR and the other relevant international organizations should be fully recognized and those organizations should be fully involved in the work of the Support office.

To this end, the UNHCR sits as a non-voting member of the management board, participates in the expert working groups and is a member of the Consultative Forum. It is also subject to a special financial arrangement.[180] Further, EASO is also mandated to cooperate with the Fundamental Rights Agency,[181] and to this end a formal working agreement can be anticipated.

[179] JSB, *Joint Supervisory Body Activity Report: October 1998–October 2002*, Brussels, 2004 (http://europoljsb.consilium.europa.eu/reports/activity-report.aspx?lang=en).
[180] Art. 50 of the EASO Regulation.
[181] Ibid., Recital 11.

One would also expect the mechanisms allowing for the participation of civil society in EASO's internal governance,[182] through both the Consultative Forum and the expert working groups, to stimulate a greater fundamental rights scrutiny from external stakeholders such as NGOs.

Finally, EASO's Regulation makes an explicit acknowledgement of the Charter in Recital 31, repeating the formulation in the Europol constituent act but adding an express reference to Article 18 of the Charter on the right to asylum:

> This Regulation respects fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union and should be applied in accordance with the right to asylum recognised in Article 18 of the Charter.

In summary, the measures outlined above denote the burgeoning formal recognition of fundamental rights principles by EU agencies. However, the official recognition of fundamental rights principles does not guarantee their practical application. The difficulty in ensuring the compliance of agencies' everyday activities with fundamental rights has been highlighted by several civil society and NGO actors and will be explored in section 5 of this study.

4. SPECIFIC PROVISIONS/FUNDAMENTAL RIGHTS OF EU CHARTER AT STAKE: AN EVALUATION

The Charter is the foremost EU commitment to fundamental rights and provides not only a catalogue of the fundamental rights that the Union and all its institutions are legally bound to uphold but also an important political statement of the importance of fundamental rights in the EU. As we have highlighted in section 3, both the political commitment that the Charter constitutes and the legal engagement it embodies must be delivered in good faith and in their totality.

All provisions of the Charter must be fully applied by all EU institutions, agencies and by the Member States and their agencies when implementing EU law. As Frontex, one of the core EU agencies of interest to this report, has stated in its Fundamental Rights Strategy:

> For law enforcement bodies in general and for Frontex in particular, the human rights potentially at stake through the sensitive nature of its activities, include, but are not limited to, the right to life, liberty and security, physical integrity and dignity, prohibition of torture and inhumane or degrading treatment, asylum and international protection, non-refoulement, non-discrimination, prohibition of slavery and forced labour, rights of the child, right to family life, right to health care, effective legal remedy and personal data protection."[183]

EU agencies must ensure the *full* delivery of the Charter's fundamental rights. There is no option of picking and choosing among the rights contained in it. Furthermore, those rights must be respected in keeping with the dignity of the individual.

For instance, one argument that has been made regarding the protection of people leaving the North African coast in small, unseaworthy boats is that it is in keeping with the right to life to prevent them from putting their lives at danger. This argument is incompatible with

[182] Ibid., Recital 12.
[183] Frontex, "Frontex Fundamental Rights Strategy", News Release, Frontex, Warsaw, 31 March 2011(a), p. 2 (http://www.frontex.europa.eu/newsroom/news_releases/art105.html).

and inconsistent with the right to dignity contained in Article 1 of the Charter.[184] As highlighted by Human Rights Watch in its report *Pushed Back, Pushed Around*,[185] it is for the individual to make the choice whether to remain is more intolerable than to leave even if the conditions under which the individual leaves are extremely risky. It is for the EU and Member State institutions to provide international protection to those in need in accordance with the Charter and their international obligations, not to substitute their administrative assessment of the fundamental rights of individuals for those claiming international protection.

Among the most important fundamental rights in the Charter, which runs as a red line through the Charter, is the obligation contained in Article 21 not to discriminate on any grounds such as sex, race, colour, ethnic or social origin, genetic features, belief, language, religion, belief, political or any other opinion, membership of a national minority, property, birth, disability or sexual orientation. In all actions of EU institutions, agencies and those of the Member States in carrying out EU law, this obligation of non-discrimination is at stake. To treat people in similar situations differently on the basis of one of the excluded grounds constitutes discrimination and is contrary to the Charter so long as it is within the scope of EU law. One of the areas of contestation before the CJEU has been the determination of when people are in similar situations and therefore are entitled to non-discrimination. We will not repeat this jurisprudence here, suffice it to note that the CJEU takes an expansive approach to the issue, examining the actual effects of treatment to determine whether unlawful discrimination has occurred or not.[186]

As one of the key concerns of this report relates to how people are treated when they come into contact with EU and Member State officials engaged in border controls of various kinds, it is important also to remember that Article 6 Regulation 562/2006 (the Schengen Borders Code, SBC) states that border guards shall, when carrying out their duties fully respect human dignity.[187] Further the provision goes on to add that while carrying out border checks, border guards shall not discriminate against people on the basis of sex, racial or ethnic origin, religion or belief, age or sexual orientation. In this context, the term border checks must be given a wide meaning to include all checks which have as an objective allowing a person to come to the EU or not, whether or not these take place in the context of a rescue operation at sea.

There are six key provisions of the Charter that are likely to have an impact on the rights of people with whom EU agencies come into contact. The corresponding provisions in the ECHR are among those that foreigners evoke most often before the ECtHR.

- Article 7: the right to protection of private and family life (the corresponding provision of Article 8 ECHR);
- Article 8: the right to data protection;
- Article 18: the right to asylum;
- Article 19: protection against collective expulsion;
- Article 41: the right to good administration; and
- Article 47: the right to an effective remedy.

[184] "Human dignity is inviolable. It must be respected and protected."
[185] Human Rights Watch, *Pushed Back, Pushed Around*, Human Rights Watch, New York, NY, 21 September 2009 (http://www.hrw.org/en/reports/2009/09/21/pushed-back-pushed-around-0).
[186] Case C-555/07, *Seda Kücükdeveci*, 19 January 2010.
[187] European Parliament and Council of the European Union, Regulation (EC) No. 562/2006 of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ L 105/1, 13.04.2006.

In order to understand these provisions three sets of questions are critical:

- What is the status of each provision in the Charter? In which section is it found and with what juridical consequences?
- What interpretative tools are available and prescribed regarding each provision? Article 52 of the Charter is central in this regard[188] also bearing in mind that the TEU itself at Article 6(1) provides that due regard should be given to the explanations referred to in the Charter.
- Has the corresponding provision (if one exists) in the ECHR been the subject of jurisprudence which needs to be accommodated in the EU's interpretation of the provision?

Before considering each provision, an overview of Charter Articles 51 (scope of the Charter) and 52 (limitations on Charter rights) and the Charter's extraterritorial application is of value as it provides general guidance on how to understand Charter rights. The three following sections deal with these matters.

4.1. To whom does the Charter apply?

Article 51 of the Charter reads as follows:

1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.

2. The Charter does not extend the field of application of union law beyond the powers of the union or establish any new power or task for the union, or modify powers and tasks as defined in the treaties.

This Article sets out the scope of the Charter in terms that are not altogether clear. The key question is when is an action that has fundamental rights consequences for individuals within the scope of the Charter? The CJEU has provided some clarification in its judgment in *McB*, concerning EU legislation on parental responsibility and child abduction by a parent.[189] The CJEU divided the question into two parts, the principle of custody and the person with custodial rights and it found that the Charter could be considered only for the purposes of interpreting the EU legislation, and "there should be no assessment of national law as such". A question is currently pending before the CJEU whether an issue falls within the scope of the Charter if it concerns the exercise of an option granted to Member States by EU legislation.[190] It seems likely the answer will be positive on the basis of the CJEU's case law before and after the entry into force of the Treaty of Lisbon.[191]

[188] Art. 52 of the Charter was amended in 2007 (seven years after the Charter was adopted) to include sub-paragraphs 4-7. Thus, they merit particular attention as they were introduced at a time when the legal effect of the Charter was very evident.

[189] The Court also mentioned Art. 51(1) of the Charter in para. 30 of its judgment in *DEB* (Case C-279/09, *DEB*, 22 December 2010), without further elaboration, obviously (and correctly) assuming that the dispute in that case (concerning whether a legal person is entitled to legal aid in order to sue a Member State for damages liability for an alleged breach of EU law) fell within the scope of EU law. The reference to Art. 51(1) was perhaps implicitly intended to make clear that not all disputes about access to legal aid fall within the scope of EU law. Art. 51(1) is also mentioned (without further explanation) in the opinion of 10 February 2011 in Case C-272/09 P, *KME Europe*, pending (para 10).

[190] Case C-411/10, *NS*, pending.

[191] Case C-236/09, *Test-Achats*, 1 March 2011

4.2. What limitations can be placed on Charter rights?

Any limitations on Charter rights need to be specified in either the TEU or the Charter itself. To fulfil this purpose, Article 52 states:

1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

2. Rights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties.

3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

4. In so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.

5. The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.

6. Full account shall be taken of national laws and practices as specified in this Charter.

7. The explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States.

Article 52(2) is important as the Charter provisions, which are the mirror image of rights in the ECHR, appear without the qualifications and limitations that are found in the ECHR. This means that without Article 52(1), the limitations the ECHR places on rights could not be applied. The problem is how far does Article 52(1) go in allowing limits to Charter rights? In *Knauf Gips*[192] about a limitation on access to courts developed by the General Court, the CJEU found that the limitation was not "provided for by law".[193] In the *Volker and Schecke* case,[194] the CJEU made reference to the general limitations rule in Article 52(1) but also found that the specific rules on limitations of ECHR rights were implicit in Articles 52(3) and 53 of the Charter.

[192] Case C-407/08P, *Knauf Gips KG v. European Commission*, para. 91.
[193] On this requirement, see in addition the opinion of 14 April 2011 in Case C-70/10, *Scarlet Extended*, pending.
[194] Case C-92/09, *Volker and Schecke*, 9 November 2010.

The remaining subsections of Article 52 have not yet been the subject of judicial interpretation by the CJEU. It is important to bear in mind that the legality of obstacles to the enjoyment of Charter rights in the form of limitations on those rights will only be compatible with the Charter if they fulfil at least one of the conditions of Article 52. The status of the Council's explanations, which are referred to in Article 6 TEU and Article 52(7) Charter, are only to be given due regard. In the latter reference, the duty to have due regard is placed specifically on courts rather than on other institutions or bodies. This means at the very least that the explanations should be read in conjunction with the Charter right. Exactly what due regard means is unclear; for it is not strictly constraining as is the case of Article 52(3) regarding the ECtHR jurisprudence yet it calls attention to the document.

4.3. Extraterritorial applicability of the Charter

First of all, before discussing the relevant Charter rights, in light of the focus of this study, it is necessary to assess to what extent the rights following from the Charter are applicable in an extraterritorial context. The territorial scope of the Charter is not limited to the geographical definition of the EU. The scope of the Charter is the field of application of the Treaties. Just as in respect of the ECHR, where EU and Member State actors operate outside the physical or sovereign territory of the EU but within the scope of the Treaties, the application of the Charter is determined by the jurisdiction of the actors. The key issue is jurisdiction, not territory. Therefore, the Charter's applicability applies to all actions of the EU institutions and bodies, wherever they are performed.[195] As is outlined in section 4.4, the Charter rights should be interpreted as a point of departure in accordance with the corresponding ECHR rights.[196] Whereas the CJEU has so far not ruled on the extraterritorial applicability of the Charter, the main guidance available to us is hence to look at the case law of the ECtHR. Complete books have been written on this topic; this section highlights the most relevant elements.[197]

It is well-established case law that Convention obligations may extend to actions beyond the territory of a State Party.[198] In *Cyprus v Turkey* the ECtHR held that "the High Contracting Parties are bound to secure the said rights and freedoms to all persons under their actual authority or responsibility, not only when that authority is exercised within their own territory but also when it is exercised abroad".[199] The departing point seems to be that Article 1 ECHR cannot be interpreted in a way to "allow a State party to perpetrate violations of the Convention on the Territory of another State, which it could not perpetrate

[195] A. Fischer-Lescano, T. Lohr and T. Tohidipur, "Border Controls at Sea: Requirements under international human rights and refugee law", *International Journal of Refugee Law*, Vol. 21, No. 2, 2009, pp. 256-296.

[196] The CJEU also held that the European Convention on Human Rights provides guidelines for Community law in Case 36/75, *Rutili* [1975] ECR 1219. For an extensive list of CJEU cases referring to the case law of the European Court of Human Rights, see S. Douglas-Scott, "A tale of two courts: Luxembourg, Strasbourg and the growing European human rights *acquis*", *Common Market Law Review*, Vol. 43, No. 3, 2006, pp. 629-665, in note 68.

[197] See for example, F. Coomans and M.T. Kamminga (eds), *Extraterritorial application of human rights treaties*, Antwerp: Intersentia, 2004.

[198] M.-T. Gil-Bazo, "The Practice of Mediterranean States in the Context of the European Union's Justice and Home Affairs External Dimension: The Safe Third Country Concept Revisited", *International Journal of Refugee Law,* Vol. 18, Nos. 3-4, 2006, p. 594. See for example, *X v. the Federal Republic of Germany,* Application No. 1611/62, European Commission on Human Rights (EComHR), 12 September 1965; *Hess v. the United Kingdom,* Application No. 6231/73, EComHR, 28 May 1975; and *X and Y v. Switzerland,* Application Nos. 7289/75 and 7349/76, EComHR, 14 July 1977. See also J.J. Rijpma, "Building borders: The regulatory framework for the management of the external borders of the European Union", PhD Thesis, European University Institute, Florence, 2009(a), pp. 348-251.

[199] *Cyprus v. Turkey*, Application No. 8007/77, ECtHR, p. 149.

on its own territory".[200] The question is thus not whether the ECHR can have extraterritorial application, but under which conditions that is the case.[201]

Most importantly, the *effective control* over a person, thus irrespectively of the territory on which that person is, can form the basis for establishing extraterritorial jurisdiction under the Convention.[202] The effective control over an individual needs to be direct and precisely identifiable: a 'jurisdictional link' is required.[203] The recent *Medvedyev v France* case made clear that the extraterritorial interception of a vessel at sea can indeed lead to effective control over that vessel; hence the State's jurisdiction is established.[204] Therefore the ECHR – and hence by analogy the Charter – applies to extraterritorial operations, such as in those extraterritorial Frontex JOs. Effective control is suggested by the fact that EU Member States' officials, on EU Member States' assets, *coercively* intercept and reroute 'would-be immigrants'. Moreover, the fact that individuals are not physically aboard a vessel is not prohibitive to establish jurisdiction, as can be deduced from the *Xhavara* case concerning the death of 58 individuals in Albanian waters allegedly resulting from collision with an Italian military vessel.[205]

This discussion should specifically mention the land mark *Banković* case; it is marked by a restrictive approach to extraterritorial jurisdiction of the ECHR and some have indeed seen it as a deviation from earlier case law.[206] However, after this judgment the ECrtHR still upheld ECHR's extraterritorial application; the *Banković* case law should thus be seen as a casuistic and non-absolute exclusion of extraterritorial application.[207] In essence, *Banković* seems to narrow down the term 'jurisdiction' to 'lawful jurisdiction' by referring to the notion of 'jurisdiction' under international law. The ECtHR stated that extraterritorial jurisdiction is in principle "defined and limited by the sovereign territorial rights of the other relevant States".[208] This means that where an agreement to operate on the territory of a third State has been reached (such as in the *Xhavarra* case), the jurisdiction is consequently lawful and the actions of that State party on foreign territory could fall into its

[200] *Issa and others v. Turkey*, Application No. 31821/96, ECtHR, 16 November 2004, para. 71.
[201] See also A. Fischer-Lescano, T. Lohr and T. Tohidipur, "Border Controls at Sea: Requirements under international human rights and refugee law", *International Journal of Refugee Law*, Vol. 21, No. 2, 2009, pp. 256-296.
[202] *Öcalan v. Turkey*, Application No. 46221/99, ECtHR, 12 May 2005, para. 91.
[203] *Hussein v. Albania*, Application No. 23276/04, ECtHR, 14 March 2006, "The Law".
[204] *Medvedyev and others v. France*, Application No. 3394/03, ECtHR, 29 March 2010, paras. 62-67.
[205] *Xhavara et al. v. Italy and Albania*, Application No. 39473/98, ECtHR, 11 January 2001 (only in French), see especially "En droit" pts. 1, 4. Nevertheless, the ECtHR declared the application inadmissible because not all national remedies had been exhausted. In this respect, see F. Coomans and M.T. Kamminga (eds), *Extraterritorial application of human rights treaties*, Antwerp: Intersentia, 2004, pp. 99-100; see also J.J. Rijpma and M. Cremona, *The extraterritorialisation of EU Migration Policies and the Rule of Law*, EUI Working Papers Law 2007/1, European University Institute, Florence, 2007, p. 22; and finally International Commission of Jurists (ICJ), *Migration and international human rights law*, Practitioners Guide No. 6, ICJ, Geneva, 2011, pp. 43-45.
[206] *Banković et al. v. Belgium et al.*, Application No. 52207/99, ECtHR, 12 December 2001. For an excellent and critical analysis of the case, see M. Happold, "Bankovic v Belgium and the territorial scope of the European Convention on Human Rights", *Human Rights Law Review,* Vol. 3, No. 1, 2003. For more critical notes, see V. Mantouvalou, "Extending Judicial Control in International Law: Human Rights Treaties and Extraterritoriality", *International Journal of Human Rights*, Vol. 9, No. 2, 2005, p. 157; see also R. Lawson, "Life after Bankovic: On the Extraterritorial Application of the European Convention on Human Rights", in F. Coomans and M.T. Kamminga (eds), *Extraterritorial application of human rights treaties*, Antwerp: Intersentia, 2004, pp. 83-124.
[207] See for example, *Öcalan v. Turkey*, Application No. 46221/99, ECtHR, 12 May 2005. On this matter see also A. Fischer-Lescano, T. Lohr and T. Tohidipur, "Border Controls at Sea: Requirements under international human rights and refugee law", *International Journal of Refugee Law*, Vol. 21, No. 2, 2009, p. 19.
[208] Para. 59 of *Banković et al. v. Belgium et al.* (Application No. 52207/99). Concerning the implications of all this, see M. Happold, "Bankovic v Belgium and the territorial scope of the European Convention on Human Rights", *Human Rights Law Review,* Vol. 3, No. 1, 2003, pp. 81-83.

jurisdiction.[209] The fact that agreements have been concluded with third States for Frontex joint operations would therefore keep them under the extra-territorial reach of the ECHR.

In conclusion, it can be said that the ECtHR's long history of granting the Convention extraterritorial applicability, even with the limitations of the *Banković* case, covers those actions conducted in the course extraterritorial operations, such as Frontex JOs. Accordingly, Charter rights cannot be disregarded by reference to the extraterritorial nature of the operations, as was also concluded in the recent study for the EP on the setting up of a Common European Asylum System.[210] The Council Decision including rules for sea border operations coordinated by Frontex also implicitly acknowledges the extraterritorial application of the *non-refoulement* principle.[211]

4.4. Specific fundamental rights at tension

4.4.1. Article 7: The right to protection of private and family life

The exact wording of this article is: "Everyone has the right to respect for his or her private and family life, home and communications." This provision is the equivalent of Article 8 ECHR; thus Article 52(3) Charter is directly relevant here. The Explanations[212] state that the variation from the mirror image provision of the ECHR (Article 8) which refers to correspondence rather than communication is designed to widen the scope of the right to reflect developments in technology. The Explanations indicate that the intention of the Council is that the limitations on Article 7 should be identical to those of Article 8 ECHR, which are:

> There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The ECtHR has a long jurisprudence on the application of Article 8 to foreigners and immigrants dating from the 1980s. There are a number of key principles that arise from that jurisprudence and that are relevant for the meaning of the Charter. First regarding the right itself:

- Any discrimination in the respect for family life that is based on the immigration status of the individual must meet a high threshold of justification to be compatible with the right to respect (*Abdulazziz, Cabales & Balkandali v UK* 28 May 1985).

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[209] Para. 60 of *Banković et al. v. Belgium et al.*, *supra*, states that "a State may not actually exercise jurisdiction on the territory of another without the latter's consent, invitation or acquiescence, unless the former is an occupying State in which case it can be found to exercise jurisdiction in that territory, at least in certain respects". See also M. Happold, *supra*, p. 81. In the *Xhavarra* case, the Italian action was based upon an Italian–Albanian agreement.

[210] See the "Executive Summary" in M. Jaillard, P. de Bruycker, F. Maiani, V. Vevstad, L. Jakuleviciene, L. Bieksa, L. de Bauche, J. Jaumotte, S. Sarolea, K. Hailbronner et al., *Setting up a Common European Asylum System*, Report for the European Parliament, Directorate-General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs, 2010, pp. 30-31.

[211] Art. 1.2, Annex, Part I of Council of the European Union, Decision 2010/252/EU of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 111/20, 04.05.2010(c).

[212] Charter of Fundamental Rights of the European Union (Notices), OJ C 303/2, 14.12.2007.

- The right respect for family life restricts the right of states to expel foreigners who have spent long periods of their life in the state and close family links even where there are serious criminal convictions (*Beldjoudi v. France* 26 March 1992).

- Children may be entitled to enter a state to join their parents and other siblings on the basis of this right to respect (*Sen v Netherlands* 21 December 2001).

- Respect for private life can also restrict a state's right to expel a foreigner who has been long resident on the territory even if there are no other family members on the territory (*Slivenko v Latvia* 9 October 2003).
- Even people who have never been regularly on the territory of a state may be entitled to remain because of family links there (*Rodriques da Silva v Netherlands* 31 January 2006).

This is only a short outline of the width of the respect for private and family life contained in provisions affecting immigration and access to the territory. The ECtHR in each of the cases has considered carefully the claims of states to the right to apply the limitation on the basis of the necessity in a democratic society to control immigration and in all these cases rejected the limitations in favour of the right. The implications of Article 8 ECHR regarding privacy will be considered in the next section on data protection in the Charter.

4.4.2. Article 8: The right to data protection

The wording of this provision is:

1. Everyone has the right to the protection of personal data concerning him or her;

2. Such data must be processed fairly and for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.

3. Compliance with these rules shall be subject to control by an independent authority.

The explosion of capacities of information technology over the past 30 years has presented very substantial challenges to our understanding of identity and how it should be protected. A right to data protection as such does not exist in the ECHR, though according to the jurisprudence of the ECtHR it is inherent in the right to privacy contained in Article 8 (see above under Article 7).

Article 8 (2) requires that data must be processed "fairly for specified purposes and on the basis of consent of the person concerned or some other legitimate basis laid down by law". This gives voice, as the explanations state, to the safeguards in Directive 95/46 on the protection of personal data,[213] Regulation 45/2001 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on

[213] European Parliament and Council of the European Union, Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281, 23.11.1995.

the free movement of such data[214] as well as Article 8 ECHR regarding privacy. The explanations make specific reference to Article 16 TFEU and Article 39 TEU as the sources of the right to data protection. While the explanations affirm that the conditions and limitations on the exercise of the right to personal data are those set out in the Directive and the Regulation, in accordance with the hierarchy of norms that the charter and TEU establish, regard must first be given to the consistency of any interference with the right to privacy (the corollary of the right to data protection) with the jurisprudence of the ECtHR.

Here the most recent consideration by the ECtHR on the meaning of privacy in the context of data use appears in *Marper v. United Kingdom*. The ECtHR highlighted the unacceptable consequences for the individual resulting from the stigmatising effect of long-term, systematic storage of fingerprints and DNA samples of individuals, including minors, who were suspected of having committed criminal offences, but not convicted.[215] The ECtHR found that the UK in breach of Article 8 ECHR on the grounds that the storage of the data including that of non-convicted persons for indefinite periods is disproportionate and not necessary in a democratic society. At the moment the EU has a number of databases that contain the personal data of foreigners in circumstances where the retention of data about EU nationals is not permitted.[216] The differential treatment of the right to data protection and the use of personal data on the basis of the nationality of the individual is inherently suspect in European human rights law.[217] The ECtHR has held that very strong reasons justifying discrimination on the basis of nationality are required.

Recently, the European Commission adopted a Communication on "a comprehensive approach on personal data protection in the European Union", including proposals and approach for the review of the EU legal system on the protection of personal data in November 2010.[218] In this Communication, the Commission defined general principles and guidelines for the future architecture of EU data protection law. However, these guidelines are insufficient in themselves to provide a complete interpretation of the Charter in this sensitive area where the ECtHR is increasingly engaged in establishing the limits of state justifications regarding the use of data.

4.4.3. Article 18: The right to asylum

Article 18 states:

> The right to asylum shall be guarantees with due respect for the rules of the Geneva Convention of 25 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on the European Union and the Treaty on the Functioning of the European Union (hereinafter referred to as 'the Treaties').

[214] European Parliament and Council of the European Union, Regulation (EC) No. 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, OJ L 8/1, 12.01.2001.

[215] *S. and Marper v. United Kingdom*, Application Nos. 30562/04 and 30566/04, ECtHR, 4 December 2008, see para. 122.

[216] Notable in this respect is EURODAC, the data on asylum seekers and persons apprehended irregularly crossing an EU external border, as well as the Schengen Information System under Art. 96 of the Convention Implementing the Schengen Agreement on persons to be refused admission to the EU. See Case C-503/03, *Commission v. Spain* [2006] ECR I-1097, 31 January 2006.

[217] See *Gaygusuz v. Austria*, Application No. 17371/90, ECtHR, 16 September 1996.

[218] European Commission, Communication on a Comprehensive Approach on Personal Data Protection in the European Union, COM(2010) 609 final, Brussels, 4 November 2010(a). These principles were further developed by the EU Justice Commissioner Viviane Reding in her speech before the Privacy Platform, "The Review of the EU Data Protection Framework", SPEECH/11/183, European Commission, Brussels, 16 March 2011.

Article 14(1) of the Universal Declaration of Human Rights 1948 (UDHR) contains an antecedent to Article 18 – "Everyone has the right to seek and to enjoy in other countries asylum from persecution" but this right was not transcribed into the Refugee Convention referred to in Article 18 of the Charter. Thus Article 18, by creating a right to asylum, makes a departure from the Refugee Convention. No similar right is contained in the ECHR. Article 78 TFEU provides for respect for the Refugee Convention (but not as such a right to asylum). The explanations make specific reference to the opt-in/opt-out arrangements of Ireland and the UK and the opt-out of Denmark contained in Protocols to the treaties, in a rather obtuse manner indicating that these countries as a result of the opt-outs may not be bound by the Charter provision in the same way as other Member States. This is even more complex as the UK has a protocol limiting the scope of the Charter which the other two countries do not share. The explanations also make reference to the protocol on asylum annexed to the treaties and state that the right to asylum is consistent with this. This is a somewhat puzzling issue as the protocol on asylum annexed to the treaties creates a presumption against refugee status in any Member State for the nationals of another Member State. However, Article 18 makes no exception on the basis of nationality. As UNHCR's Statistical Yearbook for 2009 indicates, of all Czech nationals who sought asylum in Canada that year, 54% were recognised as in need of international protection.[219]

The right to asylum appears to include the UDHR right to seek asylum. If this is the case, then the activities of the EU and the Member States acting in the context of the EU measures on asylum need properly to reflect also the right of individuals to seek asylum which must include the possibility to make an asylum claim even on the high seas and the opportunity to arrive at a port to make such a claim. The much-discussed activities of Member States and indeed Frontex regarding the obstruction of access to EU Member States' waters to small boats full of people may need to be considered in the light of this right.[220] The aforementioned *Hirsi* case regarding the push-back of a boat full of Somalis and Eritreans away from Italian waters by Italian coast guards is currently pending before the ECtHR. On 11 March 2011, it was relinquished to the Grand Chamber indicating the seriousness of the case in the eyes of the Court.[221] The outcome of this case will be crucial to our understanding of Article 18 and the duties of Member States and Frontex in respect of efforts by potential asylum-seekers to arrive at the EU's borders to seek international protection.

4.4.4. Article 19: Protection against collective expulsion

Article 19 of the Charter states:

1. Collective expulsions are prohibited.

2. No one may be removed, expelled or extradited to a state where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment of punishment.

The first paragraph of Article 19 is identical to Article 4 Protocol 4 ECHR. The explanations note this and state that the Charter provision has the same scope and meaning as the ECHR one. Neither Greece nor the UK have ratified Protocol 4,so they are bound by the

[219] See Annex 12 of UNHCR, *UNHCR's Statistical Yearbook 2009*, UNHCR, Geneva, October 2009(b).
[220] See for instance, Human Rights Watch, *Pushed Back, Pushed Around*, Human Rights Watch, New York, NY, 21 September 2009 (http://www.hrw.org/en/reports/2009/09/21/pushed-back-pushed-around-0).
[221] See the case, *Hirsi and others v. Italy*, Application No. 27765/09, ECtHR (http://www.echr.coe.int/echr/Homepage_EN); the hearing took place on 22 June 2011.

obligation in paragraph 1 only though the Charter. No mention is made of this in the explanations. However, the explanations do state that the purpose of paragraph 1 is to guarantee that every expulsion decision is based on a specific examination of the facts and no single measure can be taken to expel all persons having the nationality of a particular state. Reference is also made to Article 13 ICCPR.[222] Consistent with the obligation that every provision of the Charter that repeats an ECHR right must be interpreted consistently with the ECtHR's jurisprudence, it is worth bearing in mind that the ECtHR has considered Article 4 of Protocol 4 on a number of occasions. The ECtHR confirmed that the "Court reiterates its case-law whereby collective expulsion, within the meaning of Article 4 of Protocol No. 4, is to be understood as any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group" (para. 59).[223] Although each expulsion decision had been taken separately, the ECtHR considered the expulsion to violate Article 4 Protocol 4 stating:

> The Court notes, however, that the detention and deportation orders in issue were made to enforce an order to leave the territory dated 29 September 1999; that order was made solely on the basis of section 7, first paragraph, point (2), of the Aliens Act, and the only reference to the personal circumstances of the applicants was to the fact that their stay in Belgium had exceeded three months. In particular, the document made no reference to their application for asylum or to the decisions of 3 March and 18 June 1999. Admittedly, those decisions had also been accompanied by an order to leave the territory, but by itself, that order did not permit the applicants' arrest. The applicants' arrest was therefore ordered for the first time in a decision of 29 September 1999 on a legal basis unrelated to their requests for asylum, but nonetheless sufficient to entail the implementation of the impugned measures. In those circumstances and in view of the large number of persons of the same origin who suffered the same fate as the applicants, the Court considers that the procedure followed does not enable it to eliminate all doubt that the expulsion might have been collective.
>
> That doubt is reinforced by a series of factors: firstly, prior to the applicants' deportation, the political authorities concerned had announced that there would be operations of that kind and given instructions to the relevant authority for their implementation (see paragraphs 30 and 31 above); secondly, all the aliens concerned had been required to attend the police station at the same time; thirdly, the orders served on them requiring them to leave the territory and for their arrest were couched in identical terms; fourthly, it was very difficult for the aliens to contact a lawyer; lastly, the asylum procedure had not been completed (paras. 61 and 62).[224]

This places a high threshold on state and EU authorities to ensure that in fact in every expulsion decision the individual concerned has a real opportunity to be represented and put forward his or her arguments against expulsion before any decision is taken. There is no reason to suggest that any lower standard should apply to persons who are irregularly on the territory or indeed those who have recently arrived and are still at or near the border.

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[222] International Covenant on Civil and Political Rights, adopted and opened for signature 26 April 2010, ratification and accession by General Assembly Resolution 2200A (XXI) 16 December 1966.
[223] *Conka v. Belgium,* Application No. 51564/99, ECtHR, 5 February 2002.
[224] Ibid.

As regards Article 19(2) of the Charter, the explanations state that it takes into account the case law of the ECtHR on Article 3 including in particular *Soering v. UK*[225] and *Ahmed v. Austria*[226]. The wording of the provision is taken directly from the case law of the ECtHR. Regard should also be given to that case law that specifically rejects the argument that the individual must show that he or she will be singled out for treatment contrary to Article 3 in order to benefit from the bar on expulsion.[227] In contradistinction with the prohibition on collective expulsion, collective protection is expressly required of states where a group of people who share a characteristic is at risk of torture, inhuman or degrading treatment or punishment.

4.4.5. Article 41: The right to good administration

This article states:

1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union.

2. This right includes:

   (a). the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;

   (b). the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;

   (c). the obligation of the administration to give reasons for its decisions.

3. Every person has the right to have the Union make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.

4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.

Although this provision appears in the chapter of the Charter entitled "Citizens' rights", by its wording it is clear that it applies to everyone. According to the explanations, the right to good administration is a general principle of EU law in respect of which the explanations refer to an important series of CJEU decisions. It also notes that the obligation to give reasons comes from Article 296 TFEU; paragraph 3 of the provisions reflects Article 340 TFEU while paragraph 4 comes directly from Article 20(2)(d) and Article 25 TFEU.

The right to good administration undoubtedly applies to EU agencies that come into contact with individuals. They are under an obligation to deal fairly and impartially with those they come into contact with and within a reasonable period of time. It will also apply to EU agencies that treat issues that impact directly on individuals such as country of origin information which will be used by national authorities in the determination of asylum applications in accordance with EU law.[228]

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[225] *Soering v. UK,* Application No. 14038/88, ECtHR, 7 July 1989.
[226] *Ahmed v. Austria,* Application No. 25964/94, ECtHR, 17 December 1996.
[227] *Salah Sheekh v. Netherlands*, Application No. 1948/04, ECtHR, 11 January 2007.
[228] Council of the European Union, Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ L 304, 30.09.2004(b) and Directive

The obligation of good administration must be interpreted consistently with the ECtHR's findings regarding the duty of reliable communication which it set out in the *Conka* decision (see supra). Here it held:

> In the Court's view, that requirement [Article 5 – liberty of the person] must also be reflected in the reliability of communications such as those sent to the applicants, irrespective of whether the recipients are lawfully present in the country or not. It follows that, even as regards overstayers, a conscious decision by the authorities to facilitate or improve the effectiveness of a planned operation for the expulsion of aliens by misleading them about the purpose of a notice so as to make it easier to deprive them of their liberty is not compatible with Article 5 (para 42).

4.4.6. Article 47: The right to an effective remedy

This provision states:

> Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.
>
> Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.
>
> Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

The explanations note that this provision is based on Article 13 ECHR but is wider and provides more detail regarding the scope of the right to an effective remedy. They expressly refer to the jurisprudence of the CJEU which is extensive on the right to a remedy for everyone affected adversely by EU law. However, the explanations state that the objective of this provision is in no way to change the system of judicial review in the EU or the competences and procedural rules of the CJEU. In particular the Council's explanations clarify that the provision does not affect the rules of admissibility of direct actions before the CJEU (which are very restrictive).

As regards the second paragraph of the provision, the explanations state that they reflect Article 6(1) ECHR. However, most helpfully, the explanations confirm that in EU law the right to a fair hearing is not limited to civil law rights and obligations. This is particularly important where immigration and asylum rights are at stake, as the ECtHR has excluded these from the scope of Article 6(1) on the basis that they are governed by administrative law.[229] The explanations confirm that the right to legal aid comes from the jurisprudence of the ECtHR[230] and, as widened in scope by the Charter, applies to all actions to which the Charter also applies.

2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ L 326/13, 13.12.2005.

[229] *Maaouia v. France,* Application No. 39652/98, ECtHR, 5 October 2000.

[230] *Airey v. Ireland,* Application No. 6289/73, ECtHR, 9 October 1979.

5. IMPACT OF THE EU CHARTER ON EU HOME AFFAIRS AGENCIES' ACTIVITIES

This section will explore the intersection between the rights guaranteed in the Charter and the activities of Frontex, Europol and EASO. It will draw on practical examples and empirical evidence provided by civil society, international organisations, official EU documentation and academic literature, to highlight the tensions at stake between EU Home Affairs agencies' actions and their impact on fundamental rights. It will be seen that, common to all three agencies, their activities pose the greatest risk to individual rights where they engage in operational actions, where their activities involve the processing of data or exchange and dissemination of sensitive information and in their cooperation with third countries, including 'capacity building' activities.

It is therefore not within the scope of the current section to prove that fundamental rights violations have occurred, but rather to identify those activities of the three agencies that are sensitive with respect to fundamental rights violations so that any potential violation may be averted in the future. In so doing, this section will draw particular attention to the legal uncertainty that is inherent in each of the agencies' mandates and competences, particularly where they rely on undefined terms such as 'operational', 'investigation', and 'coordination' to frame their respective activities as essentially technocratic, extra-legal procedures and thus void of decision-making powers. Yet despite this framing of their activities, it will be seen that the three agencies do take decisions and implement policy that have very real impacts on individuals. The main activities of each agency will be addressed in turn in order to identify their specific sensitivity to fundamental rights. The sensitivities posed to fundamental rights by cooperation between the agencies will then be explored. The final part of this section will then explore the challenges and opportunities faced by individuals seeking judicial redress for a violation of their fundamental rights.

5.1. Frontex

5.1.1. Joint Operations and RABITs

As is clear from section 2, the most tangible activities of Frontex are its operational activities such as JOs and RABITs. Certain aspects of these activities may also be the most fundamental rights-sensitive. This section highlights the impact the Charter has on these activities of Frontex, most notably in its extraterritorial operational activities, of which there has been at least one: the HERA JO, running from 2006 to 2010.[231] Although it is an important issue, this study focuses on the agencies' activities in light of the Charter's rights and thus it falls beyond its scope to assess the legal basis for the extraterritorial joint operations under the law of the sea.[232]

[231] Some contestation has taken place on the Nautilus JO, according to V. Moreno-Lax ("Searching Responsibilities and Rescuing Rights: Frontex, the Draft Guidelines for Joint Maritime Operations and Asylum Seeking in the Mediterranean", *International Journal of Refugee Law*, Vol. 21, No. 2, 2010, pp. 256-296):
The relationship between the Frontex Nautilus joint operation of 2009 and the Italian Push Backs remains ambiguous, what is certain is that Nautilus 2009, running from April to October 2009, coincided with the period in which Italy began this policy. Frontex was accused by Human Rights Watch of taking action resulting in the diversion of migrants to Libya (see HRW, "Pushed Back, Pushed Around", p. 37). Yet, Frontex immediately issued a Press Release stating that it had not been involved in diversion activities to Libya. However, the operation plan of NAUTILUS has remained secret, so it is difficult to corroborate.

[232] On this issue, see E. Papastavridis, "'Fortress Europe' and Frontex: Within or Without International Law?", *Nordic Journal of International Law*, Vol. 79, No. 1, 2010, pp. 75-111; see also R. Barnes, "The international law of the sea and migration control", in B. Ryan and V. Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges*, Leiden: Martinus Nijhoff Publishers, 2010, pp. 103-150; and finally, Council of Europe,

The right to asylum appears in Article 18 of the Charter (see also section 4.4.3). In Frontex operational activities, there is a risk that this right could be violated. The interception and diversion of individuals in international or third States' waters may impede one's right to asylum as access to a place where a claim can be made may be restricted. In the context of Member State border control (i.e. outside the scope of a Frontex joint operation), there was an alarming NGO report (by *Pro Asyl*) of an effective barring by Greek authorities of people from seeking asylum.[233] Moreover (see again section 4.4.3), the *Hirsi* case, currently pending before the ECtHR, suggests that such return practices on the high seas have indeed occurred under Italian authority.[234]

The UNHCR has voiced similar concerns with regard to 'push-backs'[235] and maltreatment by Italian authorities.[236] Also Spanish authorities' ways of working have been questioned and tensions with the right to asylum have been identified in their cooperation with the Mauritanian authorities.[237] Moreover, Human Rights Watch (HRW) issued an alarming report on the practices of Maltese coast guard returning individuals to Libya.[238] Hence, the sensitivity is *not hypothetical*; in fact major Frontex member states participating in joint operations (i.e. Greece, Italy, Malta and Spain) are reported to have previously acted in this way. Hence, there is a real risk that in the course of Frontex joint operations, those officers may resort to the same practices, with the violation of the right to asylum as a result.

Parliamentary Assembly, *The interception and rescue at sea of asylum seekers: Refugees and irregular migrants*, Report of the Committee on Migration, Refugees and Population, 12628/11, Strasbourg, 1 June 2011.

233 Pro Asyl, "The truth might be bitter but it must be told: The situation of refugees in the Aegean and the Practices of the Greek Coast Guards", Press Release, Frankfurt, October 2007 (http://www.statewatch.org/news/2007/oct/greece-proasyl-refugees-prel.pdf).

234 *Hirsi and others v. Italy*, Application No. 27765/09, ECtHR. It is worrying that the Italian state justified its actions to a certain extent by stating that they form part of European policy, as put forward in the public hearing on the case that took place on 22 June 2011. It is clear from this hearing that Italy does not dispute the fact that returns from the high seas towards Libyan waters have taken place, be it in the context of a rescue operation.

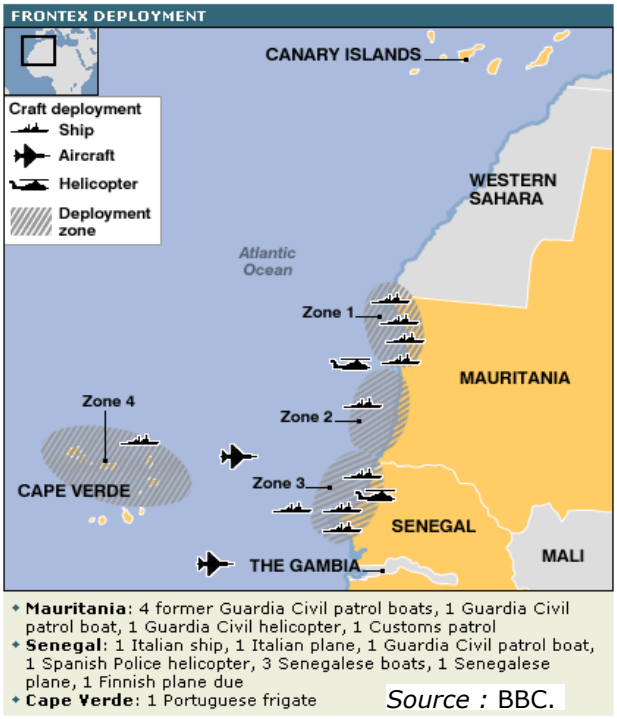
235 The concept of 'push backs' entails the practice to divert back to a third country boats with individuals on their way to Europe.

236 See UNHCR, "UNHCR interviews asylum seekers pushed back to Libya", Briefing Note, UNHCR, Geneva, 14 July 2009(a); see also J.J. Rijpma, "Building borders: The regulatory framework for the management of the external borders of the European Union", PhD Thesis, European University Institute, Florence, 2009(a), pp. 353-354.

237 P. Ceriani, C. Fernández Bessa, A. Manavella, V. Picco and L. Rodeiro, *Report on the situation on the Euro-Mediterranean borders (from the point of view of the respect of human rights)*, CHALLENGE: The Changing Landscape of European Liberty and Security, Work Package 9, University of Barcelona, 2009, pp. 45-47. They describe the "Marine I" case.

238 Human Rights Watch, *Pushed Back, Pushed Around*, Human Rights Watch, New York, 21 September 2009 (http://www.hrw.org/en/reports/2009/09/21/pushed-back-pushed-around-0), pp. 38-40.

Figure 1. Extraterritorial reach of Frontex



More alarmingly, in the HERA JO, around 1,000 individuals have been returned to the Mauritanian coast. See Figure 1 for an operational map showing the extent of the extraterritorial reach of the HERA JO.[239] There has also been a report indicating that within the NAUTILUS JO a German helicopter aided the Italian-led return to Libya of individuals intercepted at sea.[240] It is in this respect to be welcomed that the new Regulation includes provisions on the obligation for Frontex to draw up a Code of Conduct applicable to these operational activities. However, the new Regulation does not stop extraterritorial border control.[241] The adopted Council Decision containing rules for Frontex sea-border operations and non-binding guidelines on disembarkation are in principle to be welcomed, but still contain unclear elements so as to fully ensure compliance with relevant Charter obligations.[242]

[239] BBC News, "Stemming the immigration wave", 10 September 2006 (http://news.bbc.co.uk/2/hi/europe/5331896.stm#map). Frontex does not deny this (Frontex, "HERA III Operation", News Release, Frontex, Warsaw, 13 April 2007). It claims these diversions always took place under the responsibility of a Mauritanian officer, but in our opinion the role of Frontex was absolutely indispensible for such diversions to occur. See Frontex, "HERA 2008 and NAUTILUS 2008 Statistics", News Release, Frontex, Warsaw, 17 February 2009(a); see also J.J. Jeandesboz, *Reinforcing the Surveillance of EU Borders: The Future Development of FRONTEX and Eurosur*, CHALLENGE Research Paper No. 11, CEPS, Brussels, August 2008, pp. 15-16.

[240] Human Rights Watch, *Pushed Back, Pushed Around*, Human Rights Watch, New York, 21 September 2009 (http://www.hrw.org/en/reports/2009/09/21/pushed-back-pushed-around-0), p. 37.

[241] See Arts. 2a and 14(1) of the agreed text of Council of the European Union, *Proposal for a Regulation of the European Parliament and the Council amending Council Regulation (EC) No. 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX) – Analysis of the final compromise text with the view to agreement*, 12341/11, Brussels, 5 July 2011(e).

[242] See Council of the European Union, Decision 2010/252/EU of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 111/20, 04.05.2010(c); see also Amnesty International and the European Council on Refugees and Exiles (ECRE), *Briefing on the Commission proposal for a Regulation amending Council Regulation (EC) 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex)*, Amnesty International and ECRE, London and Brussels, September 2010, p. 18.

Table 2. Numbers of individuals intercepted and diverted back in maritime Frontex JOs

Year	Intercepted	Diverted back
2006	21,769	4,123 *(HERA II: 3,625; AGIOS: 498)*
2007	27,441	5,548 *(HERA III: 1,559; HERA 2007: 2,507; MINERVA 2007: 1,105; POSEIDON 2007: 377)*

Sources: Frontex General Report 2007, p. 18; Commission, Staff Working Document, *Accompanying document to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Report on the evaluation and future development of the FRONTEX Agency – Statistical Data*, SEC(2008) 150, Brussels, 13 February 2008, pp. 5-15. There are unfortunately no comprehensive numbers available for the years 2008-2011. The reported total numbers of interceptions for the years 2006 and 2007 differ significantly between those two sources; this table uses the first source for the first column.

Similar sensitivities exist in relation to the protection against collective expulsion and *refoulement* (Article 19 Charter, resp. para. 1 and 2, see section 4.4.3).[243] If 'push-back' practices would occur, arguably *ipso facto* a group of people would be diverted back without proper individual expulsion decisions being issued or real opportunities to bring arguments against the expulsion provided to those returned. In the same vein, there is a risk of *refoulement* as those aboard the pushed-back vessel are most likely a 'mixed flow'; there may be amongst them individuals with a legitimate need for international protection. This situation is not hypothetical: in the context of the aforementioned *Hirsi* case the UNHCR explained that it has accorded some 'pushed-back individuals' with refugee status in Libya and that even the Italian authorities themselves had granted refugee status to individuals who managed to make it to Italy on a later attempt.[244] The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) has also concluded that Italy has violated the *non-refoulement* principle.[245]

Moreover, in light of the ECtHR's recent *MSS v Belgium* case, barring Belgium from returning an Afghan asylum-seeker to Greece (under EU's Dublin II Regulation concerning the allocation of responsibility for the examination of asylum applications)[246] since treatment there was found to be inhumane and degrading, Human Rights Watch has argued that the Frontex RABIT in Greece (by now the permanent POSEIDON JO) should be terminated as it also renders immigrants vulnerable to inhumane and degrading treatment.[247] The apprehended immigrants there are handed over to the Greek authorities and detained in the same Greek facilities that the ECtHR found inhumane and degrading. *The MSS v Belgium* case reiterates some of the general principles in light of Article 3 ECHR, such as that it cannot be held against an individual that he or she provided no pro-active indication of his or her fear for the return.[248]

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[243] See for an extensive analysis, see International Commission of Jurists (ICJ), *Migration and international human rights law*, Practitioners Guide No. 6, ICJ, Geneva, 2011, pp. 95-118.

[244] UNHCR's oral intervention at the European Court of Human Rights Hearing of the case Hirsi and Others v. Italy (Application no. 27765/09) Strasbourg, June 22, 2011, pp. 1, 3. (http://www.unhcr.org/refworld/pdfid/4e0356d42.pdf)

[245] European Committee for the Prevention of Torture, *Report to the Italian Government on the visit to Italy carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment of 27-31 July 2009*, Strasbourg, 28 April 2010, p. 25.

[246] Council Regulation No. 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national ("the Dublin Regulation"). It applies to the Member States of the EU and to Norway, Iceland and Switzerland.

[247] See *MSS v. Belgium and Greece*, Application No. 30696/09, ECtHR, 21 January 2011, paras. 233, 234, 263, 264, 366-368; see also S. Troller, "On the borders of legality – Why Frontex forces should stop filling Greek jails with asylum seekers", Human Rights Watch, New York, NY, 8 February 2011 (http://www.hrw.org/en/news/2011/02/08/borders-legality).

[248] *MSS v. Belgium and Greece*, *supra*, paras. 344-368.

However, although these rights and protection provisions constrain the limits of permitted activities within extraterritorial border control, this system cannot be complete without ways to enforce their compliance by individuals' access to an effective remedy. Section 5.5 deals with this issue more in-depth. Although the full scope of Article 47 (namely the 2nd para.) cannot be extended to immigration and asylum cases (see section 4.4.6), nonetheless those whose rights have been violated should have access to an effective remedy.

5.1.2. Joint Return Operations (JROs)

As illustrated by Table 3 below, joint return is an area of increasing Frontex involvement. The new Frontex Regulation also grants more powers to the agency in this context.[249] This type of operation deals with individuals who sometimes resist their planned return. It thus inherently involves situations of force and coercion by officials. Moreover, not only is this activity sensitive from a viewpoint of behaviour by officials, but also a resulting tense situation amongst returnees may cause violent incidents. The right to physical integrity may thus be at risk. It is to be welcomed that the new Frontex Regulation foresees the drafting of a Code of Conduct applicable to return operations.[250]

Table 3. JROs from 2006-2010

Year	Number of JROs	Number of returnees
2006	4	*74*
2007	13	428
2008	15	801
2009	32	1622
2010	39	2038

Sources: European Commission, Staff Working Document, *Accompanying document to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Report on the evaluation and future development of the FRONTEX Agency – Statistical Data*, SEC(2008) 150, Brussels, 13 February 2008, pp. 40-41, European Commission (2010e), Frontex (2006, p. 15; 2009b, Foreword; and 2010b, pp. 39-41).

Moreover, the right to protection of private and family life (see for its scope section 4.4.1) is potentially at risk in JROs.[251] This very act of return could constitute the violation of this right. The case law of the ECtHR has been quite extensive on this point and Member State action restricting this right must meet a high threshold of justification.[252] In a similar vein, joint return activities may be sensitive to the protection against collective expulsions and *refoulement*. It is that very 'act of return' (of individuals of the same country of origin) itself that would make 'effective' a breach of these rights.

[249] See Art. 9 of the agreed text of Council of the European Union, *Proposal for a Regulation of the European Parliament and the Council amending Council Regulation (EC) No. 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX) – Analysis of the final compromise text with the view to agreement*, 12341/11, Brussels, 5 July 2011(e).

[250] Ibid.

[251] For an extensive analysis, see International Commission of Jurists (ICJ), *Migration and international human rights law*, Practitioners Guide No. 6, ICJ, Geneva, 2011, pp. 119-122.

[252] See again section 4.4.1.

The decisions authorising the return fall within Member State competence and with it the judicial remedies available at the national level.[253] It is clear that under national law a competent body must be able to review the expulsion measure and that in light of Article 3 ECHR such review should be carried out with "close and rigorous scrutiny", also to possibly suspend the expulsion.[254] Nonetheless, according to the Frontex Regulation, the JROs should also be in line with the EU's return policy.[255] The Return Directive is most relevant here; its transposition into Member State legislation would therefore seem to be a prerequisite for their participation in JROs.[256] However, the UK has for example not opted in to the Directive, but does nevertheless participate in JROs.[257] The expected amended Frontex Regulation sets out expressly that in JROs "any financial support is conditional upon the full respect of the Charter of Fundamental Rights".[258] Although the formal activity of the agency is merely to organise the 'execution' of those national decisions, the agency should nonetheless endeavour to avoid violations of the identified rights of the Charter. It is evident that it cannot provide a full scrutiny of the cases of all individuals returned in the course of JROs. However, it could instate additional procedures, such as the refusal to return in case of grave and serious doubts of the underlying national decision.

Lastly, if violations would occur in the context of Frontex joint return operations, the right to good administration and the right to an effective remedy entail that an individual can challenge such a decision before the agency itself and before a tribunal (see also sections 4.4.5 and 4.4.6). Also, as part of the right to good administration (see Article 41(3) EU Charter) individuals should be able to obtain compensation for damages (see on this point section 5.5). At the moment there seems to be no procedure by which Frontex decisions can be challenged before the agency itself, as the right to good administration entails. Furthermore, (refer to section 4.4.5) in the context of the right to good administration the duty of reliable communication concerning one's expulsion must be respected, prohibiting the conscious misleading of returnees.

5.1.3. Risk analysis and processing of personal data

The activities of Frontex's 'intelligence' dimension – risk analysis and the collection, processing and exchange of data – are also sensitive to rights flowing from the Charter. With the prospective entry into force of the new Frontex Regulation, this competence will be expanded to cover personal data. The new Regulation also introduces a Data Protection officer for the agency.[259] Moreover, in the context of joint return, the agency processes

[253] See Art. 9(1) of the new Frontex Regulation, Council of the European Union, *Proposal for a Regulation of the European Parliament and the Council amending Council Regulation (EC) No. 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX) – Analysis of the final compromise text with the view to agreement*, 12341/11, Brussels, 5 July 2011(e). Concerning the effective remedy requirements in expulsion, see International Commission of Jurists (ICJ), *Migration and international human rights law*, Practitioners Guide No. 6, ICJ, Geneva, 2011, pp. 140-143.

[254] *MSS v. Belgium and Greece,* Application No. 30696/09, ECtHR, 21 January 2011, paras. 385-397.

[255] See the Preamble, Recital 21.

[256] European Parliament and Council of the European Union, Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348/98, 16.12.2008(a).

[257] Amnesty International & the European Council on Refugees and Exiles (ECRE), *Briefing on the Commission proposal for a Regulation amending Council Regulation (EC) 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex)*, September 2010, p. 29.

[258] See Art. 9(1) of the agreed text of Council of the European Union, *Proposal for a Regulation of the European Parliament and the Council amending Council Regulation (EC) No. 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX) – Analysis of the final compromise text with the view to agreement*, 12341/11, Brussels, 5 July 2011(e).

[259] Ibid., Art. 11(a).

personal data.[260] There is no authority akin to Europol's JSB; instead the European Data Protection Supervisor (EDPS) exercises control.[261]

The sensitivity of this activity to the right to data protection is obvious; see section 4.4.2 for the scope of this right and relevant EU Directives. The EU framework for data protection enshrines several key data protection principles, such as those of purpose limitation (including a ban on aimless data collection, requirement for legitimacy of purpose and disclosure limitation), purpose specification, extra safeguards for special categories of data, quality of data and rights for the data subject to access and correct their personal data.[262]

There is a risk that the personal data held by Frontex could in various ways be ill-protected. This is even more so the case as the agency engages in a wide range of data exchange activities, both with other EU agencies and Member States.[263] Another point of concern remains the opaque general purpose limitation and specification of personal data processing outside of JRO coordination/organisation; namely to "contribute to the security of the external borders" in the context of onward transmission to Europol or for risk analysis.[264]

Moreover, the stigmatising effect of processing, storing and exchanging personal data of migrants should not be underestimated (see also aforementioned *Marper v United Kingdom* case).[265] This is even more so if risk analysis is based upon data that identifies specific ethnic groups as 'risk'. It is even more problematic, however, if such analysis is subsequently translated into operational action. This happened with joint operation HYDRA, targeting specifically individuals of Chinese origin.[266] This specific targeting is not unique; the 2007 NIRIS joint operation also targeted specifically Chinese and Indian individuals.[267] The fact that only 15 individuals were refused entry out of 579 travellers checked and interviewed (a 2.6% ratio), raises serious questions to the proportionality of the operation and the quality of the underlying risk analysis.

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[260] European Data Protection Supervisor (EDPS), Opinion on a notification for Prior Checking received from the Data Protection Officer of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX) concerning the "collection of names and certain other relevant data of returnees for joint return operations (JRO)", Case 2009-0281, EDPS, Brussels, 26 April 2010(c). See also the competence in the new Frontex Regulation: Art. 11b of the agreed text of Council of the European Union, *Proposal for a Regulation of the European Parliament and the Council amending Council Regulation (EC) No. 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX) – Analysis of the final compromise text with the view to agreement*, 12341/11, Brussels, 5 July 2011(e).

[261] See the Preamble, Recital 25 and Art. 13 of the agreed text of Council of the European Union, *Proposal for a Regulation of the European Parliament and the Council amending Council Regulation (EC) No. 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX) – Analysis of the final compromise text with the view to agreement*, 12341/11, Brussels, 5 July 2011(e).

[262] E. Brouwer, *Digital Borders and Real Rights: Effective Remedies for Third Country Nationals in the Schengen Information System*, Leiden: Martinus Nijhoff Publishers, 2008, p. 204.

[263] Under its new data processing mandate outlined by the new Frontex Regulation, the exchange of personal data to third countries is prohibited. This has been welcomed by the EDPS – see EDPS, Comments on the draft report on the revision of the Frontex Regulation, Case 2010-0056, Letter of 3 December 2010 to Rapporteur Simon Busuttil, EDPS, Brussels, 3 December 2010(b); see also the Annex to the letter, "EDPS's comments on Amendment 59 in the draft report".

[264] See Art. 11(c) of the agreed text of Council of the European Union, *Proposal for a Regulation of the European Parliament and the Council amending Council Regulation (EC) No. 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX) – Analysis of the final compromise text with the view to agreement*, 12341/11, Brussels, 5 July 2011(e).

[265] G. Gonzalez Fuster, P. De Hert, E. Ellyne and S. Gutwirth, *Huber, Marper and Others: Throwing new light on the shadows of suspicion*, INEX Policy Brief No. 8, CEPS, Brussels, June 2010.

[266] Frontex, *Frontex General Report 2007*, Frontex, Warsaw, 2007(a), p. 32.

[267] Ibid., pp. 29-30.

The Charter requires that there should be opportunities to access one's file and challenge unlawful or unjustified insertion of data into data bases.[268] As much of the work of Frontex is secret, including its risk analysis, it is hard for an individual to establish whether his or her data are processed by the agency.

5.1.4. Frontex relations with third states

Frontex has multiple working arrangements with third States (see Table 4). With the new Frontex Regulation in place, it will acquire even more competences to engage third States in its activities. For example, the agency will be able to place its own liaison officers in third countries and will be competent to implement 'assistance projects' there.[269]

Those third States are non-EU States and thus not bound by the Charter as well as in some cases not by the ECHR, meaning that some of those States are not bound by European fundamental rights protection regimes. Moreover, even States bound by those documents may still deserve a critical scrutiny of the adequateness of their practical implementation before Frontex would engage with them. Hence, there is a risk that Frontex engages with authorities that are not as committed to and bound by fundamental right obligations as it is.[270] The 'externalisation'[271] of border control to those States, but also the exchange of information and border control capacity-building, may therefore run the risk of aiding policies that do not respect fundamental rights.[272] This risk is however hard to assess, as the working arrangements are not public or subject to further scrutiny.[273]

[268] Arts. 8(2), 41 and 47 of the Charter.

[269] See Art. 14 of the agreed text of Council of the European Union, *Proposal for a Regulation of the European Parliament and the Council amending Council Regulation (EC) No. 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX) – Analysis of the final compromise text with the view to agreement*, 12341/11, Brussels, 5 July 2011(e).

[270] See J.J. Rijpma, "Building borders: The regulatory framework for the management of the external borders of the European Union", PhD Thesis, European University Institute, Florence, 2009, p. 348.

[271] See for example, E. Guild, S. Carrera and T. Balzacq, *The changing dynamics of security in an enlarged European Union*, Challenge Research Paper No. 12, CEPS, Brussels, October, 2008, p. 14; see also C. Boswell, "The external dimension of EU migration and asylum policy", *International Affairs*, Vol. 79, No. 3, 2003, pp. 619-638.

[272] Amnesty International and the European Council on Refugees and Exiles (ECRE), *Briefing on the Commission proposal for a Regulation amending Council Regulation (EC) 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex)*, Amnesty International and ECRE, London and Brussels, September 2010, pp. 24-28.

[273] European Council on Refugees and Exiles (ECRE) and British Refugee Council (BRC), Joint Response to the Select Committee on the European Union, Sub-Committee F, Frontex Inquiry, ECRE and BRC, Brussels and London, 24 September 2007, p. 7.

Table 4. *Frontex working arrangements with third States' authorities*

Working arrangements in place	Mandates to enter into negotiations (ongoing)
Albania	Brazil
Belarus	Egypt
Bosnia and Herzegovina	Libya
Canada	Mauritania
Cape Verde	Morocco
Croatia	Nigeria
Former Yugoslav Republic of Macedonia (FYROM)	Senegal
Georgia	Turkey
Moldova	
Montenegro	
Russian Federation	
Serbia	
Ukraine	
United States	

Source: Frontex website

5.2. Europol

Despite the limitations placed on Europol's mandate, as set out in section 2.2., the agency nevertheless possesses significant powers that are sensitive from a fundamental rights perspective. In particular, it can request and participate in operational investigations together with law enforcement authorities of another Member State and it collects, processes and exchanges sensitive personal data, including with third parties. In this section, these activities of the agency will be explored to highlight the potential tensions that may arise with the Charter of Fundamental Rights. It will also draw attention to the particular sensitivities which arise from Europol's increasing focus on immigration and criminality.

5.2.1. Participation in JITs and other operational activities

As we have seen in the case of Frontex, many of the open questions which surround Europol's operational activities and their impact of fundamental rights stem from the blurred boundaries surrounding Europol's activities in this domain. The legal framework for setting up and operating a joint investigation team (JIT) allows for a wide range of discretionary powers. Although the JIT Model Agreement, the mutual agreement between participants of a JIT setting out its purpose, composition and arrangements, provides supplementary guidelines, these agreements are intended to be flexible and adapted according to the nature of criminal investigations and the differences in national legislation, and therefore fail to provide legal certainty.[274]

Formally, Europol has no executive powers when participating in JITs. However, 'assistance and support' can themselves function as an indirect power. Indeed, in practice the agency appears to wield fairly extensive powers to drive and steer the direction of a joint investigation. For instance, the initiative to launch a joint investigation may come direct

[274] J. Nagy, "About Joint Investigation Teams in a Nutshell", *Current Issues of Business and Law*, Vol. 4, 2009, pp. 141-159.

from the agency itself. Secondly, although Europol staff are forbidden from taking part in any 'coercive measures', they "may assist in all activities" within the JIT.[275] Aside from the inherent contradiction between these two statements, this leaves room for a wide interpretation of the activities with which Europol staff can participate, particularly in view of the fact that no definition is provided of 'coercive measures'. Europol's participation can be far-reaching and includes giving expert advice in setting up the JIT and the planning of strategic and operational activities, providing analytical support leading to the prioritisation and identification of the main criminal targets and carrying out real time checks on the Europol database to support coercive police actions (searches and arrests).[276] Furthermore, Europol also engages in operational missions outside the scope of JITs which also involve them being deployed in the field for the purpose of providing analytical and operational support.

Given the potentially deep impact that Europol can have in its operational activities, what are the fundamental rights sensitivities at stake?

First, there are certain rights that EU agencies must take into account when they come into contact with individuals. The right to life or the right to physical integrity (refer to section 4) is one example of a right that might be jeopardised by the participation of Europol staff in joint investigations or other operational activities. It is not unforeseeable that situations may arise during operational activities, such as house searches or interviews with criminal suspects, resulting in situations of force and coercion in which individuals may be hurt or lose their lives. The very close involvement of Europol officials in the field, does not exclude their potential liability in such a scenario. Indeed, although Europol staff shall not be involved in the taking of any coercive measures:

> Europol staff can, under the guidance of the leader(s) of the team, be present during operational activities in the JIT, in order to render on-the-spot advice and assistance to the members of the team who execute coercive measures.[277]

They may not take coercive measures themselves, but they may suggest the use of coercive measures by national authorities in JITs.[278] It is therefore not unforeseeable that Europol officers could become implicated in the case of misdemeanours or damages. Indeed, it was this close proximity of Europol officers to operational tasks that led Member States to lift the immunity that had previously applied to Europol officials specifically in respect of official acts undertaken when participating in a joint investigation team.[279]

Second, certain fundamental rights laid down in the Charter may be put into question by the specific nature of the operations in which Europol is involved. Particular sensitivities exist where Europol's activities target immigrants and ethnic groups.

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[275] See Art. 4.2.2 of the "Specific arrangements related to the participation of Europol" in Council of the European Union, Council Resolution of 26 February 2010 on a Model Agreement for setting up a Joint Investigation Team (JIT), OJ C 70/1, 19.3.2010(b).

[276] For instance, this applied to Operation Golf, a joint investigation led by the UK Metropolitan Police and Europol that targeted criminal networks trafficking children from the Roma community. See Europol, *Europol Review: General Report on Europol Activities 2010*, Europol, The Hague, 3 May 2011(c), p. 42.

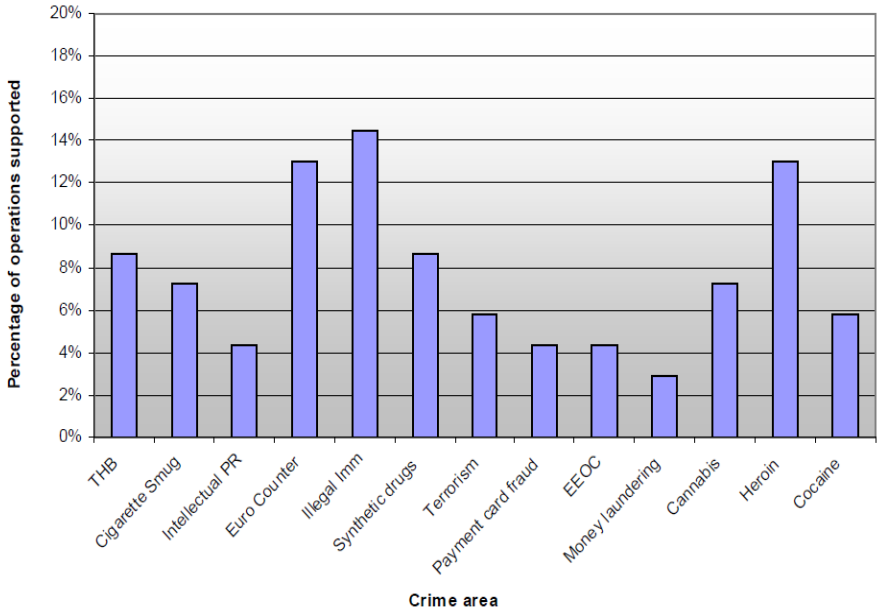
[277] See Art. 4.1.4 of the "Specific arrangements related to the participation of Europol" in Council of the European Union, Council Resolution of 26 February 2010 on a Model Agreement for setting up a Joint Investigation Team (JIT), OJ C 70/1, 19.3.2010(b).

[278] S. Peers, "Europol: The final step in the creation of an 'investigative and operational' European police force", Statewatch Analysis, Statewatch, New York, NY, January 2007.

[279] M. Busuioc, *The Accountability of European Agencies: Legal Provisions and Ongoing Practices*, Delft: Eburon Academic Publishers, 2010, p. 189.

Here it should be noted that a high proportion of Europol's operational assistance involves operations concerning irregular migration. Figure 2 below, taken from Europol's 2010 activity report, demonstrates that irregular migration was one of the main focuses of its operational activities.

Figure 2. Operational support provided by Europol to Member States in 2010



Source: Europol Activity Report 2010.

Although these operations explicitly target the criminal networks that facilitate irregular migration for financial gain, the consequences of such operations nevertheless also impact the individual migrants themselves and raise a number of questions.

Europol provides several examples of operations that target 'criminal gangs' smuggling immigrants into the EU in exchange for financial remuneration. These include operations focusing on smugglers who facilitate the movement of migrants from conflict zones (e.g. Operation Sebeke targeted networks smuggling Iraqi and Afghani nationals from Iraq and Afghanistan) or countries with poor human rights records (e.g. Operation Garnet which targeted the arrival of Chinese immigrants to the UK between 2008-2010). The actions of Europol in this domain can be seen to take on objectives of migration control. By restricting organised entry into the EU, Europol participates in the broader set of immigration and border control measures which prevent access to the territory of the EU, including for individuals who may be in need of international protection and a genuine claim for asylum.

The potential risk that operations that single out national and ethnic 'criminal groups' may breach the right to non-discrimination enshrined in Article 21 of the EU Charter (refer to section 4) must also be considered. The targeting of criminal suspects according to national, regional or ethnic origin in Europol's activities is evident in the regular threat assessments published by the agency. The 2011 EU Organised Crime Threat Assessment (OCTA) enters into extensive detail on the criminal groups involved in facilitated irregular immigration and human trafficking.[280] It identifies "Chinese, Vietnamese, Indian, Pakistani, and some West African groups" as the most active groups involved in smuggling and

[280] Europol, *EU Organised Crime Threat Assessment – OCTA 2011*, Europol, The Hague, 2011(a) (https://www.europol.europa.eu/latest_publications/3).

highlights that "Brazilian organised crime groups must be carefully monitored".[281] It also enters into detail regarding the groups involved in human trafficking, underlining that "Bulgarian and Romanian (mostly of Roma ethnicity), Nigerian and Chinese groups are probably the most threatening to society as a whole", adding that "Roma organised crime groups are extremely mobile, making the most of their historically itinerant nature".[282] Great caution should be taken when dealing with categorisations of this nature, particularly when they feed into operational actions of Europol and national competent authorities. There is a significant risk that prior stigmatisation of national and ethnic groups would lead to their discriminatory treatment at the hands of police or border officials. [283]

Where Europol operational activities deal with vulnerable groups such as irregular migrants, questions must also be asked about the specific actions executed during operations, and their implications for individuals' rights. There is a severe lack of information and monitoring of operational activities involving Europol – the information available tends to stem solely from Europol itself in the form of press releases and activity reports and therefore contains an implicit bias. Nevertheless, even this carefully filtered information provokes questions. For instance, a Europol-Eurojust press release from February 2011 covering an operation against 'illegal smuggling networks' supported by Europol and involving four Member States mentions that, in addition to the arrests of 30 suspected 'criminal facilitators':

> France took action to dismantle a transit camp used by immigrants... 38 immigrants (14 Vietnamese and 17 of various other nationalities) were intercepted in this camp, where they all lived in cramp conditions.[284]

We may only speculate which are the other nationalities of the individuals whose temporary shelter was dismantled and there is no indication of what happened to the immigrants who were "intercepted'" It is possible that the "17 of various other nationalities" included also EU citizens given the French government's systematic targeting of "irregular settlements" which led to the expulsion of almost 1,000 Romanian and Bulgarian nationals of Roma origin living in France in 2010.[285] If this was indeed the case, Europol, which was deployed 'on the spot' in France and which provided "operational analytical support throughout the investigation"[286] may be implicated in an action that stands in a difficult relationship with the EU Charter right to non-discrimination as well as the free movement and citizenship rights enshrined in the Charter and the Lisbon Treaty. Even though formally the action was taken by the host Member State, Europol's advice, information and strategic input could have played an indirect but nevertheless important part in the chain of decisions leading to those actions and therefore should not escape scrutiny.

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[281] Ibid, p. 17.
[282] Ibid, p. 20.
[283] Thomas Hammarberg, the Commissioner for Human Rights, recently warned against the stigmatisation of the Roma and its discriminatory potential, stating that politicians "should avoid using stigmatising speech against the Roma and should not feed the age-old prejudices against this minority...in particular concerning their involvement in crime...by setting the example for prejudice and discrimination in society, politicians effectively prevent Roma and Travellers from enjoying their rights on an equal footing with others". See the Commissioner's blog post, "Politicians using anti-Roma rhetoric are spreading hate", 28 June 2011 (http://commissioner.cws.coe.int/tiki-view_blog_post.php?postId=148).
[284] Europol and Eurojust, "Large international operation against illegal immigrant smuggling networks", Joint Press Release, Europol and Eurojust, The Hague, 8 February 2011 (http://www.eurojust.europa.eu/press_releases/2011/08-02-2011.htm).
[285] S. Carrera and A. Faure-Atger, *L'Affaire des Roms: A Challenge to the EU's Area of Freedom, Security and Justice*, CEPS Liberty and Security in Europe Series, CEPS, Brussels, September 2010.

Since August 2010 Europol has also participated in a Joint Investigation Team targeting marriages of convenience.[287] Errors made in the investigation that would erroneously lead to deportation or the blocking of family reunification could stand in tension with Article 7 of the Charter on the right to protection of private and family life, as discussed in section 4.3. Information and analytical support transmitted by Europol could implicate the agency as indirectly responsible for the violation of this right.

5.2.2. Processing of personal data

Europol's central task, as a criminal intelligence 'hub' is to collect and process data on persons and objects through the use of its computerised data systems, the most important of which is the Europol information system. The fundamental rights sensitivities implied by handling the scale of data that Europol holds in its system (in December 2010, the Europol information system alone held 35,585 entries on persons)[288] and the often highly sensitive nature of this data have been recognised by the agency.

Accordingly, Europol has developed its own, data protection regime, quite separate from the wider EU level framework on data protection, comprising an in-house Data Protection Officer and an independent Joint Supervisory Body (as described in section 2.2.3).[289] This system is widely held to offer a more robust level of protection than that provided by the current EU level framework on data protection.[290] Nevertheless, weaknesses and gaps have been identified within Europol's system for data protection, both in the legal basis, the Europol Council Decision, and in the de facto activities of the agency which create difficulties for Europol regarding its obligations under the Charter, and particularly Article 8 on the Right to Data Protection, and the related Data Protection Convention[291] and Data Protection Directive of 1995.[292] This EU framework for data protection enshrines several key data protection principles, such as those of purpose limitation (including a ban on aimless data collection, requirement for legitimacy of purpose and disclosure limitation), purpose specification, extra safeguards for special categories of data, quality of data and rights for the data subject to access and correct their personal data.[293]

When testing Europol's data processing activities against these principles, weaknesses in the agency's data protection framework can be identified relating to three areas in particular: the content and quality of data held on Europol's information systems and its compliance with data protection standards, the rights of the data subject and Europol's information exchanges with third countries.

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[286] Europol and Eurojust, "Large international operation against illegal immigrant smuggling networks", Joint Press Release, Europol and Eurojust, The Hague, 8 February 2011 (http://www.eurojust.europa.eu/press_releases/2011/08-02-2011.htm).

[287] Europol, *Europol Review: General Report on Europol Activities 2010*, Europol, The Hague, 3 May 2011(c), p. 46.

[288] Ibid., p. 14.

[289] For further information on the functioning of the Joint Supervisory Body, see Council of the European Union, Rules of Procedure – Europol Joint Supervisory Body, 15848/09, Brussels, 12 November 2009(d).

[290] See for instance, A. De Moor and G. Vermeulen, "The 'new' principal task for Europol to support Member States in connection with major international events: The blurring of boundaries between law enforcement and public order?", in A. Verhage, J. Terpstra, P. Deelman, E. Muylaert and P. Van Parys (eds), *Policing in Europe – Journal of Police Studies*, No. 16, 2010(a), p. 1106.

[291] Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, ETS No. 108, Strasbourg, 28 January 1981.

[292] European Parliament and Council of the European Union, Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281, 23.11.1995.

[293] E. Brouwer, *Digital Borders and Real Rights: Effective Remedies for Third Country Nationals in the Schengen Information System*, Leiden: Martinus Nijhoff Publishers, 2008, p. 204.

5.2.2.1. The content and quality of data on Europol's information systems

Regarding the content of data, it is useful first to clarify the attribution of responsibility. Although Member States have a responsibility for the data that they input into the Europol Information System, as defined in Article 29 of the Europol Council Decision, nevertheless this does not exclude Europol's own responsibility for data processing. As noted by the JSB, in situations where Member States input data on one of Europol's systems, "Europol should also have the responsibility to act when it establishes that the data processing is not in compliance with the [Europol Council Decision]".[294]

The tensions arising between the respective responsibilities for data of the Member States and Europol is highlighted by a specific incident reported by the House of Lords' 29th report on Europol, whereby information on a group of 33 young women had been entered in the Europol information system indicating they were prostitutes and suspects of criminal activity. However, when these entries were traced back to the Member State, it appeared that the majority of women were in fact likely victims of trafficking, and that there was not sufficient evidence to hold them in the Europol system as suspects. Despite this anomaly being flagged in a report of the UK's representative on the JSB, a follow-up inspection nevertheless found that the information was still held in the Europol system a year later.[295] It is relevant to mention here that just under a quarter (24%) of the information held on the Europol information system concerns trafficking in human beings.[296] The above example indicates a worrying scope for erroneous data, which could have serious repercussions for individuals in a particularly vulnerable position, implying not only a violation of the right to data protection but, if this were to lead to their treatment by national authorities of Member States as criminals rather than victims, then also a breach of their right to good administration and an effective legal remedy.

The content of data and its compliance with data protection standards are also called into question in view of the practice by Member States to exchange data on a bilateral basis, including on crimes outside Europol's legal mandate. This began as an informal practice and has now been given a legal basis in the 2009 Europol Council Decision.[297] According to Article 9.3 of the Council Decision, such bilateral exchanges are not the responsibility of Europol and take place according to the national laws of the Member States concerned. This means that they are not subject to Europol's rules on data protection or to supervision by the JSB, thereby creating an important mismatch. As the JSB noted in its opinion on the Europol Council Decision, Europol provides a platform for such exchanges in that technical facilities of Europol are used and in some cases Europol officials are involved. The ambiguity surrounding Europol's role in this activity may have "serious implications for the data protection responsibilities of Europol".[298]

Under the Charter, Article 8 on data protection includes, in paragraph two, the provision that personal data "must be processed fairly and for specified purposes". Indeed, the principle of purpose limitation is a central tenet of data protection and is reinforced by the opinion of Europol's JSB which states that "data should be collected for explicit and

[294] Opinion of the Joint Supervisory Body of Europol with respect to the Proposal for a Council Decision establishing the European Police Office (Europol) (Council Doc. 7083/07), JSB, Brussels, 7 March 2007.
[295] House of Lords, *Europol: Coordinating the Fight against Serious and Organised Crime*, 29th Report, Session 2007-2008, Select Committee on the European Union, London: The Stationary Office Ltd., 2008(a), p. 58.
[296] Europol, *Europol Review: General Report on Europol Activities 2010*, Europol, The Hague, 3 May 2011(c), p. 14.
[297] Art. 9.3 of the Europol Council Decision.
[298] JSB, Opinion of the Joint Supervisory Body of Europol with respect to the Proposal for a Council Decision establishing the European Police Office (Europol) (Council Doc. 7083/07), JSB, Brussels, 7 March 2007, pp. 5-6, 12.

legitimate purposes and not further processed in a way incompatible with those purposes".[299] However, this principle is jeopardised by Europol's information system which allows data to be held on persons who may not have committed a crime but of whom it is suspected will commit crimes in the future.[300] Whereas access to this data was previously restricted, the Europol Council Decision gives national units equal access privileges to all information. This move has been criticised both by the European Data Protection Supervisor[301] and Europol's JSB, which underlined that law enforcement officials should only have access to data when necessary for their task in a specific case. Especially when the case concerns speculative suspicions about possible future behaviour by individuals, access to this category of data "should always be limited to a need for a specific enquiry with specific control mechanisms to ensure this limitation" and these limitations should be extended also to officials from Europol.[302]

Further to these considerations, questions also need to be asked regarding the implications of Europol's increasing focus on irregular migration (and migration control objectives) for the content of Europol's data. Given the above-mentioned example of personal data concerning trafficking victims being held on the Europol Information System, there is a related risk that data of irregular migrants intercepted during operational activities may also be erroneously entered into Europol's information system, with the additional possibility that such information could be exchanged on a bilateral basis between Member States (facilitated by Europol but beyond the reach of scrutiny by the JSB). These questions become even more important when one considers that one of the functions of the Europol information system is to automatically detect any possible hits between different investigations and facilitate the sharing of this information. This could open the door for further breaches of the purpose principle and increase the chances of negatively affecting innocent persons. Here we see the potential consequences which result from the conflation of migrants and criminality in Europol's activities, leading to their stigmatisation, not as individuals who pose a specific threat, but as members of a group profiled as a risk category.[303]

The singling out of migrants as a potential risk category in this way could stand in tension with EU principles of non-discrimination and the EU Charter. The discriminatory potential of different data processing practices which monitor more strictly and systematically one group of individuals over another was highlighted by the Court of Justice in the case *Huber v Germany*.[304] In particular, the Advocate-General appointed to the case argued that differentiated data processing practice (in this case between nationals and non-national EU citizens) casts "an unpleasant shadow" over the groups subject to a stricter monitoring and that reasons of crime and threats to security cannot justify such discriminatory treatment.[305]

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[299] Ibid., p. 9.
[300] Art. 12.1(b) of the Europol Council Decision.
[301] The EDPS stated that "there is no justification for this substantive modification" and recommended providing more safeguards for the access to data of those persons who have not (yet) committed a crime. See the Opinion of the European Data Protection Supervisor on the Proposal for a Council Decision establishing the European Police Office (Europol) – COM(2006) 817 final, OJ C 255/13, 27.10.2007.
[302] JSB, Opinion of the Joint Supervisory Body of Europol with respect to the Proposal for a Council Decision establishing the European Police Office (Europol) (Council Doc. 7083/07), JSB, Brussels, 7 March 2007, p. 16.
[303] See for instance, R. Cholewinski, "The Criminalisation of Migration in EU Law and Policy", in A. Baldaccini, E. Guild and H. Toner (eds), *Whose freedom, Security and Justice? EU Immigration and Asylum Law and Policy*, Oxford: Hart Publishing, 2007.
[304] Case C-524/06, *Huber v. Germany* [2008] ECR I-9705.
[305] Refer to the opinion of Advocate General Poiares Maduro in Case C-524/06, *Huber v. Germany*, delivered on 3 April 2008.

5.2.2.2. Rights of the data subject

The second weakness in Europol's data protection framework pertains to the rights of data subjects. According to Article 8.2 of the Charter, "Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified." However, Europol's track record in this domain has been mixed, with an evaluation of the decisions of the appeals committee revealing an inconsistent approach.[306] Criticisms have also been levelled at the provision in the Europol Council Decision which requires Europol, before deciding on its response to a request for access, to consult the competent authorities of the Member States.[307] There is concern that this consultation mechanism could, by making access conditional on consultation with national competent authorities, "de facto overturn the fundamental nature of the right of access".[308] Finally, criticism has been levelled at the fact that decisions of Europol concerning individual requests to access data stored cannot be appealed to the Court of Justice; rather the route of appeal stops at the JSB.[309]

5.2.2.3. Data exchange with third countries

Thirdly, data protection concerns are raised by the transmission of data by Europol to third countries and other bodies. Table 4 below shows the current state of relations between Europol and third countries. Europol's exchange of data with third countries and bodies is both underpinned by safeguards contained in the Europol Council Decision,[310] in the implementing rules governing Europol's relations with partners[311] and by the cooperation agreements with third states and bodies which also include safeguards intended to ensure adequate levels of data protection. [312]

[306] JSB, Opinion of the Joint Supervisory Body of Europol with respect to the Proposal for a Council Decision establishing the European Police Office (Europol) (Council Doc. 7083/07), JSB, Brussels, 7 March 2007, p. 24.

[307] See Art. 30 of the Europol Council Decision.

[308] See EDPS, Opinion of the European Data Protection Supervisor on the Proposal for a Council Decision establishing the European Police Office (Europol) – COM(2006) 817 final, OJ C 255/13, 27.10.2007; see also A. De Moor and G. Vermeulen, "The 'new' principal task for Europol to support Member States in connection with major international events: The blurring of boundaries between law enforcement and public order?", in A. Verhage, J. Terpstra, P. Deelman, E. Muylaert and P. Van Parys (eds), *Policing in Europe – Journal of Police Studies*, No. 16, 2010(a), p. 1106.

[309] See M. Busuioc, *The Accountability of European Agencies: Legal Provisions and Ongoing Practices*, Delft: Eburon Academic Publishers, 2010, pp. 184-185.

[310] Art. 23 of the Europol Council Decision.

[311] Council of the European Union, Decision 2009/934/JHA of 30 November 2009 adopting the implementing rules governing Europol's relations with partners, including the exchange of personal data and classified information, OJ L 325/6, 11.12.2009(b).

[312] For an overview, see D. Heimans, "The External Relations of Europol – Political, Legal and Operational Considerations", in B. Martenczuk and S. van Thiel (eds), *Justice, Liberty and Security: New Challenges for EU External Relations*, Brussels: VUB Press, 2008.

Table 5. Europol Agreements with Third Countries

Operational Agreements with non-EU States (including the exchange of personal data)	Strategic Agreements with non-EU States (excluding the exchange of personal data)
Australia	Albania
Canada	Bosnia and Herzegovina
Colombia	Former Yugoslav Republic of Macedonia
Croatia	Moldova
Iceland	Russian Federation
Norway	Turkey
Switzerland	Serbia
USA	Montenegro
	Ukraine

Source: Europol website.

Nevertheless, the procedures and final form of cooperation agreements have come under criticism. The negotiation of the Agreement between Europol and the United States on the transmission of personal data and related information was a prime example.[313] The final Agreement attracted concern for a range of reasons: it provided for the exchange of data for purposes much wider than Europol's remit; it entitled a wide range of US authorities to receive data from Europol under the Agreement, which included local as well as State and Federal law enforcement authorities; and the lack of information about data protection or supervisory bodies in the United States raised concerns that data transmitted to the United States would not be subject to broadly equivalent data protection standards.[314]

Although the JSB is consulted before a cooperation agreement is approved by the Management Board and finally the Council, nevertheless in the case of the Europol–US agreement, the House of Lords found that, "the JSB does not appear to have taken a sufficiently independent approach" and that "on some issues it had let its acknowledgment of the political imperative to secure an agreement override its responsibility for ensuring essential data protection safeguards".[315]

More recently, the EU-US Agreement on the Terrorist Finance Tracking Programme (TFTP), which came into force on 1 August 2010,[316] and which facilitates the exchange of personal data for the purposes of identifying and tracking the finances of terrorists, has also raised data protection concerns. A JSB inspection of Europol's implementation of the TFTP agreement found that certain data protection requirements were not being met; namely that the data transfer requests made by the US authorities in the first 6 months of the

[313] Agreement between the United States of America and the European Police Office, 6 December 2001.
[314] House of Lords, *Europol's Role in Fighting Crime*, 5th Report, Session 2002-2003, Select Committee on the European Union, HL Paper 43, London: The Stationary Office Ltd., 2003, pp. 16-17.
[315] Ibid., p. 17.
[316] Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for purposes of the Terrorist Finance Tracking Program, OJ L 8/11, 13.01.2010.

agreement were so abstract as to make it impossible for Europol to verify whether they complied with the agreement and to evaluate the necessity of the transfer.[317] Despite this, Europol had approved each request it received. In addition, the JSB report notes that information provided orally to Europol staff by US authorities had persuaded Europol to transfer data, but that as the content of that communication was not known, it was impossible to verify its compliance with the TFTP agreement. The concerns raised here demonstrate that data transferred to third states raise serious tensions with Article 8 of the Charter on the right to data protection and Article 8 of the ECHR on the right to private life, in their non-compliance with principles of proportionality and necessity (refer to section 4.4.2).[318]

More generally, Europol's cooperation with a number of third countries with poor human rights records under international law and the Council of Europe system, such as Russia,[319] requires close monitoring. Although the distinction between Operational Agreements, which allow exchanges of personal data, and Strategic Agreements, which do not, has been devised specifically to allow Europol to collaborate with third states with less than sufficient human rights and data protection standards, nevertheless, questions must be asked about the specific content of the 'technical and strategic' cooperation that occurs under Strategic Agreements. In particular, could Europol receive strategic information obtained under torture or other inhuman or degrading treatment (in breach of Article 4 of the Charter and Article 3 ECHR) or in turn facilitate law enforcement operations in third states which impact on fundamental rights?[320]

5.3. EASO

The European Asylum Support Office is still very much in its infancy, having only become fully operational in June 2011. Therefore unlike Frontex and Europol, there is little possibility to draw upon empirical examples of this agency's activities and its impact on individuals. We can nevertheless identify those activities of EASO that are *sensitive* to fundamental rights violations under the Charter of Fundamental Rights. Before entering into an examination of specific tasks, it is worth re-stating that EASO's mandate is to support EU Member States' to implement EU asylum law and more broadly, the establishment of the Common European Asylum System. A first question that arises therefore is to what extent EASO could be accountable if the EU's asylum legislation itself leads to fundamental rights violations. A 2010 report by the Odysseus Network for the European Parliament found that the current Dublin Regulation falls short of ensuring compliance with the principle of non-refoulement and that there remain important lacuna in the EU legal framework covering asylum, (e.g. gaps in the protection of family unity in EU asylum

[317] See JSB, *Report on the inspection of Europol's implementation of the TFTP Agreement, conducted in November 2010 by the Europol Joint Supervisory Body*, JSB Inspection Report No. 11-07, JSB, Brussels, 1 March 2011; see also European Parliament, "SWIFT implementation report: MEPs raise serious data protection concerns", LIBE Committee, Press Release, 14 March 2011(b).

[318] See also the Opinion of the European Data Protection Supervisor on the Proposal for a Council Decision on the conclusion of the Agreement between the European Union and the United States of America on the Processing and Transfer of Financial Messaging Data from the European Union to the United States for Purposes of the Terrorist Finance Tracking Program (TFTP II), EDPS, Brussels, 22 June 2010(a) (http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2010/10-06-22_Opinion_TFTP_EN.pdf).

[319] See for instance the report by T. Hammarberg, *Report from the Commissioner for Human Rights of the Council of Europe following his visit to the Russian Federation, Chechen Republic and the Republic of Ingushetia*, Commissioner for Human Rights, Council of Europe, 11 September 2009 (https://wcd.coe.int/wcd/ViewDoc.jsp?id=1543437&Site=CommDH&BackColorInternet=FEC65B&BackColorIntranet=FEC65B&BackColorLogged=FFC679).

[320] See F. Geyer, *Fruit of the Poisonous Tree: Member States Indirect Use of Extraordinary Rendition and the EU Counter Terrorism Strategy*, CEPS Working Document No. 263, April 2007.

law).[321] The indirect influence that EASO may exert on the decisions of national asylum authorities (despite its lack of formal executive powers in this domain) for instance, through the issuance of guidelines, and where this leaves the accountability of the agency requires clarification.

5.3.1. Deployment of support teams

As with Frontex and Europol, EASO has been granted operational competences through its mandate to coordinate the deployment of EU asylum support teams in Member States experiencing particular pressure on their national asylum systems (as described in section 2.3).[322]

During deployment on a Member State's territory, EASO experts are mandated to take part in screening of asylum applications, on the proviso that EASO experts are accompanied by an official of the host Member State. Their participation in this activity is highly sensitive, given the potential violations of the rights to asylum, non-refoulement, as well as good administration which would be implied by the failure to provide adequate processing of an asylum claim (refer to sections 4.4.3, 4.4.4 and 4.4.5).

Again, it should be recalled that formally EASO is not mandated to take decisions on individual asylum claims.[323] However, here too questions must be asked as to whether this formal division of tasks would, in the case of a violation of rights under the Charter, absolve the agency of responsibility. Experts in EASO's asylum support teams might exert a degree of influence on decision-making procedures by national authorities. If not directly taking decisions themselves, their authority as EASO experts could nevertheless influence and legitimise decisions taken by the host Member State authorities.

Here again, the prevalence of 'grey areas' concerning the division of tasks and decision-making leads to blurring of responsibilities. Unfortunately, it appears that clarity will not be provided through transparent communication of information pertaining to EASO's operational activities. Despite requests by civil society and the European Parliament to provide access to the current operational plan that underpins EASO's first deployment of an asylum support team in Greece, the plan remains unavailable at the time of writing.[324] This ambiguity and lack of information surrounding the respective activities of EASO experts and Member State officials could potentially pose obstacles to any individual attempting to seek legal redress for a wrongful asylum decision.

Although the most sensitive activity in which EU asylum support team experts participate is screening exercises, other activities undertaken during the deployment of asylum support teams may also raise fundamental rights considerations. For instance, according to a report by the Swedish Migration Board on EASO's activities in Greece, it appears that EASO experts currently deployed in Greece are involved in the 'management of reception activities' and 'detention'.[325] Given the ECtHR's recent ruling in the *MSS v Belgium* case

[321] See Odysseus Network, *Setting up a Common European Asylum System – Report on the application of existing instruments and proposals for the new system,* Report for the European Parliament, Directorate-General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs, 2010, p. 36 *(http://www.statewatch*.org/news/2010/sep/ep-study-eu-asylum.pdf).
[322] See chapter 3 on "Asylum Support Teams" of the EASO Regulation.
[323] See Recital 14 of the EASO Regulation.
[324] See the EASO Monitor blog entry of 2 May 2011, "Document request denied by the Commission", (http://easomonitor.blogspot.com/2011/05/document-request-denied-by-commission.html).
[325] See Swedish Migration Board, *Rapport fran abetet med en operstiv plan for EASO i Grekland 25 februari – 24 mars 2012*, Swedish Migration Board, 2011:

(refer to section 5.1.1 above)[326] in which the Strasbourg Court found Greece's treatment of asylum-seekers to be inhumane and degrading, EASO's precise actions and responsibilities concerning the management of national reception and detention centres need to be further explored and scrutinised.

5.3.2. Provision of country of origin information and technical documents

The impact on an individual's fundamental rights must also be taken into consideration when examining EASO's mandate to provide country of origin information[327] and technical documents on the implementation of EU asylum instruments, such as guidelines and operating manuals.[328]

As noted by the European Council on Refugees and Exiles, country of origin information in particular has a fundamental role in asylum procedures:

> The provision of relevant, accurate and up-to-date and transparent country of origin information (COI) is a crucial component of a fair and efficient asylum determination process. Indeed, COI is often the only objective evidence available in all asylum cases, and is therefore critical for refugee status determination.[329]

The sensitivity of EASO's development and dissemination of country of origin information and the potential implications this activity could have on the Charter rights to asylum and protection against collective expulsion and *refoulement* should be taken into account, and not disregarded on the basis of the inclusion of a safeguard clause in the EASO Regulation. Amnesty International has highlighted, in view of EASO's future working agreements with third countries, the potential conflict between maintaining good working relations with the countries from which the asylum-seekers originate, and providing credible and impartial country-of-origin information.[330] Appropriate safeguards must be in place to ensure that country of origin information is accurate, based on independent sources of expertise and free from political influence.

In addition, safeguards must ensure that country of origin information does not jeopardise or substitute fair procedures by national authorities in the determination of asylum procedures in accordance with EU law, which would stand in breach of the right to good administration provided by Article 41 of the Charter. This includes the right "of every person to be heard, before any individual measure which would affect him or her adversely is taken" (for further discussion, see section 4.4.5).

Finally, in its provision of country or origin information, guideline and user manuals, one might also question the sensitivity of these activities with respect to the right to non-discrimination. Through its indirect influence on national asylum procedures and practices,

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(http://aditus.org.mt/aditus/Documents/SwedishMigrationBoardEASOGreeceReport%28Swedish%29.pdf). For a commentary on the report, see the EASO Monitor blog entry of 17 May 2011, "Swedish Migration Board's full report on EASO in Greece (Swedish)" (http://easomonitor.blogspot.com/2011/05/swedish-migration-board-full-report-on.html).

326 *MSS v. Belgium and Greece*, Application No. 30696/09, ECtHR, 21 January 2011.

327 See Art. 4 of the EASO Regulation.

328 Ibid., Art. 12.

329 European Council on Refugees and Exiles (ECRE), ECRE Comments on EU plans to establish a European Asylum Support Office (EASO), Ado5/12/2008/ext/AP, ECRE, Brussels, 2008 (http://www.ecre.org/topics/areas-of-work/protection-in-europe/129.html).

330 Amnesty International, "The European Asylum Support Office (EASO): Closing the Protection Gap in Europe?", Amnesty International, London, March 2011 (http://www.amnesty.eu/content/assets/Doc2011/EASO_March_2010_Medium_Res.pdf).

what measures is EASO taking to support the implementation of asylum procedures that are sensitive to certain vulnerable groups, to ensure that persons such as lesbian, gay, bisexual and transgender persons, benefit from a non-discriminatory process and that their qualification for international protection in EU Member States is brought into line with international human rights norms?[331]

5.3.3. Relations with third countries

EASO is mandated to establish relations with third countries that will entail the exchange of information and capacity-building exercises in the areas of asylum, reception and sustainable solutions. EASO's founding regulation calls on the agency to "facilitate operational cooperation between Member States and third countries...within the framework of the EU's external relations policy...".[332] This is a very broad provision. It remains to be seen how EASO's capacity-building role, which could entail fundamental rights sensitive aspects, will be managed and developed by its Management Board. There is a risk that EASO could be co-opted into EU external policies involving the externalisation of border controls. There is already evidence of such a development. For instance, a Commission communication of 24 May 2011, adopted in response to the migration flows from the Southern Mediterranean in the first half of 2011, calls upon EASO to support capacity-building efforts by North African countries "for the efficient management of migration" as part of the conditions attached to the creation of Mobility Partnerships with those countries.[333] Capacity-building in asylum in third countries should not be undertaken with the aim of containing refugees in countries and regions outside the EU.[334] There is also a risk where third states are characterised by a weak fundamental rights regime that EASO is implicated in aiding policies that do not respect fundamental rights. Finally, a core component of EASO's relations with third countries will be the exchange of information; this invokes questions surrounding the nature (including quality and accuracy) of the information exchanged and the implications for individuals.

5.4. Inter-agency cooperation

The 2009 Stockholm Programme, the third multi-annual AFSJ programme, clearly called for more coherence and cooperation between the different JHA agencies.[335] The Commission, in its Action Plan on the Stockholm Programme, followed this up with steps to *inter alia* improve inter-Agency information exchange.[336] Moreover, the Internal Security Strategy (ISS) links the state of internal security to the extent of border security, thus suggesting a strong (but often non-evidence based) assumption of external threats to internal security.[337] This approach is further reaffirmed by the joint JHA agencies' (Europol, Eurojust

[331] See the concerns raised on this issue in the joint opinion paper by Amnesty International, the European Women's Lobby and ILGA-Europe, "En-Gendering the European Asylum Support Office", Amnesty International, London, May (2011) (http://www.endfgm.eu/content/assets/Engendering_the_European_Asylum_Support_Office_2011_FINAL.pdf).

[332] Art. 49.2 of the EASO Regulation.

[333] European Commission, Communication on a Dialogue for Migration, Mobility and Security with the Southern Mediterranean Countries, COM(2011) 292 final, Brussels, 24 May 2011(c).

[334] M. Garlick and J. Kumin, "Seeking Asylum in the EU: Disentangling Refugee Protection from Migration Control", in B. Martenczuk and S. van Thiel (eds), *Justice, Liberty and Security: New Challenges for EU External Relations*, Brussels: VUB Press, 2008.

[335] See European Council, The Stockholm Programme – An open and secure Europe serving and protecting citizens, OJ C 115/01, 04.05.2010, pts. 1.2.4, 3.2.2 and 4.3.1; see also European Commission, Communication on Delivering an Area of Freedom, Security and Justice for Europe's Citizens: Action Plan Implementing the Stockholm Programme, COM(2010) 171, Brussels, 20 April 2010(b), p. 6.

[336] The Commission will issue a Proposal on information exchange between Europol, Eurojust and Frontex, see: European Commission (2010b), COM(2010) 171 final, pp. 32, 52.

[337] European Commission, Communication on the EU Internal Security Strategy in Action: Five Steps towards a More Secure Europe, COM(2010) 673 final, Brussels, 22 November 2010(c), p. 4.

and Frontex) assessment of the internal security in the EU: "Most threats to internal security are generated outside the EU".[338] Moreover, the Council gave a further impetus for inter-Agency cooperation in its conclusions on "29 measures for reinforcing the protection of the external borders and combating illegal immigration", most notably by stressing the need for information sharing.[339] Following up on these conclusions, the so-called 'Measure 6 Project Group' (i.e. the project group dealing with the sixth measure in the Council conclusions) suggested options to link more closely the agencies' activities; they include connecting Frontex to SIENA (Europol's Secure Information Exchange Network Application) and its involvement in JITs (Joint Investigation Teams).[340]

The agencies are thus continuously encouraged to cooperate.[341] In practice, this cooperation mainly takes the form of operational cooperation and information exchange, which are the subjects of the remainder of this section.

What are the implications of this cooperation from the perspective of the Charter of Fundamental Rights? We argue that on top of the agency-specific sensitivities as described above, the inter-agency cooperation creates additional challenges to the compliance with those rights.

As a preliminary point it should be noted that the unclear ways of working resulting from the multi-actor and multi-level nature of the cooperation are a basic challenge to ensure effective safeguards of the Charter rights. Clearly, some 'Frontex joint operations' are marked by the involvement of several actors, namely Frontex, Member States, third States, Europol and potentially EASO in the future. Furthermore, UNHCR and Interpol have also participated in joint operations.[342] See in particular table 5 below on six Frontex JOs involving Europol. In these Frontex-Europol activities there is a blurring of 'who is doing what'. This adds to the complexity of the working arrangements, but also to increasingly opaque responsibility allocation. Although the actors invoke their legal mandate and cordoned off liability, the situation is not as clear-cut on the ground for the individual. Even more, legal mandates often overlap or leave questions regarding responsibility and demarcation of tasks unanswered. Instead of the current undisclosed ways of working (e.g. no public operational plans, working arrangements and lack of monitoring) there should be absolute clarity for everyone (i.e. including the individuals targeted, the courts, parliaments and the general public) about the liability for actions in light of the right to an effective remedy.

[338] Council of the European Union, *The Joint Report by EUROPOL, EUROJUST and FRONTEX on the State of Internal Security in the EU*, 9359/10, Brussels, 7 May 2010(e), p. 1.
[339] Council of the European Union, *Conclusions on 29 measures for reinforcing the protection of the external borders and combating illegal immigration*, Brussels, 25-26 February 2010.
[340] Council of the European Union, *Final Report and recommendation of Project Group 'Measure 6'*, 7942/1/11 REV 1, Brussels, 15 April 2011(c), p. 7.
[341] See for an overview of cooperation in 2010, see Council of the European Union, *Report on the Cooperation between JHA Agencies in 2010*, 5675/11, Brussels, 25 January 2011(f).
[342] This happened in the Hammer JO of 2008 – see Frontex, *Frontex General Report 2008*, Frontex, Warsaw, 2008, p. 19.

Table 6. Reported FRONTEX JOs involving Europol

Name	Participating States	Type	Year(s)
AGELAUS	AT, BE, CZ, DE, EE, ES, FI, FR, HU, IT, LV, NL, PL, PT, SE, SK, SL, UK	Airport (minors)	2006, 2010
HAMMER	AT, BE, BG, CY, CZ, DE, DK, ES, FI, FR, GR, HU, IC, IT, IRL, LI, LV, LU, NL, NO, PL, PT, RO, SE, SK, SL, UK	Airport (also UNHCR, Interpol involvement)	2008 - 2010
HERMES 2011	AT, BE, CH, DE, ES, DK, FR, HU, IT, NL, PT, RO, SE	Land & Sea (Central Mediterranean)	2011
HYDRA	AT, BE, BG, CZ, DE, ES, FI, FR, HU, IT, NL, PL, PT, RO, SK, SL, UK	Airport (Chinese migration)	2006, 2007, 2010
POSEIDON	AT, BE, BG, CY, DE, ES, DK, EST, FI, FR, GR, IT, LV, LI, LU, MT, NL, PT, PL, RO, SE, SK, UK	Land & Sea (Balkan route)	2006 - 2011
SILENCE	BE, BU, DE, ES, FI, FR, IT, LV, NL, PT, RO, UK	Airport	2008

Sources: Frontex Annual Report 2006 (p. 27), Annual Report 2007 (pp. 20, 24, 30-32), Annual Report 2008 (pp. 28, 40), Annual Report 2009 (pp. 38, 41), Commission, Staff Working Document accompanying a report on the future of Frontex (p. 26 and 14), Frontex Press Release 25 February 2011, "Frontex Guest Officers sent to work in Italy".

Moreover, the right to good administration, under which an individual *inter alia* has the right to be heard, access his or her file and receive reasons for a decision, could be jeopardised by the unclear inter-agency way of working. If it is not evident which actors were involved in the action, how can the individual know to whom to turn? In this nebulous web of interwoven actions, it is hard to pin down the constitutive pieces of an action affecting an individual.

A recent example of such an operation dominated by unclear ways of working and blurring of tasks (and responsibilities) is the HERMES JO in which Europol is participating. Little information is provided on Europol's activities during the operation, and the information available is superficial. Frontex describes the agency as being "actively involved" in the JO.[343] According to Frontex, the Europol Mobile Office was deployed "on the spot" in Lampedusa, allowing Europol experts to "provide operational analytical support throughout the operation".[344] According to the Commission's Communication on Migration, the Europol team was deployed with the aim "to help [Italy's] law enforcement authorities to identify possible criminals among the irregular migrants having reached the Italian territory".[345] Reportedly, Europol is not intervening in the identification of individuals, but rather Europol officers receive information from Italian law enforcement authorities which they then upload to Europol's systems. It is not entirely clear what value Europol's presence adds.

The nature and actual reach of Frontex actions in the HERMES JO is similarly obscure. Frontex has not disclosed details on *where exactly* the involved border guards and equipment operate (e.g. in which jurisdiction?), in which *specific activities* do they engage (e.g. return in the context of the Italian-Tunisian readmission agreement?), which *detailed*

[343] Frontex, "Hermes 2011 starts tomorrow in Lampedusa", News Release, Frontex, Warsaw, 19 February 2011(b) (http://www.frontex.europa.eu/hermes_2011_extended/news_releases/).
[344] Frontex, "Hermes 2011 up and running", News Release, Frontex, Warsaw, 22 February 2011(c) (http://www.frontex.europa.eu/hermes_2011_extended/news_releases/).
[345] European Commission, Communication on Migration, COM(2011) 248 final, Brussels, 4 May 2011(d).

procedures have been followed in the reception of the immigrants (e.g. were they all informed of the possibility to obtain international protection?) and what is the effect, even unintended, of the work of the Frontex debriefing and screening officers for immigrants' asylum applications.[346]

However, beyond the 'procedural' rights discussed so far, the intensifying cooperation between agencies, most notably Frontex and Europol, could also have wider indirect consequences of conflating law enforcement and border control objectives. It is the framing of immigration – criminalising and 'insecuritising' it – that could prove problematic to the right to asylum and other relevant fundamental rights. Illustrative in this respect is Europol's assessment of migration flows from North Africa as a terrorist threat.[347] This framing of migration flows could further propel restrictive reactions to those flows towards Europe; the focus may thus shift away from the respect of the individuals' Charter rights to a fight against crime and terrorism. That may seriously influence the practical ways of working in border control and the attitudes taken by the border guards. Instead of identifying the need for international protection, the criminal and terrorist threat is assessed. Moreover, dealing with criminal and terrorist threats falls outside Frontex's remit. It is therefore not desirable to have Frontex adopt the paradigm of perceiving human mobility as a threat to security.[348] That could happen through the ongoing intensified cooperation on the ground, operational planning, joint training and expertise exchange.[349]

The risks associated with overlapping police and border control objectives and activities between JHA agencies is magnified by their information exchange activities, which is a central component of the vision of inter-agency cooperation in the EU's AFSJ. For instance, the very purpose of the cooperation agreement between Frontex and Europol is to exchange strategic and technical information between the two agencies.[350] Since 2008, an active exchange of information on irregular immigration and cross-border crime has allowed these two agencies to feed into one another's respective intelligence products (Europol's OCTA and Frontex's Annual Risk Analysis). The content of such 'strategic information', including elements such as routes used by irregular migrants, smugglers and traffickers, or methods used by individuals "threatening the security of the external borders or facilitating illegal immigration"[351] demonstrates again a worrying lack of distinction being made between 'persons on the move' and criminals. Here, through inter-agency cooperation the concept of individuals as rights-holders becomes blurred against the backdrop of 'mixed migration flows' and an emphasis on legitimate and illegitimate mobility.

Up to now, information exchange between Europol and Frontex has not extended to transmission of data related to identifiable individuals. Yet, the current version of the draft proposal for an amended Frontex Regulation includes a new provision (Article 11(c)) which allows the agency to process personal data on individuals who are "suspected, by the

[346] Frontex has published a number of press releases on the Hermes JO (see the Frontex website page on news releases, (http://frontex.europa.eu/hermes_2011_extended/news_releases/page1.html), but left these issues unaddressed.

[347] Europol, *EU Terrorism Situation and Trend Report,* TE-SAT 2011, Europol, The Hague, 19 April 2011(b) (www.europol.europa.eu/publications/EU_Terrorism_Situation_and_Trend_Report_TE-SAT/TE-SAT2011.pdf).

[348] S. Carrera, *Towards a common European Border Service?*, CEPS Working Document No. 331, CEPS, Brussels, 2010.

[349] See Art. 6 of the Strategic Cooperation Agreement between the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union and the European Police Office, Warsaw, 28 March 2008: (https://www.europol.europa.eu/sites/default/files/flags/frontex.pdf).

[350] As provided in Art. 1 of the Strategic Cooperation Agreement (ibid.).

[351] Ibid., Art. 2.

relevant authorities of Member States, on reasonable grounds of involvement in cross-border criminal activities, in facilitation of illegal migration activities or in human trafficking activities"[352] and to transmit this data to Europol.

This (possible) new mandate for Frontex presents potential risks for the right to data protection under Article 7 of the Charter. First, the EDPS has stressed that a regular and systematic transmission of data to other EU agencies, such as Europol, runs counter to the principles of proportionality and necessity, requiring a case-by-case analysis.[353] It is encouraging that during the negotiations on the new Frontex mandate some of these issues have been addressed.[354] Nevertheless, questions still remain as regards the content and accuracy of data. Data will be provided by the Member States in the course of joint operational activities and RABITs on individuals 'suspected' on 'reasonable grounds' of criminal activities and passed to Europol to be used in the law enforcement activities of that agency. The wording of the provision raises questions as to whether this allows excessive discretion to Member States. In addition, although the personal data will be deleted by Frontex within a 3-month period, once transferred to Europol, this information will be processed with the aim of facilitating Europol's law enforcement objectives, including the possibility that the data will be made available to the national units of all 27 Member States through its computerised information systems. It remains to be seen what safeguards will be in place to ensure that principles underpinning data protection – that data should be collected for explicit and legitimate purposes and not further processed in a way that is incompatible with those purposes and that law enforcement officials should only have access to data when necessary for their task in a specific case – are respected.

The above highlights the extensive – and growing – cooperation between Europol and Frontex, particularly in the field of information exchange. It is difficult to predict where EASO will fit into the developing cooperation between JHA agencies. However, given the dynamic and rather experimentalist manner in which relations between Frontex and Europol have developed, a similar pattern is not unforeseeable in the case of EASO. Article 52 of the EASO Regulation calls on the agency to cooperate with Frontex alongside other international organisations. What form this cooperation might take and its impact on individual rights under the Charter remain to be seen. One possible scenario might involve EASO experts replacing Frontex officials in pre-screening activities during Frontex joint operations. Another may see Frontex liaison officers deployed in third countries providing information to supplement EASO's country of origin reports and analysis. Whichever form cooperation between EASO and Frontex will take, it will need to be very carefully scrutinised, and clearly circumscribed, given the very different mandates of these two agencies.

[352] Council of the European Union, *Proposal for a Regulation of the European Parliament and the Council amending Council Regulation (EC) No. 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX) – Analysis of the final compromise text with the view to agreement*, 12341/11, Brussels, 5 July 2011(e).

[353] See EDPS, Comments on the draft report on the revision of the Frontex Regulation, Case 2010-0056, Letter of 3 December 2010 to Rapporteur Simon Busuttil, EDPS, Brussels, 3 December 2010(b); see also the Annex to the letter, "EDPS's comments on Amendment 59 in the draft report".

[354] In the agreed text, Frontex's onward transmission of personal data to Europol and "other EU law enforcement agencies" should be on a case-by-case basis. The necessity and proportionality principles are also enshrined in the new text. In addition, the personal data of victims cannot be processed. See respectively Arts. 11(c)(2) and 11(c)(5) of the agreed text of Council of the European Union, *Proposal for a Regulation of the European Parliament and the Council amending Council Regulation (EC) No. 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX) – Analysis of the final compromise text with the view to agreement*, 12341/11, Brussels, 5 July 2011(e).

5.5. The right to an effective remedy and the agencies' activities

5.5.1. The CJEU as the prime guardian of the Charter rights

The previous sections provided an overview of the impact of the EU Charter on the agencies' specific activities by showing their sensitivities to the Charter rights. Where those sensitivities materialise, it is pivotal that an effective remedy is available to the individual to challenge agency actions before a court of law. In a Union 'based on the rule of law', effective remedies should, in accordance with Article 47 of the Charter, be available to challenge executive power.[355]

The most obvious route for an individual seeking redress is to take their claim before a national court, in particular because it will often be the national authorities of a member state who execute the final action in the chain of events which leads to the breach of fundamental rights. Although the claim would primarily be brought against the national authority, it could nevertheless be linked to an agency should the national court in question choose to refer, via the preliminary reference procedure (Article 267 TFEU), [356] a question regarding the interpretation or validity of an involved agency 'act.' Indeed, the CJEU has been relatively flexible in using the preliminary reference procedure to hear cases involving non-binding instruments, which potentially brings certain Agency actions, such as operational plans or codes of conduct, under the procedure's reach.

However, this route only provides an *indirect* means for an individual to hold an agency to account and therefore does not provide for adequate judicial scrutiny of agencies activities.[357] Given that an agency's activities can constitute a composite part of the chain of actions which leads to a breach in fundamental rights, it is clearly insufficient that agencies should only be held indirectly liable. Thus while acknowledging the opportunities provided by national courts, the CJEU[358] should be considered the prime judicial forum to obtain redress for the following two reasons. Firstly, as we are dealing with effective remedies to challenge actions of *EU agencies*, an *EU level court* – namely the CJEU – should be able to deliver on the Lisbon Treaty promise of more accountability. Secondly, the jurisdiction of the CJEU after the entry into force of the Lisbon Treaty now expressly covers agency acts, as pre-Lisbon case law had already indicated.[359] The Lisbon Treaty thus created an opportunity to make judicial accountability of EU agencies real and effective before the CJEU. Moreover, after the Lisbon Treaty, the Court's jurisdiction is extended to cover the whole spectrum of the AFSJ field, now also including police and judicial cooperation in criminal matters (former third pillar). This extension of jurisdiction is subject to a 5-year transitional period; full CJEU review over this field will hence be effective from December 2014 onwards.[360]

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[355] Case C-294/83, *Les Verts v. Parliament* [1986] ECR 1339, para. 23.

[356] According to Article 267 TFEU, a Member State Court can refer a question to the CJEU regarding, "the validity and interpretation of acts of the institutions, bodies, offices and agencies of the Union."

[357] This is also the case because the preliminary reference procedure gives discretionary power to the national courts to decide whether to refer a question to the CJEU. See paragraph 2 of Article 267 TFEU.

[358] The CJEU is divided into the General Court, the Court of Justice and the Civil Service Tribunal. It is the General Court that in principle has the jurisdiction to hear cases discussed in the remainder of this section. The Court of Justice may, under certain circumstances, review decisions by the General Court or may, in the 'first instance', hear cases under the preliminary reference procedure, see Art. 256 TFEU.

[359] See Arts. 263, 265, 266 and 267 TFEU; see also Case T-411/06, *Sogelma v. EAR* [2008] ECR II-2771.

[360] See Art. 10, Protocol on transitional provisions. The Court still does not have jurisdiction to review "the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security" (Art. 276 TFEU). Still, that should not be an obstacle for the Court – on this topic, see J.J. Rijpma, "EU border management after the Lisbon Treaty", *Croation Yearbook of European Law and Policy*, Vol. 5, No. 5, 2009, pp. 2-3, 18. Rijpma also refers to a Court case that seems to

5.5.2. Legal remedies before the CJEU: challenges and opportunities

There are several legal avenues to which an individual can turn when mounting a claim before the CJEU. The two most relevant for our purposes are the action for annulment (Article 263 TFEU) and the compensation for damages procedure (Article 340 TFEU). The former is employed when an applicant wishes to argue that an EU body has acted unlawfully and, if successful, leads to the act being declared void;[361] the latter allows an individual to sue an EU institution or body for compensatory damages.[362]

Bringing an agency before the CJEU under either of these two procedures is not a straightforward endeavour; rather it is complicated by two specific features of Home Affairs agencies' ways of working already highlighted in sections 2 and 5 of this study: first, the avoidance by agencies of direct contact with individuals, and second, the multi-actor nature of the agencies' operational activities. This section will give a brief overview of the main pathways for bringing a case before the Court under these procedures, the barriers presented by agencies specific working practices, and opportunities for overcoming these barriers and accessing legal redress.

5.5.2.1. Action for annulment procedure

Under an action for annulment, the Court can review "the legality of acts of bodies, offices, or agencies of the Union intended to produce legal effects vis-à-vis third parties."[363] There is no authoritative list of 'acts' (a measure bringing about a distinct change in one's legal position) intended under EU law to bind third parties, and the Court has taken a flexible approach in the past,[364] even including oral statements.[365] It is not unforeseeable therefore that the Court might qualify actions of agencies, such as a detailed operational plan, or a technical document issuing instructions, as an 'act', particularly if it were worded in an imperative way and instructions affected the Charter rights of an individual.

For individuals (so called 'non-privileged applicants'), bringing an action for annulment is subject to a strict admissibility criteria. Either an act has to be shown to directly address an individual, or to be of 'direct concern' to an applicant.[366] This means that it directly affects the legal situation of the applicant and leaves no discretion to the addressees of the measure who are entrusted with its implementation.[367] Both requirements prove

indicate willingness on the Court's part to the extent that it may not shy away from such a review anyway – see Case C-150/05, *Van Straaten* [2006] ECR I-9327.

361 See Art. 264 TFEU. This means that the act and the acts based upon it are no longer in effect. Nonetheless, the Court can also qualify the extent of the nullity by leaving parts of the act untouched by the retroactive *erga omnes* nullity; see P. Craig and G. De Búrca, *EU Law – Text, Cases and Materials*, 4th edition, Oxford: Oxford University Press, 2008, pp. 571-573.

362 Moreover, if an action is brought before the Court, it may order the suspension of a contested act or prescribe interim measures – see Arts. 278 and 279 TFEU.

363 Paragraph 1, Article 263 TFEU.

364 Court of Justice of the European Union Case 60/81, *IBM v. Commission* [1981] ECR 2639, para. 9 states that [a]ccording to the consistent case law of the Court any measure the legal effects of which are binding on, and capable of affecting the legal interests of, the applicant by bringing about a distinct change in his legal position is an act or decision which may be the subject of an action under Article 173 [now Article 263 TFEU] for a declaration that it is void. However the form in which such acts or decisions are cast is, in principle, immaterial as regards the question whether they are open to challenge under that Article.

365 ECJ Case T-3/93, Air France v Commission [1994] ECR II-121.

366 The admissibility criteria for non-privileged applicants are laid down in paragraph 4, Article 263 TFEU.

367 Refer to P. Craig and G. De Búrca, *EU Law – Text, Cases and Materials*, 4th edition, Oxford: Oxford University Press, 2008, p. 509. For a selection of CJEU cases on this matter, see Case C-386/96, *Dreyfus v. Commission* [1998] ECR I-2309 and Case T-54/96, *Oleifici Italiana and Fratelli Rubino Industrie Olearie v. Commission* [1998] ECR II-3377. According to Case C-468/01 P, *National Front v. European Parliament* [2004] ECR I-6289, para. 34.

problematic when attempting to bring a case against an agency, as agency action is formally structured so as to avoid direct contact with individuals: the official demarcation of responsibilities, limiting agency activities to 'coordinate' or 'assist', means that it is the Member States who officially remain those acting vis-à-vis the individual. This makes it difficult therefore to prove in strict legal terms that an 'act', has been addressed *by an agency directly to an individual*.

However, these barriers are not insurmountable. First, it should be kept in mind that as agencies acquire more operational competences, most notably those which increase the chance of an agency addressing an act to an individual (even inadvertently), so the likelihood increases that their activities will fall within the remit of Article 263 TFEU. In parallel, the Court may choose to take a more flexible approach to the admissibility criteria to include the less traditional actions of EU agencies. It would not be the first time the Court makes a dynamic reading of the Treaties on legal remedies. Indeed, in the *Sogelma* case the CJEU extended the scope of judicial redress under Article 263 TFEU (then Article 230 TEC) to agency acts, even though no such possibility was foreseen in the Treaty at that time. It argued that "it cannot be acceptable, in a community based on the rule of law, that such acts escape judicial review".[368]

Furthermore, there is also an important *indirect* means by which individuals may bring an annulment action before the CJEU which provides an opportunity to effectively by-pass the requirements placed on non-privileged applicants. EU institutions are 'privileged applicants' under the action for annulment procedure and are thereby not subject to the strict admissibility criteria which applies to individuals.[369] The EP, Commission or Council may therefore choose to bring a case involving a fundamental rights violation by an agency before the CJEU. An individual or NGO could therefore use this route to bring a case against an agency by submitting a formal complaint to either the Commission or the Parliament. On the basis of an evaluation of the evidence, the institution could then decide to take up the case. It has been noted that the EP in particular could play a more active role in this respect. The 2011 study for the European Parliament "The Evolution of Fundamental Rights Charters and Case Law" calls on this institution to take steps to develop its position as a fundamental rights litigant under the action for annulment, strategically employing its privileged role as an applicant and intervener in cases against the EU institutions and other EU bodies in order to safeguard human rights.[370]

5.5.2.2. Compensation for damages procedure

Given the challenges facing an individual to access an action for annulment, the compensation for damages procedure may offer the individual greater opportunities to obtain legal redress before the CJEU. Under compensation for damages actions, the Court adjudicates on claims of damage against a person caused by the Union, its institutions or

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by virtue of settled case-law, the condition that the decision forming the subject-matter of the proceedings must be of 'direct concern' to a natural or legal person, as it is stated in the fourth paragraph of Article 230 EC, requires the Community measure complained of to affect directly the legal situation of the individual and leave no discretion to the addressees of that measure, who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from Community rules without the application of other intermediate rules.

368 Case T-411/06, *Sogelma v. EAR* [2008] ECR II-2771, para. 37.

369 See paragraph 2, Art. 263 TFEU; the institutions hence do not have to show 'direct' or 'individual' concern in any way to challenge an agency act.

370 L. Lazarus et al, *The Evolution of Fundamental Rights Charters and Case Law: A Comparison of the United Nations, Council of Europe and European Union systems of human rights protection,* Study for the European Parliament's Policy Department, Citizen's Rights and Constitutional Affairs, February 2011, p. 82.

its servants, requiring the Union to 'make good' such damage.[371] The Court's jurisdiction for non-contractual liability of Frontex and EASO is explicitly laid down in their founding Regulations. Although the Europol Council Decision acknowledges the jurisdiction of national courts, there is no explicit and full exclusion of the Court's jurisdiction either.

In order for an individual to gain access to this remedy, the applicant is required to show that:

> "The rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the author of the act and the damage sustained by the injured parties."[372]

Similar to the action for annulment procedure, agencies ways of working could again pose a challenge here: in particular, in certain cases Member State action could be found to break the chain of causation initiated by the contested agency act, thus preventing EU liability from arising.

However, such potential complications should not rule out this avenue. The following three reasons support the use of a compensation for damages action by an individual against an EU agency:

First, in prior case law concerning compensation for damages, the Court has held that if an EU body has failed to exercise its supervisory power over Member State actions, EU liability can still be triggered.[373] Especially under the new Frontex Regulation, the agency receives competences to inter alia ensure the implementation of the joint operational plan, to abort missions in violation of fundamental rights and to *organise* JROs.[374] This would render the agency sufficiently capable to supervise Member State actions; it could not therefore evade scrutiny of its actions merely by invoking the liability of the Member State.

Second, as the Agencies have discretionary power in the acts they take, the applicant will have to show a 'manifest and grave breach of its discretionary power' to fulfil the 'sufficiently serious breach' criterion.[375] Although it gives the Agency certain flexibility in the execution of its actions, it is definitively not impossible for an individual to show such a breach. For example, Frontex has the discretionary power to coordinate joint return; if it would do so by putting in place insufficient measures to guarantee the safety of the returnees, the liability of Frontex could certainly be triggered.

Thirdly, an interesting way for the individual to hold an Agency liable would be via actions of its servants falling within the 'performance of duties'. The activities of Agencies' servants may indeed constitute the most tangible direct contact between those agencies and

[371] Article 340 TFEU does not explicitly mention Agencies; but it seems that 'its servants' would also apply to Agency staff.

[372] ECJ Case C-312/00 P, Camar [2002] ECR I-11355, para. 53. The landmark case in this context is: ECJ Case C-352/98 P, Bergaderm [2000] ECR I-5291, para. 42. The applicability of these criteria follows from the Court's case law on State liability from breaches of Union law: ECJ Cases C-46 and 48/93, Brasserie du Pêcheur [1996] ECR I-1029.

[373] See Cases C-132/77, *Société pour l'Exportation des Sucres* [1978] ECR 1061, paras. 26-27; Cases C-9 and C-12/60, *Vloeberghs* [1961] ECR 197, p. 126; and Case C-4/69, *Alfons Lütticke* [1971] ECR 325, paras. 14-19.

[374] See respectively Arts. 3(a)(3)/25(3)(g), 3(1)(a) and 9(1) of the amended Frontex Regulation, Council of the European Union, *Proposal for a Regulation of the European Parliament and the Council amending Council Regulation (EC) No. 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX) – Analysis of the final compromise text with the view to agreement*, 12341/11, Brussels, 5 July 2011(e).

[375] Refer to P. Craig and G. De Búrca, *EU Law – Text, Cases and Materials*, 4th edition, Oxford: Oxford University Press, 2008, p. 583 – 585.

individuals. It is their conduct that may trigger the Agencies' liability. For example, if an EASO official erroneously transfers personal data of a migrant to authorities of the State of origin, endangering the immigrant or his relatives, this could be the basis for such liability.

5.5.2.3. Joint non-contractual liability: Agency and Member State

One important challenge to bringing an agency action for review before the CJEU is that activities coordinated by EU Home Affairs agencies are characterised by a plethora of actors. The opaque and secretive nature of this multi-actor way of working makes it difficult for the individual to bring evidence and to identify responsibility (as discussed in section 5 above). This is even more so the case if the activities take place extraterritorially.[376]

One solution, should a chain of interwoven actions by multiple actors eventually lead to a breach of EU Charter rights, would be to bring a case of *joint liability* (i.e. where both an EU body and a member state may share liability). There are procedural complexities to taking this route, namely bringing actors from a multi-level context (i.e. EU and member state) to account before one court of law. From a procedural perspective, the individual cannot mount a claim against a Member State directly before the CJEU and conversely national courts cannot decide on EU non-contractual liability.[377] The much-critiqued complexities surrounding this procedure have required, in some cases, applicants to simultaneously launch actions in both the domestic and European courts.[378] Notwithstanding these difficulties, from the perspective of substantive law, joint liability could offer a potential path for an individual to seek judicial redress where an EU agency has taken inadequate steps to prevent, or has even authorised, breaches of EU law by a Member State or where a Member State applies an unlawful agency act,[379] situations which could arise in an operational context where agency and Member State actions prove difficult to disentangle.

In conclusion, this section shows that there are important barriers to obtain a judicial remedy before the CJEU as a result of the Agencies' peculiar ways of multi-level and multi-actor working. Yet it also shows that if the Agencies' powers of oversight and operational control increase, their 'exposure' to judicial review will increase, even under the current arrangements of access to remedies before the CJEU. Against the background of the Court's dynamic interpretation of the Treaties on effective remedies, also in the case of agencies, it should now also employ a wide definition of 'act' and flexibly interpret the

[376] See also section 6.4 and V. Mitsilegas, "Extraterritorial Immigration Control in the 21st Century: The Individual and the State Transformed", in B. Ryan and V. Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges*, Leiden: Martinus Nijhoff Publishers, 2010, pp. 39-68.

[377] The CJEU has exclusive competence to declare EU acts void – see Case C-314/85, *Firma Foto-Frost v. Hauptzollamt Lübeck-Ost* [1987] ECR 4199. See also Case C-50/00 P, *Unión de Pequeños Agricultores* [2002] ECR I-6677, para. 40; Case C-461/03, *Gaston Schul Douane-expediteur BV v. Minister van Landbouw, Natuur en Voedselkwaliteit* [2005] ECR I-10513, paras. 15-25 (on exceptions in the case of interim measures); and Case C-344/04, *IATA* [2006] ECR I-403, paras. 27-32. For non-contractual liability the same goes, as can be deduced from Arts. 268 and 274 TFEU, on this point see also P. Craig and G. De Búrca (2008, p. 596), *supra.* From the national perspective, often only a national act can be challenged before a court of law. Hence, there are restrictions concerning where one can bring a claim for joint liability. For more on this thorny issue, see Craig and De Burca (2008, pp. 597-598) and P. Oliver, "Joint liability before of the Community and the Member States", in T. Heukels and A. McDonnell, *The action for damages in Community law*, The Hague: Kluwer, 1997, pp. 125-127. In the Europol Decision there is jurisdiction for national courts to deal with non-contractual liability – with a compensation mechanism amongst Europol and the Member State. It would seem that in this case joint liability is relatively easier to invoke before the national court. See Arts. 53-54 of the Europol Council Decision.

[378] D. Chalmers and A. Tomkins, *European Union Public Law*, Cambridge: Cambridge University Press, p.463.

[379] See P. Craig and G. De Búrca, *EU Law – Text, Cases and Materials*, 4th edition, Oxford: Oxford University Press, 2008, pp. 597-598; see also Case C-4/69, *Alfons Lütticke* [1971] ECR 325 and Cases 5, 7 and 13-24/66, *Kampffmeyer* [1967] ECR 245.

admissibility criteria so as to include the less traditional actions of agencies.[380] If not, the extension of the Court's jurisdiction over agencies' acts will partly be void of real effect for individuals.[381]

In order to allow for full scrutiny of Agencies' actions, also in light of the overburdened CJEU, it could be advisable to set up a new branch of the CJEU to deal specifically with Agency actions with *inter alia* eased conditions on access to justice and possibilities for joint liability to remedy some of current barriers to an effective remedy due to the Agencies peculiar ways of working.

6. THE RELATIONSHIP BETWEEN EU AGENCIES AND THE EU CHARTER: CROSS-CUTTING ISSUES, GAPS AND SHORTCOMINGS

Section 4 of this report identified those specific fundamental rights envisaged by the EU Charter of importance to the treatment of third country nationals at the Union's external borders and in the context of immigration and asylum measures. Section 5 examined the multifaceted implications of the legally binding nature of the EU Charter over some of the more sensitive competences and activities of Frontex, Europol and EASO from a fundamental rights point of view. Particular attention was given to those tasks and forms of inter-agency cooperation raising more sensitivities in the scope of migration controls, in particular those taking place at maritime external borders and 'extraterritorially' as well as to the processing and exchange of data in these same contexts. We have demonstrated how some of the activities carried out by these agencies touch upon (and negatively affect) central principles and rights lying at the foundations of the EU legal system.

This section continues our journey by identifying a number of cross-cutting issues stemming from the relationship between Frontex, Europol and EASO and the EU Charter. It underlines and examines a number of commonly shared factors and shortcomings pertaining to Frontex, Europol and EASO. These factors are central at times of understanding the current barriers that individuals on the move might face when becoming claimants of fundamental rights as envisaged by the EU Charter and European secondary law, and having access to justice against illiberal practices by these supranational actors. The following cross-cutting issues can be highlighted in what concerns the nature and scope of their competences, as well as their impact over fundamental rights of third country nationals: 1) home affairs focus; 2) *de jure* and *de facto* competences; 3) cross-pillarisation; and 4) legal uncertainty and lack of accountability.

6.1. A Home Affairs focus

Frontex, Europol and EASO constitute a special kind of EU agencies. Their location in the EU legal system and the special nature of their competences, fields and work tools make a peculiar sort of European actor presenting rather distinct features which contrast with other existing EU regulatory agencies. They present a predominant 'home affairs' focus, which influences not only their goals and priorities, but also the challenges that their activities pose to fundamental rights of migrants and asylum-seekers. The three, which can be

[380] See for example the landmark case on the rule of law and access to an effective remedy: Case C-294/83, *Les Verts v. Parliament* [1986] ECR 1339, para. 23 and the recent Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat* [2008], para. 316.

[381] D. Chalmers, G. Davies and G. Monti, *European Union Law*, 2nd edition, Cambridge: Cambridge University Press, 2010, p. 399.

considered as 'EU Home Affairs agencies', are paradigmatic of an innovative institutional configuration forming the so-called 'EU's AFSJ' as an administrative, regulatory and political space in constant evolution, struggle and reshaping.

Some of the competences of Frontex, Europol and EASO fall, directly or indirectly, within the general policy terrain of 'migration-related policies', where the focus of attention is around the mobility of individuals across the common EU external borders. The approaches driving their foundational remits and the categories of individuals falling within their personal scope of action are however (at least formally) rather different. With Europol adopting a focus more centred on 'organised criminal groups facilitating illegal immigration and trafficking of human beings', Frontex on 'irregular immigrants' and the control of external borders controls and EASO on asylum-seekers and refugees. A certain sort of mobility lies nonetheless at the heart of their actions and rationale. They present a number of commonly shared 'fields of interest' when facing so-called 'mixed flows of people' and the difficulty inherent to any attempt to pre-ascertain 'who' is a refugee, an irregular immigrant and a potential criminal at the point where 'control' takes place. The boundaries delimiting the answer to this blurring of legal and administrative categories of individuals lay of course at the heart of fundamental rights protection, EU law and general rule of law principles. Also, the activities of agencies like Frontex and Europol, and their inter-agency cooperation, foster the processes of insecuritisation of 'migration', and in particular irregular immigration, by artificially constructing it as a 'risk' and 'threat' for the Union.

The 'home affairs' focus of these EU agencies, especially in the case of Frontex and Europol, promotes the linkage between irregular immigration, criminality and other perceived threats that the EU is supposedly facing, which justifies the development and practice of coercive and stringent responses focused on 'policing migration' inside and even outside the common European (Schengen) territory. A case in point here is the 'extraterritorial migration controls' which, as illustrated in section 5.1.1 of this report, have so far taken place also in the context of joint operations at sea coordinated by Frontex. The academic literature has actively engaged with the nature, development and human rights and rule of law implications of 'extra-territorialisation' strategies in migration controls.[382] The notion of 'extraterritoriality' refers first and foremost to 'outside the territory'. However, extraterritorial border control also means the 'pushing back' of EU external border controls or rather 'policing them at a distance' to keep third country nationals in their countries of origin or as close as possible to them.[383] Ensuring this 'remote control' approach entails the engagement of third countries and furthermore offers the possibility to restrict migration flows without affecting the mobility of EU citizens.[384] Others have pointed to the potential evasion of procedures and accountability constraints (including those of a parliamentary and judicial nature) applicable to internal law and policy-making and to the exclusion of those targeted third country nationals from the access to the EU Member State asylum process and legal protection.[385] There is an inherent tension between fundamental rights (and access to justice) and the intended purposes guiding 'extraterritorial border control', as the 'efficacy' of the latter is exactly guaranteed by the very absence of the former.

[382] B. Ryan, "Extraterritorial Immigration Control: What Role for Legal Guarantees", in B. Ryan and V. Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges*, Leiden: Martinus Nijhoff Publishers, 2010, pp. 3-38.

[383] J.J. Rijpma and M. Cremona, *The extraterritorialisation of EU Migration Policies and the Rule of Law*, EUI Working Papers Law 2007/1, European University Institute, Florence, 2007, p. 12.

[384] V. Guiraudon, "Before the EU Border: Remote Control of the 'Huddled Masses'", in K. Groenendijk, E. Guild and P. Minderhoud (eds), *In Search of Europe's Borders*, The Hague: Kluwer Law International, 2003, pp. 194-195.

[385] See S. Lavenex, "Shifting up and out: The foreign policy of European immigration control", *West European Politics*, Vol. 29, No. 2, 2006, p. 330; see also Guiraudon (2003), *supra*, pp. 194-195.

In addition to the commonalities in some of their fields of action surrounding human mobility, and as examined in detail in section 2 above, the three agencies share the following six featuring components: First, while the three agencies are intended to 'support', 'facilitate' and 'coordinate/manage' Member States, they have been granted fundamental operational or 'quasi-operational' powers of intervention in the ground. Second, they also work in areas presenting 'external or foreign affairs facets' which develop through operational cooperation and exchange of information with third countries or in the case of Frontex when practising pre-border or extraterritorial migratory controls in territorial waters of third states. Third, they attach great importance to the collection and exchange of data (data processing). Fourth, they play a decisive role not only in the actual implementation and 'rendering more effective' EU's policy on migration, borders and asylum across the national arenas of EU's Member States, but also in the way in which the EU 'does' and develops policy around human mobility. Fifth, they are seen (in particular Frontex and EASO) as one of the most visible materialisations of the principle of solidarity and fair-sharing of responsibility amongst the EU Member States in the areas of border controls and asylum.[386] And sixth, they enter into active inter-agency cooperation in those activities presenting more direct linkages between their remits, i.e. the management of migration.

The sensitivities inherent to their activities cannot be overemphasised. The ways in which European integration has evolved during the last decades in the policy areas of migration, borders and asylum reveals the extent to which these domains still lay at the heart of national sovereignty of the EU Member States and their law enforcement authorities. There is a frequently uttered mantra according to which these are policies still closely intertwined with domestic competences and prerogatives. The last ten years of European cooperation, however, have been privileged witnesses of an emerging EU legal and policy framework in these fields, which is not only composed by a large body of substantive primary, secondary and 'soft' law, but also by an increasing plurality of European agencies such as Frontex, Europol and EASO. These EU Home Affairs agencies constitute now the most visible 'faces' of the EU policies on external borders, immigration and asylum inside and outside Europe. Some authors have even considered them to constitute "a significant departure of the traditional remits of this exclusive competence of the Member States",[387] a fundamental shift in the exercise of powers that are traditionally the domain of the State[388] or even as decisive drivers transforming the traditional nature and prerogatives of national law enforcement authorities.[389]

While presented as purely 'technical' or 'bureaucratic' in nature and scope, some of these agencies' competences do transform classical understandings of the boundaries of 'executive and administrative power' in the EU AFSJ. As we have examined in this report, Frontex, Europol and EASO aim at primarily playing a 'supportive' or 'facilitative' role to EU Member States through the 'coordination' of operational activities with national authorities,

[386] D. Vanheule, J. van Selm and C. Boswell, *The Implementation of Article 80 TFEU on the principle of solidarity and fair sharing of responsibility, including its financial implications, between Member States in the field of border checks, asylum and immigration*, Report for the European Parliament, Directorate-General for Internal Policies, Policy Department C, Citizens' Rights and Constitutional Affairs, 2011.

[387] E. Papastavridis,"'Fortress Europe' and Frontex: Within or Without International Law?", *Nordic Journal of International Law*, Vol. 79, No. 1, 2010, p. 78.

[388] A. Baldaccini, "Extraterritorial Border Controls in the EU: The Role of Frontex in Operations at Sea", in B. Ryan and V. Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges*, Leiden: Martinus Nijhoff Publishers, 2010, pp. 229-255.

[389] J.J. Rijpma, "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: Manchester University Press, forthcoming.

practitioners and experts, and the enactment of Union soft law/policy (e.g. through the setting of common standards and best practices, curricula, coordination, reporting and assessments, etc.). As stated above, the possibility to deploy their staff in the ground constitutes another innovative feature in their remits and competences. Indeed, the three agencies present competences going beyond mere 'regulatory' or administrative competences but rather expanding over 'operational' or 'on the ground' activities. According to the 2009 Stockholm Programme, Europol and Frontex have during the last eleven years achieved "operational maturity in their respective fields of activities".[390]

That notwithstanding, the 'intergovernmentalism' which has characterised European cooperation around 'migration' have deeply influenced the degree of 'delegation of powers' that has been actually attributed to them. Member States have showed constant resistance at times of transferring authority to these supranational bodies. This has paradoxically come along with constant political demands expressed by certain European governments for agencies such as Frontex (and now EASO) to 'urgently' intervene and assist southern EU Member States in the Mediterranean in their migratory dilemmas. The intergovernmental barriers that actors like Frontex face in attempting to gain more autonomy have not passed unnoticed by the academic literature.[391] Similarly, the expansion of Europol's powers since 2007 was subject to lengthy and difficult negotiation processes stemming from a majority of EU Member States being opposed to grant operational competences to this agency (particularly concerning the so-called 'right of initiative' and Joint Investigation Teams (JITs).[392] All this has in addition gone together with a high degree of mistrust and a certain sense of competition between agencies like Europol and Frontex and the competent national law enforcement authorities, which depend on each national arena to be highly heterogeneous in both nature and competences.[393]

There have been many useful debates among scholars about the most appropriate 'models' and theories facilitating a better understanding of the ways in which power and authority interplay in the context of EU agencies.[394] There is a commonly shared understanding that the theory of 'principal-agent model' developed by Dehousse[395] to study EU agencies is not the most useful one at times of examining EU Home Affairs agencies like Frontex, Europol and EASO and their experimental governance strategies and areas of intervention. The question remains open as to 'who' is really delegating power to these three EU Home Affairs agencies. The answer is indeed not a straightforward one. While one would be tempted to conclude that it is directly EU Member States and/or the Council, such conclusion would however disregard the actual degree of Europeanisation (and in some cases 'codification', e.g. SBC) which has been already achieved so far in the areas of migration, borders and asylum law, and the role that the European Commission and the European Parliament have acquired in their level of authority and accountability. It would also not take into account the complexities inherent to their sociology of power,[396] the effects of ongoing connections and networks between them and national authorities, and

[390] Council of the European Union, The Stockholm Programme: An Open and Secure Europe serving and protecting citizens, 5731/10, Brussels, 3 March 2010(h), p. 7.
[391] See for instance S. Carrera, *Towards a common European Border Service?*, CEPS Working Document No. 331, CEPS, Brussels, 2010.
[392] M. Busuioc, D. Curtin and M. Groenleer, "Agency growth between autonomy and accountability: The European Policy Office as 'living institution'", *Journal of European Public Policy*, forthcoming.
[393] M. Den Boer and W. Bruggeman, "Shifting Gear: Europol in the Contemporary Policing Era", *Politique Européenne*, Vol. 23, No. 3, 2007, pp. 77 – 91.
[394] D. Curtin, *Executive Power of the European Union: Law, Practices and the Living Constitution*, Oxford: Oxford University Press, 2009.
[395] R. Dehousse, 'Delegation of powers in the European Union: The need for a multi-principals model', *West European Politics*, Vol. 31, No. 4, 2008, pp. 789 – 805.
[396] D. Bigo, L. Bonelli, D. Chi and C. Olsson, *The Field of the EU Internal Security Agencies*, Collection Cultures & Conflits, Centre d'Etudes sur le Conflits, Paris: L'Harmattan, 2007.

the strategies that they pursue to legitimise and expand their authority(ies) through new ways of unexpected or alternative modes of governance and de facto competences.[397] EU Home Affair agencies constitute therefore new sources of authority at European level in domains standing *in between* national and EU (shared) competences. While it is true that the presence of EU Member States is still overwhelmingly predominant in some of their Management Boards,[398] their powers and level of independence extend beyond national or intergovernmental allocation of power and are moving towards terrains that are increasingly within EU policy and law venues.

Both the sensitivities inherent to their fields of activity and the ongoing tensions practised by certain national governments in negotiating their degree of autonomy, have led these agencies to grant an increasing importance to 'information management' and 'knowledge exchange' labelled as 'intelligence' (information systems and security technologies) as one of the key mechanisms to regain more power and discretion over distrustful EU Member States and their respective authorities.[399] The increasing prioritisation given to the exchange of information and ownership/access and processing (in the cases of Europol and now Frontex) of 'personal data', as well as the use of security (surveillance) technologies in the work of agencies such as Frontex can be seen as a strategy to get 'through the back door' more autonomy in a predominantly intergovernmental environment of cooperation in the field of internal security and borders/migration control. In the same vein, cooperation and working arrangements with third countries, some of which also entail the transfer and exchange of sensitive 'information' and data, can be also seen as another strategy to strengthen their position and status in relation to the EU Member States and national authorities in the ongoing struggle of authority and degree of discretion lying in between the perceived axiom of integration vs. intergovernmental in the EU legal edifice and its AFSJ.

Most importantly, the 'home affairs focus' guiding their activities and their operational powers, including those of data processing, make their areas of intervention highly sensitive from a fundamental rights viewpoint. This is especially the case for third country nationals on the move and asylum-seekers and refugees. Indeed, another key factor characterising the three agencies under examination is that some of their tasks closely relate to or might have wide implications over fundamental rights and freedoms of non-EU nationals. As we have seen in section 2 above, the relevance of fundamental rights in their remits has been (at least formally) taken into consideration by the three agencies under study in this report. This is evident when looking, for instance, at the data protection framework that has been devised for the activities of Europol, or the Fundamental Rights Strategy recently adopted by Frontex as well as its working arrangements with UNHCR and FRA, or the close input and the specific role that UNHCR plays in EASO's organisational

[397] The process of codification of European rules on the crossing of external borders leading to the adoption in 2006 of the Schengen Borders Code can be seen as a paradigmatic example of the limits of EU member states' discretion in these domains.

[398] For instance, in "Holding (Quasi-)Autonomous EU Administrative Actors to Public Account" (*European Law Journal*, Vol. 13, No. 4, July, 2007, p. 528) Curtin states that
[i]n the case of the European Agency for the Management of Operational Cooperation at the External Borders, it can be argued that the Council did not delegate its own existing executive powers but rather that the tasks in question had been largely exercised by the Member States and not the Council (or the Commission)…the institutional design of the agency is very much leaning towards the Council as principal. In any event, it is rather clear that the agency has been given (delegated) quite far-reaching powers, including operational powers…This confirms a trend already present with other potentially more 'operational' EU agencies/organs such as Europol.

[399] As Pollak and Slominski have argued, "[t]he most important resources of Frontex are not its legal powers or financial means, but information and knowledge, which in turn serve as the basis for cooperation, coordination and persuasion" (J. Pollack and P. Slominski, "Experimentalist but not Accountable Governance? The Role of

structures. The question that remains however is the extent to which this fundamental rights framework of protection is actually being effectively delivered in practice and the extent to which individuals are fully aware and have access to these rights and freedoms.

6.2. De jure competences and de facto activities

Another commonality shared by the three EU Home Affairs agencies examined in this report is their dynamism and high degree of 'experimentation' inherent to their remits, competences and activities. As the cases of Europol and Frontex have clearly demonstrated, the mandates and 'degree of autonomy' of these actors are far from being static. Their competences and areas of intervention are in constant mutation, struggle and redefinition and over the years have been expanded from a substantive and budgetary point of view. The enlargement of their competences has occurred not only 'legally', through the adoption of new European regulations and legislative amendments of their mandates, but also through actual expansions and 'learning by doing'-like actions. Frontex, Europol and (potentially) EASO present a number of de jure and de facto activities and competences, that raise unresolved issues in their relationship with fundamental rights enshrined in the EU Charter, which we will now explore.

6.2.1. De jure competences

The legal foundations of Frontex, Europol and EASO were presented in section 2 of this report. The cases of Europol and Frontex are perhaps more exemplary in terms of showing the highly evolving nature of their legal mandates since their origins until today. Both agencies have passed through several legislative revisions and amendments, some of which brought them closer to the EU legal framework (in the case of Europol), while others have significantly expanded their tasks and areas of intervention (in the case of Frontex). The actual reach and limits of the legal mandates and activities carried out by these EU Home Affairs agencies have however not been exempted from controversy both in academic and policy circles. There is a large degree of obscurity and lack of common definitions and understanding as regards what these agencies actually 'do'. These issues have however fundamental repercussions when discussing and ascertaining the degree of responsibility and level of liability in cases of fundamental rights violations by these agencies. There have been large discussions, both in academia and policy-making circles, about the extent to which the actions carried out by actors like Frontex or Europol do in fact constitute a 'legal act producing legal effects' as enshrined in Article 263 of the TFEU. There is a generally accepted official line (or widespread 'doxa') according to which these agencies are not 'fully operational' and do not take any actual decisions that would lead to their responsibility in cases of fundamental rights violations: the story goes that they are just 'facilitating' (supporting and assisting) and 'coordinating' EU Member States' actions. This position appears to argue that the Member States, and not the agencies themselves, are the ones mainly 'responsible' for final decisions on the ground.

This particular framing of EU Home Affairs agencies' activities, however, needs to be taken with special care. Agencies like Frontex, Europol and EASO officially present themselves as purely 'bureaucratic or technocratic actors'. Nevertheless, attempts by agencies like Frontex to artificially label some of their operational activities as 'rescue and interception measures' at sea instead of preventive border control measures have not passed unnoticed

Frontex in Managing the EU's External Borders", *West European Politics*, Vol. 32, No. 5, September 2009, p. 908).

in the academic literature.[400] The strategy of masquerading some of the most sensitive EU Home Affairs agencies' tasks as 'not sufficiently operational' and of merely 'technical nature' constitutes an attempt to prevent discussion of their potential fundamental rights implications and to depoliticise (limiting the public, political and legal, political and public accountability of) their activities. There is an anachronistic attempt to 'depoliticise' what they do while they are inherently political (on this point see section 6.4 below).

EU Home Affairs agencies cannot escape from accountability if the EU legal system is indeed to be founded on the rule of law. Looking at the nature of their remits and inputs (what they 'do' and the degree of autonomy in certain aspects of their roles), some of the activities of these actors may indeed have in certain situations 'legal effects' over the status and fundamental rights of persons on the move. This is especially the case in relation to those fundamental rights sensitive practices at the heart of the analysis in this report (addressed in section 5), i.e. operational practices, (the initiation, coordination and supervision of joint border control operations, joint investigation teams and/or asylum support teams), other operational activities as well as interventions aiming at preventing boats from leaving the territorial waters of a third state or in those activities involving 'push-back' operations as well as data processing.

The latter arguments are not incompatible with the fact that agencies like Europol or Frontex are expressly excluded from intervening in certain legal terrains. Concerning Europol, Article 88.3 TFEU states that "any operational action by Europol must be carried out in liaison and in agreement with the authorities of the Member State or States whose territory is concerned. The application of coercive measures shall be the exclusive responsibility of the competent national authorities". A similar tone of argumentation can be seen in the founding Regulation of Frontex, which states in Article 1.2 that "the responsibility for the control and surveillance of external borders lies with the Member States",[401] and the one of EASO which stipulates in Recital 14 that "*The Support Office should have no direct or indirect powers in relation to the taking of decisions by Member States' asylum authorities on individual applications for international protection*". The background of these provisions is one presenting a prominently political baggage which most directly reflects the above-mentioned sensitivities practised by EU Member States and the logic of intergovernmentalism in EU Home Affairs agency-building processes. Moreover, these areas of 'exclusive competence' by EU Member States in the scope of Europol, Frontex and EASO's tasks raise similarly open and unclear definitional questions (e.g. what do 'coercive powers' mean?). The potential legal effects and responsibilities of these agencies remain in cases of fundamental rights violations in the scope of their actions.

There is nowhere a common definition in EU law about what does 'operational' and 'coordination' actually mean in the scope of EU agencies work. None of their founding regulations provides a legal definition stipulating the concept and boundaries of what precisely the role of 'coordinator' and 'facilitator' means in practice. There is also nowhere a provision defining 'operational'. Moreover, why do we talk about coordination and not 'management'? Which level of responsibility can we expect from an actor taking that role in the event of fundamental rights violations? Management would be perhaps a more appropriate category to be used as it would reveal what they actually do and the level of responsibility in cases of alleged incompatibility between their activities and the EU Charter.

[400] See for instance V. Moreno-Lax, "Searching Responsibilities and Rescuing Rights: Frontex, the Draft Guidelines for Joint Maritime Operations and Asylum Seeking in the Mediterranean", *International Journal of Refugee Law*, Vol. 21, No. 2, 2010, pp. 256-296.

The scope of Europol's role/powers raises similar definitional dilemmas. What is 'investigation'? As Busuioc has proved in relation to Europol, the boundaries are indeed not clear. As an example, Busuioc quotes a respondent from the Europol legal service who says:

> In the context of joint investigation teams, Member States have decided that it is not acceptable that Europol officials are very close to the investigations and are also practically involved in the investigations in the sense that they could go together with the investigators to the scene of the crime for instance and give advice on what they see but at the same time they are not liable. And that it was said: "this is so near to actually investigating themselves that there should not be any kind of exemptions in terms of liability" and consequently, also the protocol on privileges and immunities was changed and in this specific situation Europol officials were exempted from immunity.[402]

Similar issues relate to the newly set up EASO. As Comte has said, at present:

> It is difficult to predict how these asylum support teams will play out their role and be truly operational…It remains to be seen how EASO, its Director and the Member States will envisage the use of Asylum Support Teams.[403]

Furthermore, as pointed out in section 5 above, the eventuality of liability exists in those cases where an EU agency 'support's through 'capacity-building' or 'the provision of infrastructure and financing' to EU Member States such as Greece, where the evidence is sound and notorious on the failure of its EU asylum system. The agency could be potentially accused of an act of abetting a violation of human rights on the part of a Member State by indirectly supporting a wrongful act. This becomes even more relevant in the context of cooperation and 'technical assistance' with third countries with a poor human rights record.[404]

The 'operational role' of these agencies as 'initiators' and 'contributors' of the EU-level coordinated action might indeed lead to 'unexpected terrains', even for the representatives of the agencies themselves, in relation to their de jure mandate and responsibilities. As we have seen above, they are entitled 'to act' not only as coordinators, but also as the planners and initiators of operational actions. One could therefore argue that while it is for national authorities to formally take the 'final decision' in the area under consideration, the 'assistance' and 'inputs' of these EU agencies into the actual/final decision-making results or actions could lead to some sort of 'joint responsibility' or 'responsibility in chain'. Indeed, their input might play a decisive role at times of 'informing' and 'substantiating' (and ultimately 'influencing') the final decision taken by the relevant national authority. Factually, independently of the label given or practitioners' interpretation provided, their

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[401] Refer also to Recital 4 of the Frontex Regulation and Art. 77.4 TFEU, when establishing that "the competence of the Member States concerning the geographical demarcation of their borders, in accordance with international law" shall not be affected.

[402] M. Busuioc, *The Accountability of European Agencies: Legal Provisions and Ongoing Practices*, Delft: Eburon Academic Publishers, 2010, p. 189.

[403] F. Comte, "A New Agency is Born in the European Union: The European Asylum Support Office", *European Journal of Migration and Law*, Vol. 12, No. 12, 2010, p. 401.

[404] According to Art. 16 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts (2001), it could be argued that the assistance on 'capacity building' could amount to "[a]id or assistance in the commission of an internationally wrongful act" (http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf). This has been argued by R. Weinzierl, *The Demands of Human and EU Fundamental Rights for the Protection of the European Union's External Borders*, German Institute for Human Rights, Berlin, July 2007, pp. 63-64.

actions may have legal repercussions and they should still comply with the obligation to ensure that in the scope of their activities (whatever their nature might be), fundamental rights are always fully respected. This has also been the position of Rijpma, who has argued:

> It would be incorrect to consider the coordination of operational cooperation as a value-neutral or merely technical exercise. It includes the setting of political priorities, deciding on where and how best to deploy limited resources. The agency may not only 'evaluate, approve and coordinate' joint operations but can also 'by itself' launch initiatives and co-finance actions. The non-binding nature of coordinating activities as regards third parties does not mean that in the course of the actual joint operational activity rights and obligations cannot arise.[405]

A divergent view would mean a denial of justice to these people whose fundamental rights are in question as a consequence of the action by EU Home Affairs agencies. It would also confirm that these actors are doing 'nothing' in the scope of their activities that would jeopardise their added value, including from a financial/budgetary point of view. Moreover, the legal effects and potential fundamental rights violations in the scope of EU agencies' activities such as those of Frontex became clear in the press release issued by Frontex in 2009 as a response to the accusations levelled in the Human Rights Watch report "Pushed back, Pushed around: Italy's Forced Return of Boat Migrants and Asylum Seekers, Libya's Mistreatment of Migrants and Asylum Seekers"[406] and where it stated that it "would like to state categorically that the agency has not been involved in diversion activities to Libya".[407] The case of the Italian 'push backs', which is now before the Court of Strasbourg, revealed the eventuality of Frontex to be jointly liable for the alleged fundamental rights violations.

It is therefore clear that there are many grey areas concerning the scope and limits of the de jure mandates of Frontex, Europol and EASO. These uncertainties show a profound tension between 'the operational/technical' framings of their activities with 'their political considerations' and actual legal effects in the ground. These tensions, however, make difficult and might be intended to nuance a clear determination of responsibility in cases of fundamental rights violations of individuals. There is a need to clarify the current framing of the agencies' powers as technical/technocratic (extra-legal) and put them in relation to clear legal concepts and an understanding of 'what' these EU agencies are actually doing.

6.2.2. De facto activities

The mandate and competences of EU Home Affairs agencies are far from being static. They remain in a constant evolution not only legally but also 'factually'. A commonly shared factor amongst EU Home Affairs agencies has been their 'activism' in areas which originally did not formally fall within their agreed or predetermined legal mandates or which while corresponding with 'the letter' of their founding regulations, their reach has later gone beyond the original expectations and allocation of responsibilities. A number of 'informal' and 'experimental' areas of intervention have progressively emerged and developed in recent years by EU Home Affairs agencies. Sections 2 and 5 have demonstrated and

[405] J.J. Rijpma, "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: Manchester University Press, forthcoming, pp. 13 and 19.

[406] Human Rights Watch, *Pushed Back, Pushed Around*, Human Rights Watch, New York, NY, 21 September 2009 (http://www.hrw.org/en/reports/2009/09/21/pushed-back-pushed-around-0).

[407] See the FRONTEX News Release of 21 September 2009.

addressed the various ways in which Frontex and Europol have embarked into domains falling outside their intended/explicit legal tasks, some of which present particular challenges from a fundamental rights perspective. The academic literature on EU agencies has paid close attention to these de facto activities and their relationship with their degree of autonomy and margin of manoeuvre. For instance, Curtin et al have argued:

> Once an agent has been created, it may very well develop its own preferences and interests, separate from its principals but also from stakeholders or clients. Hence, it is not enough to look at the autonomy that an agent has be design, as in that way informal adjustments or expansions of its formal autonomy may be overlooked.[408]

The highly evolving nature of Frontex since its origins in 2005 and the ways in which it has experienced an expansion of competences and budgetary allocation during the last six years have been also widely covered.[409] This constitutes another decisive factor characterising the constitutive elements of EU Home Affairs agencies, i.e. the greyness affecting their areas of competences and their capacity to act and adjust themselves to domains not necessarily falling within their legal remits and formal mandates. EU Home Affairs agencies represent a paradigmatic example of experimental governance strategies and processes at EU level. The above-mentioned obscurity characterising their tasks (e.g. lack of definition of what 'serious crime' actually is in the scope of work of Europol) has allowed for informal practices to emerge and to become accepted and unchallenged. In their analysis of Frontex, Pollak & Slominski have referred to it as 'experimentalist governance'[410], which corresponds in their view with the fact that:

> Frontex is expected to operate in a more or less underspecified context. It is this institutional feature that enables Frontex, along with national officials, to experiment with the specification of the broad framework goals of border management…. It gives more room for manoeuvre and facilitates their 'autonomy' from other scrutiny national and EU actors which are systematically sidelined in terms of information, decision making and control.

A certain tension arises when putting the factual or experimental governance interventions of EU Home Affairs agencies in relation to rule of law principles and the set of fundamental rights provided by the EU Charter assessed in section 4 of this report above. While dynamism and flexibility could be seen as necessary and welcomed features for these agencies to be able to adapt their activities more easily to new needs and evolving political realities in Europe, and as a way to enlarge their autonomy from 'intergovernmentalism', these factors stand at odds with general rule of law principles of accountability, transparency and legal certainty, and may also have negative repercussions over the effectiveness of the framework of fundamental rights protection in Europe.

The open questions characterising these agencies from a rule of law viewpoint are for instance illustrated when looking at some the activities carried out by Frontex. In the list of Frontex tasks, there is no express reference to the common EU external or internal

[408] M. Busuioc, D. Curtin and M. Groenleer, "Agency growth between autonomy and accountability: The European Policy Office as 'living institution'", *Journal of European Public Policy*, forthcoming, p. 5.

[409] See A.W. Neal, "Securitization and Risk at the EU Border: The Origins of FRONTEX", *Journal of Common Market Studies*, Vol. 47, No. 2, 2009, pp. 333-356; see also J. Jeandesboz, *Reinforcing the Surveillance of EU Borders: The Future Development of FRONTEX and Eurosur*, CHALLENGE Research Paper No. 11, CEPS, Brussels, August 2008.

[410] J. Pollack and P. Slominski, "Experimentalist but not Accountable Governance? The Role of Frontex in Managing the EU's External Borders", *West European Politics*, Vol. 32, No. 5, September 2009, p. 905.

borders. The relation between Frontex and the SBC has been a contested one. The agency started its operational work even before the Union had adopted the Code. The link between Frontex actions and the SBC is therefore not included in the founding document of the agency. This means that Frontex was established as the EU's external border agency before the EU had actually provided a legal definition to its external border, let alone who and how individuals should be able to cross that frontier and the legal remedies in their hands in case of refusal of entry.[411]

As we have argued in section 6, some of Frontex activities fall outside the harmonised legislative framework foreseen in the SBC. This has been particularly the case in relation to joint maritime operations taking place in the territory of African neighbouring countries and engaged in diversions or extra-territorial (pre)border migratory controls. These joint operations have been until present legally based on bilateral agreements between the hosting EU Member State and the third country and have remained by and large secret and outside any national and EU democratic scrutiny. These de facto interventions also leave the question open as regards the actual applicability of the SBC,[412] and more general fundamental rights obligations. It has been only recently (March 2011) that the European Commission tried to provide a proper legal framework to these Frontex activities with a proposal to amend the SBC, which is still under discussions inside the Council.[413]

6.3. The legacy of 'cross-pillarisation'

As highlighted in section 3 of this report, the entry into force of the Lisbon Treaty has positioned the EU Charter at the heart of the work of EU institutions, bodies and agencies. In addition to the conversion of the EU Charter from a document with persuasive authority into a bill of rights with legally binding nature,[414] the new post-Lisbon institutional and substantive framework introduced has also brought other highly relevant innovations to the contours of European cooperation in the AFSJ and the work of EU Home Affairs agencies.
One innovation that has already become paradigmatic to the so-called 'Lisbonisation' of Justice and Home Affairs (JHA) policies has been the end of the old pillar divide (or duality) which used to affect those fields (Third Pillar corresponding to the Treaty on European Union, Title VI "*Provisions on Police and Judicial Cooperation in Criminal Matters*") and the First Pillar with the Treaty establishing the European Community (Title IV, "*Visas, Asylum, Immigration and Other Policies related to the Free Movement of Persons*"). The 'end of the pillars' was expected to expand the 'Community method of cooperation' to all Freedom, Security and Justice-related policies, including those of police and judicial cooperation in

[411] Guild and Bigo argue that "[i]t is not surprising that as a result there is something of a chasm between the rules of the Schengen Borders Code and the actions of Frontex. They are not coordinated, nor is there any clear point of intersection between the two" (E. Guild and D. Bigo, "The Transformation of European Border Controls", in B. Ryan and V. Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges*, Leiden: Martinus Nijhoff Publishers, 2010, p. 268).

[412] See for instance E. Brouwer, "Extraterritorial Migration Control and Human Rights: Preserving the Responsibility of the EU and its Member States", in B. Ryan and V. Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges*, Leiden: Martinus Nijhoff Publishers, 2010, pp. 199 – 228.

[413] Refer to Council of the European Union, *Proposal for a Regulation amending Regulation (EC) No. 562/2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) and the Convention implementing the Schengen Agreement*, 7661/11, Brussels, 11 March 2011(d). On p. 24, point 1.1.4.3 covers "Joint border crossing points located on third-country territory" and establishes that "[b]ilateral agreements establishing joint border crossing points located on third-country territory shall contain an authorization for Member State border guards to exercise their tasks in the third country in accordance with the Schengen Borders Code and respecting the following principles: international protection". Also, point 1.1.4.4 states that "[b]efore concluding or amending any bilateral agreements on joint border crossing points with a neighbouring third country, the Member State concerned shall consult the Commission as to the compatibility of the Agreement with this Regulation" (p. 24).

[414] E. Guild, *The European Union after the Treaty of Lisbon: Fundamental Rights and EU Citizenship*, CEPS Liberty and Security in Europe Series, CEPS, Brussels, July 2010.

criminal matters.[415] The former pillar system was responsible for several deficiencies, which affected the EU's legislative foundations, engagement and institutional framing of AFSJ policies. The 'third pillar' meant a high degree of democratic deficit (limited role and accountability by the European Parliament) and a weak judicial control (limitation to the jurisdiction of the Court of Justice), as well as a lack of transparency, coherency and legal certainty characterising its legal instruments and decision-making procedures.[416]

The Treaty of Lisbon has introduced one unique Title V dealing with the entire Area of Freedom, Security and Justice in the Treaty on the Functioning of the European Union (TFEU). This title has offered to a significant majority of domains falling within the AFSJ rubric the benefits stemming from the Community method of cooperation, subject however to important exceptions and derogations such as the above-mentioned Protocol 36 on Transitional Provisions (Article 10).[417] That notwithstanding, the expectations both from academics and policy-makers were therefore that the end of First/Third Pillar divide would also signify the ending of the intergovernmental old ways of working and 'thinking' in the EU's JHA policies, including activities of EU Home Affairs agencies such as those studied in this report. The resulting scenario, however, shows a rather distinct picture where the former ways of working in 'European policing' are not still present but surprisingly reinvigorated and expanded over former first-pillar terrains and actors.

The legacy of the pillar divide is still very much present in AFSJ cooperation and the activities of EU agencies like Frontex, Europol and (to a certain extent and more limited degree) EASO. The working methods and 'mentalities', as well as political ambitions, for actors like Frontex are to become closer to 'old-third pillar' activities and ways of working (internal security matters) and even second pillar ones (external security/foreign affairs), which as we have seen above allow them to expand their degree of autonomy and margin of manoeuvre by avoiding democratic, political and legal accountability and the shadows of nationalism. As we have said elsewhere when analysing the EU internal security strategy,

> it appears as if the old third pillar spirit is not only very much present but it is also now contaminating other (formerly considered) first pillar areas, such as for instance those of external border controls and migration/asylum policies as well as agencies such as Frontex. The 'depillarization' emerging from the Lisbon Treaty is allowing for the extension of the police and insecurity-led (intergovernmental) approach to spread over the entire EU's AFSJ and not – as it might have been originally expected – the other way around (the Community method of cooperation logic to expand over internal security matters).[418]

Curtin has appropriately referred to EU agencies as 'satellite networks of actors',[419] which "*as satellites are not at the heart of the 'Community method' as such but in orbit around it,*

[415] S. Carrera and F. Geyer, "The Reform Treaty and Justice and Home Affairs: Implications for the Common Area of Freedom, Security and Justice", in E. Guild and F. Geyer (eds), *Security versus Justice? Police and Judicial Cooperation in the European Union*, Ashgate: Aldershot, 2008, pp. 289-308.

[416] E. Guild, S. Carrera and T. Balzacq, "The Changing Dynamics of Security in an Enlarged European Union", in D. Bigo, S. Carrera, E. Guild and R.B.J. Walker (eds), *Europe's 21st Century Challenge: Delivering Liberty*, Aldershot: Ashgate, 2010, pp. 31-48.

[417] According to this provision, as a transitional measure, the powers of the Commission and the Court of Justice in relation to acts dealing with "police cooperation and judicial cooperation in criminal matters" will continue to be 'as they were' in the EU third pillar for a period of five years after the entry into force of the Treaty of Lisbon.

[418] S. Carrera, S. and E. Guild, *Towards an Internal (In)Security Strategy for the EU?*, CEPS Liberty and Security in Europe Series, CEPS, Brussels, January 2011.

[419] D. Curtin, *Executive Power of the European Union: Law, Practices and the Living Constitution*, Oxford: Oxford University Press, 2009, pp. 166-172.

with different ties back to the core political actors and the formal decision making processes"[420] The incursion of EU Home Affairs agencies into secretive, police and insecurity-led and unaccountable (secretive) activities and practices not only distances these actors from the Community level or 'method', but it also takes them at times completely 'out of orbit' towards other parallel galaxies where the scope and applicability of general rule of law principles and fundamental rights laying at the foundations of the EU legal system are contested and at stake. It is in these 'new orbits of intervention' where their degree of autonomy becomes more at tension with potential responsibility and liability in cases of illiberal or unlawful actions some of which might breach fundamental rights envisaged by the EU Charter.

The first tangible example of the contamination of the work of some EU Home Affairs agencies with a 'third pillar spirit' is evidenced when looking at the increasing role that Frontex (and 'border security') is progressively acquiring in the EU Internal Security Strategy[421] and the so-called JHA Policy Cycle.[422] The relationship (and compatibility) between Frontex inputs in the internal security policy with the SBC remains debatable. Why should an agency whose mandate should be exclusively to "facilitate and render more effective the application of existing and future Community measures relating to the management of external borders" be active and embark into the field of police cooperation? When answering this question careful attention should be paid to the implications of the artificial nexus referred to above that has been too often made between immigration and criminality. The blurring of border controls with 'police' leads to a false presumption that the movement of people is a suspicious activity potentially linked with criminality and organised crime. It places certain persons on the move, especially those labelled as 'immigrants', at the heart of internal insecurity discourses and coercive policies.[423] This process of insecuritisation and 'policing' of human mobility is clearly evidenced by the Joint Report drafted by Frontex, Europol and Eurojust, which clearly states:

> Border security is compromised by groups exploiting vulnerabilities in the transport sector, including through corruption and the use of counterfeit, forged and fraudulently obtained documents, which are indispensable facilitators for illegal migration, trafficking in human beings, identity fraud, and terrorism.[424]

The way in which Frontex is progressively evolving towards a 'police and intelligence actor', including in the context of inter-agency cooperation with Europol, reflects the complexities inherent to the ways in which the EU 'does' security through the non-evidential construction of an insecurity continuum of threats related to border crossings,[425] which call for (and justify) innovative border security policies and surveillance practices and technologies. This way of working (i.e. the extension of a police-led approach in migration control) also justifies 'secrecy' and 'confidentiality' of the activities and 'information' (sometimes called

[420] M. Busuioc, D. Curtin and M. Groenleer, "Agency growth between autonomy and accountability: The European Policy Office as 'living institution'", *Journal of European Public Policy*, forthcoming.
[421] S. Carrera and E. Guild, *Towards an Internal (In)Security Strategy for the EU?*, CEPS Liberty and Security in Europe Series, CEPS, Brussels, January 2011.
[422] Refer to M. Busuioc and D. Curtin, "The EU Internal Security Strategy, the EU Policy Cycle and the role of (AFSJ) Agencies", Briefing Note, European Parliament, Policy Department C: Citizens' Rights and Constitutional Affairs, 2011; refer also to Council of the European Union, *Report on the Cooperation between JHA Agencies in 2010*, 5675/11, Brussels, 25 January 2011(f).
[423] S. Carrera, *Towards a common European Border Service?*, CEPS Working Document No. 331, CEPS, Brussels, 2010.
[424] Council of the European Union, *The Joint Report by EUROPOL, EUROJUST and FRONTEX on the State of Internal Security in the EU*, 9359/10, Brussels, 7 May 2010(e).
[425] D. Bigo, « Police en Réseaux: L'expérience européenne », Paris : Presses de Sciences Po, 1996, pp. 258-266.

'intelligence') that these actors process as well as the risk analysis/threat assessments that they (i.e. Frontex and Europol) develop as the basis of their operational activities. A somehow similar 'secrecy logic' seems to characterise now the work of EASO which, as previously noted, in this report has declined to disclose the Operating Plan concluded with Greece for the deployment of Asylum Support Teams. All these features were indeed paradigmatic of the old Justice and Home Affairs (third pillar) school of 'doing Europe'. Therefore, the more direct materialisation of legacy of the third pillar is first and foremost a reinvigoration of European cooperation framing the phenomenon of immigration, and the application of frontiers wherever they occur, as hybrid places of insecurity, crime and 'potential threats' for Europe, which come along with a culture of secrecy preventing scrutiny and accountability of decisions and actions taken.

Another example illustrating the legacy of the cross-pillarisation has been the role played by EU Home Affairs actors in external relations and foreign affairs, which corresponded with the old second pillar. As we have analysed in sections 2 and 5 of this report, EASO's mandate presents a significant foreign affairs dimension in what concerns the external aspects of the Common European Asylum System (CEAS) and "strengthening the protection capacity of third countries". In a similar fashion, both Frontex and Europol are becoming active foreign affairs actors. Europol, for instance, has concluded in recent years a very high number of operational and strategic agreements with third countries on data processing as well as technical or strategic cooperation.[426] Frontex, on the other hand, has also engaged in cooperation with third countries in the scope of 'integrated border management' through the conclusion of a series of Working Arrangements[427] and in the framework of the so-called 'Mobility Partnerships' between the EU and Moldova, Cape Verde and Georgia,[428] and those foreseen with other third countries such as Tunisia, Egypt and Morocco in the wider context of the 'EU's Dialogue for migration, mobility and security' with the southern Mediterranean countries.[429]

There have been attempts to ensure the 'policy coherency' and 'compatibility' between the external relations adventures of EASO and Frontex with EU internal and external policies. Similar attempts to avoid 'contradictions' have not occurred in the case of Europol. The respective founding Regulations of Frontex and EASO examined in section 2 expressly refer to the need to ensure that their facilitation of operational cooperation between Member States and third countries falls within the scope of "the framework of the Union's external relations policy".[430] However, in both cases reference is made to the possibility for them to "cooperate with the authorities of third countries competent in technical aspects" within their areas of competence, in the framework of working arrangements, "in accordance with the relevant provisions of the TFEU". Moreover, it is far from clear the extent to which their current (and/or potential) 'extra-legal' actions and exchange of information could meet

[426] Refer the Europol website page on "International Relations" (https://www.europol.europa.eu/content/page/international-relations-31). See also tables 4 and 5 of this study.

[427] For an analysis of the working arrangements, refer to E. Guild and D. Bigo, "The Transformation of European Border Controls", in B. Ryan and V. Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges*, Leiden: Martinus Nijhoff Publishers, 2010, pp. 257-278.

[428] S. Carrera and R. Hernàndez i Sagrera, *The Externalisation of the EU's Labour Immigration Policy: Towards Mobility or Insecurity Partnerships?*, CEPS Working Document No. 321, CEPS, Brussels, October 2009.

[429] See European Commission, Communication on a Dialogue for Migration, Mobility and Security with the Southern Mediterranean Countries, COM(2011) 292 final, Brussels, 24 May 2011(c). According to the Commission, "[t]he Dialogue for migration, mobility and security will be launched progressively with the Southern Mediterranean countries, including through the development of Mobility Partnerships…on this basis, the Commission proposes to start dialogues with Tunisia, Morocco and Egypt". See also S. Carrera, *The EU's Dialogue on Migration, Mobility and Security with the Southern Mediterranean: Filling the Gaps in the Global Approach to Migration*, CEPS Liberty and Security in Europe Series, CEPS, Brussels, 2011.

these 'dependency' criteria (and prevent competing strategies and political priorities) in practice. These 'technical working arrangements' do increase the autonomy of the EU Home Affairs agencies and might also lead to fundamental rights sensitivities and legal effects.

In a similar fashion to the point raised in section 6.2.1 above, the strategy pursued by Frontex, Europol and EASO is to frame this foreign affairs cooperation (beyond the facilitation of operational activities) as purely 'technical' and bureaucratic in nature. As the Executive Director of Frontex, General Ilkka Laitinen, stated before the UK House of Lords, "we do not establish a partnership with a country or a government but [between] the border control authority of that third country and Frontex".[431] Moreover, international cooperation between these EU actors and third countries takes place not through classical legal mechanisms such as international agreements but rather in the framework of quasi-legal or *sui generis* soft policy tools which are in a majority of cases non-legally binding for the parties involved and whose legal effects remain dubious. As Shapiro has argued[432] "a number of the agencies have become major sources of Union soft law, issuing model sets of rules, procedures, standards, best practices, guidance documents and consensus reports of coordination meetings ..[which] have clear policy-making significance". To this list we now need to add foreign affairs soft policy tools such as Working Arrangements. The technocratic and 'soft law' framing of the external affairs work conducted by EU Home Affairs agencies here also functions as an attempt to avoid democratic decision-making and a political pluralistic debate about the decisions and actions being taken. However, these 'quasi-legal' instruments have repercussions for fundamental rights of individuals, especially in those aspects related to 'the sharing of information', operational cooperation and financial assistance/capacity management in border controls. Further, issues of policy coherency are also very much a stake here. This was an issue stipulated in the 2009 Stockholm Programme as follows:

> The European Council invites the Council and the Commission to enhance the internal co-ordination in order to achieve greater coherence between external and internal elements of the work in the area of freedom, security and justice. The same need for coherence and improved coordination applies to the Union agencies (Europol, Eurojust, Frontex, European Police College (CEPOL), the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA), the future European Asylum Support Office (EASO) and the European Union Agency for Fundamental Rights). The Council should exercise more political oversight over the agencies, for example, by drawing conclusions on annual reports. Special rules in relation to some agencies apply as regards oversight by the European Parliament.[433]

6.4. Legal uncertainty and the accountability gap

The cross-cutting elements addressed in this section that characterise all three EU Home Affairs agencies under study have provoked wide concerns expressed by academia, civil society, media and international organisations about the tensions inherent in some of their

[430] Refer to Art. 49.2 of the EASO Regulation (cooperation with third and associate countries) and Art. 14 of the Frontex Regulation (facilitation of operational cooperation with third countries and cooperation with competent authorities of third countries).

[431] House of Lords, *Frontex: The EU External Borders Agency*, 9th Report, Session 2007-2008, Select Committee on the European Union, HL Paper 60, London: The Stationary Office Ltd., 5 March 2008(b), p. 46.

[432] M. Shapiro, "Independent Agencies", in P. Craig and G. de Búrca (eds), *The Evolution of EU Law*, Oxford: Oxford University Press, 2011, pp. 111-120.

[433] Council of the European Union, The Stockholm Programme: An Open and Secure Europe serving and protecting citizens, 5731/10, Brussels, 3 March 2010(h), p. 14.

activities and the rule of law. The predominantly home affairs approach, the existence (and progressive development) of de jure competences and de facto (experimental) activities and the legacies of 'cross-pillarisation' lead to several open questions and critical issues from a legal and accountability perspective.

The scholarly debate regarding the accountability of EU agencies has been wide-ranging and fruitful. Much attention has been paid to the level of autonomy enjoyed by EU agencies.[434] The concept of accountability is too often taken for granted. Within the scope of the literature on EU agencies, 'accountability' has taken different shapes and comprises different components. It has even been considered as a key condition for agencies' compatibility with the EU Treaties and for their very legitimacy.[435] In short, the following criteria have been generally pointed out as the main components of this concept: degree of transparency and provision of information; explanation and justification of decisions and activities before a forum that can pose questions and pass judgement; democratic and pluralistic debate (e.g. parliamentary scrutiny at multi-governance levels); constant scrutiny and monitoring of compliance with the given mandate and general EU principles and standards (including fundamental rights); ex-post evaluation/oversight of results and their added value (e.g. proportionality, including substantive and financial aspects); and facing responsibility and liability before courts for their actions and illiberal practices.

As we have seen in this report there is a clear tension between the ways in which EU Home Affairs agencies work and the components substantiating the principle of accountability. Busuioc, Curtin and Groenleer have argued when studying Europol that "the recurring question in relation to the emerging EU executive order is how a balance can be struck between the autonomy of EU agencies and the accountability they must render".[436] The application of the 'balance metaphor' to the EU Home Affairs agencies, however, is problematic due to the above-mentioned special nature characterising these actors in contrast with other EU regulatory agencies, in particular the profound impact of their powers and activities (independently of the actual degree of 'autonomy') over fundamental rights of individuals. Their peculiar (fundamental rights-sensitive) nature should in our view position the highest degree of accountability as the premise or *sine qua non* allowing for access to justice in cases of potential fundamental rights violations. Indeed, the ambiguities and 'grey areas' pertaining to some of the fundamental rights-sensitive areas of competence of Frontex, Europol and EASO create legal uncertainty and consequently raise the vulnerability of the individual by making it practically difficult (if not impossible) to obtain access to effective legal remedies in cases of alleged breaches of fundamental rights.

In addition, the governance strategies of expansionism, autonomy and experimentation practiced by EU Home Affairs agencies stand in a difficult relationship with basic rule of law

[434] Refer for instance to M. Bovens, "Analysing and assessing accountability: A conceptual framework", *European Law Journal*, Vol. 13, No. 4, 2007; M. Groenleer, *The Autonomy of European Union Agencies: A Comparative Study of Institutional Development*, Delft: Eburon Academic Publishers, 2009; M. Busuioc, *The Accountability of European Agencies: Legal Provisions and Ongoing Practices*, Delft: Eburon Academic Publishers, 2010; M. Busuioc, "Accountability, control and independence: The case of European agencies", *European Law Journal*, Vol. 15, No. 5, 2009, pp. 599-615; D. Curtin, "Holding (Quasi-)Autonomous EU Administrative Actors to Public Account", *European Law Journal*, Vol. 13, No. 4, July, 2007, pp. 523-541; D. Curtin, P. Mair and Y. Papadopoulos, "Positioning Accountability in European Governance: An Introduction", *West European Politics*, Vol. 33, No. 5, 2010, pp. 929-945; and M. Busuioc, D. Curtin and M. Groenleer, "Agency growth between autonomy and accountability: The European Policy Office as 'living institution'", *Journal of European Public Policy*, forthcoming.

[435] See M. Bovens (2007, pp. 447-468), *supra*; see also M. Everson, "Independent Agencies: Hierarchy Beaters?", *European Law Journal*, Vol. 1, No. 2, 1995, p. 198; and A. Arnull, "Introduction: The European Union's Accountability and Legitimacy Deficit", in A. Arnull and D. Wincott (eds), *Accountability and Legitimacy in the European Union*, Oxford: Oxford University Press, 2002, pp. 1-9.

principles that have been donated to the EU legal system in the domains of migration, borders, asylum and security cooperation. The lack of clarity as regards the boundaries of their competences and responsibilities exacerbates even further this legal uncertainty and leads to intriguing mixtures of accountability procedures. An illustrative example in this context are the Frontex joint operations at sea where, as highlighted in section 5 above, there is a complex web of interwoven interventions by EU, Member States and individual border guard authorities in the performance of migration/borders controls. The picture becomes even more blurred in those cases where Frontex joint operations engage in extra-territorial border controls. As Baldaccini has rightly pointed out:

> The lack of clarity and transparency regarding the exact scope of Frontex coordinating role, and the way in which Frontex operations are conducted make it difficult to establish which authority can ultimately be held responsible by an individual…The available information does not, however, allow either an assessment of whether Frontex operations at sea are effective in meeting the human needs of migrants, or whether Member States participating in them are meeting their obligations under international human rights law.[437]

The situation is therefore still one where the identification and determination of responsibility and authority are difficult to capture.[438] The various border and migration controls activities taking place in the Mediterranean show a complex scenario where there is a widely diversified plethora of actors and multi-level authorities involved in various forms and fashions in migration control, which sometimes enter into competition with each other as regards areas of blurred responsibility and competences. This is no longer only happening amongst the different law enforcement authorities at national level involved in 'border controls' and 'policing migration' (depending on each national level, e.g. borders guards, customs authorities, police and/or military). European and international actors have now entered the same scene. Frontex, and under its coordination, law enforcement authorities of other participating EU Member States are currently also 'in the field'. The case of the previously discussed joint operation HERMES also demonstrates how other agents like Europol are becoming increasingly active in EU level-coordinated 'border control' operations. It is expected that EASO could also join the wider scene. And all this activity is on top of that of other older actors such as NATO naval forces, which since 2002 have assisted EU Member States like Greece in irregular immigration operations and (surprisingly) 'the fight against terrorism' in this context.[439]

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[436] M. Busuioc, D. Curtin and M. Groenleer, "Agency growth between autonomy and accountability: The European Policy Office as 'living institution'", *Journal of European Public Policy*, p. 2, forthcoming.

[437] See A. Baldaccini, "Extraterritorial Border Controls in the EU: The Role of Frontex in Operations at Sea", in B. Ryan and V. Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges*, Leiden: Martinus Nijhoff Publishers, 2010, p. 230; see also Amnesty International and the European Council on Refugees and Exiles (ECRE), *Briefing on the Commission proposal for a Regulation amending Council Regulation (EC) 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex)*, Amnesty International and ECRE, London and Brussels, September 2010 (http://www.ecre.org/topics/areas-of-work/access-to-europe/94-ecre-and-amnesty-international-joint-briefing-on-the-commission-proposal-to-amend-the-frontex-regulation.html).

[438] V. Mitsilegas, "Extraterritorial Immigration Control in the 21st Century: The Individual and the State Transformed", in B. Ryan and V. Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges*, Leiden: Martinus Nijhoff Publishers, 2010, pp. 39-68.

[439] See for instance the report of the NATO Parliamentary Assembly, Mediterranean and Middle East Special Group, *Migration in the Mediterranean Region: Causes, Consequences, and Challenges*, Brussels, Rapporteur: Antonio Cabras, Nato Parliamentary Assembly, 2009 (http://www.nato-pa.int/default.asp?SHORTCUT=1858), which has the following statement:
48. NATO could also play a role in this by increasing its ability to monitor social, political and economic trends across the regions that supply the flow of undocumented migrants. As part of its broader political transformation, NATO could establish analysis units that would integrate a range of information on trends and their implications for European security, including trends that fuel migration.

The main problem is that in this multi-actor context or 'field', the responsibility for unlawful actions causing fundamental rights violations shifts from one side to another and becomes too volatile in nature. The response provided by Frontex to the above-mentioned accusations levelled by Human Rights Watch of 'push backs' to Libya is quite revealing of this problem. The agency stated:

> Frontex would like to state categorically that the agency has not been involved in diversion activities to Libya (these are based on a bilateral agreement which Italy signed with Libya in May this year). The Frontex operation referred to in the report, Operation Nautilus 2009, was underway on June 18th 2009, but in a different operational area. Though German helicopters did participate in this operation, they were at no time involved in the incident described in the report (on the basis of two press reports, one from ANSA and one from Malta Today). In general, Frontex would like to point out that the task of helicopters involved in joint operations coordinated by the agency is only to patrol the operational area, not to divert.[440]

A similar kind of response was recently given by NATO after the release of a newspaper article published by *The Guardian* attributing responsibility to a NATO ship for the death of dozens of African migrants in a boat fleeing Libya after ignoring cries for help. The UK newspaper published later an amended version stating: "This article was amended on 9 May 2011. The original version referred throughout to a NATO ship. This has been changed to European units pending further clarification."[441] The inquiries to ascertain the identity of the aircraft carrier which denied rescue to the migrants in distress were inconclusive, with hints potentially leading to a French ship which was also operating in that area during the days of the event. Both NATO and French naval authorities denied responsibility.[442] Moreover, as *The Guardian* reports, "No country has yet admitted sending the helicopter that made contact with the migrants".[443]

The evasion of political and legal accountability for fundamental rights and rule of law violations in border controls in the Mediterranean Sea do not match with the overly-politicised nature of the interventions of agencies like Frontex and Europol. It is striking to see how careful EU Home Affairs agencies have been in expressly including in their founding regulations their 'depoliticised' and 'independent' nature. That notwithstanding, the emergency-driven nature of their activities and their dependency with political pressures coming from certain EU Member States and EU institutions to "show results" and demonstrate that "Europe is doing something" in times of constructed crises in Southern

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Refer also to Guild and Bigo, who argue that "[t]he assumption [of NATO's intervention in border controls] appears to be that the terrorists may have been thinking of hiding out on the little pateras and other small boats in the Mediterranean which carry people from the East and Southern shores to the northern shores" (E. Guild and D. Bigo, "The Transformation of European Border Controls", in B. Ryan and V. Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges*, Leiden: Martinus Nijhoff Publishers, 2010, p. 273).

440 See the FRONTEX News Release of 21 September 2009.

441 See J. Shenker, "Aircraft carrier left us to die, say migrants", *Guardian.co.uk*, 8 May 2011 (http://www.guardian.co.uk/world/2011/may/08/nato-ship-libyan-migrants); see also J. Shenker, "Libyan migrants' boat deaths to be investigated by Council of Europe", *Guardian.co.uk*, 9 May 2011 (http://www.guardian.co.uk/world/2011/may/09/refugees-libya?intcmp=239).

442 According to a Reuters article, "NATO spokeswoman Carmen Romero said only one aircraft carrier was under NATO command during the period, the Italian ship Garibaldi, and that was operating 100 nautical miles out to sea. Therefore any claims that a NATO aircraft carrier spotted then ignored the vessel in distress are wrong." See Reuters, "NATO, France deny failing to save Libyan migrants", 9 May 2011 (http://www.reuters.com/article/2011/05/09/us-libya-nato-migrants-idUSTRE74836P20110509).

443 Ibid.

Europe has not passed unnoticed by the academic literature.[444] Here also the HERMES joint operation provides an illustrative example of the politicisation driving the sending of agencies like Frontex and Europol to the field, without having any independent evidential proof of their actual 'added value' beyond mere political games of 'showing European solidarity' and justifying their own existence and competences.

The political nature of EU Home Affairs agencies is however not accompanied with a sound and strong political and legal accountability of their decisions and activities, which would enable one to determine their actual responsibility and potential liability in cases of fundamental rights allegations. The plurality of law enforcement authorities intervening and 'assisting' EU Member States like Italy in border control exempts a proper scrutiny of the activities and inputs of EU agencies like Frontex and Europol. There is a lack of knowledge and public information concerning the actual scope of the EU Home Affairs agencies' actions, which makes it even more difficult to carry out daily monitoring and ex-post evaluation on the compatibility between their activities with fundamental rights envisaged by the EU Charter as well as the procedural guarantees envisaged by EU secondary law, such as the SBC and EU asylum law. The legal vacuums (and extra-legal nature of some of their inputs) and 'the accountability gap' characterising the de jure competences and de facto activities of actors like Frontex and Europol profoundly transform traditional rule of law standards and principles determining and ensuring public authorities' accountability and liability in the case of fundamental rights violations and illiberal practices. They also obscure, and to a certain extent allow, 'power' to evade responsibility and effective legal protection.

EU agencies have indeed become a constitutive part of the Union's institutional landscape and the EU's AFSJ. As the Commission underlined in 2008:

> it has become increasingly important to have clarity about their role, and about the mechanisms to ensure the accountability of these public bodies…[their importance] calls for a common understanding between the EU institutions of the purpose and role of agencies. At the moment, this common understanding is lacking. There is not an overall vision of the place of EU agencies in the Union.[445]

This is currently still not the case for actors like Frontex and Europol, and a similar situation is expected to apply also to EASO once it becomes more operational and develops further its competences. The resulting scenario does not allow for effective access by non-EU

[444] See S. Carrera, *The EU Border Management Strategy: FRONTEX and the Challenges of Irregular Immigration in the Canary Islands*, CEPS Working Paper No. 261, CEPS, Brussels, March 2007; see also R. Hernández i Sagrera, "FRONTEX: Projection at the European Level of the Vision of Spain on Border Control?", in E. Barbé (ed.), *Spain in Europe 2004-2008*, Monograph of the Observatory of European Foreign Policy, No. 4, Institut Universitari d'Estudis Europeus, Bellaterra (Barcelona), February 2008.

[445] See European Commission, Communication on European Agencies – The Way Forward, COM(2008) 135, Brussels, 11 March 2008. Since then, an institutional group has been created to work towards 'more coherency' and improve their governance and accountability; see also European Commission, "EU starts discussions on European Agencies", Press Release IP/09/413, Brussels, 18 March 2009(a) (http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/413&format=HTML&aged=1&language=EN&guiLanguage=en); and also the Inter-institutional Working Group on Regulatory Agencies, "Commission Role", Analytical Fiche No. 31, 23 June 2010 (http://www.astrid-online.it/Riforma-de/Agenzie/Inter-institutional-Working-Group-on-regulatory-agencies---analytical-fiches-31-33.pdf); and finally, the Inter-institutional statement (Annex I) appended to the Council position (Council of the European Union, Position at first reading adopted by the Council on 25 February 2010 with a view to the adoption of a Regulation of the European Parliament and of the Council establishing a European Asylum Support Office – Statement of the Council's reasons, 16626/09, ADD 1 REV 1, Brussels, 3 February 2010(g)) (http://register.consilium.europa.eu/pdf/en/09/st16/st16626-ad01re02.en09.pdf).

nationals to the possibility to claim and enforce their fundamental human rights and denounce potential violations by EU Home Affairs agencies before relevant tribunals.

As section 5.5 has argued, the specific ways of working by the agencies – by trying to effectively avoid any direct contact with individuals and by working with multiple actors – complicate the possibilities for individuals to obtain an effective remedy before a Court. Against the background of the Court of Justice's dynamic case law on the rule of law and effective remedies, also in the case of agencies, a flexible interpretation of the admissibility criteria by the Luxembourg Court could however ensure full judicial protection. Moreover, the unclear ways of working of the agencies often make it difficult to establish liability; an interwoven web of different actions by several actors (Member States, agency, third countries, international organisations) leading to possible fundamental rights violation are hard to disentangle. This complicates bringing evidence. There are possibilities for joint liability of the agency and Member States, but procedural and jurisdictional obstacles remain.

Although a legal 'fix' could be provided for the currently undesirable situation, the applicants' position is in general weak. Often they are uninformed about access to justice and their rights. Moreover, their financial position often makes it burdensome to start proceedings, or to obtain access to legal aid. In addition the poor command of the language spoken before the competent court or tribunal further complicates their access to it. Therefore, translation services should be available. In the cases of extraterritorial border control, their position is further weakened. First of all, in the extraterritorial context itself they have no access to a legal remedy and once returned to the country of origin or transit, access to any redress is further complicated by the physical remoteness to the competent tribunal. From abroad the possibilities to contact legal representation in the EU is further complicated.[446]

[446] This is evidenced by the currently pending *Hirsi* case (*Hirsi and others v. Italy*, Application No. 27765/09, ECtHR). During the public hearing on the case on 22 June 2011, the legal representatives of the applicants indeed indicated that contact with some applicants had been lost, that some had deceased and that they had managed to stay in touch with several others.

7. CONCLUSIONS AND POLICY RECOMMENDATIONS

This report has examined the impact and implementation of the EU Charter of Fundamental Rights on three key EU Home Affairs agencies: Frontex, Europol and EASO. It has assessed the relevance of the EU Charter in the course of evaluating their mandates, legal competences and practices in the field of external border controls and the management of 'mixed flows of people'. The 'non-EU national' on the move has been placed at the heart of our analysis by first identifying those specific fundamental rights provisions in the EU Charter that might be more vulnerable in the scope of some tasks and interventions performed (individually or jointly) by these three EU Home Affairs actors. Secondly we have addressed the modalities and obstacles for individuals to have access to effective legal remedies and justice in cases of alleged fundamental rights violations in the scope of their fields of action.

The Treaty of Lisbon has consolidated the position of the EU Charter at the centre of gravity of European cooperation in the AFSJ. The effects resulting from the legally binding nature of the Charter are increasingly visible in the work of the European institutions and (to varying degrees) that of EU agencies such as those covered in this report. One of the major challenges remains the ways in which the EU Charter can be more effectively made a living document for those whose lives and rights are directly or indirectly touched (and potentially negatively affected) by EU law and/or actions in the domains of external borders, migration and asylum policies. There appears to be general concerns regarding the capacity of the EU and its institutions to deliver the fundamental rights of the Charter to all people entitled to them. While much attention has been paid to trying to reach and inform individuals of their Charter rights, less attention has been paid to the ways in which they (once aware of their rights) can obtain access to justice and have their rights enforced in relevant judicial and administrative venues. Even less attention has been given to how people may access judicial redress for breaches of their fundamental rights when these occur as a result of activities falling within the scope of EU law and policy.

The importance of these provisions of the Charter for the competences and activities of EU Home Affairs agencies cannot be overstated. It is critically important that these supranational actors contribute decisively to the improvement of the situation and are centrally engaged in raising the standards of treatment and fundamental rights protection of third country nationals. The roles, remits and some of the actions carried out by Frontex, Europol and EASO have clear policy significance and might exert profound legal effects over the rights and freedoms of non-EU nationals on the move. This report has demonstrated how the effective delivery and scrutiny of fundamental rights in the activities of EU Home Affairs agencies go beyond ideological considerations of the issues at stake. They rather constitute central issues lying at the foundation of basic rule of law principles such as legal certainty, proportionality, accountability and accessibility to justice and effective remedies upon which the Union has been based. Our investigation has underlined and resulted in the following main five findings:

First, Frontex, Europol and EASO have confirmed themselves as a distinct and peculiar kind of EU regulatory agency. These three actors share a number of common institutional features which have deep implications for their compatibility with effective fundamental rights delivery and accessibility to remedies by individuals affected by their actions. The legal mandates and competences of actors like Europol and Frontex have actively expanded during the last few years of European integration, sometimes transcending their original remits. A similar 'activist' path could be expected in the case of EASO. The material scope

of action and the boundaries applying to certain of their tasks are not fully predetermined and defined in their founding Regulations, which allows for the flexible accommodation, and sometimes extension, of their competences to new domains on an ad hoc basis.

The three agencies have also been granted important operational tasks which go beyond mere 'regulatory activities' by allowing them to intervene in the national arenas of the EU Member States. They also ascribe increasing importance to the 'exchange of information' (and the security/surveillance technologies allowing for data processing) in their respective and inter-agency setting, which we have identified as another governance strategy to increase their margin of manoeuvre and autonomy from EU Member States, national law enforcement authorities and even European institutions. The 'open-ended' nature inherent to the functions played by these EU Home Affairs agencies has been generally and/or officially presented in a rather technical or bureaucratic fashion which attempts to frame their role as mere 'coordinators', 'facilitators' and/or 'assistants' at the service of EU Member States and the implementation of European policies but ultimately not taking any effective 'decision' which has a policy and legal impact. This strategy of 'depoliticising' their role has also primarily aimed at highlighting their 'independence', further increasing their degree of power, preventing controversies and a proper democratic scrutiny (political debate) of the nature and impact of their activities and evading questions of accountability, responsibility and liability in cases of unlawful actions, including potential fundamental rights breaches and risks. The 'expansionism' characterizing their legal foundations has sometimes been accompanied by a series of 'experimental governance strategies' consisting of factual activities and immersions into domains formally falling 'outside' European law and their founding regulations. The evasion of accountability has most directly resulted in a scenario whereby the emergence of 'informal administrative and operational practices' by EU Home Affairs agencies of an extra-legal nature has so far passed unchallenged.

Second, some of the activities performed by Frontex, Europol and EASO as foreseen in their legal remits or as developed through informal (de facto) practices are at odds or present a more sensitive relationship with specific fundamental rights provisions foreseen in the EU Charter. This is especially the case in relation to: first, their operational activities (e.g. joint operations in the case of Frontex, participation in Joint Investigation Teams for Europol and the deployment of asylum support teams in the context of EASO); second, the exchange and processing of information and personal data (in the cases of Frontex and Europol), and their use in carrying out 'risk analysis' and drafting policy documents on 'threat assessments'; and third, their relations, cooperation and exchange of information with third countries through working arrangements and 'soft law'.

Similar tensions might arise in the scope of inter-agency cooperation, such as in the context of the ongoing HERMES JO 2011, in light of the unclear ways of working and the opaqueness characterising the scope and allocation of responsibilities in a scene showing an increasingly nebulous web of interconnected actions and multi-level actors involved in 'policing migration', and sometimes competing against each other. Particularly problematic from a fundamental rights point of view are their actions that present an 'experimental' or extra-legal nature, such as for instance Frontex joint operations putting into practice 'extraterritorial migration controls' in the maritime territories of third countries, as well as the processing of information and personal data (and potential practices of 'profiling') of certain groups of 'undesired immigrants' and nationalities.

Third, the relationship between EU Home Affairs agencies' roles and fundamental rights is also at tension when looking at their 'home affairs focus' and the 'legacy of cross-

pillarisation' featuring their constitutive components, policies and practices. One of the cross-cutting commonalities between Frontex, Europol and EASO identified in section 6 of this report has been their shared focus (while from different perspectives) on several 'control or managerial aspects' surrounding the management of human mobility in Europe. Their role is not driven by the effective delivery of fundamental rights envisaged in the EU Charter within the scope of their relevant competences and fields of intervention, but rather supporting EU Member States' policies and systems and contributing to the implementation of EU borders, security, immigration and asylum policies. The potential incompatibility of some of the aspects falling within both of these dimensions with fundamental rights and the EU Charter remains, as we have demonstrated in this report, open in practice. What is central in the three agencies is that the guiding principle is not the liberty, justice and security of the individual on the move, but rather the security as perceived and constructed (also as a consequence of their 'soft law' reports and policy activities) for the Union and its Member States. The 'police-led' functions inspiring the activities and inter-agency cooperation between actors like Europol and Frontex give rise to processes of insecuritisation framing irregular immigration and undocumented immigrants as a 'risk', 'threat' and 'uncertainty' for the Union, as an "increasing pressure to be contained". The 'home affairs' focus of these EU agencies artificially places irregular immigration 'into the same basket' with serious and organised crime and other perceived threats to the Union such as 'terrorism'. This 'home affairs' framing of migration legitimises the adoption of coercive policy responses and the new application of extra-legal surveillance and control practices focused on human mobility.

This is accompanied by a tendency to fall into the old ways of working (and thinking) under the former EU third pillar framework of JHA cooperation. Even though the Treaty of Lisbon has meant the formal abolition of the pillar divide in the EU's AFSJ and a substantial expansion of the Community method of cooperation, EU agencies like Frontex and Europol, and to a certain extent EASO, present several features, practices and political ambitions that bring back the 'third pillar spirit'. The first hint of its reoccurrence is the increasing role played by Frontex in the scope of the EU Internal Security Strategy and 'policing migration' (linking border controls with police-law enforcement focus), including its cooperation with Europol and Eurojust in the 'state of internal security in the EU'. The second aspect is the secrecy and lack of transparency characterising some of the activities of the three actors in providing information for democratic scrutiny and public accountability (e.g. the unwillingness by EASO to disclose the Operating Plan with Greece providing the legal framework for the first deployment of an Asylum Support Team). The third element bringing us back to the 'pre-Lisbon JHA era' is the incursion of these EU Home Affairs agencies into former 'second-pillar' or foreign affairs domains typically pertaining to international relations and some of which similarly escape the 'Community method of cooperation' and fall into 'soft law or policy' arrangements and tools such as Mobility Partnerships.

Fourth, there is a profound 'knowledge gap' concerning the added value, nature and impact of the activities by Frontex, Europol and EASO in the field, as well as their full compatibility or 'policy coherence' with EU internal and external policy priorities and legal frameworks. This report has shown a severe lack of information and monitoring of their actions, especially those of an 'operational' nature, which leads to cases raising legal uncertainties and accountability gaps that put them at odds with the EU Charter and general rule-of-law principles of the European legal regime. This goes along with a number of shortcomings stemming from the EU Home Affairs agency's governance strategies of expansionism, autonomy, technocracy and experimentation identified in this report.

The nuanced and obscure context in the Mediterranean concerning the identification and determination of responsibility and authority as regards 'migration control' is paradigmatic in this regard. The current multi-level actor scene blurs the factual inputs of agencies like Frontex and Europol and makes 'responsibility' a constantly shifting and volatile dimension that is impossible to capture and scrutinise in practice. This results in a higher degree of vulnerability of third country nationals on the move by making it practically impossible for them to obtain access to justice in cases of alleged breaches of fundamental rights and guarantees. The lack of information on access to justice and awareness of their rights is particularly problematic. Their financial position often makes it burdensome to start proceedings, or to obtain access to legal aid at all. In the cases of extraterritorial border control, the situation becomes even more problematic. By its nature, extraterritoriality prevents access to a legal remedy and once an individual is returned to his/her country of origin or transit, access to it is further complicated by the physical remoteness from the competent tribunal. From outside Europe, the possibilities to contact legal representation in the EU is further complicated, if not made impossible. Overall, under the current situation, the possibilities for holding EU Home Affairs agencies liable before the CJEU are severely circumscribed.

Finally, this report has shown the anachronistic relationship between the 'overly-politicised' nature of some of these agencies as a result of pressures by certain EU Member States and the European institutions to show that 'something is being done' at EU level and demonstrate the practical application of 'the principle of solidarity' and 'mutual trust-based cooperation', with their evasion of democratic, legal/judicial and public accountability of their legal and de facto actions and inter-agency cooperation. In light of the above, we put forward four basic recommendations to the European Parliament and national parliaments with the aim of ameliorating and reinvigorating the democratic, legal/judicial and public accountability and effective fundamental rights delivery in EU Home Affairs agencies' activities, and in particular the work of Frontex, Europol and EASO:

1. A first recommendation would be the development of a new 'model of EU Home Affairs agency' which should be ensured and streamlined across all the Home Affairs agencies, while still respecting agencies' specific characteristics.[447] This model could consist of, at least, the following main components and features:

- First, the European Parliament should not only be entitled to adopt a 'position setting out its view' relating to the selected candidate and to 'invite the candidate to make a statement before its committees and answer questions put by its members' such as is currently the case with EASO, but it should be directly involved by giving a binding 'green or red light' to his/her appointment similar to its powers in the context of the appointment of European Commissioners.

- Second, the Management Board of the agencies should be less 'intergovernmental' in nature by extending the number of appointed members of the European Commission and ensuring a wider representation of the different Directorate Generals (more than the current '2' members) inside the Commission working on issues related to the tasks and fields of work of the

[447] This would reflect the need expressed by European Commission President Barroso to "strike a balance between the need for a global and coherent approach, and the need to respect agencies' specific characteristics - taking into account their different sizes, functions, maturity and ways of working." See the speech of President Barroso of 17th February 2010, "A new Treaty, a new Commission: A revised framework for EU Regulatory agencies".

relevant agency. A minimum of five members representing the Commission should be ensured and the weighting of their votes should be increased and doubled. Commission representatives could also be granted veto rights regarding more fundamental rights sensitive decisions taken by the Management Board. Membership of the Management Board should be open to relevant international organisations, as is currently the case with the participation of the UNHCR in EASO. In addition, the European Parliament could be granted observer status on the Management Board of EU Home Affairs agencies, represented by an administrator (e.g. a member of the LIBE secretariat), rather than a political actor to avoid conflicts of interest.

- Third, an Advisory Board or a 'Consultative Forum' should be established in all the agencies as part of their administrative and management structure. The Consultative Forum, composed of relevant civil society organisations and independent practitioners and academics, should be given the role of issuing opinions on the general reports, programmes of work, fundamental rights impact and long-term strategies, as well as evaluation reports on the operational activities, of the EU Home Affairs agencies. To be able to fulfil these tasks this body should have full access to information concerning the Agencies' activities and should be admitted to monitor these activities at all times.

- Fourth, the availability of information and transparency of the EU Home Affairs agencies' activities should be further improved. The current state of affairs is insufficient from an accountability point of view. There should be a time limit on the confidentiality and non-disclosure of documents, reports and arrangements of the agencies. The agencies should retroactively disclose documents previously considered to be 'sensitive' after a certain time period. They should also publicly disclose all the information of a non-sensitive nature in order to ensure the public accountability of their work, progress and results.

- Fifth, the current modalities and institutional structures for individuals to have access to effective legal remedies in cases of fundamental rights violations should be revised and developed. All the EU Home Affairs agencies should formally and explicitly accept the full jurisdiction of the CJEU in Luxembourg to review the validity and lawfulness of their acts.

- Sixth, a code of conduct and common core curricula similar to the one currently developed in the new 2011 Frontex Regulation should be streamlined to all the EU Home Affairs agencies. The training on fundamental rights provided by Frontex should be also taken as a model for the rest of agencies. This mandatory training on fundamental rights should extend to all individuals taking part in the Agencies' work, including third States' officials.

- Seventh, in addition to a formal express reference in their founding legal texts to the fulfilment and compliance of their activities with fundamental rights, EU Home Affairs agencies should develop and include in their legal mandates the obligation to adopt and implement in practice a fundamental rights strategy similar to the one included in the new 2011 Frontex Regulation. This should be accompanied by the establishment of a Fundamental Rights Office inside the agencies (which would carry out evaluation and conduct of inspections focused on the protection of fundamental rights) and an independent EU Monitor that

would be in charge of the daily supervision of all their activities and actions, as well as incident reporting, in the field. The Monitor would be responsible for initiating disciplinary measures in cases of improper application of the EU law or misconduct.

- Eighth, further mechanisms of internal accountability should be developed, for instance, an independent Board of Appeals before which fundamental rights cases can be heard. Such a Board of Appeals is not uncommon for EU agencies; some have such a mechanism available.[448] The Board of Appeals should be composed of independent lawyers (i.e. not linked to NGOs or other EU agencies) with experience in matters of fundamental rights and therefore modelled on a 'real' court. It must be able to deal with cases quickly and the challenged action must be frozen while it is under consideration by the Board of Appeals. Furthermore, its verdict must subsequently be challengeable before a new special branch of the CJEU or 'EU Agency Tribunal' (see below).

- Ninth, partly modelled after the 2011 Frontex Regulation, EU Home Affairs agencies should have the competence to suspend or terminate activities if violations of fundamental rights occur in the course of those activities. If individuals, NGOs or the Consultative Forum request the Agency to take such a decision by bringing a complaint, the Agency should be under an obligation to quickly adopt a decision on whether it will follow the request. If the Agency decides not to fully suspend or terminate the operation, that decision may be challenged before the Board of Appeals, further opening the way for scrutiny by the 'EU Agency Tribunal' (see below).

- Tenth, EU Home Affairs agencies should not perform any activity or action falling outside their legal remits and competences. Every field of intervention and action should fully correspond with the original mandates and remits. Moreover, legal definitions should be provided for the key concepts related to their tasks, such as the precise meaning and boundaries of coordination, coercive actions, investigations, etc.

- Eleventh, comprehensive provisions on data protection should be integral to the legal mandates of EU Home Affairs agencies, requiring full compliance with principles of purpose limitation, purpose specification and rights for the data subject to access and correct personal data held by agencies. Legal provisions must be accompanied by robust supervisory bodies which can ensure their practical delivery of these principles. Where EU Home Affairs agencies rely on their own specific Joint Supervisory Bodies, these must be empowered to issue binding opinions and their full independence guaranteed.

This model of EU Home Affairs agency should act as a 'standard setter' against which the European Parliament and national parliaments could evaluate and scrutinise the performance and functioning of current and future agencies. Given the dynamic evolution of EU Home Affairs agencies, the model could be taken into account if and when the legal

[448] For example, the European Aviation Safety Agency has a Board of Appeal, which may decide on claims challenging certain decisions by the Agency. See Arts. 40-51, European Parliament and Council of the European Union, Regulation (EC) No. 216/2008 of the European Parliament and of the Council of 20 February 2008 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency, and

mandates of the agencies are opened for re-negotiation or during the negotiations of any new EU home affairs agencies. The inclusion of the mechanisms described above would better allow legal frameworks to pre-empt/respond to the experimental governance strategies employed by EU Home Affairs agencies.

2. In view of the above, the Inter-Institutional Working Group (IIWG) that was set up in March 2009[449] to discuss and define rules for a global framework for regulatory agencies (including those that would improve the transparency and coherence of the system) should explicitly recognise the fundamental rights-related accountability gaps identified by this report in the activities of EU Home Affairs agencies and take these into account it its final declaration.[450]

3. As a third general recommendation, every EU Home Affairs agency's structure, functioning, planning and work should be subject to a closer and solid democratic scrutiny by the European Parliament and national parliaments. A permanent inter-parliamentary body/committee should be set up dealing specifically with EU regulatory agencies. This body should be run by the European Parliament's LIBE Committee, with the participation of other relevant committees, and including the representatives of corresponding committees from the national parliaments. The inter-parliamentary body would organise regular meetings and hearings focused on the EU Home Affairs agencies. It could have the possibility to set up 'confidential working groups' assessing the secret/non-publicly disclosed operating plans, risks analyses and threat assessments and working arrangements with third countries and other actors constituting the basis of their operations in order to examine their proportionality (including from a budgetary point of view), soundness and added value.

4. A fourth general recommendation covers the need to improve access to justice and effective remedies for individuals, whatever their nationality and/or location, subject to EU Home Affairs agencies' actions. A new branch of the Court of Justice should be established – an Agencies Tribunal – following the same format as the EU Civil Service Tribunal. The Agencies Tribunal would deal with admissibility claims and complaints of a legal and administrative nature against the agencies and national authorities participating in agencies' operations and activities. Moreover, a special procedure should be specifically devised to hold the agencies and the EU Member States jointly liable that would not require the applicant to clearly identify 'who' has committed the alleged fundamental right violation, leaving the burden of proof to the relevant agency and the EU Member States involved. The Court of Justice should use a flexible interpretation of the criteria envisaged in the Treaties and its previous jurisprudence.

repealing Council Directive 91/670/EEC, Regulation (EC) No. 1592/2002 and Directive 2004/36/EC, OJ L 79/1, 19.03.2008(b).

[449] Commission Press Release of 18th March 2009, "EU starts discussions on European agencies", IP/09/413. For an analysis of this group and the Commission's wider efforts to develop a framework for EU regulatory agencies see F. Comte (2010), "2008 Commission Communication 'European Agencies – the Way Forward': What is the Follow-Up Since Then?" *Review of European Administrative Law*, Vol. 3, No. 1, pp.65 – 110.

[450] The European Parliament delegation to the IIWG at political level is: Ms Grässle (EPP), Ms Haug (S&D), Ms. Jensen (ALDE), Ms. Lambert (Greens), Mr. Chichester (ECR) and Mr. Messerschmidt (EFD). Cited in F. Comte (2010), "2008 Commission Communication 'European Agencies – the Way Forward': What is the Follow-Up Since Then?" *Review of European Administrative Law*, Vol. 3, No. 1, p. 93.

5. Fifth, the Commission should have the competence to freeze EU home affairs agencies activities in cases of actual, suspected or imminent breaches of fundamental rights, while the legality of the case is being examined in detail. For such an *ex ante* procedure to be fully effective, careful attention should be paid to ensuring its overall objectivity, impartiality and democratic accountability. The procedure would be activated by the European Commission (on its own initiative or that of the European Parliament) on the basis of evidence provided by impartial actors such as the EU Agency on Fundamental Rights (FRA) or a new external network of independent and interdisciplinary experts/academics working in close cooperation with civil society organisations based in the different member states.[451]

6. Sixth, a new piece of secondary law should be adopted specifying the access to rights and access to justice of third country nationals subject to new border and migration controls (including those taking place 'extraterritorially'). The tasks and competences of the EU Home Affairs agencies call for more legal certainty. Their remits and activities and allocation of responsibilities should be clearly defined in law. Any experimental governance activities falling outside the remit of EU law should be avoided.

7. Seventh, particular attention should be paid to the practical implementation of EASO's mandate, given the particularly sensitive nature of some of the agency's tasks from a fundamental rights viewpoint. Guaranteeing the right to asylum envisaged in Article 18 of the EU Charter of Fundamental Rights should constitute an explicit priority for EASO and the agency's work should be focused first and foremost around this objective. Careful consideration should also be made *before* embarking on cooperation activities, of the impact of future cooperation between EASO and Frontex over this fundamental right.

8. Eighth, the fundamental rights sensitivities of Europol's work and safeguards should be taken into account when Europol's mandate is re-opened for negotiation in 2013. DG Justice should play an active role during the preparation of the Commission's proposal for a Europol Regulation to conduct a fundamental rights proof-reading of the new legislation. Moreover, the European Parliament should ensure that the new 'model of agency-building' proposed in Recommendation 1 of this report would be mainstreamed to Europol to the largest extent.

9. A final policy recommendation concerns extraterritorial migration controls. The European Parliament should recommend Frontex to stop and no longer conduct any joint operation in the maritime territory of any third state. Not only are these practices inconsistent with rule of law principles of legal certainty and accountability, but they are also at odds with fundamental rights foreseen in the EU Charter.

[451] See S. Carrera, 'Filling the Gaps in the Global Approach to Migration – The EU's Dialogue on Migration, Mobility and Security with the Southern Mediterranean under scrutiny', *CEPS Liberty and Security in Europe*, June 2011, pp. 6-9.

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