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### **European Border and Coast Guard (Frontex): Security, Democracy, and Rights at the EU Border**

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### **Summary and Keywords**

The European Border and Coast Guard (EBCG) was officially launched in October 2016. In the European Commission's view, it marks a milestone in the history of the integrated management of European Union (EU) borders. This article describes the main features of the new agency, focusing on two key issues. First, it analyzes the powers that the new agency is entrusted with in an attempt to understand whether it will be able to articulate a "European space of control" where an authentically postnational border police will take the lead over national border agencies. Second, it explores whether, and to what extent, the reform of the EU border agency has been accompanied by the development of mechanisms to exercise effective democratic and judicial control over its activities. The discussion concludes by arguing that the views of those who believe that the evolution of EU justice and home affairs policies does not raise particular challenges for the exercise of democratic control over EU security agencies and the protection of fundamental rights during their operations are fundamentally flawed, and that new ways to ensure proper scrutiny over security policies that take account of the peculiarities of EU institutional structure need to be devised.

Keywords: Frontex, borders, EU justice and home affairs, democratic policing, migration, asylum

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## **From Frontex to Frontex**

On October 6, 2016, at the border post located near the village of Kapitan Andreevo, on the border between Bulgaria and Turkey, the European Border and Coast Guard (EBCG) was officially launched. Regulation (EU) No. 2016/1624, relating to the introduction of the EBCG, had been adopted on September 14, 2016, and published in the *Official Journal of the European Union* two days later. The agency, which, like its predecessor, the European Agency for the Management of Operational Cooperation at the External Borders, will be referred to as “Frontex,” undoubtedly represents the main political response to the so-called refugee crisis and, in the words of Dimitris Avramopoulos, EU Commissioner for Migration, Home Affairs, and Citizenship, should be considered “a milestone in the history of European border management” (European Commission, 2016A). This article describes the renewed Frontex, highlighting critical points in relation to the protection of fundamental rights and the democratic policing of European Union (EU) borders. In particular, the analysis will focus on two main issues, as outlined below.

The first issue concerns the nature of the powers that the EBCG is entrusted with. During 2015 and 2016, it was repeatedly argued that the refugee crisis in Europe had been aggravated by the lack of external border controls and the concomitant inability of the old Frontex to provide an adequate supplementary response. The new agency is seen as representing a true leap in quality with respect to the past. The EBCG is said to have new powers to intervene in critical situations and access to a reserve of human and technical resources, making it very similar to a truly supranational police. It is supposed to be able to act even in the face of reticence among member-states to cooperate, resulting in what seems to be a revolutionary change with respect to the classical Westphalian conception of border control (Zaiotti, 2011). Rather than simply representing a pooling of national sovereignties, the agency should be able to articulate a true “European space of control,” where an authentically postnational border police will take precedence over national border agencies. The aim here is to try to understand if the creation of the EBCG will amount to a real change in the relationship between national sovereignty and supranational powers at EU borders.

The second issue concerns the quality of democratic and judicial scrutiny of the agency’s activities. Policing is one of the main public services provided by the state, and the police are entrusted with the task of guaranteeing peace and internal order, concepts that in democratic countries generally coincide with the idea of the protection of fundamental rights and freedoms. To fulfill this function, the police have coercive powers that can be easily abused. Control over police activities, therefore, is a central element of the rule of law, if not one of the main indicators of the democratic quality of a country’s political institutions (Jones, Newburn, & Smith, 1996). The shift of coercive powers to the supranational level, as envisaged in the field of EU migration and home affairs policies, obviously raises the issue of the quality and effectiveness of the democratic and judicial

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control exercised over EU agencies. This article discusses the quality of the checks surrounding the actions of the EBCG, and by doing so it raises questions about the democratic quality of the European political project.

The article is organized as follows. First, it discusses the main hypotheses on the evolution of cooperation in justice and home affairs, so as to define the main theoretical perspectives that will be taken into account in the analysis of EBCG. It then traces the genealogy of the EBCG, from the creation of Frontex in 2004 to the political and diplomatic context that led to the adoption of Regulation (EU) No. 2016/1624. From that point, the text describes the powers that the EBCG is entrusted with and assesses whether its launch actually amounted to the birth of a truly supranational border police, as well as if effective mechanisms for the democratic and judicial control over its action have been put in place. The conclusion argues that the belief of EU policymakers that the evolution of EU justice and home affairs policies does not present particular challenges for the exercise of democratic control over EU security agencies and the protection of fundamental rights during operational activities is fundamentally flawed, and that new ways to ensure the democratic and judicial control over security policies which take account of the peculiarities of EU institutional structure need to be developed.

## **Three Views on Democracy, Security, and Rights in Europe**

The history of the evolution of European cooperation in justice and home affairs before and after 1992 has been discussed by many commentators. Jörg Monar has argued, for example, that the move toward cooperation was accelerated by a number of “driving factors” (such as the perception of the growing inadequacy of national responses to the challenges of global society and the parallel emergence of the single market), and that cooperation developed within some institutional “laboratories” (such as the Trevi Working Groups and the Executive Committee of the Schengen Agreements), which then paved the way for the first forms of cooperation that would later be incorporated into the EU framework with the enactment of the Treaty of Maastricht (Monar, 2001). Others argued instead that the development of cooperation in justice and home affairs has been accelerated by recurring crises. The collapse of the Soviet Union, the political instability in the western Balkans and the resulting outflow of thousands of refugees, the recurring terrorist attacks since 2001, and the enlargement of the European Union in 2004 all have been seen as critical events that triggered institutional change, further legitimizing the framing of the technical problems posed by the creation of an area of free movement within the European Union as security issues (Walker, 2004).

Another perspective from which cooperation in justice and home affairs has been analyzed is that of institutional evolution. Typically, five phases are identified that correspond to different institutional setups placed along an evolutionary line starting with

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purely intergovernmental forms of cooperation (where the decisive actors in policymaking were national governments), and ending with the full communitarization of this field of EU policies (when actors such as the European Commission and the EU Parliament have gained a prominent role), which was brought about by the enactment of the Treaty of Lisbon. This corresponds to the idea that early intergovernmental cooperation within the European Union was characterized by low levels of transparency, while the new policymaking process has been seen as the beginning of a period in which the effectiveness of democratic and judicial scrutiny of EU justice and home affairs policies will be decisively improved (Mitsilegas, Monar, & Rees, 2003; Peers, 2011; Acosta & Murphy, 2014).

It is suggested that three main views on the evolution of cooperation in justice and home affairs may be discerned in the academic literature, and that each offers a specific view on the relationship between democracy, security, and rights in Europe. The first view is to some extent the official narrative that accompanied the emergence of cooperation in justice and home affairs, describing it as a kind of technocratic spillover of the process of economic integration. From this perspective, the driving force behind EU institutional development has been the single market, which has triggered a number of additional institutional arrangements to manage the externalities associated with the free movement of goods, services, and people.

The first forms of police cooperation provided for in the Schengen Agreements were in fact presented as forms of compensation for the lifting of internal borders, and as such, they found their first formal recognition in the Treaty of Maastricht, when the so-called third pillar on justice and home affairs was established (Benyon, 1996; Fijnaut, 1993). The introduction of scope for intergovernmental cooperation in police matters was legitimized as a relative loss of sovereignty, as it was believed to correspond more to the logic of pooled sovereignty than to the actual transfer of executive powers to the supranational level. Such an interpretation reflected the representation of the European Union as a purely regulatory political body (Majone, 1994), and the police cooperation agencies that emerged between the late 1990s and early 2000s were seen merely as technical agencies with a remit to coordinate national police forces. From this point of view, the problem of the democratic legitimacy of EU justice and home affairs policies, as well as of the European Union as a whole (Majone, 1998; Moravcsik, 2002, 2008), is not even raised, as police cooperation is not believed to imply the transfer of coercive powers to the supranational level. Democratic control and the protection of fundamental rights are considered to be adequately guaranteed by the presence of democratically elected governments within the EU institutions, as well as by the role exerted by national courts in the monitoring of executive action.

The second view is a development of Klaus Dieter Wolf's idea that the search for forms of international cooperation represents in some way a new expression of the "reason of state" (Wolf, 1999). The development of cooperation in justice and home affairs is thus interpreted as a process led by national governments, which used the European Union as a vehicle to achieve goals that would have been unlikely to be achieved by acting at the

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domestic level alone. Although some forms of international cooperation can entail a partial loss of sovereignty, intergovernmental action allows national governments to be partly insulated from democratic and judicial scrutiny, and at the same time offers the opportunity to lay the blame for policy failures at the supranational level. The creation of supranational policymaking venues, usually dominated by representatives of the same ministries, essentially allows national governments to gain autonomy over the domestic political arena, where competing actors are able to offer alternative points of view on the issues at stake (Guiraudon, 2000).

According to this interpretation, cooperation in justice and home affairs has emerged from institutional laboratories dominated by high-ranking officials from interior ministries who, acting in insulation from democratic scrutiny, privileged policy solutions where security was the dominant political value (Lavenex & Wagner, 2007; Monar, 2001). These features were particularly evident in the early days of cooperation in justice and home affairs, when cooperation took place in purely intergovernmental venues such as the European Council's committees (which were dominated by security bureaucrats), but they continue to shape the dynamics of post-Lisbon policymaking, where, in the opinion of some, a new form of intergovernmentalism can be singled out in the multiplication of specialized agencies suffering from a lack of democratic accountability (Bickerton, Hodson, & Puetter, 2015; Bulmer, 2015). According to this point of view, the chances of developing democratic EU security policies are minimal, as cooperation in justice and home affairs appears to be used by national governments as a way of circumventing democracy.

Finally, according to the third view, the development of cooperation in justice and home affairs can be seen as a significant leap in quality in European political integration. This leap in quality is exemplified by the terminological choice made with the enactment of the Treaty of Amsterdam, with cooperation in justice and home affairs included under the umbrella of policies aimed at building a *space of freedom, security, and justice*. According to some (Walker, 2004; Lindahl, 2004), the reference to a territorialized concept of security is a clear indicator of the European Union's political ambitions, which has started to represent itself as a unified political space, with risks and dangers that must be managed collectively, not as an entity made of independent sovereign actors trying to handle issues of common interest. From this perspective, the progressive shifting of coercive powers to the supranational level is taken more seriously.

In particular, despite the fact that the new justice and home affairs agencies are officially described as merely coordinating bodies for the actions of national police forces, they are seen to be gaining ever-greater operational autonomy (Parkin, 2012; Rijpma, 2014).

Ensuring appropriate democratic and judicial control over EU home affair agencies is therefore one of the main political challenges for the future of the European integration process. The European Union traditionally has privileged effectiveness in executive action over political and legal accountability, which were deemed to be adequately resolved at the domestic level, where EU policies are implemented. The emergence of supranational executive agencies raises unprecedented challenges, which need to find solutions beyond

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the strictly national dimension of the democratic rule of law. From this perspective, the problem of democratic and judicial control over EU security policies needs to be resolved at the EU level by enhancing the roles of EU bodies (e.g., EU Parliament, EU Court of Justice) and reducing the influence of national interests.

The EBCG is undoubtedly the most-developed EU home affairs agency; therefore, it is also a perfect case study to test the various hypotheses on the development of cooperation in justice and home affairs discussed previously. The following sections trace the genealogy of the EBCG, from the creation of Frontex in 2004 to the enactment of Regulation No. 2016/1624, describe the powers that it is entrusted with, and consider the direction of travel in the evolution of the relationship between democracy, security, and rights at the EU level.

### **A Genealogy of the EBCG**

Borders are the last bastion of state autonomy, and although states may have lost much of their economic, political, and military sovereignty, borders still remain highly symbolic, representing the territorial projection of national identity (Anderson & Bort, 2001, p. 11). Border control is one of the most relevant state prerogatives, so it is not surprising that member-states have always resisted the idea of creating a true EU border agency.

Since the birth of the border-free Schengen area, the issue of compensatory measures, needed to reduce the risk implicit in the lifting of controls at national borders, has become one of the central elements of the project of creating a Europe-wide space of free circulation for goods and people, resulting in a process of securitization that altered the liberal logic of that ambitious political project (Van Munster, 2009; Zaiotti, 2011). Among these measures, more intense cooperation between national border police, or even their integration into a supranational body, was seen as the key to achieving a common standard in managing the new common EU external borders.

As has been written by the European Commission in one of the key policy documents on the EU border control strategy, “the managers and staff of [national border police forces] need to develop an awareness that they are in fact now guarding the borders of the Member States of the European Union. They should, therefore, see their activity as a contribution to a European check and surveillance network” (European Commission, 2002, p. 9). In the Commission’s view, none of the EU member-states should be considered as exercising full sovereignty over their own borders, as they increasingly would be asked to manage them by taking into account collectively defined legal standards and policies.

However, it took more than 10 years for the first experiments on police cooperation, attempted within the working groups born under the umbrella of the Schengen Agreements and then incorporated into the EU institutional framework (Lavenex & Wagner, 2007; Van Munster, 2009), led to the creation of an agency entrusted with the task

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to stimulate the operational cooperation among national border police. Although the birth of Frontex can be viewed through the logic of risk management and compensatory measures that inspired the governance of the Schengen border-free area since its inception (Neal, 2009), the decisive political push for its creation came from the political impact of critical events such as a number of terrorist attacks in the early 2000s and the prospect of EU enlargement in 2004 and 2007 (Léonard, 2009). From the very beginning, therefore, Frontex has been caught in a dialectic between technocratic risk management and emergency politics, which has been described as a typical expression of the securitization of migration in the European Union (Campesi, 2015, p. 35).

Frontex is surely the EU justice and home affairs agency that has experienced the fastest growth, with a budget that went from 2.1 million in 2005 to over 254 million Euros in 2016 and a staff reaching 365 units. Despite the agency's spectacular growth, Frontex's mandate has always been circumscribed to the mere coordination of national border police, which remained legally responsible for enforcing border controls. To some extent, Frontex was a compromise. National sovereignty was not overlooked, but rather pooled at the supranational level through the agency's action in setting standards and developing operational models. This was essentially done through the joint activities, involving various national border police forces, that Frontex has started to coordinate since 2006, when Hera was launched—its first and, for a long time, most expensive joint operation at sea borders (Carrera, 2007). Joint operations were carried out under the command and control of the hosting member-state, but the strategic framework and operating models were defined according to risk analyses carried out by Frontex, which thus started to play a leading role in the active dissemination of a new European culture of border control.

The contradiction between Frontex's increasing protagonism in the coordination of operational activities and its institutional structure is a clear indicator of the fact that behind the birth of Frontex, there was a political drive that, in spite of a certain reluctance of member-states to give up their sovereignty over border control issues, was pushing in the direction of building a truly supranational border police, capable of elaborating its own strategic models and exercising the associated coercive powers. This political drive toward the creation of a supranational border police has placed Frontex under a permanent reform process that has progressively increased its operational autonomy<sup>1</sup>; however, this was done without officially changing its nature as a mere coordinating agency.

Therefore, the idea of creating a true EU border police did not emerge as a response to the recent refugee crisis. It had been discussed for a long time, and in 2011, when the old Frontex regulation was amended for the second time, it was explicitly foreseen that the feasibility of the creation of a European system of border guards might be considered as part of future reviews of the agency's activities. In accordance with that provision, the Commission had commissioned a feasibility study on the subject from Unisys, a

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consultancy firm specializing in security policies. The study (Unisys, 2015) envisaged a three-stage transition to a wholly supranational border management model:

- The first stage would be devoted to the structural strengthening of Frontex and the optimal use of existing legal instruments.
- The second stage would start in 2020, with the aim to move to a shared responsibility model in border management. According to this model, member-states are supposed to maintain control of their borders during ordinary circumstances, with Frontex taking direct responsibility during what the study called “hotspot situations” (p. 24).
- The third stage would commence in 2030 and lead to the full integration of border control activities, with the creation of a true “European Border Corps” under the direction of a “Commander in Chief” appointed by the EU Council (p. 28).

Up to that point, the political debate and the official papers published at the EU level seemed to envisage an evolution of Frontex that conformed to the path outlined by Unisys, whose survey had clearly showed some reluctance on the part of member-states to move toward a supranational border management model and a clear preference for strengthening the existing agency. In particular, the policy lines issued under the Commission presidency of Jean-Claude Juncker suggested that the agency needed reinforcement in terms of the resources available to it, and that this would be sufficient to enhance its capacity to intervene in support of member-states facing strong migratory pressures (Juncker, 2014). During the first six months of 2015, the discussion focused on the need to strengthen Frontex joint operations in the Mediterranean (namely, operations Triton and Poseidon), to ensure that they were capable of carrying out search-and-rescue activities comparable to those carried out throughout 2014 by the Italian Mare Nostrum operation (Carrera & Den Hertog, 2015).

The debate on the strengthening of Frontex was at that point imbued with the rhetoric of humanitarian imperatives, as well as with the parallel rhetoric of solidarity to member-states most exposed to the influx of refugees. This was reflected in the words of the European Agenda on Migration, a key communication adopted by the Commission in May 2015, a few weeks after another dramatic shipwreck in the Strait of Sicily (European Commission, 2015A, p. 3).

Europe cannot stand by whilst lives are being lost. Search and rescue efforts will be stepped up to restore the level of intervention provided under the former Italian ‘Mare Nostrum’ operation. To triple the budget for the Frontex joint operations Triton and Poseidon, the Commission has already presented an amending budget for 2015 and will present its proposal for 2016 by the end of May. When implemented, this will expand both the capability and the geographical scope of these operations, so that Frontex can fulfil its dual role of coordinating operational border support to Member States under pressure, and helping to save the lives of migrants at sea. In parallel to this increase in EU funding, assets



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(ships and aircrafts) are being deployed by several Member States. This welcome solidarity will need to be maintained for as long as the migratory pressure persists.

The European Agenda on Migration, however, was opening a new phase in border control policies, during which the intervention model in what the Unisys report called “hotspot situations” was tried. With this communication, and the sequence of other policy papers that followed (European Commission, 2015B, 2015C), the Commission had indeed launched the so-called hotspot approach, which envisaged an entirely new role for Frontex in the processing of incoming migrants and the repatriation of those not entitled to seek international protection. Frontex had acquired new functions, but nevertheless, the creation of a true European system of border guards was announced without a clear timescale (European Commission, 2015A, p. 17), as if it were a long-term objective.

Summer 2015 completely changed the political landscape, prompting the Commission to accelerate the Frontex reform process. In his “State of the Union” speech, delivered on September 9, 2015, President Juncker announced the imminent submission of an ambitious proposal for the creation of an entirely new European system of border guards (Juncker, 2015). It was no longer the time for business as usual: the growing influx of refugees to the southern EU borders suggested that the strengthening of Frontex joint operations and the launch of the hotspot approach would not be sufficient to handle the situation. “The crisis has shown,” argued the Commission, “that beyond these immediate steps, we need to fundamentally rethink the way we manage our common external border” (European Commission, 2015D, p. 11).

The European Council’s response has been open, albeit at first rather cautious. The heads of state and governments of the member-states, meeting on October 15 and 16, 2015, agreed to open a debate on the creation of a new European system of border guards; however, they also suggested that the Commission’s proposals should be “in accordance with the distribution of competences under the Treaty,” and “in full respect of the national competence of the Member States” (European Council, 2015C). It was clear that any proposal from the Commission would have to overcome the resistance of member-states, which were quite reluctant to give up their sovereignty in favor of a genuine supranational border management system.

It was certainly not a humanitarian argument, which still lay at the core of Juncker’s speech to the EU Parliament, nor the rhetoric of solidarity, that had justified the strengthening of the Triton and Poseidon joint operations, that was the key to winning over the skeptical member-states. To gain political support for a revolutionary proposal, such as the one announced by the Commission, stronger arguments were needed. It was necessary, in short, to present the refugee crisis not as a mere humanitarian crisis, but as an existential threat to the European Union—a crisis that could endanger its very existence by threatening one of its key pillars: the free movement of people within an area without internal borders.

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The Commission proposal on the new border agency (European Commission, 2015E) was finally published on December 15, 2015, after weeks during which the EU public had witnessed a true border spectacle announcing the end of Schengen (Casas-Cortes et al., 2014; New Keywords Collective, 2016). This spectacle involved member-states reactivating controls at their internal borders. The Commission was thus able to capitalize on the unilateral actions of countries such as Austria, Germany, Denmark, and Sweden by blaming southern EU countries for the lack of adequate controls at the external borders. What had been a diplomatic struggle among member-states on the appropriate sharing of the burden for the reception of incoming refugees had been transformed into a border security crisis that was described as threatening the very existence of the ideal of free movement. The securitization of the refugee crisis, however, was even more apparent when reference was made to the need to strengthen border controls in relation to preventing terrorism, suggesting that potential terrorists could infiltrate groups of incoming refugees (European Commission, 2015F, p. 2):

Between January and November 2015, almost 1.5 million illegal border crossings were detected, representing an all-time peak of arrivals in the EU. Third-country nationals have been able to cross the external borders of the EU illegally and then continue their journey across the EU, without having been first identified, registered and subject to adequate security checks. The scale of these huge secondary movements of migrants within the EU has fundamentally put into question the coherence of the Schengen area, and, as a result, some Member States have chosen to reintroduce temporary controls at their internal borders – a situation that cannot and should not endure in the long term. Security concerns following the terrorist attacks of this year, and the phenomenon of foreign terrorist fighters, have only added to citizens' concerns. It has become increasingly clear that the challenges these movements represent cannot be adequately dealt with by individual Member States acting in an uncoordinated manner. We need Union standards and a unified system of shared responsibility for external border management.

These arguments gave an unprecedented sense of urgency to the proposal, to the point that the same European Council announced the intention to reach an agreement on the issue by June 2016 (European Council, 2015A). In the following months, there was not much room for the advancement of alternative points of view, such as those timidly put forward by the European Economic and Social Committee (2016), which underlined that any attempt to return to the normal functioning of the Schengen rules would need a reform of the Dublin system rather than a new border agency. On the contrary, the Commission repeatedly reiterated that a return to normality in the Schengen area depended on the rapid adoption of its proposal on the EBCG (European Commission, 2016B), and therefore recommended that the European Council authorize member-states to maintain internal border controls for another six months, until, with the final enactment of the regulation on the new border agency, all the serious deficiencies in the

management of external borders could be definitively overcome (European Commission, 2016C).

### The EU Border Agency: An Outline

The proposal for the establishment of the EBCG was approved quickly, at least in comparison with the normal speed and complexity of EU legislative procedure.<sup>2</sup> The agency has a wider mandate than the former European Agency for the Management of Operational Cooperation at the External Borders, although the prerogatives attributed to the new agency in many respect merely reinforce the powers that the old Frontex was already entrusted with.

One of the main novel elements concerns the overall increase of powers relating to data collection and processing, which will undoubtedly make the EBCG a key informational hub at the center of the network of national and EU home affairs agencies. According to the newly created regulation, the EBCG can collect personal data not only for those suspected of involvement in cross-border crime, but also for anyone crossing external EU borders without authorization. This means a significant increase in the amount of data that the agency is authorized to process and includes data relating to potential refugees and asylum seekers. The agency may process personal data for performing its tasks and also transmit them to Easo, Europol, or Eurojust, or to the authorities of relevant member-states responsible for border control, migration, asylum, and law enforcement. The existing legal standards on data processing remain applicable, but given the wide range of prerogatives granted to the new agency, it is not very clear whether the information collected will be used for law enforcement or border control purposes. This will inevitably raise uncertainties about the relevant legal framework, as has already been signaled by the European Data Protection Supervisor (2016) in its commentary on the proposal to establish the EBCG.

Another change is the increased operational profile of the new agency. The old Frontex had always had a fairly pronounced operational profile, and during its first 10 years of activity, it coordinated several operational activities (for an overview, see Campesi, 2015, pp. 127–207). In 2016, operational activities accounted for 82% of the current agency's budget. Moreover, much of the budget devoted to operational activities is spent on the financing of actions carried out at sea borders, whose morphology requires the deployment of significant resources.<sup>3</sup> Sea border patrols have always been the core business of Frontex, and this fact is reflected in media representations of it, which have usually portrayed the agency in the context of interventions taking place in the Mediterranean or in the Atlantic, near Western African shores. Therefore, the promotion of a European border management model has mainly been carried out through the launch of joint operations, during which Frontex has attempted to make national border police

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familiar with news models for action. The increase of 1,035% in the operational days recorded between 2006 and 2014 (see Campesi, 2015, p. 129) clearly testifies to the agency's growing capacity to involve member countries in its activities at the borders.

Alongside the control of irregular migration and migration management, the renewed Frontex is now explicitly called on to prevent cross-border crime and provide technical and operational assistance in support of search-and-rescue operations. These objectives may also be pursued jointly, in the course of multipurpose operational activities. This in a sense reinforces the contradiction that many have already underlined (e.g., Horsti, 2012; Campesi, 2014; Aas & Gundhus, 2015) between the largely securitarian mandate attributed to the EU border agency and the humanitarian rhetoric that often accompanies its action.

However, the role that the EBCG will play in controlling the European Union's external borders is now enhanced by other responsibilities. Besides the traditional joint operations or rapid border interventions, the EBCG can deploy its officials within the framework of migration management support teams at so-called hotspot areas. According to the Commission's policy papers outlining the hotspot approach, migration management support teams should be made up of officials from different EU agencies (including Europol, Eurojust, and Easo), and carry out tasks not only related to the identification, registration, and debriefing of incoming migrants, but also with the reception of asylum seekers. The fact that EU law has set the rules for EBCG's action in hotspot areas ahead of providing a general legal framework for the hotspot approach as a whole may be a source of imbalance, giving rise to the prioritization of border control functions over reception needs (Rijpma, 2016).

Directly linked to the role that the EBCG will play in hotspot areas is the enhancement of its powers relating to the repatriation of irregular migrants. The role played by the old Frontex in the repatriation of irregular migrants had increased over time, particularly after the 2011 reform, which explicitly attributed to the agency the mandate to provide the necessary assistance to EU member-states in their return policy by coordinating or organizing joint return operations, including through the chartering of aircraft for the purpose of such operations. The number of joint flights had thus grown rapidly, from 15 flights in 2008 to 66 flights in 2015, delivering a total of more than 3,500 irregular returnees.

The EBCG is now called to promote the development of what is defined as "an integrated system of return management among competent authorities of the Member States, with the participation of relevant authorities of third countries and other relevant stakeholders" [Article 27(1)(a), Regulation (EU) No. 2016/1624]. In this regard, it has the power to coordinate return-related activities, provide technical and operational assistance to member-states experiencing particular challenges with regard to their return systems, and provide support on consular cooperation for the identification of third-country nationals and the acquisition of travel documents. In the choice of which

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return operations to finance or cofinance, the agency shall give priority to those conducted by more than one member-state or those in hotspot areas.

As in the past, such assistance is provided without considering the merits of the return decisions, which remains within the exclusive competence of national authorities. However, the agency may play a proactive role by proposing to member-states the organization of repatriation operations without the need to wait for assistance to be requested. It also can define the operational plan with some degree of autonomy in relation to the dates and destinations of return operations that it considers necessary. In circumstances when a member-state is facing difficulties in implementing an effective return policy, the agency shall, upon request of that member-state, provide the appropriate technical and operational assistance in the form of a return intervention. The real innovation, however, is that the agency can organize and coordinate repatriation operations for which the means of transport and forced-return escorts are provided by a third country of return, and this obviously raises the issue of how to ensure that migrants' fundamental rights are respected during operational activities involving officials acting under the judicial and disciplinary control of a third country (Rijpma, 2016).

In order to make the new agency more effective, its power to develop diplomatic relations with third countries regarding operational cooperation and migration control has been strengthened. Like the old Frontex, the EBCG has the task of "facilitating" and "encouraging" technical cooperation between member-states and third countries within the framework of EU external action [Article 54, Regulation (EU) No. 2016/1624]. The agency can now deploy experts from its staff as "liaison officers" located in the main third countries of origin and/or transit of migration, who are assigned the task of "establishing and maintaining contacts with the competent authorities of the third country to which they are assigned with a view to contributing to the prevention of and fight against illegal immigration and the return of returnees" [Article 55(3), Regulation (EU) No. 2016/1624]. In addition, it can conclude working agreements on operational cooperation with security forces in third countries or take the lead in operational activities conducted on the territory of neighboring third countries. Some observers have rightly expressed concerns about the Commission's original proposal, in particular with regard to the distribution of responsibilities in the case of operational activities carried out on the territory, in cooperation with third countries, or both (Rijpma, 2016). The approved text states that a specific "status agreement" between the European Union and the third country concerned "should cover all aspects that are necessary for carrying out the actions. It shall in particular set out the scope of the operation, civil and criminal liability, and the tasks and powers of the members of the teams" [Article 54(4), Regulation (EU) No. 2016/1624].

Alongside the increase in powers and prerogatives described thus far, there has been a corresponding strengthening of the human and technical resources made available to the EBCG. This point is considered one of the most relevant parts of the reform, as one of the old Frontex's main weaknesses was believed to be its dependence on the will of member-states to contribute to its operational activities. The EBCG has at its disposal a pool of

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border guards and forced-return escorts made available by each member-state on the basis of annual agreements. These are available for operational deployment at the request of the agency unless a member-state faces an exceptional situation substantially affecting the discharge of national responsibilities. In addition, the agency has at its immediate disposal a standing corps of a minimum of 1,500 border guards, or other relevant staff, made available by each member-state to act as a rapid reaction pool.

With regard to technical equipment, the old Frontex was already allowed to buy vehicles and other equipment, either autonomously or in coownership with member-states. In both cases, registration was provided by a member-state, which also was responsible for maintenance. In addition, the relevant member-state and the agency were called upon to agree on the terms ensuring the interoperability of the equipment and governing its use. These rules are reproduced in the new regulation, with the stipulation that “technical equipment owned solely by the Agency shall be made available to the Agency upon its request and the Member State of registration may not invoke the exceptional situation” [Article 38(4), Regulation (EU) No. 2016/1624]. Alongside equipment that is solely or coowned by the agency, the EBCG technical equipment pool also includes equipment contributed to the pool by member-states on the basis of annual agreements. Member-states are required to make technical equipment available for deployment at the request of the agency unless they are facing an exceptional situation. Nevertheless, member-states may not invoke the “exceptional situation” clause in relation to their contribution to the rapid reaction equipment pool, which contains a limited number of items of equipment needed for possible rapid border interventions.

## **A Supranational Border Agency?**

The new regulation seems to suggest that the agency's tasks are no longer limited to the coordination of national border agencies, but that the EBCG is itself directly responsible for border control. The "integrated border management" at the EU level is indeed defined as a "shared responsibility of the Agency and of the national authorities responsible for border management, including coast guards to the extent that they carry out maritime border surveillance operations and any other border control tasks" [Article 5, Regulation (EU) No. 2016/1624]. National authorities are still entrusted with the "primary responsibility for the management of their sections of the external borders," but they shall act "in full compliance with Union law and in line with the technical and operational strategy" established by the EBCG.

The Commission's proposal was even more ambitious on the issue, going so far as stating, "The European Border and Coast Guard Agency *shall be responsible for the management of the external borders* in the cases foreseen in this regulation, in particular where the necessary corrective measures based on the vulnerability assessment are not taken or in the event of disproportionate migratory pressure, rendering the control of the external borders ineffective to such an extent that it risks putting in jeopardy the functioning of the Schengen area" (European Commission, 2015E, p. 24, emphasis added). This amounted to a true revolution in the balance between national sovereignty and supranational powers in border control policies, paving the way for the agency's right to intervene on the territory of member-states.

In the Commission's opinion, such a Copernican revolution was legitimate, in spite of the fact that the EU Treaties stated exclusive national competence on matters of internal and external security [see, in particular, Article 4(2), Treaty on European Union, and Article 72, Treaty on the Functioning of the European Union], as Article 77(2)(d) of the Treaty on the Functioning of the European Union establishes EU competence on the adoption of "any measure necessary for the gradual establishment of an integrated management system for external borders" (European Commission, 2015E, p. 6). Such a reading of EU fundamental law was essentially based on the assumption that border control functions could be dissociated from state powers in matters of public order and national security by creating a three-pronged model in security policies that is unprecedented in the history and theory of the modern state.

The text approved by the EU legislator finally rejected the Commission's point of view on the issue, and it seems to emphasize the exclusive competence of national governments in border control by stating that the EBCG shall "support the application of Union measures relating to the management of the external borders by reinforcing, assessing, and coordinating the actions of Member States in the implementation of those measures and in return" [Article 5(3), Regulation (EU) No. 2016/1624]. Nevertheless, the resilience of the Westphalian paradigm must not lead observers to underestimate the extent of the

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changes introduced by the new regulation on the EBCG, as Sergio Carrera and Leonard Den Hertog (2016) did. If, on the one hand, the new Frontex has still not acquired proper executive powers, it has, on the other hand, gained key prerogatives in the strategic direction of border control policies. This change is not irrelevant. The EBCG will have the task of developing a strategy for the integrated management of EU borders and of assessing its effective implementation by member-states. The new regulation has established a vulnerability assessment system, thus reinforcing the role that the old Frontex was already playing in the strategic analysis of the situation at external borders. The EBCG shall evaluate every aspect related to the effective integrated management of external borders, and particularly “the availability of the technical equipment, systems, capabilities, resources, infrastructure, adequately skilled and trained staff of Member States necessary for border control” [Article 13(2), Regulation (EU) No. 2016/1624]. Moreover, the agency is also called upon to deploy its liaison officers on member-states’ territory, so as to ensure effective monitoring of situations not only through risk analyses and information exchange, but also through its presence on the field.

Member-states are thus subject to a permanent monitoring system directed at evaluating their “capacity to carry out all border management tasks, including their capacity to deal with the potential arrival of large numbers of persons on their territory” [Article 13(4), Regulation (EU) No. 2016/1624]. This evaluation system forces them to make transparent their strategic infrastructure for border control, fulfilling a number of information-sharing duties [see, in particular, Articles 9, 10, 11(4), and 13(3) of Regulation (EU) No. 2016/1624]. This, according to some commentators (e.g., Rijpma, 2016), creates a kind of hierarchy between the agency and national border authorities, with the latter being essentially subject to the EBCG supervisory power.

The Commission hoped that this evaluation mechanism would prevent the eruption of critical situations at external borders that could jeopardize the functioning of the whole Schengen system (European Commission, 2015F). The original proposal established that, in the face of a negative assessment of vulnerabilities, the agency’s executive director could determine the remedies that a member-state was required to implement. According to the text approved, these remedies are now merely “recommended,” initially, at least, and are always decided taking into consideration the comments of the member-state concerned [Article 13(7), Regulation (EU) No. 2016/1624]. Only where a member-state does not implement the necessary measures may the agency management board adopt a binding decision that sets out the measures to be taken by the member-state concerned and the time limit for implementing the measures. Finally, if the member-state does not implement the measures within the time limit foreseen in that decision, the management board shall notify the European Council and the Commission, and further action may be taken in accordance with Article 19, Regulation (EU) No. 2016/1624, which establishes a procedure for dealing with a “situation at the external borders requiring urgent action.”

The procedure provided for in Article 19 has been considered the most controversial point of the Commission’s proposal, given that it established the EBCG’s right of intervention in the event of a member-state failing to fulfill its obligations in relation to



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the effective management of external borders. The crisis management mechanism has been imagined to prevent the occurrence of situations similar to that which occurred in autumn 2015, when Greece repeatedly refused Frontex's support in dealing with the large influx of refugees, thus triggering member-states to reactivate controls at their internal borders. This procedure could be activated when a member-state does not take the necessary measures in accordance with a decision of the management board made in response to a negative vulnerability assessment; or when a member-state facing specific and disproportionate challenges at the external border has not requested sufficient support from the agency. In these cases, the member-state concerned may be forced to accept the EBCG's intervention on its territory and agree to the operational plan drawn up by the agency's executive director within three working days.

However, there are two relevant differences between the text adopted and the Commission's original proposal. The first difference lies in the fact that the decision leading to an EBCG's intervention on the territory of a member-state should be adopted by the European Council, not by the Commission itself. The second (and perhaps most relevant difference) lies in the fact that the consequences of the lack of cooperation from the member-state concerned are now clearly specified. In the Commission's proposal, nothing was foreseen, and this, especially in the light of the original version of Article 5(3) stating the agency's direct responsibility for border control, would suggest that the Commission was envisaging the possibility of acting even against the will of the member-state concerned.

A solution of this kind was, of course, highly questionable from a legal point of view (Peers, 2015; Rijpma, 2016), but also fundamentally unrealistic to the extent that nothing was established on the command and control of operational activities in such circumstances. According to the rules set for ordinary operational activities, command and control is entrusted to the hosting member-state, and this may have led to the situation in which the latter would have been responsible for the direction of an operational activity carried out on its territory without its consent. The many paradoxes of such a crisis management mechanism emerged quickly during the discussion on the Commission's proposal, and any reference to the EBCG's right of intervention was finally eliminated from the final text. When facing a lack of cooperation from a member-state, the Commission may now propose that the European Council adopt a recommendation that one or more member-states reintroduce controls at all or at specific parts of their internal borders under the procedure set out in Article 29 of Regulation (EU) No. 2016/399.

## **A “Democratic” Border Agency?**

The issue focused on in this next section is the democratic quality of the new EU border agency. In short, the section considers whether the increase in prerogatives and operational powers has been accompanied by an improvement in democratic controls and safeguards for the protection of fundamental rights. It is, though, necessary to first understand what the idea of “democratic” policing means, since there is no agreement on the issue in the academic literature (Jones, Newburn, & Smith, 1996). According to some authors (e.g., Stone & Ward, 2000), democratic policing is essentially accountable policing, which means a police force whose actions are oriented by democratically established legal standards and policy guidelines, and whose officials may be held responsible for failing in the implementation of these standards and guidelines. Following this definition of democratic policing, Trevor Jones (2012) has distinguished between organizational accountability and individual accountability.

The concept of organizational accountability concerns the constitutional dimension of policing and provides a form of *ex ante* control over its action. This control is typically exercised in two ways: first, by legally defining the police’s organizational structure and the powers it is entrusted with; and second, by setting its main policy goals and the operational strategies to be followed. The degree of democratic control that it is possible to exercise over the police largely depends on the transparency of the procedure through which the decisions on the legal standards and policy guidelines driving its action are taken. Such control can be exercised directly, through representative bodies such as parliaments, or indirectly, through democratically elected governmental bodies. In the first case, democratic control is typically exercised through the definition of legal standards, even though parliaments usually have the power to supervise the governmental production and implementation of policy guidelines. This, however, depends on the ability of parliaments to effectively influence government choices, and, essentially, on the quality and quantity of information that they may access. In the second case, democratic control is exercised through political and administrative strategic direction, which is usually implemented through governmental decisions regarding the appointment of high-ranking officials and the allocation of resources.

In contrast, “individual accountability” concerns the *ex post* control over the action of police officers. One of the fundamental elements of a democratic police force is clearly the respect for legal standards (Ericson, 2007). The action of police officers is ruled by law, which entrusts them with legally defined powers and prerogatives. Therefore, ensuring compliance with the rules governing police action is crucial, although this can be organized in many ways. Ideally, we could distinguish four different forms of *ex post* control over police officers’ actions, depending on whether the procedure is internal or external, and whether the outcome is a sanction or is the revision of operational procedures.

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Judicial control is traditionally the main form of individual accountability. It ensures police officers' liability for any damages or criminal offenses committed during their office. This is a very strong tool for the protection of individual rights; it also represents the main guarantee against the politicization of police action. The main limitations of judicial control are its slowness and procedural complexity. Internal disciplinary procedures, therefore, can sometimes be more effective, although they are usually viewed with some suspicion, as internal loyalty is believed to prevail over the protection of individual rights. Unlike judicial or disciplinary procedures, monitoring systems are mainly used to assess the effectiveness of police operational procedures and the risk of causing accidents. They can be both internal and external and may lead eventually to the application of sanctions (as in the case of complaint procedures), even though their main goal remains that of reducing the incidence of police misconduct rather than detecting and punishing it.

From the very beginning, police cooperation at the EU level had been viewed with suspicion, as it developed outside the European Community framework, in a purely intergovernmental dimension that kept it away from judicial and parliamentary scrutiny (Wagner, 2006). Many thought that the adoption of the Treaty of Lisbon offered the potential for significant improvement in the organizational accountability of EU security agencies, mainly due to the diminishing role of interior ministers in defining their organizational models and powers (Kaunert, 2010; Kostakopoulou, 2010; Salminen, 2011). By eliminating the "pillars" structure, the Treaty has significantly strengthened the role of supranational actors in the EU legislative procedure and extended the jurisdiction of the European Court of Justice over justice and home affairs policies.

According to Article 6(1) of the Treaty on European Union, the European Charter of Fundamental Rights of the European Union has the same legal value as the Treaties, which means that EU security agencies are now bound to respect the fundamental rights enshrined in it (Guild, Carrera, den Hertog, & Parkin, 2011). The only element that seems to keep the old intergovernmental logic alive is the role in "defining the strategic guidelines for legislative and operational planning within the area of freedom, security and justice" that Article 68 of the Treaty on the Functioning of the European Union entrusts the European Council with. This is a role that is certainly at odds with the right of initiative attributed to the Commission, and which is leading to the overlap of partially discordant agendas in the field of justice and home affairs policies (Carrera & Guild, 2012).

However, what is certain is that the new ordinary legislative procedure has made the EU Parliament a crucial actor in defining the structure and legal framework of EU security agencies. On the one hand, the European Council has maintained an hegemonic role in the home affairs policymaking, at least in part because of the leverage provided by the policy core that had consolidated in the previous decade (Trauner & Ripoll Servent, 2016). But on the other hand, the Treaty of Lisbon has opened a window of opportunity that the EU Parliament has been able to take advantage of in order to make the old Frontex's fundamental rights obligations more incisive given that, paradoxically, Regulation (EC) No. 2007/2004, said little or nothing on the issue. This shortcoming was justified by the

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argument that the agency had no executive powers, so in fact it could not violate the rights of anyone. It was, rather, national governments that were to be held responsible for violations committed by their seconded officials during Frontex's coordinated operational activities. Such an argument, albeit correct in strict legal terms, risked producing a dangerous dilution of responsibilities (Keller, Lunacek, Lochbihler, & Flautre, 2011), a risk that increased when the agency gained new powers and prerogatives with the reforms of 2007 and 2011.<sup>4</sup>

The fact that since its launch, Frontex has been subject to a permanent reform process has allowed the EU Parliament to demand that the increase in powers and prerogatives be offset by a clarification of its obligations with regard to the protection of fundamental rights, especially in relation to its rescue obligations and the respect of the principle of *non-refoulement* during its operational activities at external borders (Slominski, 2013; Trauner, 2012). One of the clearest examples of this was the introduction in 2011 of the obligation to appoint a Fundamental Rights Officer and the establishment of a Consultative Forum to assist Frontex in developing its strategy for the protection of fundamental rights. These bodies are still included in the new regulation on the EBCG. In particular, the Consultative Forum is an external body, with a remit to assist the executive director and the management board with independent advice on matters of fundamental rights, while the Fundamental Rights Officer is an internal body appointed by the management board, with the task of promoting respect for and monitoring the agency's compliance with fundamental rights.

The adoption of the new regulation on the EBCG has been a further opportunity to strengthen the agency's fundamental rights obligation. A quick comparison between the Commission's proposal and the text approved by the EU Parliament shows at least 22 amendments related to the protection of the rights of migrants and asylum seekers. The obligation to respect fundamental rights is now stated by Article 6(3), Regulation (EU) No. 1624/2016, and obsessively reiterated in relation to the innumerable activities that the agency may carry out. The repeated references to the obligation of respecting fundamental rights is probably an indication that EU institutions were concerned about the old Frontex's legitimacy deficit, as the agency had often been criticized for its controversial border operations (Papastavridis, 2010; Baldaccini, 2010; Liguori & Ricciuti, 2012; Marin, 2014; Aas & Gundhus, 2015).

The new EBCG regulation, however, improves some of the most critical elements of the operational model that the agency had developed. Among the improvements especially worthy of mention are the obligation to include in operational plans procedures whereby persons in need of international protection, victims of human trafficking, unaccompanied minors, and other persons in a vulnerable situation are directed to the relevant national authority for appropriate assistance [Article 16(3)(l), Regulation (EU) No. 2016/1624]; the obligation to ensure fundamental rights are fully respected during operations carried out on third countries' territory or in cooperation with their border police [Article 54(4), Regulation (EU) No. 2016/1624].

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The increased involvement of the EU Parliament in defining the regulatory framework governing the EU border agency has not been paralleled by effective democratic control over the definition of the policy guidelines and operational strategies to be followed (Trauner, 2012; Walker, 2012). Even if the EU Parliament now plays a greater role in the procedures leading to the appointment of the EBCG's executive director, the agency remains an essentially intergovernmental body, with a management board dominated by national representatives who in several crucial areas make decisions using the qualified majority procedure. Moreover, the task of elaborating the agency's policy guidelines seems to be firmly in the hands of the European Council through its Standing Committee on Internal Security (COSI), which is entrusted with the task of ensuring that operational cooperation on internal security is promoted and strengthened within the European Union by Article 71 of the Treaty on the Functioning of the European Union. COSI plays a crucial role in collecting knowledge and risk analysis data produced by the various EU security agencies, on the basis of which it defines the strategic guidelines that the agencies translate into operational plans (Parkin, 2012; Rijpma, 2014). Compared to the latter, the EU Parliament continues to suffer from a significant informational deficit, which the new regulation on the EBCG has remedied only partially.

On the one hand, it is true that according to the new regulation, the EBCG shall be accountable to both the EU Parliament and the European Council, and also should report on its activities to them to the fullest extent; on the other hand, however, there has been no effective strengthening of the EU Parliament powers to control the EBCG's operational strategy. The EU Parliament continues, as in the past, to control the agency's budget and now has the right to be "consulted" on the adoption of its multiannual work program [Article 64(1), Regulation (EU) No. 2016/1624], and it also receives information about a number of specific aspects related to its activities.<sup>5</sup> Nevertheless, it remains unaware of many crucial issues on which the elaboration of the agency's operational strategies depend. In particular, the new regulation makes no reference to parliamentary scrutiny of the process for elaborating the overall strategy for integrated border management, nor does it ask the agency to make available the risk analyses on the basis of which operational actions are planned. The agency is in this regard required to consult only the Fundamental Rights Officer, which, as mentioned previously, is an internal body appointed by the management board. This confirms the impression of those (Rijpma, 2014; Wolff, 2015) who have seen the evolution of justice and home affairs policies as a typical example of neointergovernmental policymaking, where crucial elements of the elaboration of political and operational strategies are delegated to subinstitutional actors, such as European Council committees or executive agencies, thus escaping democratic scrutiny.

A completely different issue is the question of ex post control of the EBCG's operational activities. As in the past, command and control powers are entrusted to the authorities of the host member-state. This means that the relevant member-state should be considered responsible for any breach of fundamental rights that may occur during operational activities, and that members of operational teams should be treated in the same way as

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officials of the host member-state with regard to criminal or civil liability. While acting under the command and control of the host member-state, the members of the teams remain under the direct disciplinary control of the authorities of their home member-state.

Besides the traditional judicial and disciplinary controls, the new regulation established a number of monitoring procedures that reinforce the protection of fundamental rights by improving the agency's operational strategies. The members of the Consultative Forum, which is an independent external body, now have the power to conduct field inspections in order to verify compliance with fundamental rights during operational activities. This prerogative is, however, subject to the approval of the host member-state and does not appear to correspond to any concrete power, except that of publishing a report containing recommendations on how to improve the protection of fundamental rights during operational activities. The Fundamental Rights Officer, which in contrast is an internal body, has only a right of access to information, but it publishes reports that the agency takes into account in performing its duties. Relevant monitoring powers are entrusted to coordinating officers, the field experts whom the EBCG appoints to ensure the correct implementation of operational activities. They monitor the protection of fundamental rights and report to the agency on this, and their reports may lead the executive director to suspend or terminate an operational activity when "there are violations of fundamental rights or international protection obligations that are of a serious nature or are likely to persist" [Article 25(4), Regulation (EU) No. 2016/1624].

Finally, the new regulation on the EBCG has provided for the strengthening of ex post controls by creating an internal complaint mechanism. Any person who is directly affected by the actions of the staff involved in operational activities and considers himself or herself to have suffered a breach of fundamental rights, may submit a complaint in writing to the agency. The Fundamental Rights Officer is responsible for handling complaints received by the agency, reviewing their admissibility, and ensuring their confidentiality. In cases of registered complaints concerning a staff member of the agency, the executive director ensures appropriate follow-up; if a complaint concerns a border guard of a host member-state or an expert member of an operational team, the home member-state must ensure appropriate follow-up. In both cases, this may include the adoption of disciplinary measures as necessary.

In particular, the relevant member-state must report back to the Fundamental Rights Officer on the findings and follow-up made in response to the complaint within a set time period. If no report is received, the matter is followed up by the agency, even though the executive director may not exercise any disciplinary power over the national expert. In this way, the complaint mechanism is rather ineffective, as most of the staff participating in the EBCG's operational activities are seconded officers, and there is no guarantee that any disciplinary action will be taken against them in cases of misconduct. In situations when a border guard or a seconded national expert is found to have violated fundamental

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rights or international protection obligations, the executive director may only request that the member-state remove that officer from the agency's operational activities.

## Final Remarks

Does the new EBCG represent the first manifestation of a true postnational border police? Or is it just an improved instrument for pooling national sovereignties and coordinating the exercise of coercive powers, which remain firmly in the hands of member-states? From a strictly legal point of view, it is clear that the answer to these questions gives weight to the second hypothesis. In spite of the Commission's attempts, the regulation on the EBCG has not explicitly overlooked sovereign powers. The EBCG has no executive powers and continues to rely on the security apparatus of member-states for the implementation of its operational strategy. Apparently, in fact, the EBCG will continue to carry out the task performed by other existing international police agencies, providing the institutional infrastructure needed to pool at the supranational level the coercive powers that remain firmly in the hands of national agencies (Sheptycki, 2002).

This is, however, only a partially satisfactory answer. Intelligence and knowledge production have become increasingly key in policymaking and strategic management in relation to security (Ericson & Haggerty, 1997). Looking at the evolution of cooperation in justice and home affairs by focusing only on the issue of the formal attribution of coercive powers, is likely to lead many observers to underestimate how much the increasing role of EU agencies in knowledge production and the development of operational standards is slowly eroding sovereign powers. This is particularly clear in the case of the EBCG, which is entrusted with wide powers for evaluating the effective implementation of its strategic guidelines on integrated border management by the national authorities.

The belief of EU policymakers that the evolution of EU justice and home affairs policies does not raise particular challenges for the exercise of democratic control over EU security agencies and the protection of fundamental rights during their operational activities, therefore, is fundamentally flawed. Moreover, such a point of view seems to be influenced by a certain degree of "methodological nationalism" (Chernilo, 2011); that is, the belief that the solution to the democratic deficit in EU security policies is to be found in institutional solutions at the supranational level that reflect nation-states' constitutional structure. Rather, the European Union is a complex, multilevel polity, which means that new ways to ensure democratic and judicial control over security policies that take account of the peculiarities of its institutional structure need to be devised (Loader, 2002).

If EU security policies are, as argued here, much more related to knowledge production and the dissemination of strategic guidelines than to the exercise of direct coercive powers, then democratic control should focus on the process of knowledge accumulation and production, something that is currently treated as a purely technical matter to be left in the hands of risk analysts and security experts in EU agencies. Likewise, the idea that, lacking executive powers, the EBCG cannot be held responsible for violations of



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fundamental rights committed during its operational activities can no longer be defended, especially in the light of its increased powers in defining strategic and operational guidelines for the integrated management of EU borders.

While it is certainly true that the EBCG shares with national authorities the responsibility for controlling EU external borders, it is also important that this shared responsibility is matched with a corresponding shared accountability. While it is true that the agency does not replace member-states and therefore cannot be held responsible in their stead, it could be considered to be at least jointly responsible, with member-states, for failing to prevent the violation of fundamental rights during its operational activities.

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### Notes:

(1.) In 2007, Regulation (EC) No. 863/2007 created Frontex's rapid border intervention team, while in 2011, the human and technical resources at Frontex disposal were increased by the enactment of Regulation (EU) No. 1168/2011.

(2.) The Commission's proposal was published on December 15, 2015, and the Council reached an agreement on the mandate for negotiations with the EU Parliament on April 8, 2016. The latter approved the final text on July 6, 2016.

(3.) In 2015, joint operations at sea borders accounted for 63% of the budget for operational activities.

(4.) The reference here is to Regulations (EC) No. 863/2007 and (EU) No. 1168/2011.

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(5.) Besides the annual report and budget, which are made public through the agency's web page, the executive director shall transmit to the EU Parliament the results of the vulnerability assessment. Moreover, the EU Parliament is informed of the steps taken in situations requiring urgent action; the number of border guards that each member-state has committed and the number of border guards actually deployed; the cooperative working arrangements concluded with other Union institutions, bodies, offices, agencies, and international organizations; and cooperation with third countries and the activities of liaison officers dispatched there.

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