ERA Forum
DOI 10.1007/s12027-016-0447-y

ARTICLE

The new European Border and Coast Guard: yet another "half way" EU reform?

Francesca Ferraro[1] · **Emilio De Capitani**[2]

Abstract The adoption of EU Regulation 2016/1624 is an endeavour to widen the scope of existing measures shaping a fully-fledged EU integrated border policy. This article discusses key innovations and ambiguities in the text in the light of the debate regarding the still lacking supranational model. EU security has become the driving factor of border management system. The article argues that the respect for the principle of institutional balance is threatened by this Regulation as well as the principles of the rule of law and democratic control, notably at national level.

Keywords EU Integrated Border Management · European Border and Coast Guard · Rule of law · Democratic deficit · Solidarity principle · EU agencies · FRONTEX, Schengen · EU Regulation 2016/1624

1 Introduction

Proposed, negotiated and adopted in extremely short time[1] under the pressure from the European Council, EU Regulation 2016/1624 on the European Border and Coast Guard (EBCG[2]) could be seen as a major evolutionary step and, at the same time,

[1] A quite detailed collection of the legislative preparatory works can be found here: https://free-group.eu/2016/06/10/wiki-lex-the-new-eu-border-guard-proposal/.

[2] Regulation (EU) 2016/1626 of the European Parliament and of the Council of 14 September 2016 amending Council Regulation (EC) No. 768/2005 establishing a Community Fisheries Control Agency, OJ L 251, 16.9.2016, pp. 80–82.

✉ Professor F. Ferraro
prof.frafer@libero.it

1 University of Naples "L'Orientale", Via Partenope 10/A, 80121 Napoli, Italy

2 Queen Mary University of London, Mile End Road, London E1 4NS, UK

Published online: 08 December 2016

a revolutionary one in the relationship between the EU and its Member States not only insofar as concerns the protection of EU borders but also in the wider perspective of the establishment of an European area of Freedom, Security and Justice.

This overarching political objective was put on hold for some time after the entry into force of the Lisbon Treaty to take account of national sensibilities but in recent years has been pushed again into the forefront by increasing migration flows and growing terrorist threats both requiring a bolder reaction at supranational level. Moreover, the figures of travellers crossings EU borders have been growing exponentially and this trend will continue in the future. According to the European Agency for the operational management of large-scale IT systems in the area of Freedom, Security and Justice (EU-LISA),[3] by 2025, the number of travellers from non-European countries crossing the borders of the Schengen area will have almost doubled from 190 million in 2014 to more than 300 million per year. Seeking to manage flows of this size with traditional tools and following a silo approach would be a dangerous illusion.

If the volume and speed of transport and trade transactions increases exponentially, as expected, it is almost certain that national infrastructures and manpower will not adequately meet the growing needs of increased trade, complex supply chains and, last but not least, increasing criminal activity.

2 The new regulation on the European Border and Coast Guard

Regulation 2016/1624 on the EBCG is the latest (and quite likely not the last) of a chain of legal texts by which the EU has tried in the recent years to legally frame the issue of human mobility and human security in the post-Lisbon legal framework.[4]

Over thirty years after the first Schengen agreement, the Regulation agreed by the European Parliament and the Council outlines, for the first time, at legislative level, the main "*… measures necessary for the gradual establishment of an integrated management system for external borders*" as required by Art. 77 TFEU.

The generic term "measures"[5] in the Treaty has already paved the way for the co-legislator to strengthen the general EU rules found in the Schengen Border Code[6] as well as within the EUROSUR[7] system by creating supranational structures, such

[3] See Regulation (EU) No. 1077/2011 of the European Parliament and of the Council of 25 October 2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice, OJ L 286, 1.11.2011, pp. 1–17.

[4] In the post-Lisbon framework, it is essential to consider the new role in EU legislation of the Charter of Fundamental rights, see more details in: *Ferraro/Carmona* [3].

[5] As noted by Hoffman-Morini "*Policy-specific powers exist allowing for the creation of structural or procedural "measures", for example, in the area of research, in the environmental field, in the air and maritime transport or regarding border checks, asylum and immigration in the context of the so-called "Area of Freedom, Security and Justice" allowing for the adoption of "any measure for the gradual establishment of an integrated management system for external borders"*. See: *Hofman/Morini* [6].

[6] Recently codified: Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ L 77, 23.3.2016, pp. 1–52.

[7] See: Regulation (EU) No. 1052/2013 of the European Parliament and of the Council of 22 October 2013 establishing the European Border Surveillance System (Eurosur), OJ L 295, 6.11.2013, pp. 11–26.

as FRONTEX,[8] administrative networks and information systems.[9] The aim of all such "measures" is to establish a stronger complementarity between the European and national levels.

The new Regulation pushes this objective even further by widening the scope of the existing EU measures, announcing a fully-fledged integrated border policy, a multilevel national-European Border Guard, amending the Schengen Border code, and strengthening the FRONTEX coordinating role towards the national authorities dealing with border protection that operate in the so-called "hotspots" in search and rescue operations and in return of illegal migrants. Reaching so many targets has been difficult, and the 62-page Regulation has resulted in an unbalanced text—either elusive or too detailed.

Although the main subject of the text is border management, it also covers other EU policies such as refugee law, international protection, migration, and even internal and external security. Such an ambitious objective was difficult to achieve in so short a time, and several scholars (see Peers, Carrera,[10] Rijpma,[11] and, more recently, De Bruycker[12]) as well as representatives of civil society have already taken the view that the text does not deliver what it announces and is *de facto* perpetuating, with different expressions, the old intergovernmental model. This negative assessment is not shared by the EU institutions, and Regulation 2016/1624 has been welcomed by the Commission as "*...a fully-fledged European Border and Coast Guard system, turning into reality the principles of shared responsibility and solidarity among the Member States and the Union...*". This statement has been heavily criticised by several NGOs which have argued that the adoption of the Regulation[13] is bad news for the fundamental rights of migrants and refugees and that the EU is moving in the direction of a "war against an imaginary enemy".

Paradoxically, the adopted text is so complex and ambiguous that all these contradictory analyses could be defended. Apparently, "creative ambiguity" is a common feature of EU legislation dealing with controversial issues. Legal clarity comes later and very often only after the intervention of national and European judges who will inevitably be called to solve the problems of its interpretation and implementation.

This was the foreseeable outcome of legislative negotiations between the EU institutions. It could therefore be interesting to compare the negotiating position of the European Parliament, the Council and the Commission as presented in a *multi-column document* leaked by Statewatch, which, for the first time, shows the content of

[8] See: Council Regulation (EC) No. 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union. The regulation has already been modified in 2007, 2011, 2013 and 2014. The current Consolidated version can be found here: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:02004R2007-20140717.

[9] Notably the Schengen Information System which according to the European commission planning will be (hopefully) updated to the post-Lisbon legal framework in 2017.

[10] *Carrera/Den Hertog* [1].

[11] *Rijpma* [7].

[12] *De Bruycker* [2].

[13] See the joint press release "A reinforced FRONTEX Agency EU turns a deaf ear to NGO's warnings", PROGRESS Lawyers Network, 22.09.2016.

the so-called legislative "trilogues". It shows, for instance, that the European Parliament has tried to improve the original Commission proposal and has obtained some concessions from the Council side, but, regrettably, it has lost on core points such as the definition of the European Border Strategy by co-decision and even on the procedure to appoint the Agency Director.

3 How to build an EU Integrated Border Management without "fair sharing"?

The main innovation of the new Regulation is that European and national administrations should be considered "integrated". It is worth noting that until the entry into force of the Lisbon Treaty, the notion of integrated management was more a political concept than a legally binding one even if it was already present as an objective in the 2001 Laeken Declaration.[14] In 2002, a Commission Communication set out priorities for the development of the integrated management of the EU's external borders based on common rules, operational cooperation and financial solidarity between Member States (MS). The issue was further debated during the negotiations on the Constitutional Treaty.[15] In 2006, it was developed by the Council[16] which defined for the first time its essential components and, at a primary law level, it was included in the Lisbon Treaty[17] and given force in the updated Schengen Borders Code.

[14] Adopted three months after September 11 and in the political framework which will be the base for the creation in the US of the Homeland Security Department.

[15] Already at the time of the negotiation of the Constitutional Treaty, the Final Report of Working Group X "Freedom, Security and Justice" to the European Convention (December 2002, p. 17) made clear that: "*Consideration should also be given to indicating, in this legal basis, the possible longer-term perspective of a common European border guard unit operating in conjunction with national border control services*".

[16] According to these conclusions: "*Integrated border management is a concept consisting of the following dimensions*:

- *Border control* (*checks and surveillance*) *as defined in the Schengen Borders Code including relevant risk analysis and crime intelligence*.
- *Detection and investigation of cross border crime in coordination with all competent law enforcement authorities*.
- *The four-tier access control model* (*measures in third countries, cooperation with neighboring countries, border control, control measures within the area of free movement, including return*).
- *Inter-agency cooperation for border management* (*border guards, customs, police, national security and other relevant authorities*) *and international cooperation*.
- *Coordination and coherence of the activities of Member States and Institutions and other bodies of the Community and the Union*."

[17] At the same time, the increasing numbers of migrants making dangerous sea crossings in unsafe boats led the Commission to focus on the Southern Maritime Borders. The goal of establishing integrated border management was added with the Lisbon Treaty (Article 77(2)(d) TFEU). The establishment, in 2004, of FRONTEX, the Agency for managing cooperation on the EU's external borders, was a key element in fostering improved coordination. With the 2011 update of FRONTEX's mandate, developing a European border surveillance system was key task for the Agency, as well as more generally assessing risks on the external frontiers.

However, even though the 2006 concept was clear in its form (and is mirrored in the new EU Regulation), it was also elusive in its implementing phase and it did not detail how the European and national administrations could be integrated and how powers, competencies and responsibilities could be shared between the EU institutions and the Member States, the latter being legally equal but profoundly diverse in terms of geography, population, size, and legal and administrative tradition.

The new Regulation explicitly states that the EU integrated border management is a "*fundamental component of the Freedom, Security and Justice area*"[18] and its external dimension should be developed as suggested in 2006 by the Council with the so-called "four-tier access model" (covering the common visa policy, measures with neighbouring Third Countries, border control measures at the external border as well as risk analysis measures within the *Schengen* area, and return).

The notion of integrated management should be fleshed out in compliance with the principles of "sincere cooperation" (Art. 4 TEU) and solidarity (Art. 80 TFEU). The latter states that border, migration and asylum "common" policies "*...shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the Union acts adopted pursuant to this chapter shall contain appropriate measures to give effect to this principle*."

However, the Regulation remains elusive on how responsibility should be shared. How could sharing of responsibility be considered "fair" if there is no overall impact assessment of the costs linked to border protection in the different sections of the common borders? As noted by De Bruycker, the costs of protecting the Greek Islands are far higher than the costs of protecting Luxembourg Airport or German sea borders and airports (Germany has practically no external land borders but the Swiss section of its frontier).

If one has no idea of the general financial and organisational costs at EU level (whether there is a mass influx of migrants at the borders or not), how can one calculate and share them "fairly" between all the EU Member States? On this crucial aspect, the Regulation is silent although the relevant data can be collected by the Agency from the Member States in compliance with Articles 9, 10 and 11 of the Regulation. However, no compensatory mechanism is envisaged by this Regulation for the EU Member States sharing sections of the external borders to provide compensation on behalf of other Member States. As for the content of the integrated border management, Article 4 lists all its components. However, is such a list exhaustive? The answer is 'yes and no'. Surprisingly, Article 4 of the Regulation, on the one hand, does not integrate the customs policy which is one essential aspect of border control, but on the other hand, it covers other policies with a different legal basis in the EU Treaties, such as the return policy (linked with irregular migration), and notably internal and external security which is becoming the main driving factor justifying the creation of the new integrated border model.

[18] "The objective of Union policy in the field of external border management is to develop and implement European integrated border management at national and Union level, which is a necessary corollary to the free movement of persons within the Union and is a fundamental component of an area of freedom, security and justice."

4 The "missing link" of a formal document shaping the actual content of EU Strategy on Integrated Border Management

Given the ambition and the complexity of the EU Integrated Border Management, it is unfortunate that the co-legislator has not detailed in this Regulation how the EU Integrated Border Management Strategy should be adopted and published to become binding for the EU institutions and for the Member States. Without a formal EU document adopted by the EU institutions, shaping in a consistent and balanced way, all the "components" listed in Art. 4 with a reference to a given period of time, how will it be possible for the EU citizens and the national parliaments to be democratically associated as required by Art. 11 and 12 TEU and 15 TFEU?

Moreover, this silence is unexpected as the same Regulation clearly states that "*the development of the policy and legislation on external border control and return, including the development of a European Integrated Border Management strategy, remains a responsibility of the Union institutions*." (Preamble paragraph 8).

However, Article 3 of the Regulation states that it is up to the Management Board of the European Border and Coast Guard Agency (based on a proposal of the Executive Director) to "*. . . establish an operational and technical strategy for the European integrated border management, taking into account, where justified, the specific situation of the Member States, in particular their geographical location*". The point is that, in the absence of an overarching strategy adopted by the EU institutions, the only meaningful strategic documents in this domain will be those adopted by the Agency's Management Board, e.g., by the representatives of the EU Member States. Does it comply with the Treaty? Can an EU agency define and, at the same time, implement an overarching political objective of the Treaty?

Even after the entry into force of the Lisbon Treaty, such a delegation of power may violate the respect of the principle of "institutional balance" between the EU institutions. This was confirmed by the recent seminal European Court of Justice case law on the EU Agencies (see the *ESMA Shortselling case*, Case C-270/12) in which the Court approved the possibility of EU institutions delegating powers to issue measures of general application to an EU agency but only in cases where there is no political discretion as is clearly the case for an integrated strategy.

This is still the main point arising from the "*Meroni*" doctrine which requires the preservation of the rule of law and of the principle of democracy in the EU. Even if it is true that, in the post-Lisbon Treaty, reference is made to EU agencies in several articles and if it is possible to challenge their acts before the Court (see Art. 263 TFEU), the main institution's responsibilities remain untouched. It would nonetheless be bizarre if, for instance, the European Parliament instead of taking the responsibility for defining the objectives for which it has been elected, had to bring the Agency's "operational and technical" strategy before the Court to have an influence on its content.

Moreover, if such a strategy were deemed to be binding on the national legislature, it would become a sort of "derived legal basis", a practice that the ECJ has consistently condemned in recent years. Notably, this has happened when the outcome would be to circumvent the Treaty obligations and downgrade EU decisions to

an "executive" or "operational" measures status. This can impact fundamental rights, which is clearly the case for the measures linked with human mobility.[19]

Aware of this inconsistency, the European Parliament representatives asked during the trilogues to add a paragraph in the explanatory section of the Regulation stating the following: "*The Commission should present a legislative proposal for a European integrated border management strategy setting out general guidelines, the objectives to be met and the key actions to be taken in order to establish a fully functioning European integrated border management system*." No record of the trilogues is currently available and we do not know why this amendment was not retained by the Council or by the Commission (which could have amended its proposal and adopted it by qualified majority in the Council). And even if the absence of a Council's decision could look less important for the governments (as they are all represented in the Agency management board), it is evident for the national parliaments which, as things currently stand, have no chance to say a word on this sensitive issue, not even as regards their national section of EU borders.

TH/THES

5 A worryingly increasing democratic deficit?

The absence of any reference to the national legislatures in this Regulation is therefore appalling and contrary to the mission conferred to them by Article 12 TEU according to which

> "*National Parliaments contribute actively to the good functioning of the Union*: (...) *by taking part, within the framework of the area of freedom, security and justice, in the evaluation mechanisms for the implementation of the Union policies in that area, in accordance with Article 70 of the Treaty on the Functioning of the European Union, and through being involved in the political monitoring of Europol and the evaluation of Eurojust's activities in accordance with Articles 88 and 85 of that Treaty*;"

The specific reference in the Treaties to the national parliaments' oversight over operational bodies, such as the Council Standing Committee on Operational Cooperation on Internal Security (COSI, as to which see Art. 71 TFEU), Europol and Eurojust, was a clear indication to the co-legislator that the same treatment should have been granted to national parliaments in relation to a new Agency which—although FRONTEX is not explicitly envisaged in the Treaties—plays the same role in (almost) the same domain.

It is therefore unfortunate that the European Parliament has missed this opportunity to play in full its legislative role in supporting democratic control at national level when shaping this fundamental EU political objective in a domain where EU citizens' and national parliaments' sensibility is the highest. This silence confirms

[19] See a recent Case raised by the European Parliament Case C-355/10 (decided by the Grand Chamber) 5 September 2012 (Schengen Borders Code—Decision 2010/252/EU—Surveillance of the sea external borders—Introduction of additional rules governing border surveillance—Commission's implementing powers—Scope—Application for annulment).

that the spirit, if not the letter, of the Treaties has been ignored and that the democratic principle in the current EU construction is weakening faced with the increasing role of executives and unelected bureaucracies such as, in the case of this Regulation, the Management board of the "new" European agency.

so that's how the EBCG can be labelled!!

6 FRONTEX 2.0 no more only a powerful "Fire Brigade"

However, the quantum leap of this Regulation is the new role for FRONTEX in the general Schengen framework transforming it from an element of a horizontal network to the core of hierarchically integrated structure. FRONTEX was already considered a pivotal element of EU border management in 2013 when Schengen governance[20] was reformed (following a 2011 Franco-Italian dispute about the treatment of thousands of Tunisian migrants and refugees who had landed in Italy). The crucial point of the 2013 Schengen reform was a new evaluation and monitoring mechanism[21] which "*…in the case of serious deficiencies relating to external border control and of the specific procedure in case of exceptional circumstances putting the overall functioning of the area without internal border control at risk*" could trigger the reintroduction of internal border checks by the Schengen States surrounding a Member State whose border was not adequately protected.

It was, for the first time, a sort of internal "self-defence"[22] mechanism in an EU legislative text. Moreover, the new evaluation system has not been designed following the original intergovernmental model but by empowering the EU institutions, namely the European Commission, the Council (partially), the European Parliament and FRONTEX which "*…should support the implementation of the evaluation mechanism, primarily in the area of risk analysis relating to external borders. The evaluation mechanism should also be able to rely on the expertise of FRONTEX's assistance on an ad hoc basis when carrying out on-site visits at the external borders…*".

However, the 2013 Schengen evaluation reform was also the first strong signal that the Schengen Member States no longer trusted each other and that a supranational mechanism was unavoidable. In theory, the role of external controller has formally been conferred on the Commission, but the European Parliament and the Council have empowered FRONTEX for the evaluation on the ground because all the Member States are represented in the Management Board and can all directly verify the situation in the other Member States' territories.

Another remarkable feature of the 2013 reform has been to frame by law what should be done in case of an emergency, especially in the presence of a sudden mass

[20] See *Ferraro* [5]; For a more detailed analysis, see *Ferraro* [4].

[21] See Council Regulation (EU) No. 1053/2013 of 7 October 2013 establishing an evaluation and monitoring mechanism to verify the application of the Schengen acquis and repealing the Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen, OJ L 295, 6.11.2013, pp. 27–37.

[22] See Regulation (EU) No. 1051/2013 of the European Parliament and of the Council of 22 October 2013 amending Regulation (EC) No. 562/2006 in order to provide for common rules on the temporary reintroduction of border control at internal borders in exceptional circumstances, OJ L 295, 6.11.2013, pp. 1–10.

influx on a section of the external border (Art. 77, par. 3, TFEU), particularly if the State concerned is not able or willing to protect the common border. In these exceptional cases, the controls at the internal borders can be re-instated even if only on a temporary basis (see Article 29 of the Schengen Border Code—now Regulation (EU) 2016/399).

This Regulation 2016/1624 on EBCG strengthens FRONTEX from two perspectives.

First, it boosts its "fire brigade" role which had been limited by the fact that FRONTEX was not able to purchase its own resources, did not have its own operational staff, relied on Member State contributions, and was unable to carry out return or border management operations without the prior request of a Member State; nor did it have an explicit mandate to conduct search and rescue operations. The new Agency will be strengthened and reinforced to address all these issues. In the final text, if a Member State faces disproportionate migratory challenges in particular areas on its external border, characterised by large influxes of mixed migratory flows, the Agency shall, at the request of a Member State or on its own initiative, organise and coordinate rapid border interventions and deploy European Border and Coast Guard Teams (EBCGTs) from a rapid-reaction pool as well as technical equipment. Rapid border intervention teams will support national authorities for a limited period of time when an immediate response is required and where such an intervention would provide an effective response. Regarding the Agency's staff and equipment, a rapid-reaction pool of border guards and other relevant staff in the Member States, amounting to a minimum of 1,500 persons, will be set up. The deployment of teams from the rapid reaction pool will be complemented by additional EBCGTs where necessary. The Agency's permanent staff will be more than doubled and, for the first time, the Agency will be able to purchase its own equipment and deploy it in border operations at a moment's notice. A rapid reserve pool of border guards and a technical equipment pool will be put at the disposal of the Agency—meaning there will no longer be shortages of staff or equipment for Agency's operations.

Secondly, Regulation 2016/1624 empowers FRONTEX 2.0 with a stronger coordinating power placing it "functionally" above the MS administration. It means that:

(a) the Agency and national authorities that are responsible for border management and return (including coastguards) will have the duty to cooperate in good faith and exchange "in a timely and accurate manner all necessary information" (Articles 9, 10 and 11.4). This information should cover the situation, trends and possible threats at the external borders and in the field of return by complementing the information required by the EUROSUR Regulation. If correctly implemented, this exchange of information will bring more clarity on what is happening on the ground, so that border policy can no longer be considered a strictly national issue.
(b) the Agency's "common integrated risk analysis model" shall be applied by the Agency and the Member States (Art. 11.1). It should be expected that this common EU model will avoid both hyper-dramatisation and underestimation, which currently happens for internal political aims.
(c) the Agency's risk analysis covering all aspects of the Integrated Border Management shall be submitted to the European Parliament, the Council and the Commission in order to develop a pre-warning Mechanism (Art. 11.3), and Member

States shall take results of the risk analysis into account when planning their operations and activities at the external borders and their activities with regard to return (Art. 11.6).

(d) the Agency shall ensure regular monitoring of all Member States' management of external borders through independent liaison officers appointed by the Agency's Director who will also become the interface of the Agency in the Member States and will be associated with the vulnerability assessment. The Liason officers "shall take instruction only from the Agency" (Art. 12.6).

(e) The Agency shall, at least once a year, monitor and assess the availability of the technical equipment, systems, capabilities, resources, infrastructure, and adequately skilled and trained Member States staff necessary for border control. Member States shall, at the request of the Agency, provide information as regards technical equipment, staff and, to the extent possible, the financial resources available at national level to carry out border control. Article 13 of the Regulation makes clear that "the aim of the vulnerability assessment is for the Agency to assess the capacity and readiness of Member States to face upcoming challenges, including present and future threats and challenges at the external borders; to identify, especially for those Member States facing specific and disproportionate challenges, possible immediate consequences at the external borders and subsequent consequences on the functioning of the Schengen area; and to assess their capacity to contribute to the rapid reaction pool" (Art. 13).

6.1 The FRONTEX's "Vulnerability" assessments and possible impact on EU Member States

If a Member State is found "vulnerable", the Agency's Executive Director has to "make a recommendation setting out the necessary measures to be taken by the Member State concerned, and the time limit within which such measures shall be implemented". If this does not happen, the Executive Director shall refer the matter to the Commission and to the Agency's Management Board which shall adopt a decision "setting out the necessary measures to be taken by the Member State concerned and the time limit within which such measures shall be implemented".

According to Article 13.8: "*The decision of the management board shall be binding on the Member State. If the Member State does not implement the measures within the time limit foreseen in that decision, the management board shall notify the Council and the Commission*".

And, according to Article 19 of the Regulation, "*. . . the Council, on the basis of a proposal from the Commission, may adopt without delay a decision by means of an implementing act, identifying measures to mitigate those risks to be implemented by the Agency and requiring the Member State concerned to cooperate with the Agency in the implementation of those measures. The Commission shall consult the Agency before making its proposal.*"

At the end of the day, if the Member State concerned does not comply with the Council decision within 30 days and does not cooperate with the Agency, the Commission may authorise the reestablishment of controls at the EU internal borders (Article 29 of Regulation (EU) 2016/399) so that, in practice, the State concerned will be treated as if it was outside the Schengen Area.

By complementing the general Schengen evaluation mechanism set out in 2013, the new FRONTEX "stress tests" will be crucial in identifying and overcoming the weaknesses of the EU border protection system just as the stress tests conducted by ECB on national banks have become crucial to preserve the credibility of the EU Banking Union.

For these reasons, even if incomplete, somewhat ambiguous and unbalanced on the security side, the Regulation should be seen as a new start for the EU and its Member States and not only as a disguised reproduction of the past.

7 Conclusions

Should we consider the notion of integrated border management as defined by the new Regulation as only "legal fiction"? Should we consider that, at least from a functionalist perspective, there is continuity between the national and the supranational level? If this is true, and Member States have to implement it in a spirit of sincere cooperation, when will it be clear which organisational units are interlinked? On the supranational level, it is well known that the notion of "shared responsibility"—between FRONTEX, as an agent of the EU, and the Member States—has always been a point of contention since the creation of the Agency.

As noted by Amnesty International, the European Council on Refugees and Exiles (ECRE) and the International Commission of Jurists, on the concept of shared or indirect responsibility, (see Article 5 of the Regulation) "*...the division of responsibilities between the Agency and Member States remains unclear* (...). *Moreover, even if the Regulation confirms that Member States retain "primary responsibility for the management of their section of the external borders", the Agency has been assigned a new set of competences that could trigger, through its actions or omissions, the EU's direct responsibility for violations of human rights*".

Civil and criminal liability are dealt with by Articles 42–43 of the Regulation in a rather general way. However, the responsibility of both EU agencies and Member States is necessarily engaged, under the EU Charter, by human rights violations arising from their conduct when implementing EU law. According to this perspective, the Regulation has improved the current legal framework by confirming the need for the Fundamental Rights Strategy, even if its implementation remains limited because of the person in charge of it. Indeed, how could a single Fundamental Rights Officer cover all these activities being in charge of instructing the complaint mechanism envisaged by this Regulation?

The latter has been strengthened when compared to the original Commission proposal. Complainants shall be informed in writing about the admissibility and merits of a complaint. In case of non-admissibility decisions, the reasons for the decision and the suggestion of further options for addressing their concerns shall be provided to the complainant. The relevant Member State shall report back to the Fundamental Rights Officer as to the findings and follow-up to a complaint within a determined time period, and, if necessary, at regular intervals thereafter. The Agency shall follow up on the matter if no report has been received from the relevant Member State. The Agency shall also include in its annual report information on the complaints mechanism.

These improvements are welcome but remain very mild compared with the scope of the Agency's intervention powers. It would have been more sensible to establish, for instance, the possibility of collective redress being triggered by the intervention of NGOs which can better represent the interests of people who are in a weak position *vis-à-vis* the EU agencies and Member State authorities. It would have been more sensible to establish a stronger presence or cooperation with other EU agencies, such as EASO and FRA, by associating them in each FRONTEX operation rather than limiting their cooperation to an ancillary role, especially in the Hotspot areas.

The real "elephant in the room" is that EU security has become the driving factor of border management. The strong relation between the control of Schengen external borders and EU security policy was already evident when the EUROSUR Regulation was adopted but, in the aftermath of the so-called "refugee crisis", has become the predominant theme of the new text.

Even though it is stated that when "*…implementing European integrated border management, coherence with other policy objectives should be ensured, including the proper functioning of cross-border transport*", the core of the text deals with an EU security perspective and strengthens the notion of intelligence-led policing, which clearly mirrors the US border policy model.

Clearly, we are far from the times when security was considered only a simple "compensatory measure" ancillary to the abolition of the internal border checks in the Schengen Area, as it was at the beginning of the Schengen cooperation. One can even take the view that the legal basis of this Regulation—respectively Article 77.2 paras. (b) and (d), as well as Article 79 (2) let (c)—covers only the prevention and fight against illegal crossing and irregular migration which are the tasks covered by the border guards. This "mission creep" has been imposed by the Member States, endorsed by the Commission, and has been largely accepted by the European Parliament. The point is that, without a legislative basis, legal clarity will also be missing in a European Union which is deemed to be bound by the rule of law. A problem of legal basis could be raised as EU internal security is covered by a different Treaty Chapter to that dealing with the policies on border, migration and asylum, and the "external" EU security has a very specific regime which makes it autonomous in relation to the EU "ordinary policies" (and *vice versa*—see Article 40 TEU, the "mutual respect" clause). However, reality is very different: EU internal and external security measures are increasingly intertwined and require an increasing role for "internal" EU agencies, such as EUROPOL, EUROJUST and, increasingly, FRONTEX.

Even six years after the entry into force of the Lisbon Treaty, which has transformed police and judicial cooperation in criminal matters in "ordinary policies", the scope of national and European competencies remains unclear. This is mirrored in the legislative texts referring to EU security. It is also self-evident in the recent rules adopted concerning *EUROPOL*[23] where reference is made to the internal security "of the Union" and to a "policy cycle" established at EU level, but these references are not binding at national level.

[23] See: Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA, OJ L 135, 24.5.2016, pp. 53–114.

The same ambiguous approach is present in the Regulation 2016/1624 according to which the new EU Border Guard should grant "*a high level of internal security within the Union*" and should analyse "*the risks for internal security and analysis of the threats that may affect the functioning or security of the external borders*" (Article 4), but this should be done "*without prejudice to the responsibilities of the Member States with regard to maintaining law and order and safeguarding internal security*", so that "*no Member State should be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security*".

However, FRONTEX's exact role in the EU security strategy as well as its relations with the other EU agencies working in this domain remain unclear as they are covered by "soft law" instruments such as Council Conclusions, "Policy Cycle", Guidelines, Handbooks and Roadmaps. It is therefore evident that through these soft-law tools the EU Member States are increasingly overhauling the "mutual respect" clause in the Treaty by progressively merging the action of the "internal" agencies in "external" policies and by empowering "external" services in "internal" policies.

The 2011 roadmap on the synergy between CSDP and FSJ actors is self-explanatory since it reflects the growing role of FRONTEX as the operational bridge between the two legal worlds. Fostering this trend is also the operational result of some initiatives, such as the recent Operation SOPHIA in the Mediterranean and the position taken by the ECJ in recent cases which have privileged the external security dimension against the internal one.

The point is that soft-law measures, even if partially echoed in a legislative text such as this new Regulation, cannot address the problems of which authority is responsible, particularly in the case of violation of fundamental rights, or which law is applicable to the EU agencies, such as FRONTEX, in case of intervention in the framework of a CSDP measure apart from the binding nature of strategic and operational agreements concluded by the Agencies with Third Countries on behalf of the Union.

This article should not be considered a detailed analysis of the 62-page Regulation through which the European Parliament and the Council have dared to outline what an integrated border management should be. The 83-article Regulation covers many issues which had been in unchartered territory for the European legislature, and some of the proposed solutions are questionable or merely a disguised representation of old ones. However, the legislation can have its autonomous life when implemented in the real world and pave the way for further improvements. Undoubtedly, bringing together, in a consistent and balanced way, the protection of borders, migratory flows and asylum protection requires a supranational political "EU model" where security, economic and socio-political aspects can be dealt with in a consistent way. It will not be easy, but it is an unavoidable task if the EU project is to survive.

THES

References

1. Carrera, S., Den Hertog, L.: A European Border and Coast Guard: what's in a name? CEPS, no. 88/2016. Available at: https://www.ceps.eu/system/files/LSE%20No%2088%20SC%20and%20LdH%20EBCG.pdf

2. De Bruycker, P.: The European Border and Coast Guard: a new model built on an old logic. European Papers, no. 2/2016. Available at: http://www.europeanpapers.eu/en/e-journal/european-border-and-coast-guard-new-model-built-old-logic
3. Ferraro, F., Carmona, J.: Fundamental rights in the European Union. The role of the Charter after the Lisbon Treaty. European Parliamentary Research Service, Brussels, March 2015 (Original manuscript in English). Available at: http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/554168/EPRS_IDA(2015)554168_EN.pdf
4. Ferraro, F.: Lo spazio giuridico europeo tra sovranità e diritti fondamentali. Democrazia, valori e rule of law nell'Unione al tempo della crisi (European legal space between sovereignty and fundamental rights: democracy, values and the rule of law in the Union in the times of crisis). Editoriale Scientifica, Napoli (2014)
5. Ferraro, F.: Schengen governance after the Lisbon Treaty. European Parliamentary Research Service, Brussels (2013). Available at: http://www.europarl.europa.eu/eplibrary/Schengen-governance-after-the-Lisbon-Treaty.pdf
6. Hofmann, H.C.H., Morini, A.: Constitutional aspects of the pluralisation of the EU executive through "agencification". European Law Review **37**(4), 419–443 (2012)
7. Rijpma, J.: The proposal for a European Border and Coast Guard: evolution or revolution in external border management? Directorate-General for Internal Policies, European Parliament, March 2016. Available at: http://www.europarl.europa.eu/RegData/etudes/STUD/2016/556934/IPOL_STU(2016)556934_EN.pdf