



Law School

The European Union Agency's FRONTEX mandate and operations in the framework of transparency and human rights

Master Thesis International and European Public Law

Authored by: M. Ruskyte

Supervisor: Mr. dr. H. Oosterom- Stamples

Second supervisor: Mrs. mr.dr. A.K. Meijknecht

ANR: 467673

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INTRODUCTION

*Libertas, Securitas, Justitia*¹

Three words – *Liberty, Security and Justice* are greatly highlighted on the main web page of FRONTEX and seem to be the core principles, which must be upheld in all its activities. I started with this ‘ironic’ motto not without a reason. Recent operations, held by this European Union border managing Agency have received an enormous amount of criticism and attention from various sources – starting with civil society and non-governmental organizations (NGO’s) and ending with numerous opinions and articles written by elite scholars. Taking in account all this criticism, we get an impression that the real slogan of FRONTEX could be better described by the words - *Intolerance, Injustice and Inequality*, which place the fundamental principles along with core values of European Union (such as transparency, human rights and democracy) in great danger.²

The European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX) was established by Council Regulation of 26 October 2004 and began to operate in 2005.³ Now the Agency is a key actor, which helps EU Member States to coordinate and supervise their management of the external borders of the EU from irregular migration. Although its mandate does not directly include protection of fundamental human rights, there is no doubt that activities carried out by FRONTEX have an impact on persons who are often vulnerable and in need of international protection.⁴

The Agency clearly lacks public transparency into its operations, especially those executed on high seas or outside the European Union territory, where there is no possibility to

¹ Frontex web page, available at: <http://en.wikipedia.org/wiki/Frontex>, last accessed 25 February 2014.

² European Security review by: Aoife Spengeman, ‘*Upholding the legitimacy of FRONTEX: European Parliamentary Oversight*’, March 2013, p.1.

³ Council Regulation (EC) No 2007/2004, establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, 26 October 2004, available at: http://frontex.europa.eu/assets/About_Frontex/frontex_regulation_en.pdf, last accessed 25 February 2014.

⁴ UNHCR’s observations on the European Commission’s proposal for a Regulation of the European Parliament and the Council amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX), COM (2010) 61 final, p.1.

monitor its activities.⁵ All the information we get from FRONTEX's annual reports is the number of persons who were found in unseaworthy boats and the statement of a „successful“ operation, which was completed in order to protect the European external borders from the invasion of irregular immigrants.

Even the website of FRONTEX, which is (or at least, is supposed to be) the main source of available documents and other important information on its activities, does not disclose much information on the actual performance of its operational activities at the external frontiers. The main documents that can be reached publically are their work programme together with general reports, which gives shallow and statistical information about its ongoing or passed missions, its budget, Member States involved and the time frame of operations. However, the main questions how and what exactly had been done, remain unanswered.⁶ The necessity of an independent and transparent source of information on how FRONTEX identifies asylum seekers and guarantees that nobody will be sent back to the environment, where he/she might be subject to inhuman or degrading treatment is hardly disputable, considering that the main operations of the Agency are carried out on the high seas, far away from public eyes.⁷ The hidden facts and numbers make us question the legality of these border operations, where human rights and even lives are being lost and which is part of an overall policy of protecting the European Union from unwelcome immigration.⁸

This ruthless process of combating irregular migration touches thousands of lives of woman, children and men – all of them have names and life stories with which we are not introduced and who, at the end of the day, become another unnamed person in FRONTEX's reports.⁹ Due to a lack of transparency there are serious concerns about FRONTEX's compliance with human rights, which are, allegedly, violated regularly and unfortunately, numerous cases of these infringements remain undocumented.¹⁰

⁵ Fahamu refugee legal aid newsletter, 1st January 2013 by N.Perkowski, *An introduction to FRONTEX: human rights*, available at: <http://frlan.tumblr.com/post/39343638445/an-introduction-to-frontex-human-rights>.

⁶ Fahamu refugee legal aid newsletter, December 2012 by N. Perkowski, *An introduction to FRONTEX: frequent criticism*, available at: <http://frlan.tumblr.com/post/36946082241/an-introduction-to-frontex-frequent-criticism>, last accessed 25 February 2014.

⁷ *Ibid.*

⁸ F. Dzodan, *Those who die to keep us safe: European Union's Frontex and the administration of immigrants*, February 2012, available at: <http://tigerbeatdown.com/2012/02/02/those-who-die-to-keep-us-safe-european-union%E2%80%99s-frontex-and-the-administration-of-immigrants/>, last accessed 25 February 2014.

⁹ *Ibid.*

¹⁰ K. Babická, *Towards a human rights dimension of FRONTEX?* Available at:

It is confusing that official documents about the Agency's activities, which are available to the public, released by FRONTEX mostly narrate about the effectiveness of its operations and how they succeed to protect Europe from unwanted migrants, while civil society and media are depicting FRONTEX as a ruthless and immoral deportation Agency, which is responsible for all those deaths at Europe's external borders.¹¹ Europe is thus presented with two different and usually conflicting pictures about what has happened during Agency's operations. Taking into account that most operations carried out by FRONTEX are taking place at the sea, it is complicated for the journalist and media to get access to reliable and real information on the situation in distant areas,¹² which raises a question who is right and who to believe? FRONTEX's biased information released by itself or NGO's and media's reports, which have limited access to primary information?

Since the beginning of its establishment, FRONTEX has carried out several Joint Operations at the sea borders. Let's take the very first FRONTEX sea border operation HERA (I, II, III) as an example. First of all, the Agency's view on its success and, then as a contrast, civil society reports on the same operations will be discussed.

Joint Operation HERA I started in July 2006 with the objective to support Spanish authorities and to protect the Canary Islands from illegal immigrants who were coming in small boats from the coast of Senegal and Mauritania.¹³ The operations were requested by Spain and had two main goals. The first one was to deploy experts from various Member States to help Spanish authorities to identify and interview illegal immigrants in order to establish where they are coming from, as the knowledge of the country of origin would facilitate return operations.¹⁴ According to one of FRONTEX's publications "*identification of these individuals was of*

<http://www.migrationonline.cz/en/towards-a-human-rights-dimension-of-frontex>, last accessed 25 February 2014.

¹¹ For example - Human Rights Watch, 'EU's Dirty Hands', available: <http://www.hrw.org/reports/2011/09/21/eu-s-dirty-hands-0>; Amnesty International, 'SOS Europe', available at: http://www.amnesty.eu/content/assets/S_O_S_Europe_Report_Web_02.pdf.

¹² L. Marin, 'Policing the EU's External Borders: A Challenge for the Rule of Law and Fundamental Rights in the Area of Freedom, Security and Justice?' *An Analysis of Frontex Joint Operations at the Southern Maritime Border*, Journal of Contemporary European Research. Volume 7, Issue 4, p. 478.

¹³ S. Keller, U. Lunacek, B. Lochbihler, H. Flautre, *FRONTEX Agency: which guarantees for human rights?* A study conducted by Migreurop on the European External Borders Agency in view of the revision of its mandate, 2010, p.13.

¹⁴ Amnesty International, 'Mauritania: "Nobody wants to have anything to do with us" arrest and collective expulsions of migrants denied entry into Europe', July 2008, available: <http://www.amnesty.org/en/library/asset/AFR38/001/2008/en/ad888d90-46c2-11dd-9dcb-1bbf1ead8744/afr380012008eng.html>, last accessed 25 February 2014.

paramount importance. Without knowing who a person was and where he or she had come from, it was impossible to identify genuine asylum seekers who may have been fleeing war or political persecution”.¹⁵

The second goal was to perform joint sea surveillance, especially near the bank of West Africa, in order to prevent risky journeys in small and unseaworthy boats by stopping them before leaving the coast, or already rescuing those, who had managed to leave the coast and who had exposed themselves to a great danger in an open sea without the necessary supplies.¹⁶

HERA operations are rated as a real success by FRONTEX itself. According to the report ‘FRONTEX: the first five years’:

“Despite the complexity of the operation, and the long distance from mainland Europe, it had worked well. The immediate results of HERA were impressive. By the end of October 2006 almost 19.000 irregular immigrants had arrived on the Canary Island. Yet FRONTEX experts and the Spanish authorities involved in HERA I were able to identify every person”. It continues by calling it ‘the largest search and rescue operation on the planet’.¹⁷

From information provided by FRONTEX we can see that the Agency is picturing this first Joint Operation at the sea borders as a real ‘achievement’. The officers of FRONTEX described HERA as an operation, which rescued lives of thousands of migrants, who were the lucky ones to survive. However, NGOs and media are telling a different story.

According to the report conducted by Migreurop (European Programme for Integration and Migration), activities carried out by FRONTEX in Joint Operation HERA in the territory of Africa in order to prevent the possible migration to Europe, could have been obstacles to use the ‘right to leave any country’.¹⁸ The report states that the primary task of this operation was to prevent unseaworthy boats from reaching the European Union’s territory. However, it had

¹⁵ Frontex Information and Transparency Team, *‘Beyond the frontiers, FRONTEX: the first five years’*, Warsaw 2010, p.33.

¹⁶ *Ibid.* p. 33.

¹⁷ *Ibid.* p. 37.

¹⁸ S. Keller, U. Lunacek, B. Lochbihler, H. Flautre, *‘FRONTEX Agency: which guarantees for human rights?’* A study conducted by Migreurop on the European External Borders Agency in view of the revision of its mandate, 2010, p.13.

prevented people, who possibly needed international protection, from the opportunity to use their procedural rights if they would have reached European Union.¹⁹ Migreurop made this claim on the basis of the documents they saw from the police officers in Mauritania, which stated that “*individuals had been intercepted following an attempt to undertake an illegal journey to Europe*”.²⁰ The Migreurop report further criticizes the annual report of FRONTEX, where it reveals that during the operation HERA I 6067 illegal immigrants were returned to their home countries - mainly to Morocco, Mali, Senegal, Gambia and Guinea. However, in the Agency’s presentation about the operation HERA II, where FRONTEX noted that 3887 illegal immigrants were intercepted near the shore of Africa and diverted back, the Agency remained silent on the number of those intercepted, which applied for asylum or where those people were sent back to.²¹ In the same annual report it was noted that FRONTEX had succeeded to identify 100% of the illegal immigrants and to obviate the departure of more than one thousand people. According to Migreurop, however, it is not clear what the reason for those departures was and how many people who were not able to leave Senegal would have been granted international protection if they had reached the coast of Spain.²² Not all migrants are ‘illegal’, some of them could possibly be asylum seekers. According to Migreurop, these ‘grey areas’ in the activities of FRONTEX show that not all important information is revealed by the Agency itself. The lack of transparency and knowledge of the operations, performed by the Agency, raises questions concerning the correct compliance with fundamental rights protection at the external border of the European Union.

This is only one example of many more discussed by NGO’s and scholars, where FRONTEX is criticized for violating immigrant’s and refugee’s rights and for putting in danger EU core values, including transparency and democracy. FRONTEX has been allotted with significant tasks, which are more than regulatory operations. In some cases the Agency fails to ensure appropriate democratic scrutiny of its activities and obviates questions concerning their

¹⁹ S. Keller, U. Lunacek, B. Lochbihler, H. Flautre, ‘FRONTEX Agency: which guarantees for human rights?’ A study conducted by Migreurop on the European External Borders Agency in view of the revision of its mandate, 2010, p.13.

²⁰ *Ibid.*, p.13.

²¹ Frontex annual report of 2006, p.12, available at:

http://frontex.europa.eu/assets/About_Frontex/Governance_documents/Annual_report/2006/annual_report_20061.pdf, last accessed 26 February 2014.

²² S. Keller, U. Lunacek, B. Lochbihler, H. Flautre, ‘FRONTEX Agency: which guarantees for human rights?’ A study conducted by Migreurop on the European External Borders Agency in view of the revision of its mandate, 2010, p.13.

responsibility in cases of illegal actions, along with possible human rights violations. Even though FRONTEX's accountability and legitimacy is often questioned in academic articles and the media,²³ the lack of transparency regarding its operations receives little attention, though accountability starts with transparency.

Taking into account that since its establishment in 2005 FRONTEX is becoming more and more important in securing the European Union's external borders, it is crucial to trace the roots, upon which criticism grows. This Master Thesis will show that those roots are a lack of transparency and a lack of an independent supervisory mechanism. The claim is that if these problems are solved, FRONTEX could gain its public faith as transparency would force it to conduct its activities in a manner more favourable to human rights. Consequently the main research question will be:

How can transparency be improved within FRONTEX in order to ensure higher standards of human rights compliance by that agency?

To reach an adequate answer to this research question it is necessary to first answer the following sub-questions:

- What is FRONTEX and in what framework does it operate?
- What is transparency?
- To what extent and how does the principle of transparency apply to FRONTEX, in order to ensure that the public has access to relevant, timely and precise information on the decision-making and activities performed by this Agency
- Which human rights are at stake in FRONTEX operations?
- How can transparency within FRONTEX be improved?

²³ For example - Human Rights Watch, 'EU's Dirty Hands', available: <http://www.hrw.org/reports/2011/09/21/eu-s-dirty-hands-0>, last accessed 26 February 2014; Amnesty International, 'SOS Europe', available at: http://www.amnesty.eu/content/assets/S_O_S_Europe_Report_Web_02.pdf, last accessed 26 February 2014.

Methods of Research

In order to answer the questions mentioned above, I will first discuss a theoretical and legal framework of the latest European Union policy developments in a common migration policy, including the circumstances in which FRONTEX was established. Chapter II deals with the concept of transparency and its development in the European Union, with a precise focus on how this principle applies to FRONTEX. This will be followed by an overview of European Union Treaties provisions on transparency and evaluation of FRONTEX's Annual Reports, in order to answer if the public has access to relevant, timely and precise information on the decision-making and activities performed by this Agency. Chapter III introduces human rights, which are at stake in FRONTEX operations by reviewing the reports of NGOs and information provided by the Agency itself. Lastly, the recommendations on how can transparency within FRONTEX be improved will be made.

CHAPTER I

ESTABLISHMENT, STRUCTURE AND MANDATE OF FRONTEX

While the most important task of this Master Thesis is to answer the question about transparency within FRONTEX and its improvement possibilities - first of all it is necessary to get to know the Agency itself. In order to do so, we will present and analyze the establishment, main tasks and institutional structure of FRONTEX, laying the foundations for Chapter II of this Thesis, which will analyse the concept of transparency and its applicability to FRONTEX. Chapter I provides a brief history and evaluation of the latest European Union policy developments in a common migration policy, including the circumstances in which FRONTEX was established and will give an effort to answer the sub-question: *what is FRONTEX and in what framework does it operates?*

1.1 The establishment of FRONTEX and its legal framework

European Union has traveled a long way before it succeeded to establish a common EU migration policy. In 1968, the six founding Member States lifted customs duties regarding commodities (services and goods) imported from each other and for the first time established an area without internal borders.²⁴

In the 1980s, the controversy on the concept of free movement of persons began among the Member States. Some countries thought that the concept should apply only to European Union citizens, while others supported the idea that it should involve both European Union and non-European Union citizens, commonly referred to as third-country nationals. This disagreement led to cooperation amongst some Member States in order to create a borderless Europe.²⁵ As an outcome, the Schengen Agreement was signed on 14 June 1985 by Belgium, Germany, Luxembourg, France and the Netherlands that entered into force ten years later, in

²⁴ http://europa.eu/about-eu/eu-history/1960-1969/index_en.htm.

²⁵ http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asylum_immigration/l33020_en.htm.

1995. The objective of this agreement was to abolish internal border controls between all participating EU countries and to create a goods and persons free travel area in Europe, which now is known as the “Schengen area”.²⁶

While passport checks at internal frontiers of the Member States were abolished, in the meantime external border controls on all third country nationals, seeking to enter the Schengen Area, were implemented. Consequently, migration into the EU became an important debate subject amongst Member States, as the abolishment of internal borders made external border management even more important, because once crossed, it provided an opportunity to all to move freely throughout the whole area of the European Union.²⁷

In 1999, when the Treaty of Amsterdam entered into force, the ‘Schengen acquis’ was incorporated into European Union Law and gave a legal basis to a common European Union migration policy. The area of Freedom, Security and Justice was officially created.²⁸

In the same year, the leaders of the European Union met in the configuration of the European Council which took place in Tampere. The main goal of the meeting was to address the important issue of migration flows to the EU and to develop guidelines to realise the area of Freedom, Security and Justice in Europe until the year 2005.²⁹ The Council addressed issues related to the realization of a common European asylum and migration policy, visas, as well as problems regarding judicial collaboration in civil matters and collaboration in criminal matters to fight against crimes.³⁰

It is also worth mentioning that European leaders of the Tampere summit declared that the “Area of Freedom, Security and Justice should be based on the principles of *transparency* and *democratic control* (...) in order to maintain confidence in authorities common standards on the integrity of authorities should be developed”.³¹ It also stated that “*The aim is an open and secure European Union fully committed to the obligations of the Geneva Refugee Convention and other relevant human rights instruments and able to respond to humanitarian needs on the*

²⁶http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asylum_immigration/l33020_en.htm.

²⁷ E. Spiegel, ‘FRONTEX- Legitimate Agent for Border Security or Ruthless Deportation Agency?’ 2010, p. 10.

²⁸ *Ibid.* p. 10.

²⁹ *Ibid.* p. 10.

³⁰ Presidency Conclusions, Tampere European Council, 15 and 16 October 1999, para 10-58

³¹ *Ibid.* para 7.

basis of solidarity (...)".³² It can, therefore, be concluded that with the establishment of the Area of Freedom, Justice and Security, the European Union Member States committed themselves to the principles of transparency and accountability and were committed to respect core human rights, including refugee laws in their migration policy.³³

The idea of binding the EU to the principles of transparency and democracy was further developed by the European Council, at the Laeken meeting, in December 2001. The conference of Laeken also addressed the weaknesses in the Area of Freedom, Security and Justice as developed by the Tampere programme.³⁴ The Council further declared that there is a need of a real and common asylum and migration policy:

"The European Council undertakes to adopt, on the basis of the Tampere conclusions and as soon as possible, a common policy on asylum and immigration, which will maintain the necessary balance between protection of refugees, in accordance with the principles of the 1951 Geneva Convention (...)".³⁵

The summit of Laeken specifically entrusted to the Council and the Commission the development of a new common EU external border policy emphasizing that control of external borders could be reached by 'a mechanism' or 'common services'. The European Council asked the Council and the Commission *"to work out arrangements for cooperation between services responsible for external border control and to examine the conditions in which a mechanism or common services to control external borders could be created (...)"*.³⁶ The European Council of Laeken turned out to be an important instrument in reinforcing common EU external border control.

A Communication was prepared by the Commission, as requested by Laeken Council, in the year 2002 and was called *'Towards integrated border management of the external borders of the member states of the European Union'*. In this Communication the Commission examines the main problems of EU border management and puts forwards suggestions how to strengthen

³² Presidency Conclusions, Tampere European Council, 15 and 16 October 1999, para 4.

³³ I.B. Gavelstad, 'Protection of borders or protection for refugees?' A literature review on the functioning of the European border control agency Frontex, 2012/2013, p. 12.

³⁴ Presidency Conclusions, European Council Meeting in Laeken, 14 and 15 December 2001, para 37.

³⁵ *Ibid.* para 39.

³⁶ *Ibid.* para 42.

the EU external frontiers by setting up a ‘European border guard’ and proposes a common policy, which consisted of five main elements:³⁷

- a common *corpus* of legislation;
- a common coordination and operational cooperation mechanism;
- common integrated risk analysis;
- staff and interoperational equipment;
- burden-sharing between Member States.³⁸

In short, this policy was to be based on operational co-operation and financial burden-sharing between the Member States of European Union, which led to the establishment of the External Border Practitioners Common Unit, which was composed of national high level practitioners, the heads of national border guards and members of the Strategic Committee on Immigration, Frontiers and Asylum. The main task of the Common Unit was to manage border controls across Europe and supervise pilot projects.³⁹

However, soon after its establishment the External Border Practitioners Common Unit was faced with criticism from some EU Member States and the European Commission. The Unit was seen as ineffective in its dealings with EU border management and, according to European Commission, “*the Common Unit has shown structural limits with regard to the co-ordination of the operational co-operation at the external borders*”.⁴⁰ The Greek Presidency also criticized the absence of an independent monitoring mechanism and the lack of an appropriate legal framework.⁴¹

In 2003 the European Commission proposed to create a new permanent agency, which would be able to exercise the daily management of EU borders and would be capable of responding to critical situations when needed.⁴² In June of the same year, the European Council of Thessaloniki confirmed the idea of a permanent agency, by calling “*the Commission to examine the necessity of creating new institutional mechanisms, including the possible creation*

³⁷ S. Peers, E. Guild, J. Tomkin, ‘EU Immigration and Asylum Law (Text and Commentary)’: Second Revised Edition: Volume 1: Visas and Border Controls, June 2012, p. 120.

³⁸ COM (2002), 233 final. Communication from the Commission to the Council and the European Parliament towards integrated management of external borders of the Member States of the European Union, para 20.

³⁹ Official web page of FRONTEX. Available at: <http://frontex.europa.eu/about-frontex/origin>.

⁴⁰ Commission of the European Communities, Proposal for a Council Regulation establishing a European Agency for the Management of Operational Co-operation at the External Borders, p. 3.

⁴¹ *Ibid.* p. 3.

⁴² Commission of the European Communities, Proposal for a Council Regulation establishing a European Agency for the Management of Operational Co-operation at the External Borders, p. 3-4.

*of a Community operational structure, in order to enhance operational co-operation for the management of external borders (...) and welcomes the Commission's intention to present a proposal for an Agency for the management of external borders...".*⁴³ The Commission reacted to this invitation of the European Council by presenting a draft proposal for a regulation in 2003 establishing a European External Border Agency.⁴⁴

The proposal for a regulation that eventually resulted in the founding of what is now known as FRONTEX, set out as the main task of this agency:

*"to facilitate the application of existing and future Community measures relating to the management of the external borders by ensuring the coordination of Member States' actions in the implementation of those measures (...) The Agency will therefore not be given a policy making role, nor would it make legislative proposals..."*⁴⁵

It is interesting to note that according to the proposal for the FRONTEX regulation: *"the establishment of an Agency is expected to lead to **increased visibility for the management of external borders** in the public and cost-savings with regard to the operational co-operation falling under its competence"*.⁴⁶ However, the idea of binding the EU to the principles of transparency and democracy, which was developed by the Tampere and Laeken European Council meetings, was not developed here. The proposal was accepted and implemented as Regulation (EC) No. 2007/2004 on 26 of October 2007, which established FRONTEX, the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union. FRONTEX is now the main EU executive Agency, responsible for developing a common strategy for the management of the EU external borders.⁴⁷ As an EU Agency, FRONTEX derived its legal basis from Articles 62(2) (a) and 66 of the Treaty establishing the European Community (Currently: Art. 77(2) (b) (d) and 74 of the TFEU). The

⁴³ Commission of the European Communities, Proposal for a Council Regulation establishing a European Agency for the Management of Operational Co-operation at the External Borders, COM(2003) 687 final/2, p. 3-4.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*, p. 5.

⁴⁶ *Ibid.*, p. 8.

⁴⁷ I.B. Gavelstad, 'Protection of borders or protection for refugees?' A literature review on the functioning of the European border control agency Frontex, p. 15.

main objectives of the Agency are set out in the FRONTEX Regulation, Articles 1-3. These provisions read as follows:

*“(1) (...) the Agency is hereby established with a view to **improving the integrated management of the external borders of the Member States of the European Union.** (2) (...) the Agency shall **facilitate and render more effective the application of existing and future Community measures relating to the management of external borders. It shall do so by ensuring the coordination of Member States’ actions in the implementation of those measures, thereby contributing to an efficient, high and uniform level of control on persons and surveillance of the external borders of the Member States.** (3) The Agency shall **also provide the Commission and the Member States with the necessary technical support and expertise in the management of the external borders and promote solidarity between Member States**”.*⁴⁸

In short, the main objective of FRONTEX is to strengthen the security at the external frontiers of the EU by ensuring operational co-operation and coordination among Member States in the implementation of EU measures, concerned with the management of external borders and to assist Member States, by providing technical assistance.

1.2 Main tasks and operational activities of FRONTEX

In this section of the Thesis we will sketch the legal basis and main tasks carried out by the FRONTEX in more detail. The Agency’s tasks can be divided into two main fields – coordination and operational co-operation and technical tasks, which consist of border guards training, development and research, which are relevant to border control. FRONTEX is one of the main actors in developing the European Union Border Management System. Nevertheless, there still remain a lot of questions, concerning Agency’s real mandate, tasks and the manner in which they are accomplished.

The Main tasks of FRONTEX are set out in Chapter II of its founding Regulation and according to Article 2(1), they are as follows:⁴⁹

⁴⁸ 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, Article 1(1), 1(2) 1(3).

⁴⁹ *Ibid.*, Article 2(1).

- “(a) coordinate operational cooperation between Member States in the field of management of external borders;
- (b) assist Member States on training of national border guards, including the establishment of common training standards;
- (c) carry out risk analyses;
- (d) follow up on the development of research relevant for the control and surveillance of external borders;
- (e) assist Member States in circumstances requiring increased technical and operational assistance at external borders;
- (f) provide Member States with the necessary support in organizing joint return operations.”

Shortly after the establishment of FRONTEX, its mandate was rapidly expanded. Regulation No. 2007/2004 was amended for the first time in 2007 in order to make the Agency more effective in protecting Europe’s external frontiers.⁵⁰ The amendment introduced the so-called Rapid Border Intervention Teams (RABITs), to be used in cases “(...) of urgent and exceptional pressure, especially the arrival at points of the external borders of large numbers of third-country nationals trying to enter the territory of the Member State illegally...”.⁵¹ A RABIT is comprised ‘of border guards of Member States serving with the Rapid Border Intervention Teams other than those of the host Member States and serves only on a temporary basis to assist Member States in surveillance of the external borders on the request of that Member States’.⁵² Following an amendment in 2011 the Rapid Border Intervention Teams were replaced by the term European Border Guard teams, where “the Rapid Border Intervention Teams and the joint support teams are becoming part of one single set of provisions under the heading: European Border Guard Teams”.⁵³

⁵⁰ Fahamu refugee legal aid newsletter, December 2012 by N. Perkowski, ‘An introduction to FRONTEX: frequent criticism’, available at: <http://frian.tumblr.com/post/36946082241/an-introduction-to-frontex-frequent-criticism>, last accessed 4 April 2014.

⁵¹ Regulation (EC) No 863/2007 of the European Parliament and of the Council establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers, 11 July 2007 (OJ L 199, 31.07.2007), Article 1(1).

⁵² *Ibid.*, para 14 and Article 3(3).

⁵³ Invitation to tender No. HOME/2012/EBFX/PR/1001 concerning a study on the feasibility of the creation of a European System of Border Guards to control the external borders of the Union, p. 4.

According to Regulation (EC) No. 863/2007 Article 6(8)⁵⁴ the Agency may be authorized by the host-Member State to access its national and European databases. This provision should raise concerns about possible human rights violations, as FRONTEX is involved not only in securing the external borders, but also in carrying out intelligence tasks, which give access to personal data - a privilege broadly worded. Moreover, human rights concerns are justified even more as Article 6(5) of the same Regulation states that ‘guest officers’ have a right to carry weapons during their operations⁵⁵ without laying down the rules of necessity and proportionality. In addition, FRONTEX may demand immunity for its officers’ actions under Article 18 of the Regulation.⁵⁶

FRONTEX’s tasks were further developed in another amendment to FRONTEX Regulation, adopted in November 2011 and that entered into force in December 2011, in order to improve the autonomy of its operations. According to Cecilia Malmström, (the European Commissioner responsible for Home Affairs):

“(...) the amended regulation will provide an increased operational capacity and a stronger operational mandate to the Agency and contribute to improved EU border management. The new mandate will also allow FRONTEX to cooperate more effectively with the competent border control authorities of countries of origin and transit of migrants. As such it will contribute to increasing the EU's capacity to deal with irregular migration flows”.⁵⁷

However, together with FRONTEX’s increased significance in the management of European Union external borders the problems of a lack of transparency and its accountability could become even more visible.⁵⁸

⁵⁴ Regulation (EC) No 863/2007 of the European Parliament and of the Council establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers, 11 July 2007(OJ L 199, 31.07.2007).

⁵⁵ *Ibid.*, Article 6(5).

⁵⁶ 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, Article 18.

⁵⁷ Commissioner Malmström welcomes political agreement on the proposal to amend the Frontex Regulation, Brussels, 22 June 2011. Available at: http://europa.eu/rapid/press-release_MEMO-11-449_en.htm?locale=en.

⁵⁸ It can be concluded so, as FRONTEX border guards will be involved in more specific operations, thus many grey areas already surrounds the activities of FRONTEX.

Following the latest amendment, FRONTEX is now empowered to buy its own technical equipment; to collect and exchange personal data of migrants; develop information systems and it is able to deploy its own liaison officers in third countries.⁵⁹ From FRONTEX's expanded mandate and the nature of its tasks the Agency's important role in securing EU external borders is apparent and it is not any more just a 'mechanism' to "simply assist Member States in implementing European Union legislation in the fields of control and surveillance of the external borders and removal of third-country nationals".⁶⁰ FRONTEX is progressively keeping a main role in the development and implementation of the above mentioned European Union strategy⁶¹ and now holds a significant position in the institutional design of the European Union's Area of Freedom, Justice and Security.⁶²

1.2.1 Coordination between Member States

As already mentioned, the main tasks of the Agency are listed in Article 2 of Council Regulation (EC) No. 2007/2004.⁶³ The first one is to "*coordinate operational cooperation between Member States in the field of management of external borders*".⁶⁴ It is clearly stated that its activities are only additional to those, carried out by the governments of the Member States. The Agency cooperates with a Member State, which needs its assistance in coordinating joint operations and pilot projects at its external frontier of the EU.⁶⁵ According to FRONTEX Regulation, "*joint operation means operational activities carried out by two or more Member States, and possibly in co-operation with the Agency, with a view to strengthen surveillance and*

⁵⁹ Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

⁶⁰ 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.

⁶¹ Strategy on migration and asylum issues as well as on control of EU external borders.

⁶² E. Guild, S. Carrera, L. den Hertog, J. Parkin "Implementation of the EU Charter of Fundamental Rights and its Impact on EU Home Affairs Agencies Frontex, Europol and the European Asylum Support Office", Directorate General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs, requested by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs, 2011, p. 14.

⁶³ 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, Article 2(1).

⁶⁴ *Ibid.*, Article 2(1)(a).

⁶⁵ H. Jorry. 'Construction of a European Institutional Model for Managing Operational Cooperation at the EU's External Borders: Is the FRONTEX Agency a decisive step forward?' March 2007, p. 13.

*control at a section of the external borders.”*⁶⁶ A “*Pilot project means operational activities related to surveillance and control of the external borders with a view to examining the feasibility of applying a certain operational methodology and/or certain technical equipment*”.⁶⁷

Joint operations can take place at the sea, land and air borders. All joint operations, despite the place where they are held, should be based on risk analysis, prepared and evaluated by FRONTEX (see § 1.2.2)⁶⁸. It is the Agency’s competence to coordinate, evaluate and approve pilot projects and joint operations requested by the Member States. Nevertheless, as we will see in the paragraph 1.4, the most important body of the Agency is the Management Board, which is composed of the representatives of the Member States. It leads to the fact that the authority which approves the proposals for joint operations are the Member States. In particular cases a joint operation can be initiated by FRONTEX itself in cooperation with Member States concerned.⁶⁹ However, there are some obscurities regarding the precise role that FRONTEX has during joint operations. The founding Regulation of the Agency says nothing about how exactly joint operations, performed by FRONTEX, should be conducted.

1.2.2 Risk Analysis

Risk analysis is the core task of FRONTEX, which helps to identify and apply an appropriate basis for its day-to-day activities. In order to collect valuable data for its risk analysis, the Agency inspects all possible factors, which might influence the security of the EU’s external border. For this purpose, FRONTEX collects regular information on illegal migration, as well as, *‘personal data of suspects involved in cross-border criminal activities, in facilitating illegal migrations activities or in human trafficking’*⁷⁰ from the local authorities of the Member States, EU institutions, media and other sources. The aim of these risk assessments is to provide the Agency with a clear view of what is going on at the EU’s external frontier and to contribute to planning joint operations and pilot projects.⁷¹

⁶⁶ 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, Article 3.

⁶⁷ *Ibid.*, Article 3.

⁶⁸ Official web page of FRONTEX. Available at: <http://frontex.europa.eu/operations/types-of-operations/general>

⁶⁹ Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, Article 3(1).

⁷⁰ *Ibid.*, Article 11c (2).

⁷¹ Official web page of FRONTEX. Available at: <http://frontex.europa.eu/intelligence/risk-analysis>.

Council Regulation (EC) No. 2007/2004 confirms that the Agency “*shall develop and apply a common integrated risk analysis model*”.⁷² Due to that, FRONTEX has built its own risk analysis model CIRAM (the Common Integrated Risk Analysis Model), which was established in close collaboration with the Member States. CIRAM provides the Agency with a suitable basis to coordinate its operational activities at Europe’s external frontiers in order to achieve adequate response to possible threats.⁷³ The risk analysis model is a four stage access control model, which gathers and spreads information and risk analysis to “*border control authorities both within the Schengen area and at the external borders (e.g. Customs) as well as Member State actors in cooperating neighbouring countries and non-EU states farther afield*”.⁷⁴

It is important to note that Risk Analyses are confidential and, for this reason, are not accessible publicly. The Management Board of the Agency in its decision of 21 September 2006⁷⁵ stated that:

“In principle, all documents should be accessible to public, however (...) in order to safeguard the ability to carry out its tasks, special attention should be paid to the specific requirements of FRONTEX as a specialized body tasked with improving the integrated management of the external borders of the Member States of the EU. Therefore, full account of the sensitive nature of tasks carried out by FRONTEX, in particular in relation to operations at borders and border related data should be taken”.

The Risk Analysis consists of sensitive information retrieved from the authorities of the Member States, including routes and patterns of irregular migration, displacements and situation on the transit countries. In order to prevent this sensitive material from being discovered, for example by smugglers, who could use this information to select their route into the European Union, it is secret from public eyes. However, this lack of transparency gives rise to some real

⁷² 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, Article 4.

⁷³ Official web page of FRONTEX. Available at: <http://frontex.europa.eu/intelligence/risk-analysis>.

⁷⁴ *Ibid.*

⁷⁵ Decision of the Management Board laying down practical arrangement regarding public access to the documents of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex), 21 September 2006, p. 1, para (5) and (6).

concerns, in particular the accountability and scrutiny of FRONTEX activities.⁷⁶ According to the FRONTEX Regulation, Risk Analysis is presented by FRONTEX to the Council and the Commission.⁷⁷ This information enables them to adequately react to any possible weaknesses in the application of European Union law and helps to develop Agency's activities. Thus, the European Parliament, which is the only directly-elected body of European Union⁷⁸ and, which is the primary budgetary authority with a significant influence in the monetary distribution to FRONTEX, is not included in the process of monitoring risk analysis drawn up by the Agency. It is confusing, since the role of the European Parliament has been highly strengthened in the scope of democratic scrutiny in the Area of Freedom, Justice and Security. Consequently, its exclusion from monitoring the activities of FRONTEX leads to lack of transparency and democratic accountability⁷⁹ in the field of Agency's activities because Risk Analysis is the starting point of all the tasks that FRONTEX carries out. By applying this confidential rule, the source, which legitimises these operations cannot be checked and reviewed.⁸⁰

1.2.3 Planning, research and development

Articles 2(d) and 6 of the FRONTEX Regulation states that the Agency should follow up on the development of research relevant for the control and surveillance of the external border. It also has to keep the EU Commission and the Member States informed about all recent developments.⁸¹ Again, the European Parliament, representative of people, which is protecting the community on civil rights and liberties, is not included. It is a problem, since the European Parliament is the only institution, which is directly accountable to European people who have

⁷⁶ S. Carrera "The EU Border Management Strategy FRONTEX and the Challenges of Irregular Immigration in the Canary Islands", CEPS Working Document No. 261, March 2007, p. 14.

⁷⁷ 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, Article 4.

⁷⁸ Official web page of the European Parliament. Available at:

<http://www.europarl.europa.eu/aboutparliament/en/0025729351/Organisation-and-work.html>.

⁷⁹ European Parliament is the most democratic institution of the European Union. Moreover, the European Parliament has the competence for evaluating the content, development and results of the evaluation system of the implementation of the Area of Freedom, Security, and Justice. Furthermore, European Commission is entirely appointed institution and has representative in the Management Board of FRONTEX, so it cannot be called an effective monitoring mechanism of FRONTEX.

⁸⁰ H. Jorry. 'Construction of a European Institutional Model for Managing Operational Cooperation at the EU's External Borders: Is the FRONTEX Agency a decisive step forward?' March 2007, p. 15.

⁸¹ Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, article 2(d) and 6.

delegated it to make the European Union policy more clear and observable. Since FRONTEX operations are highly related to fundamental freedoms, improved democratic and appropriate control is of great importance.

Research and development is a key instrument in managing Europe's external border. In order to adequately plan joint operations and pilot project at the external frontiers it is necessary to investigate and develop suitable techniques and methods.⁸² To improve its research activities, FRONTEX has established a Research and Development Unit, which operates under the Capacity Building Division. Due to the different methods applied for border checks and border surveillance, FRONTEX's research and development activities have been reorganized into two programmes: border surveillance and border checks.⁸³

1.2.4 Training task

The main goal of FRONTEX's training activities is to promote the professionalism of the border authorities and to create common standards amongst the European Member States in order to help them to work together more efficiently.⁸⁴ In the FRONTEX Regulation the Agency is tasked to establish common core curricula for the training of border guards.⁸⁵ The Common Core Curriculum was initiated by FRONTEX in 2007. It was the first time that the EU introduced a common systematized set of skills and knowledge yardsticks at the principal level for border guards training. The training includes topics as trafficking in human beings, stolen cars, detection of falsified documents, fundamental rights and knowledge of international law. The Common Core Curriculum is reviewed on a regular basis in order to familiarize the guards with the latest innovations and developments in the area of border management and to make sure that they are in line with the latest human right laws on important issues.⁸⁶

⁸² H. Jorry. 'Construction of a European Institutional Model for Managing Operational Cooperation at the EU's External Borders: Is the FRONTEX Agency a decisive step forward?' March 2007, p. 17.

⁸³ Official web page of FRONTEX. Available at: <http://frontex.europa.eu/research/role>.

⁸⁴ Official web page of FRONTEX. Available at: <http://frontex.europa.eu/training/principles>.

⁸⁵ 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, Article 5.

⁸⁶ Official web page of FRONTEX. Available at: <http://frontex.europa.eu/training/curricula>.

1.3 Concluding remarks on the main tasks and operational activities of FRONTEX

From our analysis about FRONTEX mandate and main tasks, we can see that the Agency has experienced a progressive growth since its creation. The first amendment of the FRONTEX Regulation in 2007 introduced the so-called Rapid Border Intervention Teams and provided FRONTEX with access to Member States' national and European databases. The legal mandate of FRONTEX was expanded further by the Regulation of 2011, which strengthened Agency's autonomy and its powers by giving the right to buy its own technical equipment; to collect and exchange personal data of migrants; develop information systems and to deploy its own liaison officers in third countries.

Generally almost all the activities, performed by FRONTEX, derive from its legal mandate. However, some tasks of the Agency are flexible for interpretation, due to the non-informative scope and vaguely formulated tasks (for e.g. 'coordination of operational cooperation'). FRONTEX Regulation determines that its main competence is to manage migration flows at the European Union external frontiers. Nevertheless, some tasks exceed pure assistance and technical support to the European Union Member States. It can thus be concluded, because FRONTEX activities in some cases go beyond the territory of European Union and happen extraterritorially in the waters of third countries. Furthermore, the Agency is able to carry out intelligence tasks and process data, including personal one.

The intelligence-driven operations of the Agency are based on Risk Analysis, which is the core task of FRONTEX. However, due to its sensitive information, it is confidential and not publically accessible. Consequently, it can be concluded that this confidentiality rule leads to a lack of transparency in FRONTEX performed activities, because Risk Analysis is the starting point of all the tasks that FRONTEX carries out. In order to make operations of the Agency more transparent, Risk Analysis, which legitimises the operations of FRONTEX, should be subject to overall review and accountability by giving the greater role to the European Parliament.

1.4. FRONTEX's institutional structure and management

1.4.1 The Management Board

After examining the legal basis and main tasks carried out by the FRONTEX, the following part of this Chapter deals with its institutional structure and management. This part is important, in order to better understand how and by whom FRONTEX activities are managed.

The structure of the Agency is set out in Chapter III of the Council Regulation (EU) No. 2007/2004, where the very first sentence states that FRONTEX should be “a structure of community and that it should have a legal personality”.⁸⁷ The main apparatus to control the work of the Agency is the Executive and Deputy Directors (see§1.4.2) and the Management Board, which is “*composed of representatives of the heads of the border authorities of the 26 EU Member States that are signatories of the Schengen acquis, plus two members of the European Commission*”.⁸⁸ Members of the Management Board “*should be appointed on the basis of their degree of high level relevant experience and expertise in the field of operational cooperation on border management*”.⁸⁹ The composition of the Management Board was highly criticized by European Parliament member - Christian Ulrik von Boetticher,⁹⁰ who opposed the idea that all Member States should be represented in FRONTEX's Management Board. He thought that the Agency can only be held accountable and controlled better by giving a significant role to the EU Commission and by giving to the European Parliament more ‘*political control powers*’.⁹¹ However, these prepositions of the European Parliament were not taken into consideration and from the existing FRONTEX Regulation we can see that the Member States, through their representatives in the Management Board, are the most important actors in the decision-making procedure and that all control of the Agency's activities is concentrated in their hands, whilst involvement of European organizations is barely seen.

⁸⁷ 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, Article 15.

⁸⁸ Official web page of FRONTEX. Available at:

<http://frontex.europa.eu/aboutfrontex/organisation/managementboard>.

⁸⁹ 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, Article 21(1).

⁹⁰ 20.07.1999 / 19.07.2004 : Group of the European People's Party (Christian Democrats) and European Democrats – Member.

⁹¹ H. Ekelund, ‘Tracing the establishment of the European Agency for the Management of Operational Cooperation at the External Borders (FRONTEX)’, Riga: 4th ECPR Pan-European Conference on EU Politic, 25-27 September 2008, p. 14, quoting von Boetticher (A5-0093/2004, p. 30).

The Management Board of FRONTEX is assigned multiple tasks. First of all, it has a right to appoint the Executive Director of the Agency on a proposal from the EU Commission.⁹² It exercises disciplinary authority over the Executive Director and the Deputy Director.⁹³ Secondly, it is obliged to adopt the Agency's Annual Programme⁹⁴, as well as, the General Report on FRONTEX's activities and has to make them available to the public.⁹⁵ Other tasks of the Agency's Management Board include: establishing organisational structure of the Agency and its rules of procedure;⁹⁶ adoption of the Agency's staff policy⁹⁷. It is also responsible for establishing decision making procedures, which are related to the operational tasks of the Agency⁹⁸.

In the meetings of FRONTEX, the Management Board is represented by its Chairperson, which, from 26 April 2012, is Ralf Göbel together with its Deputy Chairperson Marko Gašperlin.⁹⁹

1.4.2 The Executive and the Deputy Directors

Currently the seat of FRONTEX's Executive Director belongs to the former Finnish border guard Ilkka Laitinen, who has been working with the Agency since its inauguration in 2005. He is assisted by Gil Arias-Fernández, FRONTEX's Deputy Executive Director.¹⁰⁰ According to Article 25(1) Council Regulation (EU) No. 2007/2004 the Agency is represented by the Executive Director, who "*shall be completely independent in the performance of his/her duties*" and who "*shall neither seek nor take instructions from any government or from any other body*".¹⁰¹ The Management Board has the power to appoint and dismiss the Executive Director, who should be selected "*on the grounds of merit and documented administrative and*

⁹² 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, Article 20(2)(a).

⁹³ *Ibid.*, Article 20(2)(f).

⁹⁴ *Ibid.*, Article 20(2)(c).

⁹⁵ *Ibid.*, Article 20(2)(b).

⁹⁶ *Ibid.*, Article 20(2)(g).

⁹⁷ *Ibid.*, Article 20(2) (h).

⁹⁸ *Ibid.*, Article 20(2)(d).

⁹⁹ Official web page of FRONTEX. Available at:

<http://frontex.europa.eu/about-frontex/organisation/management-board>.

¹⁰⁰ Official web page of FRONTEX. Available at:

<http://frontex.europa.eu/about-frontex/organisation/executive-directors>.

¹⁰¹ 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, Article 25(1).

management skills, as well as his/her relevant experiences in the field of management of external borders.”¹⁰²

The Executive Director is assisted by the Deputy Executive Director, who in a case of absence or indisposition replaces the Executive Director.¹⁰³

It is important to note that “*the European Parliament or the Council may invite the Executive Director to report on the carrying out of his/her tasks, in particular on the implementation and monitoring of the Fundamental Rights Strategy, the general report of the Agency for the previous year, the work programme for the following year and the Agency's multiannual plan.*”¹⁰⁴ As regards FRONTEX oversight monitoring, the European Parliament's competences are rather limited. This right is one of the few existing, which allows the European Parliament to monitor the Agency.

After the FRONTEX Regulation was amended in 2011, the Agency introduced a Fundamental Rights Strategy, which needs to be further developed and implemented. The Agency is responsible for establishing “*an effective mechanism to monitor the respect for fundamental rights in all the activities of the Agency.*”¹⁰⁵ In doing so “*a Consultative Forum shall be established by the Agency to assist the Executive Director and the Management Board in fundamental rights matters.*”¹⁰⁶ The Executive Director together with Management Board is competent to decide on the working methods and the composition of the Consultative Forum (see § 3.2).¹⁰⁷ Other competences of the Executive Director, as follows from the amended FRONTEX Regulation, are:

- 1) to prepare and implement the decisions and programmes and activities adopted by the Agency's Management Board within the limits specified by this Regulation, its implementing rules and any applicable law;¹⁰⁸

¹⁰² 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, Article 25(2).

¹⁰³ *Ibid.*, Article 26(3).

¹⁰⁴ Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, Article 25(2).

¹⁰⁵ 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, Article 26a(1).

¹⁰⁶ *Ibid.*, Article 26a(2).

¹⁰⁷ *Ibid.*, Article 26a(2).

¹⁰⁸ *Ibid.*, Article 25(3)(a).

- 2) to take all necessary steps, including the adoption of internal administrative instructions and the publication of notices, to ensure the functioning of the Agency in accordance with the provisions of this Regulation;¹⁰⁹
- 3) to prepare each year a draft working programme and an activity report and submit them to the Management Board;¹¹⁰
- 4) to exercise in respect of the staff the powers laid down in Article 17(2);¹¹¹
- 5) to draw up estimates of the revenues and expenditure of the Agency pursuant to Article 29, and implement the budget pursuant to Article 30;¹¹²
- 6) to delegate his/her powers to other members of the Agency's staff subject to rules to be adopted in accordance with the procedure referred to in Article 20(2)(g).¹¹³

The Executive Director is responsible for the development of relations between FRONTEX and the governmental authorities of the Member States and some non-Member States, as well as, with the European institutions. The Executive Director is the one who initiates the programmes and activities of FRONTEX, which are later submitted to the Management Board of the Agency for its approval. It can be concluded, that the Executive Director can be seen as a counterbalance to the Management Board, which consists of the representatives of the Member States, as follows from the FRONTEX Regulation Article 25(1), Article 3, Article 23(2), which state that the Executive Director should be completely independent while exercising its duties and that it should not take any instructions from any other body including the Management Board.¹¹⁴ Article 3 provides that the Executive Director is competent to suspend or terminate joint operations if needed¹¹⁵ and Article 23(2) that he has the right to take part in the meetings of the Management Board.¹¹⁶

¹⁰⁹ 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, Article 25(3)(b).

¹¹⁰ *Ibid.*, Article 25(3)(c).

¹¹¹ *Ibid.*, Article 25(3)(d).

¹¹² *Ibid.*, Article 25(3)(e).

¹¹³ *Ibid.*, Article 25(3)(f).

¹¹⁴ *Ibid.*, Article 25 (1).

¹¹⁵ *Ibid.*, Article 3.

¹¹⁶ *Ibid.*, Article 23(2).

The structure of FRONTEX

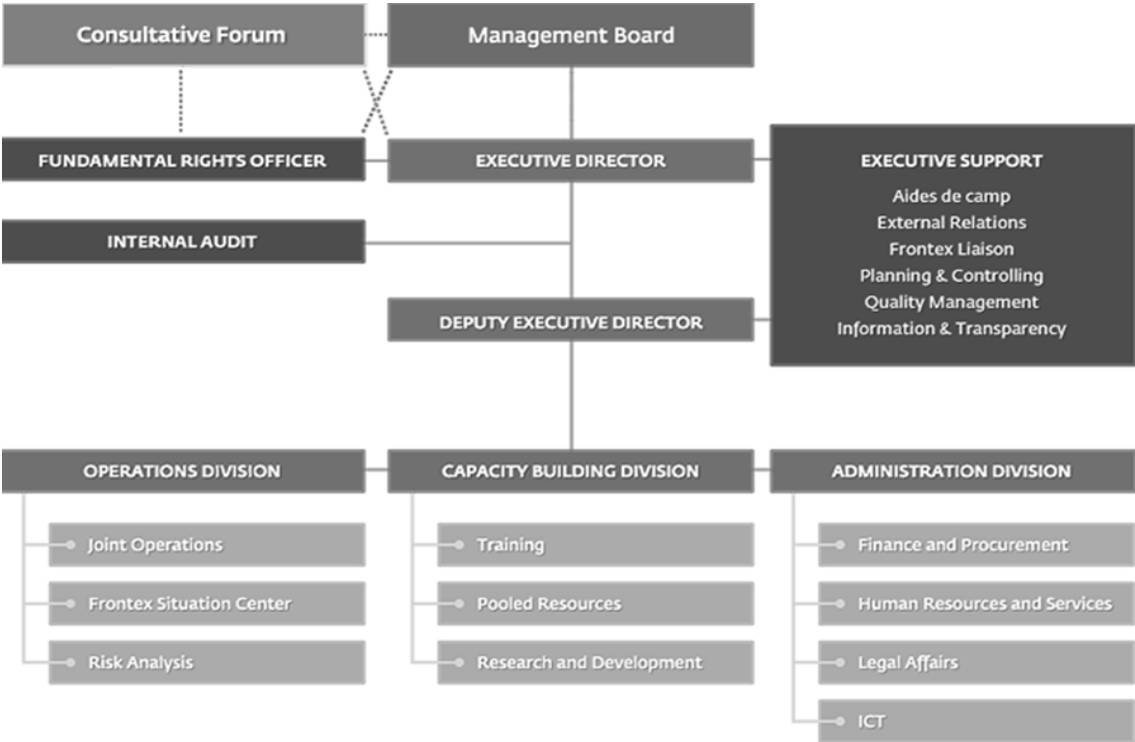


Figure 1 taken from: <http://frontex.europa.eu/about-frontex/organisation/structure>

1.5 The overall summary of the Chapter I

When answering the sub-question *what is FRONTEX and in what framework does it operates*, the following conclusions can be drawn from the present study. From the early beginning the European Union has developed an area of external border management strategy, which seeks to integrate control of the external borders, in order to fight irregular migration. The framework, which regulates the European Union competences regarding its external border management, is created on the Schengen acquis. The Schengen agreement was signed by five countries - Belgium, Germany, Luxembourg, France and the Netherlands. The objective of this agreement was to abolish internal border controls between all participating EU countries and to create a goods and persons free travel area in Europe.

As can be seen from the first section of this Chapter, the decision to establish an European Agency in order to enhance operational cooperation amongst the Member States to secure external borders was only one of several possibilities. A few ‘mechanisms’ were discussed by the Member States and the European Commission, including the establishment of an European Border Guard, which was later adopted as the External Borders Practitioners Common Unit. Nevertheless, soon after its establishment the Common Unit was faced with criticism and was seen as ineffective in its dealings with EU border management. This encouraged the European Commission to draft a proposal to create a permanent agency, which would be able to exercise the daily management of the EU external borders and would be capable of responding to critical situations when needed.¹¹⁷

When answering the question in what framework does the Agency operates, it can be seen from Chapter I that as an EU Agency, FRONTEX derived its legal basis for its Regulation (EC) No. 2007/2004 from Articles 62(2) (a) and 66 of the Treaty establishing the European Community. As described in this Chapter FRONTEX’s competences has been increasing over time. The Agency’s tasks embraces several areas – coordination between Member States, research and development, training tasks, rapid response, risk analysis and information sharing. However, while the Agency was set up with the idea of strengthening the security of European external borders and to develop the Area of Freedom, Security and Justice, certain problems

¹¹⁷ Commission of the European Communities, Proposal for a Council Regulation establishing a European Agency for the Management of Operational Co-operation at the External Borders, p. 3-4.

remained in activities performed by FRONTEX. It can be acknowledged from the second part of this Chapter, where the main tasks of the Agency have been examined. Even though, the main tasks of the Agency derive from its legal mandate, it still leaves room for flexible interpretations. By widening the powers of FRONTEX, its tasks exceeded just a simply assistance and technical support to the European Union Member States. The Agency is empowered to perform so-called intelligence-driven operations based on Risk Analysis, which are highly secret. FRONTEX is also able to execute intelligence tasks and process data, including personal one, which it uses for organizational purposes and for the preparation of its risk analysis. The Agency's joint operations raise some concerns, due to the fact, that its founding Regulation says nothing about how these operations are actually planned and performed. Finally, when answering the question what is FRONTEX, It can be concluded that the Agency is not any more just a 'mechanism' to 'simply assist' Member States in implementing European Union legislation in the fields of control and surveillance of the external borders and removal of third-country nationals. The results of this Chapter indicate that FRONTEX is progressively keeping a main role in the development and implementation of the European Union strategy on migration and asylum issues as well as on control of EU external border.

CHAPTER II

TRANSPARENCY

Having set out the remits, main tasks and institutional structure of the EU Agency FRONTEX under analysis, this section introduces the concept of transparency and its development in the European Union, with a precise focus on how this principle applies to FRONTEX. Before we start our analysis of transparency applicability to the Agency, we will briefly give an account how this principle became crucial within European Union. In this Chapter we will seek to answer the sub-questions *what is transparency*, as well as, *to what extent and how does the principle apply to FRONTEX*, in order to ensure that public has access to relevant, timely and precise information on the decisions-making and activities performed by this Agency.

2.1 Transparency as a legal principle and its development in the European Union law

2.1.1 Transparency and openness after the Maastricht and the Amsterdam Treaties

Since the establishment of the European Union, it has been recognized that such an international organization has a legal duty and responsibility to explain its policies, legal framework and goals.¹¹⁸ At the European Union level, transparency is vital for spreading citizen's knowledge and understanding of European Union decision-making process, as well as, to increase the public's trust in the European Union institutions and its other bodies, which is necessary for a democracy to function.¹¹⁹ Transparency empowers citizens and opens the way to analyse, evaluate and better comprehend the activities of the public authorities.¹²⁰ Moreover, it

¹¹⁸ V. Deckmyn and I. Thomson, 'Openness and Transparency in the European Union', 1998, European Institute of Public Administration, Maastricht, the Netherlands, p.3.

¹¹⁹ D.M. Curtin, 'Betwixt and Between: Democracy and Transparency in the Governance of the European Union', in J.A. Winter, D.M. Curtin, A.E. Kellermann and B. de Witte (eds.), *Reforming the Treaty on European Union - The Legal Debate*, (The Hague/Boston/London: Kluwer Law International), 1996, p. 97.

¹²⁰ M. Augustyn and C. Monda, 'Transparency and Access to Documents in the EU: Ten Years on from the Adoption of Regulation 1049/2001, EIPA Maastricht, 2011, p. 1.

contributes to a more effective use of their other rights, such as the right to information and freedom of expression.¹²¹

From the early days of the European Union, the European Parliament and the European Commission were responsible for providing the community with information, related to the work of the European institutions. In 1984, the European Parliament adopted a resolution,¹²² in which it promoted openness¹²³ of government and, over a couple of years, endorsed a few more resolutions with a similar content. The European Commission showed its initiative to foster openness in a Directive of 1988,¹²⁴ concerning environmental issues. This Directive stated that the Member States have a duty to provide the necessary information upon request.¹²⁵ Nonetheless, a clear public information policy of the European Union appeared only after the Maastricht Treaty.¹²⁶

The Treaty of Maastricht introduced Europe with a concept of transparency and openness in 1992. The Declaration to the Final Act of the Treaty of Maastricht No. 17 supplemented the Treaty with a suggestion to improve public access to information:

*“The Conference considers that transparency of the decision-making process strengthens the democratic nature of the institutions and the public's confidence in the administration”.*¹²⁷

However, its impact remained narrow. The Maastricht Treaty influenced both the European Commission and the Council to adopt a Code of Conduct on Access to Documents,¹²⁸ where they committed themselves *“to give the citizens the greatest possible access to*

¹²¹ Rights enshrined in The Charter of Fundamental Rights of the European Union (2000/C 364/01), Article 11.

¹²² Resolution on the compulsory publication of information by the European Community, O.J. 1984, C 172/176.

¹²³ Terms transparency and openness are often used interchangeably.

¹²⁴ Proposal for a draft directive on the freedom of access to information on the environment, O.J.C 1988, C335/5.

¹²⁵ D. Curtin and H. Meijers, ‘The Principle of Open Government in Schengen and the European Union: Democratic Retrogression’, *Common Market Law Review* 32(2), 1995, p. 417.

¹²⁶ M. Augustyn and C. Monda, ‘Transparency and Access to Documents in the EU: Ten Years on from the Adoption of Regulation 1049/2001, EIPA Maastricht, 2011, p. 1.

¹²⁷ Treaty on European Union, Official Journal, C-191 of 29 July 1992, p. 2.

¹²⁸ 93/730/EC: Code of conduct concerning public access to Council and Commission documents, *Official Journal L* 340, 31/12/1993.

information".¹²⁹ Subsequently, the same two European institutions and later the European Parliament adopted rules, which laid down concrete conditions that allowed for citizens to access their documents.¹³⁰ Nevertheless, this right was limited with a number of restrictions (as we will see in § 2.1.2).¹³¹

The Treaty of Maastricht initiated the concept of transparency not only by significantly modifying the decision-making process, in order to make it more open to the citizens, but also by establishing the office of an European Ombudsman. Even if the European Ombudsman was not found to directly enhance transparency, it contributed to more clear requirements of openness in decision-making process through its reports on complaints lodged by citizens, concerning access to EU documents.¹³² In addition, the Maastricht Treaty connected the European Ombudsmen institute to the new concept of the European citizenship (Article 17 (1) EC). According to Harden, citizens have a right to call public authorities to account through a complaint to the European Ombudsmen. In order to do so, they should have a right to access information and documents.¹³³ For the purpose of this Thesis it is not necessary to go into the details of the activities, performed by the European Ombudsmen, however, it is obvious that it had a significant role in the further discussions on the concept of transparency and the European Union openness.

In 1997 the Treaty of Amsterdam integrated a transparency clause in Article 255 EC by providing the right of access to the documents of the European Parliament, Council and European Commission to any citizen of Union, and any natural or legal persons residing or

¹²⁹ 93/730/EC: Code of conduct concerning public access to Council and Commission documents, *Official Journal L 340, 31/12/1993*.

¹³⁰ Council Decision 93/731/EC on public access to Council documents OJ L 340, 31 December 1993, p. 43, Commission Decision 94/90/ECSC, EC, Euratom on public access to Commission documents OJ L 46, 18 February 1994, p. 58 and European Parliament Decision 97/632/EC, ECSC, Euratom on public access to European Parliament documents, OJ L 263, 25 September 1997, p. 27.

¹³¹ Council Decision of 20 December 1993 on public access to Council documents (93/731/EC): "the Code of Conduct, prevents access to Councils and Commissions documents, where it could undermine the protection of the public interest; the individual and his privacy; commercial and industrial secrecy; the Community's financial interest; the confidentiality requested either by the supplier of the information contained in the document or the legislation of the Member State, which supplied the information. Moreover, both institutions may refuse access in order to protect their own interests in the secrecy of their proceedings".

¹³² S. van Bijsterveld, 'Transparency in the European Union: a Crucial Link in Shaping the new Social Contract Between the Citizen and the EU', *Transparency in Europe II, Public Access to Documents in the EU and its Member States*, Hosted by the Netherlands during its chairmanship of the EU Council, The Hague, 25 and 26 November 2004, p.20.

¹³³ I. Harden, 'Citizenship and Information', *European Public Law 7 (2)*, p.165.

having their registered office in one of the Member States (third country nationals are not included).¹³⁴ Moreover, the new Article 1 of the EC Treaty, provided that the EC was seeking “*to create an ever closer union among the people of Europe*”, where the decisions should be taken “*as openly as possible*” in all the three pillars of European Union. According to V. Deckmyn, the term ‘*as possible*’, prevents this right from being a fundamental and absolute right of openness for the subjects of European Union Law, however, it should be taken into account that the principle of openness was extended not only to the so-called first and second pillars of the Union, but also to the third.¹³⁵

2.1.2 Transparency and openness in Regulation No. 1049/2001

Emphasized by the European Union, with a view to strengthen citizens’ confidence over the public administration, the principles of transparency and openness had almost no regulatory force.¹³⁶ Article 255 EC gave a legal ground to administer the right of access to the European Union institutions’ documents, which was further developed in Regulation No. 1049/2001,¹³⁷ regarding public access to European Parliament, Council and Commission documents. The main purpose of this Regulation is “*(a) to define the principles, conditions and limits on grounds of public or private interest governing the right of access to European Parliament, Council and Commission (...) documents (...) in such a way as to ensure the widest possible access to documents, (b) to establish rules ensuring the easiest possible exercise of this right, and (c) to promote good administrative practice on access to documents.*”¹³⁸ This Regulation provides for every natural or legal person residing or having its registered office in a Member State, a right to request access to documents of the European Union institutions without any special reason.¹³⁹ However, if a document has been requested by a group, not indicated by the Regulation, it automatically results in denying the request, as is the case for third-country nationals, not

¹³⁴ Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, Oct. 2, 1997, O.J. C 340/1 (1997), Article 255.

¹³⁵ V. Deckmyn and I. Thomson, ‘Openness and Transparency in the European Union’, 1998, European Institute of Public Administration, Maastricht, the Netherlands, p. 10.

¹³⁶ H. Labayle ‘Openness, transparency and access to documents and information in the European Union’, Directorate General for Internal Policies, Policy Department C: Citizens’ Rights and Constitutional Affairs, requested by the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs, 2013, p. 7.

¹³⁷ Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.

¹³⁸ *Ibid.*, Article 1.

¹³⁹ *Ibid.*, Article 6(1).

residing in the European Union. It is interesting, as it means that FRONTEX has no obligation under this provision to provide information to third-country nationals.¹⁴⁰

It is important to note, that Regulation No. 1049/2001 does not embody an absolute right of access to documents. It consists of a number of exceptions, which might legitimize the refusal of such access even to European Union citizens.¹⁴¹ These exceptions are listed in Article 4(1), which determines that:

*“The institutions shall refuse access to a document where disclosure would undermine the protection of the public interest (...), the public security, defence and military matters, international relations and the financial, monetary or economic policy of the Community or a Member State”.*¹⁴²

The second part of this Article establishes the ground on which access to documents may be refused, due to the protection of commercial interest, court proceedings, legal advice, inspections, investigations and audits.¹⁴³ Another important provision for our analysis is Article 4(3), which states that:

“Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure”.

From these provisions¹⁴⁴ it can be acknowledged that it is up to the institutions to decide if they will provide the applicant with the access to their documents. Article 4(3) leaves the space for institutions to work secretly while making internal or inter-institutional decisions. If documents would be disclosed publicly at the stage before its completion, it could jeopardize the institution's activities, as it could suffer from external influence, which would undermine their final decisions-making.¹⁴⁵ As we have already analysed in the first Chapter of this Thesis, FRONTEX often uses this excuse to avoid the necessity to provide the public with information

¹⁴⁰ Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, Article 4(3).

¹⁴¹ *Ibid.*, Article 4.

¹⁴² *Ibid.*, Article 4(1).

¹⁴³ *Ibid.*, Article 4(2).

¹⁴⁴ *Ibid.*, Article 4(1), 4(3).

¹⁴⁵ M. Myhaylova, 'Implementation of the concept of transparency by EU institutions: access to documents', 3rd Global Conference on Transparency Research HEC Paris, 24 – 26 October 2013, p.12.

about so-called intelligence-driven operations, which are based on Risk Analysis made by that Agency.

2.1.3 Transparency and openness after the Lisbon Treaty

The Treaty of Lisbon, which was signed on 13 December 2007 and entered into force 1 December 2009,¹⁴⁶ changes the understanding of the right of access to documents in the European Union, as well as, the conditions under which the authorities of the Union serve. It also includes significant changes into the EU's external policies.¹⁴⁷

According to the Preamble of the Treaty, its main aim is to enhance the democratic legitimacy of the Union and to improve the coherence of its action.¹⁴⁸ The Lisbon Treaty for the first time includes in the Treaties clear provisions narrating the democratic principles. Article 1 of the EU Treaty repeats its predecessor by stating that it '*creates an ever closer union among the peoples of Europe in which decisions are taken as openly as possible and as closely as possible to the citizen*'. Democratic principles are further explained and incorporated under Title II¹⁴⁹, which is named *Provisions on Democratic Principles*. Article 10 of the EU Treaty establishes essential democratic pleas such as '*every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen*'.¹⁵⁰ It can be acknowledged that European Union is democratic, because it is open to public scrutiny. The principle of openness was for the first time connected with a democratic life of the European Union by the Lisbon Treaty.¹⁵¹ Article 11 of the EU Treaty directly applies to the institutions of the EU, where they "*shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action*". The second paragraph of this Article invites institutions to take active moves towards openness and transparency by stating that they "*shall maintain an open,*

¹⁴⁶ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, (2007/C 306/01).

¹⁴⁷ Treaty on European Union, Articles 18, 21, 27.

¹⁴⁸ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, (2007/C 306/01), the Preamble.

¹⁴⁹ Treaty on European Union, Title II.

¹⁵⁰ *Ibid.*, Article 10(3).

¹⁵¹ H. Labayle 'Openness, transparency and access to documents and information in the European Union', Directorate General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs, requested by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs, 2013, p.8.

transparent and regular dialogue with representative associations and civil society'.¹⁵² Title II of the EU Treaty provides for initiative of citizens, in order to reach the purpose worded in the Preamble - to enhance the democratic legitimacy of the European Union. It is acknowledged, that citizen's participation is one of transparency's subcomponent.

Since its entry into force of the Treaty on the functioning of the European Union (TFEU) strengthens these democratic principles, by establishing conditions for its implementation under Article 15(1) TFEU, which states that '*In order to promote good governance and ensure the participation of civil society, the Union institutions, bodies, offices and agencies shall conduct their work as openly as possible*'. It means that the principle of openness now applies to all European Union bodies listed in this provision. It imposes on them an active duty to ensure that all their activities, and information about those activities, are open to the public that can understand them. The third paragraph of the Article 15 TFEU, is a procedural ground for invoking the principle of transparency, where it states that, '*Each institution, body, office or agency shall ensure that its proceedings are transparent and shall elaborate in its own Rules of Procedure specific provisions (...)*'.

However, even though the Agencies have an obligation to open their work to the public, the same paragraph states that, "*Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union institutions, bodies, offices and agencies (...)*"¹⁵³, it consequently means that this Article excludes third-country nations, not resident in the European Union, from exercising this right. It leads to the fact that the Agency FRONTEX has no duty to disclose its information to those people. Furthermore, the statement that "*EU institutions, bodies, offices or agencies would have to adopt specific provisions regarding access to documents in their rules of procedure*", leaves a lot of space for their discretion to foresee supplementary grounds to refuse to give an access to documents.

Another important provision, which supports the regulatory incorporation of the principle of openness, is Article 298 TFEU, which states that "*In carrying out their missions, the institutions, bodies, offices and agencies of the Union shall have the support of an open, efficient and independent European administration*" and that the "*European Parliament and the Council,*

¹⁵² Treaty on European Union, Article 11(2).

¹⁵³ Treaty on the Functioning of the European Union (TFEU) as amended, Article 15(3).

acting in accordance with the ordinary legislative procedure, shall establish provisions to that end". This Article gives a legal ground to adopt legislation, regarding access to European Union information other than an access to documents.¹⁵⁴

From our short overview of the principles of transparency and openness in the European Union Treaties, it can be concluded that until the Lisbon Treaty, they largely overlapped with each other and had only little regulatory force. Moreover, due to their 'incest' nature, the precise content of these principles was uncertain. They were basically limited to the right to access to information, or more precisely documents. While the idea of openness was known from the early days of the European Union, it was only fully acknowledged after the Treaty of Lisbon entered into force. For the first time participation in decision-making has been associated with the concept of democracy. The procedural and institutional transparency was incorporated into the content of the Treaty and gave some appropriate meaning to the European Union's activities. Since the entry into force of the Treaty of Lisbon, the principle of transparency is binding upon all the European Union institutions, including Agencies. It can be concluded, that the principle of transparency has emerge independently from openness and is composed of several subcomponents: freedom of information and participation; the duty to make publicly known information about the Union's activities in all the areas, as well as, the duty to publish all the legislative acts and make the information about decision-making process as open and understandable as possible. While the principle of transparency is engaged with the public administration work and information accessibility, the principle of openness embraces a wider form of public participation in the European Union activities.

2.2 Transparency of FRONTEX

After having examined the concept of transparency and its evolution in the European Union law, this part of Chapter II analyses to what extent and how the principle of transparency applies to the European Union Agency FRONTEX.

FRONTEX was set up with the idea to strengthen the security of the European Union's external borders and to develop the Area of Freedom, Security and Justice. As we have already seen in the first chapter of the Thesis, the Agency is mainly focused on external border control

¹⁵⁴ S. Peers, 'The Treaty of Lisbon and EU Openness and Transparency', Statewatch, based on a seminar contribution at the European Institute of Public Administration, 14 May 2008, p. 5.

and irregular migration, which naturally makes its activities related to the rights of persons, especially those of third-country nationals. After the Lisbon Treaty entered into force in December 2009, the principle of transparency became legally binding to all European Union institutions, including Agencies.¹⁵⁵ It is, therefore, necessary to analyse FRONTEX's compliance with this principle and to answer the question if the public has access to relevant, timely and precise information on the decisions-making and activities performed by this Agency.

2.2.1 Transparency clause in the FRONTEX Regulation

The transparency policy of FRONTEX, including the right of access to documents, is explicitly foreseen in the Article 28 of the Council Regulation 2007/2004 establishing FRONTEX. According to Article 28(1), FRONTEX is subject to Regulation No. 1049/2001 on public access to European Union documents: *“Six months after the entry into force of this Regulation the Agency shall be subject to Regulation (EC) No 1049/2001 when handling applications for access to documents held by it”*¹⁵⁶. It further states that the Agency ‘may, on its own initiative, communicate in the fields of its mission and should ensure that the Management Board will adopt a general report of FRONTEX performed activities, which would rapidly give objective, reliable and easily understandable information to the public’.¹⁵⁷

However, it is interesting to note, that on 21 September 2006 the Management Board of the Agency adopted its own Decision on public access to documents¹⁵⁸, which, however, contains several deviations from the EU Regulation No. 1049/2001. While stating that in principle *“all documents should be accessible to public”*, it further explains that *“in order to safeguard the ability to carry out its tasks, special attention should be paid to the specific requirements of FRONTEX as a specialized body tasked with improving the integrated management of the external borders of the Member States of the EU. Therefore, full account of*

¹⁵⁵ Treaty on the Functioning of the European Union (TFEU) *as amended*, Article 15.

¹⁵⁶ 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, Article 28(1).

¹⁵⁷ *Ibid.*, Article 28 (2).

¹⁵⁸ Decision of the Management Board of 21 September 2006, Laying down practical arrangements regarding public access to the documents of the European Agency for the management of operational cooperation at the external borders of the Member States of the European Union.

*the sensitive nature of tasks carried out by FRONTEX, in particular in relation to operations at borders and border related data should be taken.*¹⁵⁹

It can be acknowledged that even though the Agency claims to be bound by the Regulation No. 1049/2001, in its Decision on public access to documents FRONTEX is furthering exceptions to provide its information due to the ‘*sensitive nature of its tasks*’, an aspect already foreseen in Article 9 of Regulation No. 1049/2001.¹⁶⁰

The same idea is set out in Article 4, which states that while deciding if to grant access to FRONTEX documents, it should take into account “*the necessity not to jeopardize the attainment of objectives and tasks of the Agency*”.¹⁶¹ Furthermore, Article 3 (exceptions to public access) of the Management Board decision is explicitly linked to the Article 4 of Regulation No. 1049/2001, where it states that while assessing the request for the Agency’s documents, FRONTEX will apply the latter provisions. However, it is necessary to remember that Article 4 of the Regulation No. 1049/2001 does not embody an absolute right to access documents and that it consists of a number of exceptions (see§2.1.2), which might legitimize the refusal of such access (third country national are excluded from this right).

Another deviation is that the Management Board Decision on access to their documents does not include a provision, which would incorporate Article 11 of Regulation No. 1049/2001, more precisely, a request to develop a public register of documents. According to Statewatch:

*“Making available a public register of documents ensures that citizens and civil society can follow and understand what is being discussed and decided. (...) By making available documents concerning the implementation of policy and legislation it ensures that the activities of Frontex are subject to public and parliamentary accountability. Access to documents is the life-blood of a democratic system and a public register of documents is crucial to this process (...).”*¹⁶²

¹⁵⁹ Decision of the Management Board of 21 September 2006, Laying down practical arrangements regarding public access to the documents of the European Agency for the management of operational cooperation at the external borders of the Member States of the European Union, Recital 6.

¹⁶⁰ Access to EU documents, ‘Calling the agencies to account: Case 3: Frontex’, Statewatch complaint and the Ombudsman’s own- initiative Inquiry, 30 of March 2014. Available at: <http://www.statewatch.org/ombudsman-cases/frontex/frontex-complaint.htm>.

¹⁶¹ Decision of the Management Board of 21 September 2006, Laying down practical arrangements regarding public access to the documents of the European Agency for the management of operational cooperation at the external borders of the Member States of the European Union, Article 4.

¹⁶² Statewatch, 25 May 2013, Reference: OI/132012/MHZ, ‘Statewatch’s complaints against FRONTEX’, p.2. Available at: <http://www.statewatch.org/ombudsman-cases/frontex/letter-frontex-to-ombs-24-jun-13-final..pdf>.

Moreover, Article 15 of the FRONTEX Decision on access to its documents also deserves attention, since it determines that “*FRONTEX shall include in its annual report the numbers of cases in which it refused to grant access to documents and the reasons for such refusals*”. However, Article 17 of Regulation No. 1049/2001 also requests institutions to include the number of sensitive documents, which are not recorded in the register.¹⁶³ And, as for sensitive documents, it is important to mention that Article 9 of Regulation No. 1049/2001 determines that documents are sensitive “*when originating from the institutions or the agencies established by them, from Member States, third countries or International Organisations, classified as ‘TRÈS SECRET/TOP SECRET’, ‘SECRET’ or ‘CONFIDENTIEL (...)*”.¹⁶⁴ Taking into account what we have examined in the first Chapter of this Thesis, it can be acknowledged, that due to the nature of the Agency’s tasks, a number of its documents can fall under the umbrella of so-called ‘*sensitive documents*’.

Nevertheless, it is a commendable fact that new rules of the Management Board Decision on its access to documents were adopted on 27 March 2014.¹⁶⁵ The Agency took into account the European Ombudsmen’s recommendations¹⁶⁶ and has included Article 14, where it states that FRONTEX maintains a register of documents. Moreover, Article 2 (2) states that ‘*Frontex may, subject to the same principles, conditions and limits, grant access to documents to any natural or legal person **not residing or not having** its registered office in an EU Member State*’.¹⁶⁷ Yet, it is up to FRONTEX to decide if the Agency will provide third-country nationals with the access to their documents. Furthermore, the Agency finally incorporated Article 17 of Regulation No. 1049/2001 into Article 13 of its Decision, where it includes in its Annual Reports the number of sensitive documents not recorded in the public register.¹⁶⁸ FRONTEX has recently

¹⁶³ Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001, regarding public access to European Parliament, Council and Commission documents, Article 17(1).

¹⁶⁴ *Ibid.*, Article 9.

¹⁶⁵ Decision of the Frontex Management Board No. 3/2014 of 19 February 2014 adopting practical arrangements regarding public access to the documents of Frontex.

¹⁶⁶ See: European Ombudsman P. Nikiforos Diamandouros, “Suggestions of European Ombudsman further to visit to FRONTEX on 4 October 2012”, Complaint 2167/2012/BEH and OI/13/2012/MHZ, Warsaw, 24 February 2013 and European Ombudsman P. Nikiforos Diamandouros, Complaint 2167/2012/BEH and OI/13/2012/MHZ, Strasbourg, 26 September 2013, ‘Decision of the European Ombudsman closing own initiative inquiry OII/13/2012MHZ.

¹⁶⁷ Decision of the Frontex Management Board No. 3/2014 of 19 February 2014 adopting practical arrangements regarding public access to the documents of Frontex, Article 2(2).

¹⁶⁸ *Ibid.*, Article 13.

demonstrated its policy developments towards a wider public access to documents. However, due to fact that the Management Board Decision on its access to documents was adopted this year (2014), considerably more work will need to be done to determine to what extent the transparency policy of FRONTEX's is actually being implemented effectively in practice.

2.2.2 FRONTEX annual reports

As we have already discussed in the section '*Transparency clause in FRONTEX Regulation*', it is clear that each year the Management Board of FRONTEX should adopt general report on the activities performed by the Agency.¹⁶⁹ Moreover, Article 17 of Regulation No. 1049/2001, imposes on each institution a duty to publish an annual report, '*including the number of cases in which the institution refused to grant access to documents, the reasons for such refusals and the number of sensitive documents not recorded in the register*'.¹⁷⁰ However, according to the Statewatch's '*complaint against FRONTEX*',¹⁷¹ the analysis of the Agency's annual reports demonstrates that FRONTEX does not fully comply with this duty:

- In the FRONTEX Annual Report of 2005, there are no references to Regulation No. 1049/2001, to the plea for access to documents, as well as, to the number of sensitive documents that was not recorded in the register;¹⁷²
- In 2006, there is only one statement that "*Frontex did not receive any requests for documents in line with Regulation (EC) No 1049/2001 (...). In one case Frontex was consulted in a confirmatory application addressed to EU Council General Secretariat. Partial access was granted*";¹⁷³
- In 2007, there is no separate section for transparency matters. Again no links to Regulation No.1049/2001, or to requested documents, including sensitive ones. The only

¹⁶⁹ 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, Article 20(2)(b).

¹⁷⁰ Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, Article 17.

¹⁷¹ Access to EU documents, 'Calling the agencies to account: Case 3: Frontex', Statewatch complaint and the Ombudsman's own- initiative Inquiry, 30 of March 2014. Available at: <http://www.statewatch.org/ombudsman-cases/frontex/frontex-complaint.htm>.

¹⁷² General Report of FRONTEX FOR 2005. Available at: http://www.statewatch.org/observatories_files/frontex_observatory/general_report_2005_en%5B1%5D.pdf.

¹⁷³ FRONTEX Annual Report 2006, p.20. Available at: <http://www.statewatch.org/news/2007/jul/frontex-annual-report-2006.pdf>.

thing mentioned is that the project ‘*Document Management System*’ is taking place for two months;¹⁷⁴

- In 2008 and 2009, there are no references to Regulation No. 1049/2001, to the request for access to documents, nor, to the number of sensitive documents that was not recorded in the register;¹⁷⁵
- In 2010, there is a statement that the Agency “*received and processed 13 official requests for Frontex documents (...) the Information and Transparency Team processed over 250 requests for information from researchers, students and the general public*”. However, it does not explain if all requested document were granted, likewise, it does not mention the number of sensitive documents not recorded in the register;¹⁷⁶
- In 2011, FRONTEX determined that it “*received and processed 17 official requests for Frontex documents (...)*”. Again, no explanation if all applications for requested documents were granted nor references to the number of sensitive documents not recorded in the register.¹⁷⁷
- In 2012, FRONTEX “*received sixteen applications for access to documents (...)*”. For the first time FRONTEX explained in more detail how many requests were refused and how many granted. However, there is no reference to the number of sensitive documents not recorded in the register.¹⁷⁸

¹⁷⁴FRONTEX General Report 2007, p.60. Available at:

<http://www.statewatch.org/news/2008/dec/eu-frontex-ann-rep-2007.pdf>.

¹⁷⁵ FRONTEX Annual Report 2008 and FRONTEX General Report 2009. Available at:

<http://www.statewatch.org/news/2009/jul/eu-frontex-annual-report-2008.pdf> and

http://www.statewatch.org/observatories/files/frontex_observatory/gen_rep_2009_en.pdf.

¹⁷⁶ FRONTEX General Report 2010, p.19. Available at:

http://frontex.europa.eu/assets/About_Frontex/Governance_documents/Annual_report/2010/frontex_general_report_2010.pdf.

¹⁷⁷ FRONTEX General Report 2011, p.20. Available at:

<http://www.europarl.europa.eu/document/activities/cont/201207/20120725ATT49372/20120725ATT49372EN.pdf>.

¹⁷⁸ FRONTEX General Report 2012, p. 63. Available at:

http://frontex.europa.eu/assets/About_Frontex/Governance_documents/Annual_report/2012/EN_General_Report_2012.pdf.

| | |
|--------------------------------------|--|
| Initial requests: | |
| 16 | Initial applications received |
| Results: | |
| 11 | Access granted |
| 4 | Partial access |
| 1 | Access refused |
| Confirmatory requests: | |
| (-) | Confirmatory applications received |
| Refusal by exception applied: | |
| 1 | Article 4.1 (a) Protection of the public interest as regards public security, defence and military matters, international relations, the financial, monetary or economic policy of the Community or a member State |

http://frontex.europa.eu/assets/About_Frontex/Governance_documents/Annual_report/2012/EN_General_Report_2012.pdf

- In 2013, FRONTEX “received 26 applications for access to documents (...), where full access to the requested documents was granted to twenty one applicants, partial access was granted to four and one was rejected on the basis of protection of public interest as regards public security and international relations foreseen in Article 4.1 (a) of Regulation (EC) No 1049/2001”; However, no references to the number of secret documents not recorded in the register.¹⁷⁹

From our short analysis of FRONTEX Annual Reports, it can be acknowledged that public concern about the Agency’s activities is significantly growing every year. While in the first year of its existence FRONTEX stated that it did not get any requests from the public, recently, the number of applicants, seeking access to Agency’s information, has increased. Furthermore, the investigation of the Agency’s Annual Reports has shown that their quality is improving every year. However, it does not include all the necessary information as required by the Regulation No. 1049/2001.

¹⁷⁹ FRONTEX General Report 2014, p. 38-39. Available at: http://frontex.europa.eu/assets/About_Frontex/Governance_documents/Annual_report/2013/General_Report_EN.pdf.

2.3 The overall summary of the Chapter II

Chapter II has examined the concept of transparency, as well as, to what extent and how does this principle apply to FRONTEX. This Chapter has shown that the principle of transparency was broadly entrenched in European law after the Treaty of Lisbon entered into force in 2009, which ascertained that the European Union institutions, including Agencies, have a duty to conduct decision-making as openly as possible and as closely as possible to the citizen.¹⁸⁰ When answering the sub-question *what is transparency*, it can be concluded that this principle is composed of sever subcomponents, such as freedom of information and participation; the duty to make publicly known information about the Union's activities in all the areas, as well as, the duty to publish all the legislative acts and make the information about decision-making process as open and understandable as possible. Though the principle of transparency is engaged with the public administration work and information accessibility, it is mostly used in the terms of the right to access documents.

While the European Union's take on transparency is to strengthen this principle, it does create a number of exceptions thereby restricting the right to access information. According to the Article 15(3) TFEU, European Union bodies have a right to adopt their own rules of procedure regarding access to documents, which leave European Union institutions room to include supplementary grounds to refuse to give an access to their information.

As regards the sub-question *to what extent and how does the principle of transparency applies to FRONTEX*, Chapter II has shown that transparency policy of the Agency is explicitly foreseen in the Article 28 of the Council Regulation 2007/2004 establishing FRONTEX. Under Article 28(1), FRONTEX is subject to Regulation No. 1049/2001 on public access to European Union documents. However, this Regulation contains a number of restrictions and it does not embody an absolute right of access to documents. Moreover, it does not include third-country nationals, which consequently means that FRONTEX has no obligation under this Regulation to provide information to people, most likely to suffer from its activities. While the Management Board Decision on its access to documents (of 21 September 2006) partly ignored Regulation No. 1049/2001 by making a lot of exceptions, the new Decision of 19 February 2014, took into

¹⁸⁰ Consolidated versions of the Treaty on European Union and the Treaty on the functioning of the European Union, Brussels, 30 April 2008, Article 15 TFEU.

account the European Ombudsmen's recommendations to maintain a public register of documents, as well as, to incorporate in its Annual Reports the number of sensitive documents not recorded in the public register¹⁸¹ and in doing so this improved its transparency policy. However, due to the fact that the Management Board Decision was adopted this year (2014), more work will need to be done to determine to what extent the transparency policy of FRONTEX's is actually being implemented effectively in practice.

Moreover, the Agency is also under the obligation to adopt a general report of FRONTEX's performed activities, which would rapidly give an *objective, reliable and easily understandable information to the public*.¹⁸² Yet, from our short analysis of FRONTEX's general reports, it can be concluded that even though the reports are improving every year they do not contain all the necessary information and that FRONTEX does not fully comply with its duty to publish information, including cases in which the Agency has refused to grant access to documents and the reasons for such refusal, as well as, sensitive documents not recorded in the register.¹⁸³ Finally, it can be concluded that FRONTEX is bound by a transparency clause and has a duty to conduct its decision-making as openly as possible. FRONTEX has recently demonstrated its policy developments towards wider public access to documents. However, taking into account the nature of the Agency's tasks and the area where it operates, a number of its documents can fall under the umbrella of so-called '*sensitive documents*', which consequently means that FRONTEX is not willing to grant a complete access to its information. The findings of this Chapter suggest that the public has no adequate access to relevant, timely and precise information on the decisions-making and activities performed by this Agency. Future study investigating FRONTEX's new policy on access to documents is necessary.

¹⁸¹ See: European Ombudsman P. Nikiforos Diamandouros, "Suggestions of European Ombudsman further to visit to FRONTEX on 4 October 2012", Complaint 2167/2012/BEH and OI/13/2012/MHZ, Warsaw, 24 February 2013 and European Ombudsman P. Nikiforos Diamandouros, Complaint 2167/2012/BEH and OI/13/2012/MHZ, Strasbourg, 26 September 2013, 'Decision of the European Ombudsman closing own initiative inquiry OII/13/2012MHZ.

¹⁸² 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, Article 28(2).

¹⁸³ Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, Article 17.

CHAPTER III

Enhancing transparency of FRONTEX to ensure better human rights compliance

So far we have analysed the remits, main tasks and institutional structure of FRONTEX, as well as, the concept of transparency and its development in the European Union with a precise focus on how this principle applies to the Agency. The third Chapter of this Thesis will seek to answer the sub-questions *which human rights are at stake in FRONTEX operations and how transparency within the Agency can be improved?*

3.1 Human rights, which are at stake in FRONTEX operations, protected by the Charter

In Chapter I we have established that when FRONTEX was established, its primal role was to strengthen the security of the European Union external borders and to develop the Area of Freedom, Security and Justice. The Agency's activities focused mainly on migration flow management and the control of external borders. However, after FRONTEX started functioning, it became evident that its activities are closely related to human rights and that the Agency was not well prepared to adequately protect them.¹⁸⁴ Human rights protection is of crucial importance in FRONTEX's joint return operations, where asylum seekers, refugees and irregular migrants are intercepted and turned back to the neighbouring or the countries of their origin.¹⁸⁵ Moreover, as we have already seen in the first Chapter, FRONTEX's mandate was revised several times and the Agency's competences were widened, yet, special guarantees to ensure compliance with fundamental rights were not provided. This section of the Thesis will address FRONTEX's compliance with human rights standards. For this purpose we will consider in some detail the

¹⁸⁴ Council of Europe, "Frontex: human rights responsibilities", Parliamentary Assembly, Doc. 13161, 08 April 2013, Origin: Reference to committee: Doc. 12704, Reference 3809 of 7 October 2011.2013, p.3.

¹⁸⁵ S. Keller, U. Lunacek, B. Lochbihler, H. Flautre, "FRONTEX Agency: which guarantees for human rights?" A study conducted by Migreurop on the European External Borders Agency in view of the revision of its mandate, 2010, p.10.

right of asylum and the non-refoulement principle (3.1.1); protection against inhuman and degrading treatment (3.1.2) and other rights which are potentially at stake during and after FRONTEX operations (3.1.3).

3.1.1 The right of asylum and non-refoulement principle

Article 1 of the Geneva Convention describes a refugee as a person *“Owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it”*.

Article 33(1) of the Convention prohibits expulsion or return (non-refoulement) and reads as follows:

“No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion”.

After the Treaty of Lisbon entered into force in December 2009, the European Union’s Charter of Fundamental Rights became directly binding on all EU institutions, including Agencies.¹⁸⁶ The relevant provision in the Charter as far as FRONTEX’s activities are concerned is Article 18 (the right to asylum). The provision reads:

“The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 25 July 1951 and the Protocol of 31 January 1967 relating to the status

¹⁸⁶ E. Guild, S. Carrera, L. den Hertog, J. Parkin, European Parliament, Directorate-General for Internal Policies. Policy Department C: Citizens' Rights and Constitutional Affairs. *“Implementation of the EU Charter of Fundamental Rights and its impact on EU home affairs agencies: Frontex, Europol, and the European Asylum Support Office: study”*, p.7.

of refugees and in accordance with the Treaty on the European Union and the Treaty on the Functioning of the European Union (...)”.

In addition, it is important to remind that Article 19 of the Charter of Fundamental Rights of European Union, which is binding to FRONTEX, states that “*Collective expulsions are prohibited and that no one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment*”.¹⁸⁷

The discussion in Chapter I of FRONTEX’s activities at the European Union’s external border has revealed that these operations, which are aimed at preventing migrants from reaching the EU’s external border whilst they are at sea, are conducted irrespective of the reason why a migrant is seeking access to the European Union. We have established that as conducted presently, there is a huge risk that during FRONTEX’s operations, where irregular migrants are intercepted on the high seas or third country’s national waters, the right to claim for asylum is not adequately assured. As the only information that can be retrieved from the general reports of the Agency is the statistical outcome of detection, i.e. the number of illegal migrants who were refused permission to enter the EU. It cannot be ascertained in how many cases the right to seek asylum was guaranteed and, therefore, we will consider the issue in terms of a risk of human rights violation rather than arguing that FRONTEX has actually violated this right in a specific case.

Returning to the figures given by FRONTEX in its 2007 annual we learn that 130,000 of third country nationals were not allowed into the European Union¹⁸⁸ and the annual report of 2008 gives a number of 140,000.¹⁸⁹ As said, the reports do not provide any information how many of these people were potentially asylum seekers,¹⁹⁰ so there might be cases in which migrants were sent to third countries without an adequate individual examination which thus

¹⁸⁷ Charter of Fundamental Rights of the European Union (2010/C 83/02), Article 19.

¹⁸⁸ FRONTEX General Report 2007, p. 16. Available at:

http://frontex.europa.eu/assets/About_Frontex/Governance_documents/Annual_report/2007/frontex_general_report_2007_final.pdf.

¹⁸⁹ FRONTEX General Report 2008, p. 13. Available at:

http://frontex.europa.eu/assets/About_Frontex/Governance_documents/Annual_report/2008/frontex_general_report_2008.pdf.

¹⁹⁰ S. Keller, U. Lunacek, B. Lochbihler, H. Flautre, “FRONTEX Agency: which guarantees for human rights?” A study conducted by Migreurop on the European External Borders Agency in view of the revision of its mandate, 2010, p. 11.

could amount to a breach of the non-refoulement principle in Article 18 of the Charter and/or the prohibition to subject someone to inhuman or degrading treatment protected by Article 19 of the Charter.

One of the most evident cases in which FRONTEX was blamed to undermine the principle of non-refoulement, was provided in an alarming Human Rights Watch report,¹⁹¹ revealing that:

*“On June 18, 2009, for the first time in its history, a Frontex operation resulted in the interdiction and **push back of migrants** in the central Mediterranean Sea to Libya. A German Puma helicopter operating as part of Operation Nautilus IV coordinated Italian coast guard interception of a boat carrying about 75 migrants 29 miles south of Lampedusa. The Italian Coast Guard reportedly handed the migrants over to a Libyan patrol boat, which took them to Tripoli where they were reported to have been “handed over to a Libyan military unit”.*¹⁹²

The same report¹⁹³ provides clear evidence that FRONTEX rejects its responsibility to assure that persons, returned to Libya, would have the right to seek international protection. According to FRONTEX’s vice-director, Gil Arias-Fernandez:

*“(…) on the humanitarian level, fewer lives have been put at risk, due to fewer departures. But our agency does not have the ability to confirm if the rights to request asylum as well as other human rights are being respected in Libya”.*¹⁹⁴

This incident raises serious concerns regarding the position of FRONTEX, knowing that the Agency has the right to conclude agreements with third countries,¹⁹⁵ which might not be

¹⁹¹ Human Rights Watch (2009) Pushed Back, Pushed Around Italy’s Forced Return of Boat Migrants and Asylum Seekers, Libya’s Mistreatment of Migrants and Asylum Seekers; Karl Stagno- Navarra, Handover of Migrants to Italy Results in Forced Repatriation, Malta Today (21 June 2009), p.98.

¹⁹² *Ibid.*, p 37.

¹⁹³ Human Rights Watch (2009) Pushed Back, Pushed Around Italy’s Forced Return of Boat Migrants and Asylum Seekers, Libya’s Mistreatment of Migrants and Asylum Seekers; Karl Stagno-Navarra, Handover of Migrants to Italy Results in Forced Repatriation, Malta Today (21 June 2009), p.98.

¹⁹⁴ *Ibid.*, p 37.

¹⁹⁵ Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011, amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, Article 14.

subject to the same commitments on human rights. For example, third countries are not bound by the Charter of Fundamental Rights of the European Union and some of them are also not bound by the European Convention on Human Rights and/or the 1951 International Refugee Convention and 1967 Additional Protocol. FRONTEX may engage in activities and agreements with third countries that do not respect human rights. However, it is hard to assess the risk of these agreements, due to the lack of transparency and secrecy that surrounds them. In addition, as already has been analysed in Chapter I, it is obvious that there are some obscurities and ‘gray areas’, as regards the mandate and precise role of FRONTEX in joint return operations. Therefore, it can be concluded that FRONTEX’s activities need to be more transparent in order to determine its responsibility in the occurrence of human rights violations, either during an operation or after returning migrants to third countries.

FRONTEX’s working arrangements with third countries¹⁹⁶

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

3.1.2 Inhuman and degrading treatment

Article 4 of the Charter of Fundamental Rights of the European Union states that: “*No one shall be subjected to torture or to inhuman or degrading treatment or punishment*”.¹⁹⁷ This is an absolute right, which cannot be limited in any circumstances. One of the clearest examples

¹⁹⁶ E. Guild, S. Carrera, L. den Hertog, J. Parkin, European Parliament, Directorate-General for Internal Policies. Policy Department C: Citizens' Rights and Constitutional Affairs. “Implementation of the EU Charter of Fundamental Rights and its impact on EU home affairs agencies: Frontex, Europol, and the European Asylum Support Office: study”, p. 65.

¹⁹⁷ Charter of Fundamental Rights of the European Union (2010/C 83/02), Article 4.

where FRONTEX is accused of inhuman and degrading treatment can be found in Human Rights Watch's report '*The EU's Dirty Hands*'.¹⁹⁸ In November 2010, FRONTEX had provided Greece with staff and material support to assist in patrolling its borders near the Evros River with Turkey. The Agency deployed 175 guest officers, made available by different Member States, as a part of a rapid border intervention team (RABIT), which later was replaced by a permanent FRONTEX presence. During four months the RABIT guards were apprehending migrants and taking them to the detention centers or police stations that did not meet even the minimal human rights standards.¹⁹⁹ Human Right Watch stated that FRONTEX:

“Has fallen short of its obligations to respect the absolute prohibition on exposing individuals to inhuman and degrading treatment as a result of its cooperation with Greek authorities in detaining migrants in Greek detention facilities where the conditions violate European and international human rights standards”.²⁰⁰

It can be acknowledged that FRONTEX's activities performed in Greece did not meet the requirements of Article 4 of the European Union Charter of Fundamental Rights, which should be binding to the Agency.

3.1.3 Other rights violated by the Agency

Article 21 of the Charter of Fundamental Rights of the European Union contains a non-discrimination principle - *an obligation not to discriminate on any grounds such as sex, race, colour, ethnic or social origin, genetic features, belief, language, religion, political or any other opinion, membership of a national minority, property, birth, disability or sexual orientation*. According to the European Court of Human Rights:

“(...) in order for an issue to arise (...) there must be a difference in the treatment of persons in relevantly similar situations (...). Such a difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it

¹⁹⁸ I. Mann, “The EU's Dirty Hands: Frontex Involvement in Ill-treatment of Migrant Detainees in Greece”, Human Rights Watch, 2011.

¹⁹⁹ *Ibid.*, p. 59.

²⁰⁰ *Ibid.*, p. 46.

does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realized (...)".²⁰¹

However, some joint operations of the Agency raises some concerns, as specific groups of people have been targeted. According to FRONTEX's General Report 2007, during the Operation HYDRA (illegal Chinese migration by air), only people of Chinese origin had been targeted. The operation led to the interception of 291 Chinese nationals.²⁰² This is not the only examples. The operation NIRIS only targeted people of Chinese and Indian origin, while operation SILENCE was specifically targeted against Somalian migrants.²⁰³ All these operations question Agency's compliance with a non-discrimination principle.

Other rights in the Charter of Fundamental Rights of the European Union are potentially at risk as well. Every joint return operation run by FRONTEX might jeopardize the right to protect private and family life, foreseen in the Article 7. The simple 'act of return' could lead to a violation of this right.²⁰⁴ As established in the Chapter I, the amended Regulation of FRONTEX allows border guards of the Agency to carry firearms without laying down the rules of necessity and proportionality, which might put at risk fundamental rights,²⁰⁵ established in the Charter. In this light it is important to recall the statement made by Mikael Cederbratt (Sweden, Group of the European People's Party) that "*although managing migration through external border control measures remains one of Europe's key challenges today, the need to respect and protect human rights in all Frontex activities is not an option – it is an obligation*".²⁰⁶

²⁰¹ ECtHR, *Burden v. United Kingdom*, No. 13378/05, 29 April 2008, paragraph 60.

²⁰² FRONTEX General Report 2007, p. 32. Available at:

http://frontex.europa.eu/assets/About_Frontex/Governance_documents/Annual_report/2007/frontex_general_report_2007_final.pdf.

²⁰³ S. Keller, U. Lunacek, B. Lochbihler, H. Flautre, "FRONTEX Agency: which guarantees for human rights?" A study conducted by Migreurop on the European External Borders Agency in view of the revision of its mandate, 2010, p. 21.

²⁰⁴ E. Guild, S. Carrera, L. den Hertog, J. Parkin, European Parliament, Directorate-General for Internal Policies. Policy Department C: Citizens' Rights and Constitutional Affairs. "Implementation of the EU Charter of Fundamental Rights and its impact on EU home affairs agencies: Frontex, Europol, and the European Asylum Support Office : study", p. 61.

²⁰⁵ such as the right to dignity established in Article 1 and the right to life, foreseen in Article 2.

²⁰⁶ Mikael CEDERBRATT, Sweden, Group of the European People's Party, Parliamentary Assembly, "Frontex: human rights responsibilities", Doc. 13161, 08 April 2013, Origin: Reference to committee: Doc. 12704, Reference 3809 of 7 October 2011.2013, p. 19.

3.1.4 The necessity for transparency

The examples of incidents reported by NGO's reveal that human rights can be at stake in joint operations coordinated by FRONTEX. We must therefore turn our attention to the question how compliance with human rights standards can be ensured during these operations. It is argued, that the best way to ensure compliance with fundamental rights during FRONTEX operations is to make them more transparent, as external scrutiny would force the Agency to conduct its activities in a manner more favourable to human rights. As the Agency operates in a politically sensitive area, where FRONTEX's activities, especially joint operations, give a big leeway for various incidents to happen and relates to vulnerable people (irregular migrants) - it is of a great importance to ensure transparency.²⁰⁷ However, from our examination, it can be acknowledged that although the mandate of the Agency is determined in its Regulation, there still exists a lack of transparency and clarity, regarding FRONTEX's precise role in the management of the European Union's external frontiers. Moreover, the main website and the Annual Reports of FRONTEX, which are the main sources of available documents and other important information on its activities, are evaluated and monitored by FRONTEX itself. This lack of clarity about the Agency's operations and activities questions its liability for human rights violations. However, we are not going to analyse the question of FRONTEX's accountability, but concentrate on the **transparency** as everything starts and ends with transparency. In order to enhance transparency within FRONTEX, an independent monitoring mechanism should be established, as it is the main key to ensure efficient protection and promotion of fundamental rights. Therefore, the second part of this Chapter examines existing monitoring mechanisms of the Agency and the steps that FRONTEX is taking to deal with human rights issues.

²⁰⁷ S. Keller, U. Lunacek, B. Lochbihler, H. Flautre, "FRONTEX Agency: which guarantees for human rights?" A study conducted by Migreurop on the European External Borders Agency in view of the revision of its mandate, 2010, p. 44.

3.2 Policy developments of FRONTEX towards better human rights compliance

The first major improvement towards better human rights compliance is the agreement established by an exchange of letters in June 13, 2008 between the United Nations Refugee Agency (UNHCR) and FRONTEX in which they agreed to work closely together. This work agreement focuses on several areas of cooperation concerning FRONTEX's risk analysis and joint operations. The UNHCR supports the Agency with regular consultations, information sharing, expertise and experience and helps to develop training tools on international human rights standards and refugee law for border guards participating in the joint operations.²⁰⁸ Though, the main aim of this working agreement between both Agencies is to ensure that border management is fully in line with fundamental rights, Michele Simone (UNHCR's senior liaison officer with FRONTEX) has expressed her concern concerning compliance with these standards, stating that:

*“Today, virtually all Frontex-led training activities for border guards include an asylum component. However, it remains difficult to evaluate the impact of training while information on operational activities at the borders, especially at sea, remains rather limited”.*²⁰⁹

Further cooperation that should enhance human rights compliance dates back to 26 May 2010, when the European Union Agency for Fundamental Rights (FRA) and FRONTEX signed an agreement, in order to “*establish a cooperation framework between the FRA and Frontex with the overall objective of strengthening the respect of fundamental rights in the field of border management and in particular in Frontex activities*”.²¹⁰ Cooperation between these Agencies also focuses on border guards training on fundamental rights, including how to recognize vulnerable people.

²⁰⁸ UNHCR's observations on the European Commission's proposal for a Regulation of the European Parliament and the Council amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX), COM(2010)61 final p. 2-3.

²⁰⁹ The United Nations Refugee Agency, “Q&A: Working for refugees on Europe's outer borders” 18 May 2010. Available at: <http://www.unhcr.org/print/4bf29c8b6.html>, last accessed 04.06.2014.

²¹⁰ Cooperation Arrangement Between the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union and the European Union Agency for Fundamental Rights, entry into force 26 May 2010, p.3.

However, in 2010 Migreurop in its report ‘*FRONTEX Agency: Which Guarantees for Human Rights*’, has expressed some concern, regarding the FRONTEX, UNHCR and FRA working agreements. The Report criticises the transparency barrier, which prevents these agreements to fully carry out their purposes. The secrecy, which surrounds FRONTEX’s activities, diminishes the improvements made by the Agency in the field of human rights. FRA personnel depend on FRONTEX’s will to cooperate: “(...) *under the agreement established between the FRA and FRONTEX, the former contributes to the Agency’s operations only at the request of the latter*”.²¹¹ It further criticises the annual reports of FRONTEX, which despite the agreements signed with FRA and UNHCH, give no information about the Agency’s actions during joint operations, as regards the protection of fundamental rights. Moreover, it is very difficult to estimate the results of border guard training, supported by UNHCR and FRA, in particular those on the high seas.²¹² Migreurop considers that “*in terms of the plans set out by FRONTEX, staff training and efforts to share information will probably not be enough to bring operations into line with international law (e.g. the principle of non-refoulement).*”

In order to upgrade the efficiency of management of European external borders, new rules for FRONTEX were adopted by the European Council on October 10, 2011.²¹³ One of the key elements of the new Regulation is strengthened provisions ensuring the protection of fundamental rights, and the introduction of a Consultative Forum on Fundamental Rights (CF) and a Fundamental Rights Officer (FRO).²¹⁴ However, the European Parliament’s aspiration to create a fundamental rights authority capable of monitoring FRONTEX’s activities independently and externally was unfulfilled. During the negotiations for the new Regulation, the Council “*opted for a diplomatic strategy of keeping up appearances with continued negotiations but had no intention of creating an empowered independent authority*”.²¹⁵ The negotiations led

²¹¹ S. Keller, U. Lunacek, B. Lochbihler, H. Flautre, “FRONTEX Agency: which guarantees for human rights?” A study conducted by Migreurop on the European External Borders Agency in view of the revision of its mandate, p. 30

²¹² *Ibid.*, p. 30.

²¹³ Regulation (EU) No 1168/2011 of the European Parliament and of the council of 25 October 2011, amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

²¹⁴ Council of the European Union, “New rules on Frontex adopted - Strengthening the European external borders agency”, Luxembourg, 10 October 2011, 15208/11, PRESSE 353, p. 1-2, available at: file:///C:/Users/u1262080/Downloads/PRES-11-353_EN.pdf.

²¹⁵ Statewatch Report “A drop of fundamental rights in an ocean of unaccountability: Frontex in the process of implementing Article 26(a)”, 15 May 2012.

to the rejection of the European Parliament's proposal to establish an independent unit, which would be able to access information and withhold FRONTEX operations.²¹⁶

Despite the fact that the new Regulation²¹⁷ of the Agency attaches more importance to fundamental rights, Statewatch has criticized these amendments.²¹⁸ It describes the human rights improvements of FRONTEX as 'cosmetic changes', which "*do not provide sufficient systematic, preventive and evaluative guarantees*".²¹⁹ The criticism is justified as follows. While the European Parliament's initial proposal suggested that the Fundamental Rights Officer would be an independent body of FRONTEX, the final text of the Regulation states that FRO is employed by the Management Board of the Agency. A further point of concern is, Article 26a,²²⁰ which states that the Consultative Forum '*shall obtain access to all information regarding the Agency's activities concerning respect for fundamental rights*'. It is not clear, whether CF can access information, which it considers to be important or the one that FRONTEX believes to be relevant with fundamental rights. Furthermore, it is the Management Board that has a right to '*decide on the composition and the working methods of and the modalities of the transmission of information to the Consultative Forum*'.²²¹

²¹⁶ Statewatch Report "A drop of fundamental rights in an ocean of unaccountability: Frontex in the process of implementing Article 26(a)", 15 May 2012.

²¹⁷ Regulation (EU) No 1168/2011 of the European Parliament and of the council of 25 October 2011, amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

²¹⁸ Statewatch Report "A drop of fundamental rights in an ocean of unaccountability: Frontex in the process of implementing Article 26(a)", 15 May 2012.

²¹⁹ *Ibid.*

²²⁰ S. Peers, Statewatch Analysis "The Frontex Regulation –Consolidated text after 2011 amendments", Article 26a(2) : " A Consultative Forum shall be established by the Agency to assist the Director and the Management Board in fundamental rights matters. The Agency shall invite the European Asylum Support Office, the Fundamental Rights Agency, the United Nations High Commissioner for Refugees and other relevant organisation to participate in the Consultative Forum. On the proposal of the Executive Director, the Management Board shall decide on the composition and the working methods of and the modalities of the transmission of information to the Consultative Forum".

²²¹ Regulation (EU) No 1168/2011 of the European Parliament and of the council of 25 October 2011, amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, Article 26a(2).

3.3 Conclusion

As regards the sub-question of this Thesis *which human rights are at stake in FRONTEX operations*, the following conclusions can be drawn from the present Chapter. It was shown that FRONTEX operates in a politically sensitive area, where Agency's activities, especially joint operations, give a big leeway for various incidents to happen. It was established that FRONTEX operations have a clear impact on fundamental rights and freedoms of irregular migrants, in particular the right of asylum and the non-refoulement principle, the prohibition of inhuman and degrading treatment, the principle of non-discrimination, the right to private and family life and the right to be protected against collective expulsion.

This Chapter has also demonstrated FRONTEX's policy developments towards better human rights compliance. It is evident that the European Parliament played a significant role in improving FRONTEX's compliance with fundamental rights. Even though the European Parliament did not succeed to establish an independent fundamental rights authority, it has clearly left its mark on the establishment of the Consultative Forum and the Fundamental Rights Officer in the new FRONTEX Regulation of 2011. However, in terms of FRONTEX's monitoring mechanism, the European Parliament's competences are rather limited. As we have already established in the first Chapter, the European Parliament is excluded from the process of monitoring risk analysis drawn up by the Agency, as well as, from being informed about the recent development of research relevant for the control and surveillance of the external border.

In general, therefore, it seems that despite FRONTEX's welcome progress in promoting human rights, transparency requirements are still not adequately fulfilled. The secrecy, which surrounds the Agency's activities, impedes FRONTEX from actually improving its practices involving fundamental rights. Until this day the monitoring mechanisms, which are designed to ensure that the Agency's policy is in line with fundamental rights, remain internal. However, the monitoring can be useful and reliable only if it is external and independent. The Consultative Forum and the Fundamental Rights Officer are deployed by the Management Board of the Agency. Furthermore, the Consultative Forum and the Fundamental Rights Officer cannot be considered effective and sufficient monitoring organs, due to their uncertain mandates and lack of independence. Their function is more advisory one. It can be concluded, that there is an absence of a real monitoring mechanism to ensure FRONTEX's respect to EU core values.

Returning to the sub-question *how can transparency within FRONTEX be improved*, a reasonable approach to tackle this issue could be the establishment of an independent and external oversight mechanism, which would have the competence to access all information it feels it needs to perform its task and the right to monitor FRONTEX 's coordinated operations at the external border. Moreover, in order to make the Agency's activities more transparent and improve its compliance with fundamental rights it is suggested that risk analysis, which is the basis of all operations of FRONTEX, should be subject to overall review and accountability giving greater role to the European Parliament as the representative of individual rights.

CHAPTER IV

CONSLUSIONS

The main goal of this Thesis was to show that the main reasons for the growing criticism of the European Agency FRONTEX are its lack of transparency and the omission to establish an independent supervisory mechanism. Chapter I of this Thesis has identified the nature of FRONTEX's mandate and its tasks and strived to answer the sub-question *what is FRONTEX and in what framework does it operates*. Chapter II has discussed the concept of transparency and has attempted to answer the sub-question *to what extent and how this principle applies to this Agency*. Taking into account that FRONTEX operations are targeted at particularly vulnerable people, Chapter III has sought to find out *which human rights are at stake in its operations*. Finally, Chapter III has also tried to figure how transparency can be improved in order to ensure higher standards of human rights compliance by FRONTEX.

Returning to the sub-question posed at the beginning of this Thesis, *what is FRONTEX and in what framework does it operates*, it can be seen from the Chapter I that the main objective of FRONTEX is to strengthen the security at the external frontiers of the EU by ensuring operational co-operation and coordination among Member States in the implementation of EU measures, concerned with the management of external borders and to assist Member States, by providing technical assistance. As an EU Agency, FRONTEX derived its legal basis for its Regulation (EC) No. 2007/2004 from Articles 62(2) (a) and 66 of the Treaty establishing the European Community. As described in the Chapter I of this Thesis FRONTEX's competences have been increasing over time. The Agency's tasks embraces several areas – coordination between Member States, research and development, training tasks, rapid response, risk analysis and information sharing. When answering the question what is FRONTEX, it can be concluded that the Agency is not any more just a 'mechanism' to 'simply assist' Member States in implementing European Union legislation in the fields of control and surveillance of the external borders and removal of third-country nationals. The results of the Chapter I indicate that FRONTEX is progressively keeping a main role in the development and implementation of the European Union strategy on migration and asylum issues as well as on control of EU external border.

While answering the sub-question what is transparency, this study, in particular Chapter II has shown that transparency is composed of sever subcomponents, such as freedom of information and participation; the duty to make publicly known information about the Union's activities in all the areas, as well as, the duty to publish all the legislative acts and make the information about decision-making process as open and understandable as possible. However, transparency is mostly used in terms of the right to access documents.

While the European Union's take on transparency is to strengthen this principle, it does create a number of exceptions thereby restricting the right to access information. A noteworthy issue to consider in this respect is Article 15 of TEFU. This provision compels European Union bodies to adopt their own rules of procedure regarding the right to access documents. It does, however, leave European Union institutions room to include supplementary grounds to refuse to give an access to their information.

As regards another sub-question to what extent and how does the principle of transparency apply to FRONTEX, Chapter II has shown that transparency policy of the Agency is explicitly foreseen in the Article 28 of the Council Regulation 2007/2004 establishing FRONTEX. Under Article 28(1), FRONTEX is subject to Regulation No. 1049/2001 on public access to European Union documents. Finally, it is now possible to answer this sub-question by stating that FRONTEX, as a Union body, is bound by the principle of transparency and has a duty to conduct its decision-making as openly as possible. While the Management Board Decision on its access to documents (of 21 September 2006) partly ignored Regulation No. 1049/2001 providing for a lot of exceptions, the new Decision, which was adopted on 19 February 2014, took into account the European Ombudsmen's recommendations to maintain a public register of documents, as well as, to incorporate in its Annual Reports the number of sensitive documents not recorded in the public register and in doing so this improved its transparency policy. As the Management Board Decision was only adopted this year (2014), it is too early to assess whether these amendments will actually mean an improvement or not. Future study investigating FRONTEX's new policy on access to documents is necessary.

The analysis of the General Reports of the Agency has shown that those documents do not contain all the necessary information. The results of this research support the idea that FRONTEX does not fully comply with its duty to publish information documenting the Agency's decision to refuse to grant access to documents and the reasons for such decision. It

also revealed that sensitive documents are not recorded in the register listing all documents produced by the Agency. It was also shown that FRONTEX's website, likewise, its Annual and General Reports do not disclose much information on the actual performance of its operational activities at the external frontiers, which are evaluated by the Agency itself. A lack of adequate information prevents us from fully examining how FRONTEX identifies asylum seekers and guarantees that nobody will be sent back to the environment, where he/she might be subject to inhuman or degrading treatment, as prohibited by Article 2 of the Charter. In conclusion, taken together, these results suggest that FRONTEX's present level of transparency is insufficient. It lacks transparency, as far as its joint operations at the EU external borders are concerned as well as its duty to disclose all the necessary information to civil society and the public.

As regards another important sub-question of this research, which human rights are at stake in FRONTEX operations, the following conclusions can be drawn from the Chapter III. Whilst the primary objective of FRONTEX is to simply assist Member States in implementing European Union legislation in the fields of control and surveillance of the external borders, it is evident that in fact the Agency's involvement goes way beyond only regulatory tasks. First of all, the Agency may engage in activities with third countries and can operate in their territorial waters. Secondly, FRONTEX may collect and exchange the data, including personal one, which it uses for organizational purposes and for the preparation of its risk analysis.

This study has established that the Agency's policies and operations have a clear impact on fundamental rights and freedoms of irregular migrants, in particular the right of asylum and the non-refoulement principle, the prohibition of inhuman and degrading treatment, the principle of non-discrimination, the right to private and family life and the right to be protected against collective expulsion. It was also shown that FRONTEX itself took some small steps towards better compliance with human rights standards. The Agency endorsed an Fundamental Rights Strategy and had concluded working agreements with the United Nation Refugee Agency and the European Union Agency for Fundamental Rights. Although this Thesis has demonstrated FRONTEX's policy developments towards better human rights compliance, it is hard to evaluate these changes, due to its short period of existence. Considerably more work needs to be done to determine to what extent the Fundamental Rights Strategy of FRONTEX is actually being implemented effectively in practice. The analysis of the Agency's new 'human rights bodies' has shown that the Consultative Forum and the Fundamental Rights Officer remain internal, have

uncertain mandates and lack independence. They can, therefore, not be considered as effective and adequate monitoring mechanisms. The outcome of this Thesis indicates that there is an absence of a real oversight mechanism to ensure FRONTEX's compliance with fundamental rights. In general, therefore, it seems that despite the Agency's improvements in promoting human rights, transparency requirements are not adequately fulfilled. It can be concluded that the secrecy, which surrounds the Agency's activities, impedes FRONTEX from actually improving its practices thereby realising better compliance with human rights standards.

The aim of this Thesis was not only to determine FRONTEX's transparency policy and its compliance with fundamental rights, but also to elucidate how transparency can be improved within the Agency, as our main research question of this Thesis is *how can transparency be improved within FRONTEX in order to ensure higher standards of human rights compliance by that agency?* Whereas we are strictly convinced that if the issue of lack of transparency would be solved, FRONTEX could gain public faith as transparency would force the Agency to conduct its activities in a manner more favourable to human rights. Accordingly, there are a number of important changes which need to be made. I share with M. Cederbratt (Sweden, Group of the European People's Party)²²² recommendations concerning FRONTEX. As Chapter III of this Thesis has already shown that there is no real mechanism to monitor FRONTEX's activities, a reasonable approach to tackle this issue could be the establishment of an independent and external oversight mechanism, which would have the competence to access all information it feels it needs to perform its task and the right to monitor FRONTEX's coordinated operations at the external border. Moreover, the outcome of this surveillance should be made available to the European Parliament, which should also have a right to access FRONTEX information on its working agreements with third countries, as well as, the Agency's Risk Analysis and information on recent development relevant to the control and surveillance of the external borders, in order to investigate their legality and compliance with fundamental rights. There is also a definite need of further development and improvement of FRONTEX's 'Human Rights Strategy', so as to strengthen the capacity and independence of the Consultative Forum and the Fundamental Rights Officer which would allow to fully execute their tasks. Another important suggestion is to make the Agency's Annual and General reports more detailed as far as its operations at the external

²²² M. Cederbratt, Sweden, Group of the European People's Party, Parliamentary Assembly, "Frontex: human rights responsibilities", Doc. 13161, 08 April 2013, Origin: Reference to committee: Doc. 12704, Reference 3809 of 7 October 2011.2013

border are concerned. These reports should include comprehensive information about the reasons for interceptions and the precise location, as well as, how FRONTEX identifies asylum seekers and ensures their international protection. It should also include all relevant information about the cases in which the Agency has refused to grant access to documents and the reasons for such refusal, as well as, sensitive documents, which are currently not recorded in the public register. Moreover, as the Agency often refuses to reveal information, due to its sensitive nature, it is recommended that there should be a time-limit on period of confidentiality of these documents. FRONTEX must provide information about such '*sensitive documents*' after a certain time.

The Thesis has gone some way towards enhancing our understanding of what FRONTEX is and how it operates. Taking into account that since its establishment in 2005 the Agency is becoming more and more important in securing the European Union's external border, it was crucial to examine its operations in the framework of transparency and human rights. It can be concluded that if FRONTEX's expanded mandate would be balanced by the presence of an independent and external monitoring mechanism, as well as, an increased role for the European Parliament control in controlling the Agency, it could gain public faith, as improved transparency could lead to better compliance with human rights standards.

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