

Towards a Common European Border Service?

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Abstract

What should be the future institutional configurations of the second generation of the EU's Integrated Border Management strategy for the common external borders? The Stockholm Programme endorsed by the European Council on December 2009 and the European Commission's action plan implementing it published in April 2010 have brought back to the EU policy agenda the feasibility of setting up a European system of border guards as a long-term policy vision. This Working Document examines the origins of this proposal and aims at thinking ahead by asserting that any future discussion and study in this context should be refocused by initially addressing two central questions: First, what kind of 'border guard' and what kinds of 'border controls' does the EU need in light of the current EU *acquis* on external border crossings and the Schengen Borders Code? Second, what would be the 'added value' of any new institutional arrangement at the current stage of European integration?

The answer to these questions could presage the establishment of a common European border service aimed at i) guaranteeing a uniform implementation and high-standard application of EU border law and the materialisation of a European approach to external border controls; ii) ensuring the respect of fundamental rights and guarantees in all external border control-related activities; iii) facilitating the (de)politicisation and accountability of external border controls; and iv) addressing issues of solidarity and mutual trust building across the external borders in an enlarged EU.

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TOWARDS A COMMON EUROPEAN BORDER SERVICE?

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Introduction

The European Council endorsed the Stockholm Programme in December 2009, which constitutes the third multiannual programme outlining the policy agenda on the European Union's Area of Freedom, Security and Justice (AFSJ) for the next five years.¹ One of the key proposals identified by the Stockholm Programme in relation to the common EU external-border policy is the establishment of a European system of border guards (ESBG). The action plan implementing the Stockholm Programme published by the European Commission in April this year² confirmed this long-term priority by foreseeing the publication of a Communication on the feasibility of such an initiative by 2014. In a speech on 25 May 2010, the first European Day for Border Guards and the fifth anniversary of Frontex (the European Agency for the Management of Operational Cooperation at the External Borders),³ home affairs commissioner Cecilia Malmström identified the creation of a European border guard as one of the most important policy actions to be debated before the end of her mandate. She also confirmed that the European Commission will return to this issue, focusing "in particular on the actual, practical needs that a European Border Guard would meet, as well as how a sound legal framework could be constructed".⁴

This Working Document aims at thinking ahead and contributing to the broad reflection on the future institutional configurations of the next phase of the EU's external border policy by taking the ESBG initiative as our case study. We start by looking at the origins of the ESBG proposal and highlighting the latest policy developments calling for its establishment. While the initiative was part of the European debates taking place between 2001 and 2002, and then lost momentum, the setting-up of an ESBG has actually never disappeared from the EU agenda as a long-term policy vision. On the basis of the main factors that played a role during past discussions on the unfeasibility of the ESBG initiative, section 2 moves on to study the way forward and recommends that the best strategy would be to refocus former debates, and

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¹ Council of the European Union, The Stockholm Programme: An open and secure Europe serving and protecting citizens, 5731/10, Brussels, 3 March 2010.

² European Commission, Communication on Delivering an Area of Freedom, Security and Justice for Europe's Citizens: Action Plan Implementing the Stockholm Programme, COM(2010) 171, Brussels, 20 April 2010.

³ For more information about the event refer to the website, European day for border guards (<http://www.ed4bg.eu/index.html>).

⁴ C. Malmström, "European Day for Border Guards", Speech delivered at the 5th anniversary of Frontex and the first European Day for Border Guards, Speech/10/264, Warsaw, 25 May 2010.

facilitate an open reflection on (and independent evaluation of) the two following questions. First, what kind of ‘border guard’ and what kinds of ‘border controls’ does the next generation of the EU’s Integrated Border Management (IBM) strategy need in light of the current EU *acquis* on external border crossings? Second, what would be the added value at the current stage of European integration of any new institutional arrangement in the common EU external-border policy? The final argument, and policy recommendation, is that any future debate about the institutional elements of the IBM should consider the establishment of a common European border service. The latter should primarily aim at the institutional materialisation of the common European approach on external border controls as envisaged by the Schengen Borders Code (SBC), and would have as its main added value a strategy to address the ‘unfinished elements’ of the IBM in an enlarged EU.

1. Proposal for a European system of border guards: Origins and latest policy developments

The idea of an ESBG is far from new. It originally emerged in 2001 out of the fears expressed by some EU-15 member states’ representatives concerning the negative consequences and insecurities that the 2004 EU enlargement – and the shift of the EU’s external territorial border towards the perimeters of the new Eastern and Central European member states – would bring to the Union.⁵ The former were of the opinion that increasing the level of security (understood as ‘external border protection’) at the eastern borders was fundamental to trusting the (by then) candidates for EU membership as holders of the common EU external border,⁶ and when facing cross-border phenomena widely related to irregular human mobility and other issues such as corruption and organised crime. The events of 11 September 2001 added the necessary political momentum for a security-driven proposal of this sort to move forward.⁷ In addition to addressing insecurity and anxieties associated with mistrust, the ESBG was also presented as a key institutional tool to foster the principle of solidarity and a fair sharing of responsibility between the old and new EU member states. The initiative, however, was received with cold reactions by countries such as Poland and Slovenia, which expressed concern in relation to its potential impact over their national sovereignty and constitutional prerogatives.⁸

The ESBG made its official debut back in November 2001 in a Communication entitled “On a Common Policy on Illegal Immigration” (COM(2001) 672),⁹ wherein the European Commission called for a more “coherent strategy” on European border management and identified as a core element of the latter the creation of a European border guard. The Laeken European Council Conclusions of December 2001 reiterated the need for more effective and

⁵ J. Monar, “The External Shield of the Area of Freedom, Security and Justice: Progress and Deficits of the Integrated Management of the External Borders”, in J.W. Zwaan and F.A.N.J. Goudappel (eds), *Freedom, Security and Justice in the European Union: Implementation of the Hague Programme*, The Hague: T.M.C. Asser Press, 2006(a), pp. 73-88.

⁶ For a study of the Schengen *acquis* in the context of enlargement, refer to L. Corrado, “Negotiating the EU External Border”, in S. Carrera and T. Balzacq (eds), *Security versus Freedom? A Challenge for Europe’s Future*, Farnham: Ashgate Publishing, 2006, pp. 183-204.

⁷ J. Monar, “The European Union’s ‘Integrated Management’ of External Borders”, in J. DeBardleben (ed.), *Soft or Hard Borders? Managing the Divide in an Enlarged Europe*, Farnham: Ashgate Publishing, 2005, pp. 145-164.

⁸ Refer to P. Hobbing, “Integrated Border Management at the EU Level”, in S. Carrera and T. Balzacq (eds), *Security versus Freedom? A Challenge for Europe’s Future*, Farnham: Ashgate Publishing, 2006, p. 163.

⁹ European Commission, Communication on a Common Policy on Illegal Immigration, COM(2001) 672, Brussels, 15 November 2001.

“integrated” management of the EU external borders, and underlined the necessity to examine the conditions in which “a mechanism” or “common services” to control external borders could be created in the future.¹⁰ Exploratory work on the feasibility of setting up such a system was carried out by an EU-funded project bringing together a study group of representatives from police authorities from a selection of EU member states (France, Belgium, Germany and Spain), led by Italy. The results of the project, which were presented in the report *Feasibility Study for the Setting up of a European Border Police*,¹¹ concluded by proposing the establishment of a complex network model instead of a unitary one of a common border guard system.¹² As the study highlighted,

[t]here was a [conceptual] dilemma: unity versus variety, with the consequence of attributing a priority character to the creation of a centralized structure, or variety versus unity, adopting a strategy aimed at satisfying the greatest number of needs, taking the risk of favoring uncontrollable centrifugal forces.¹³

The *Feasibility Study* decided to go for a version of the “variety” (intergovernmental) option and argued for a network system articulated in a series of “knots” organised as operational centres in each member state. These would be coordinated by a council of national representatives made up of those responsible for border police, holding the task of setting common guidelines and helped by a permanent secretariat.¹⁴

The European Commission developed the ESBG in a quite detailed fashion in a Communication entitled “Towards Integrated Management of the External Borders of the Member States of the European Union” (COM(2002) 233) published in May 2002.¹⁵ The latter called for reflection on a “European Corps of Border Guards”, which would mainly contribute to solidarity and “burden-sharing” with the (would-be) 2004 EU member states. In the Commission’s view, the ESBG would aim at “supporting” (and not replacing) the surveillance activities of national and local services, and at a later stage they could then participate in border checks at border crossing points.¹⁶ In a similar fashion, in June 2002 the Council adopted the action plan for the

¹⁰ European Council, Presidency Conclusions of the Laeken European Council of 14 and 15 December, SN 300/1/01, Brussels, 2001, p. 12.

¹¹ See the *Feasibility Study for the Setting up of a European Border Police*, Final Report, Rome, 30 May 2002.

¹² Refer to J. Monar (2006), “The Project of a European Border Guard: Origins, Models and Prospects in the Context of the EU’s Integrated External Border Management”, in M. Caparini and O. Marenin (eds), *Borders and Security Governance: Managing Borders in a Globalised World*, Geneva Centre for the Democratic Control of Armed Forces (DCAF), Geneva, 2006(b), pp. 193-208.

¹³ Refer to p. 30 of the *Feasibility Study* (2002), op. cit.

¹⁴ This, the *Feasibility Study* concluded, “would be the start of a gradual process of sedimentation of competences and experiences, also at the operational level, that could lead to the setting up of a European Border Police as a central element of an integrated and coherent strategy” (ibid., p. 31). The conclusions of the *Feasibility Study* also highlighted that “[t]he activity of the Study Group has been constantly characterized by pragmatism. A choice was made, i.e. to avoid the temptations of utopia. The Study Group left aside the “how it should be” of the future European Border Police, and proceeded decidedly, realistically and with methodological rigour, from the “as it is” situation, towards the identifying of the first concretely practicable steps, keeping its focus on the final goal: the European Border Police” (p. 51).

¹⁵ European Commission, Communication, Towards Integrated Management of the External Borders of the Member States of the European Union, COM(2002) 233 final, Brussels, 7 May 2002.

¹⁶ For an analysis, refer to P. Hobbing, “Management of External EU Borders: Enlargement and the European Border Guard Issue”, in M. Caparini and O. Marenin (eds), *Borders and Security Governance: Managing Borders in a Globalised World*, Geneva Centre for the Democratic Control of Armed Forces (DCAF), Geneva, 2003, pp. 169-192.

management of the external borders of the member states of the European Union,¹⁷ where for the first time it confirmed its political willingness to seriously consider the ESBG proposal. In the action plan, the Council also stressed that this common corps would not be destined to replace national services but only to support them. The Council was of the opinion that the common teams could start by participating in border surveillance activities, while leaving the actual border checks on the movement of persons to a potential second phase.¹⁸

The ESBG was also part of the debates and working arrangements that took place during the Convention on the Future of Europe in 2002.¹⁹ One of the working documents submitted to Working Group X dedicated to “Freedom, Security and Justice” was prepared by Joschka Fischer and Dominique de Villepin (then ministers of foreign affairs of Germany and France respectively). The document recommended that “[t]he constitutional treaty should set a target date for the establishment of a European border police entrusted with sovereign powers and should provide the corresponding legal basis”.²⁰ The final report of Working Group X published in December 2002 concluded that

[m]ost members of the Group consider the possible creation of a common European border guard unit as a *longer-term issue*... Consideration should be given to indicating, in this *legal base* [of the Treaty], the possible longer-term perspective of a common European border guard unit *operating in conjunction with* national border control services.²¹ (Emphasis added.)

Art. III-166 of the Draft Treaty establishing a Constitution for Europe²² did not include an express reference to the ESBG; however, it is important to refer to the background of the discussions held during the Convention to explore possible interpretations of the final wording given to this article. In particular, paragraph 1.c stated that “[t]he Union shall develop a policy with a view to the gradual introduction of an integrated management system of the external borders”. Perhaps most importantly, paragraph 2.d of the same provision stipulated that “[f]or this purpose, European laws and framework laws shall establish measures concerning any measure necessary for the gradual establishment of an integrated management system for external borders”. This wording remained in precisely the same form (word for word) in the current Art. 77 of the Treaty on the Functioning of the European Union (TFEU), which entered into force with the Treaty of Lisbon in December 2009, and which therefore leaves windows open for future institutional initiatives on the EU’s border policy.²³

¹⁷ Council of the European Union, Plan for the Management of the external borders of the Member States of the European Union, 10019/02, Brussels, 14 June 2002.

¹⁸ See para. 31 of European Council, Presidency Conclusions of the Seville European Council of 21-22 June, SN 14702/02, Brussels, 24 October 2002. The Conclusions also referred to “the intention expressed by the Commission of continuing to examine the advisability of such a [European] police force”.

¹⁹ Refer to the website on the European Convention (<http://european-convention.eu.int>).

²⁰ Europäischer Konvent, Das Sekretariat, Deutsch-französische Vorschläge für den Europäischen Konvent zum Raum der Freiheit, der Sicherheit und des Rechts, vorgelegt von Herrn Joschka Fischer und Herrn Dominique de Villepin, Mitglieder des Konvents, Working Group X, Brüssel, 27 November 2002, p. 8.

²¹ The European Convention Secretariat, *Final Report of Working Group X ‘Freedom, Security and Justice’*, CONV 426/02, Brussels, 2 December 2002, p. 17.

²² The European Convention Secretariat, Draft Treaty Establishing a Constitution for Europe, CONV 850/03, Brussels, 18 July 2003.

²³ Treaty of Lisbon, consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, OJ C 115/73, 9.5.2009.

The discussion opened by the Commission Communication and the Council's action plan, as well as by Fischer and de Villepin's initiative during the debates in the Convention, was not followed by any subsequent policy or legal initiative. An inquiry was carried out by the UK House of Lords Select Committee on the EU, the results of which were published in a report entitled *Proposals for a European Border Guard* in July 2003. The report concluded that "the case for a fully fledged multi-national force has not been made"²⁴ based on the following five considerations. The first is the significant implications that the measure would have for national sovereignty. Second, there was no reason to think that the new EU member states would not be able to effectively operate border controls at the external borders (given the necessary financial and technical assistance). Third, "each Member State knows its own borders best and is best equipped to cooperate with its neighbours". The fourth concerns the legal problems involved in border guards exercising powers outside their jurisdiction. Finally, the report highlighted the "danger of misunderstanding as a result of languages and other differences".

The fact that no further concrete steps have been taken on the ESBG has resulted in prioritising the development of the more complex 'network' model first proposed by the Italian-led *Feasibility Study* mentioned above. The model has focused initially on setting up an ad hoc (emergency-driven) and intergovernmental-led (coordination) agency – Frontex – which is now in charge of managing operational cooperation in a predominantly intergovernmental setting,²⁵ and the potential establishment of a loose (and dispersed) network of regional or specialised operational centres or 'knots' at the national level.²⁶ Concerning this last aspect, the Council invited Frontex to consider the establishment of specialised branches in the member states as a means for improving its coordination efforts in the management of the external borders,²⁷ in particular "in regions affected by increased migratory pressure".²⁸ The Commission's action plan implementing the Stockholm Programme foresees the establishment of regional or

²⁴ UK House of Lords, Select Committee on the European Union, *Proposals for a European Border Guard*, 29th Report, Session 2002-03, London: Stationary Office Ltd., July 2003, p. 18.

²⁵ In fact the 'network model' pre-existed the setting-up of Frontex through the establishment of various 'ad hoc centres' between 2002 and 2005 following up the Council's (2002) action plan 10019/02 mentioned above. For an overview of the development of the operational elements of the Council's plan, refer to S. Peers and N. Rogers (eds), *EU Immigration and Asylum Law: Text and Commentary*, Leiden: Martinus Nijhoff Publishers, 2006. On the origins of Frontex, see also S. Leonard, "The Creation of FRONTEX and the Politics of Institutionalisation in the EU External Border Policy", *Journal of Contemporary European Research*, Vol. 5, No. 3, 2009, pp. 371-388. As to how Frontex cannot be seen as an institutionalisation of the post-9/11 securitisation of migration in the EU, see A.W. Neal, "Securitization and Risk at the EU Border: The Origins of FRONTEX", *Journal of Common Market Studies*, Vol. 47, No. 2, 2009, pp. 333-356.

²⁶ V. Mitsilegas, "Border Security in the European Union: Towards Centralised Controls and Maximum Surveillance", in A. Baldaccini, E. Guild and H. Toner (eds), *Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy*, Essays in European Law, Oxford: Hart Publishing, 2007, pp. 359-394.

²⁷ This took place in particular in the Council Conclusions under the Slovenian presidency (Council of the European Union, Draft Council conclusions on the management of the external borders of the Member States of the European Union, 9873/08, Brussels, 23 May 2008), as well as in the European pact on immigration and asylum (European Council, Presidency Conclusions of the Brussels European Council of 15 and 16 October 2008, 14368/08, Brussels, 16 October 2008).

²⁸ See Frontex, *General Report 2009*, Frontex, Warsaw, 2009, p. 9. Frontex then launched a study entitled "Study on the Feasibility of establishing Specialized Branches of Frontex", which was published at the end of 2009 – see Deloitte (2009), *Study on the Feasibility of establishing Specialized Branches of Frontex*, Final Report, December 2009 (www.frontex.europa.eu).

specialised Frontex offices before the end of this year.²⁹ In fact, a decision was taken in February 2010 to set up the first specialised branch in the form of a pilot in Greece (Piraeus), which is expected to become operational before the end of 2010.

While no further debates on the ESBG proposal have taken place since the beginning of 2003, this has not actually meant that it has been abandoned. The idea has been around in EU political discourses during the last nine years, attracting the largest number of champions at the end of 2002 and then somehow losing its appeal afterwards, but it has nevertheless continued to be part of all the key EU political documents on the EU's AFSJ up to now. The ESBG has been expressly (or indirectly) mentioned in all the principal EU political documents dealing with the future parameters expected to guide EU policy on external border controls. This was the case, for instance, in the Thessaloniki Council Conclusions of June 2003, which invited the Commission "to examine in due course...the necessity of creating new institutional mechanisms, including the possible creating of a Community operational structure".³⁰ The 2004 Hague Programme,³¹ the predecessor of the Stockholm Programme, equally referred to the need to evaluate the feasibility of setting up an ESBG. To this we need to add the European pact on immigration and asylum of 2008,³² which also foresaw the proposal in a long-term perspective. The ESBG is included in both the text of the Stockholm Programme and the Commission's action plan implementing it, which envisages including this debate in the context of the next external evaluation of Frontex.³³ Finally, the report delivered in May 2010 by the Reflection Group on the Future of the EU 2030 highlighted the need to develop a European body of specialised personnel to support member states' activities on border management.³⁴

All this constitutes confirmation of the continuing willingness of certain (high-level) EU policy circles to consider more ambitious (long-term) institutional configurations in the future generation of the IBM for the common external borders. Such willingness might be based on an

²⁹ European Commission, COM(2010) 171 final (op. cit.), p. 44.

³⁰ European Council, Presidency Conclusions of the Thessaloniki European Council of 19-20 June 2003, SN 11638/03, Brussels, 1 October 2003.

³¹ European Council, The Hague Programme: Strengthening Freedom, Security and Justice in the European Union, OJ C53/1, 3.3.2005.

³² See European Council, European Pact on Immigration and Asylum, 13440/08, Brussels, 24 September 2008; see also S. Carrera and E. Guild, *The French Presidency's European Pact on Immigration and Asylum: Intergovernmentalism vs. Europeanism? Security vs. Rights?*, CEPS Policy Brief No. 170, CEPS, Brussels, 2008.

³³ It is interesting to note that the ESBG proposal did not appear in the contribution that the European Commission made to the Stockholm Programme (European Commission, COM(2010) 171, op. cit.), nor in the first published draft of the Stockholm Programme that was prepared by the Swedish presidency (Council of the European Union, Multiannual Programme for an area of Freedom, Security and Justice serving the citizen (The Stockholm Programme), 14449/09, Brussels, 16 October 2009). It first appeared in the second public draft of the programme (Council of the European Union, Multiannual Programme for an area of Freedom, Security and Justice serving the citizen (The Stockholm Programme), 16484/09, Brussels, 23 November 2009, p. 51).

³⁴ See Reflection Group, *Project Europe 2030: Challenges and Opportunities*, a report to the European Council by the Reflection Group on the Future of the EU 2030, Brussels, May 2010, which states that an issue to prioritise should be to develop "a more integrated external border management system by reinforcing Frontex with a European body of specialized personnel available to support the Member States" (p. 32). The report also states that "[a]s ten[s] [of] millions of third-country nationals lawfully cross the EU's external borders every year, it is also essential to enhance control and verification mechanisms inside the EU. This would ensure that the burden of migration control is not unilaterally shifted towards the EU's external borders and the countries securing them" (p. 24).

unspoken awareness among high-level EU officials that the current institutional landscape of EU external border controls will increasingly face profound dilemmas of uniformity, dispersion and coherent application, which in the long run will not be possible to address if a more ambitious, European institutional structure is not put in place.

In addition, it is also interesting to note the permanence of the ESBG proposal in EU discourses in view of the considerable political emphasis given to the use of technology in border management activities. Technology, in particular the use of (European-wide) large-scale databases and biometric technology, is now presented as the ‘ultra-solution’³⁵ to any imagined threat to the EU’s internal security (most prominently the phenomenon of irregular immigration), without duly considering that it may end up creating more ‘insecurity(ies)’ from the perspective of fundamental rights and the rule of law. The negative implications and vulnerabilities of the Commission’s 2008 border package,³⁶ which presented a number of specific (technology-driven) policy initiatives for the future generation of IBM, has been analysed elsewhere³⁷ and is therefore not covered by this paper. Let us simply stress here that the idea of an ESBG composed of physical border guards now stands in direct opposition to certain official (and private-sector) visions calling for the reinforcement and further development of electronic frontiers in Europe, as part of a dream (or for some rather a nightmare) of a new era of ‘border control by technology’ liberated from any border guard (human) interaction.

2. The way forward: Refocusing the debate and overcoming political, legal and practical obstacles

Returning to the final outputs from the exchange of ideas on the ESBG that took place during 2001 and 2002, it is clear that the multilateral or unitary border corps model was the one finally prioritised. Neither of the premises inspiring the discussions at the time was proper for an initiative of such a nature to move forward. Many factors played a role. Among others, we highlight first, the perceived profound impacts of its establishment over the principles of national sovereignty and territoriality; second, the police and insecurity-driven approaches (mainly centred on added value for identifying and preventing ‘threats’ to national security and on ‘the national interest’) that inspired (and took over) most of the debates. This was for instance most transparently evidenced by the focus of the *Feasibility Study for the Setting up of a European Border Police*,³⁸ and third, the lack of a harmonised EU legal framework providing a common European approach and rules on border controls and founded on a common corpus of legislation.

³⁵ D. Bigo and S. Carrera, “From New York to Madrid: Technology as the Ultra-Solution to the Permanent State of Fear and Emergency in the EU”, CEPS Commentary, CEPS, Brussels, April 2004.

³⁶ European Commission, Communication, Preparing the next steps in border management in the European Union, COM(2008) 69 final, 13 February 2008.

³⁷ The package proposed three specific initiatives: first, an EU entry–exit system; second, a European electronic travel authorisation system; and third, an automated border control system. For an analysis refer to E. Guild, S. Carrera and F. Geyer, *The Commission’s New Border Package: Does it take us one step closer to a ‘cyber-fortress Europe’?*, CEPS Policy Brief No. 154, CEPS, Brussels, March 2008.

³⁸ The study emphasised the role of police and cooperation in the control of the external borders as an “expression of a sovereign instance, which in a United Europe must seek to innovate, modulate, strengthen and harmonise themselves, for a common interest in the internal security of the Union and security of its borders” (p. 5).

This paper argues that instead of trying to continue with *the same kinds* of discussions that were left in 2002,³⁹ the inclusion of the ESBG proposal in the Stockholm Programme should be seen as a unique opportunity to initiate renewed reflection on possible options for the future institutional lines of the next generation of the EU's IBM.⁴⁰ Any possible options should initially be capable of overcoming the obstacles and ambivalent (nationalistic and police-led) positions that characterised previous ESBG discussions. Moreover, the following two questions should guide future deliberations: First, what kind of 'border guard' would the EU need for what kinds of 'external border controls'? And second, what would be the added value of any new institutional initiatives in this policy domain? As this paper demonstrates, the answers to these two questions might shed light on the best strategy to tackle the legal, practical and political challenges that any new future institutional initiatives (or the further development of the current ones) would need to confront.

2.1 What kind of border guard, what kinds of border controls? The European approach on external border controls

During the last five years, the European integration processes on border policy have evolved in a highly dynamic fashion.⁴¹ Europeanisation has brought profound changes in traditional understandings of border controls and classical readings of the interplay between sovereignty and frontiers in the Union. It has also altered the *habitus* of border controls with that of state territorial borders. The EU *acquis* on external borders, and its IBM, are now part of the main legal, institutional and financial foundations (see Appendix 2 of this paper for a full list of the legislative measures adopted so far). Since 2005, Frontex has been in charge of coordinating operational cooperation among the border services of the EU member states.⁴² One year later Frontex's activities were complemented by the adoption of the Community Code on the rules governing the movement of persons across the borders (the SBC),⁴³ which offers a more transparent and common set of harmonised rules and procedures for crossing the external borders of the EU.⁴⁴ This has been accompanied by the adoption of the external borders fund in 2007,⁴⁵ which has been politically presented as a key component of the principle of solidarity on

³⁹ Proposals have been made following the same logic. See for instance, G. Callovi, *Securing External Frontiers in a Union of 25*, Policy Brief 5, Migration Policy Institute, Washington, D.C., September 2004. The paper called for the establishment of a 'EU multinational coast guard corps' as a first step towards the creation of a European corps of border guards.

⁴⁰ For a study on the origins of the IBM concept, refer to P. Hobbing (2006), *op. cit.*, pp. 155-182.

⁴¹ S. Bertozzi, *Schengen: Achievements and Challenges in Managing an Area Encompassing 3.6 million km²*, CEPS Working Document No. 284, CEPS, Brussels, February 2008.

⁴² H. Jorry, *The Construction of a European Institutional Model for the Management of Operational Cooperation at the EU External Borders: Does the FRONTEX Agency take a decisive step forward?*, CHALLENGE Research Paper No. 6, CEPS, Brussels, March 2007.

⁴³ Regulation (EC) No. 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ L 105/1, 13.4.2006.

⁴⁴ For an analysis of the SCB, refer to E. Guild, "Danger – Border under Construction: Assessing the First Five Years of Border Policy in an Area of Freedom, Security and Justice", in J.W. de Zwaan and F.A.N.J. Goudappel (eds), *Freedom, Security and Justice in the European Union, Implementation of the Hague Programme*, The Hague: T.M.C. Asser Press, 2006, pp. 45-72.

⁴⁵ Decision No. 574/2007/EC of the European Parliament and of the Council of 23 May 2007 establishing the External Borders Fund for the period 2007-2013 as part of the General Programme "Solidarity and Management of Migration Flows", OJ L 144, 6.6.2007.

border controls in an enlarged EU by financing border-crossing infrastructure, equipment and projects as well as the exchange and training of staff.

The overall legal and policy framework of the European external border system has therefore fundamentally transformed in comparison with 2002. The political attitudes of certain (previously ‘hesitant’) EU member states are also expected to have changed during the last few years (e.g. Poland is now the headquarters of Frontex). Any future institutional proposal would need to be understood within the current policy context that now substantiates, and informs, the EU *acquis* on external border controls. In particular, one of the most important consequences stemming from the gradual Europeanisation of external border-control policy has been that the level of discretion (sovereignty) enjoyed by the member states and their respective national authorities has been (and to a certain extent unexpectedly for some) inevitably affected. Despite the continual efforts of some national representatives to indicate at every possible occasion that the common external borders are those of the member states of the Union (and not of the Union itself),⁴⁶ the entry into force of the SBC has actually meant that they are no longer ‘free’ but are now under a clear legal obligation to apply a harmonised set of European rules on border checks and border surveillance.⁴⁷ The SBC has also codified a common European understanding of the ways in which border controls should be carried out across the Union, which has had deep repercussions regarding ‘who’ is to be considered a border guard and the kinds of activities and tasks falling under the scope of external border controls in Europe.

Who is a border guard in the EU? The answer to this question is far from evident. When asked about it very few people, including some EU officials, would actually come to a straightforward and commonly agreed response. When looking at the national arenas across the Schengen member states there is a widely diversified list of services, which have recently been said to amount to a total of around 400,000 officials.⁴⁸ As demonstrated by Appendix 1 of this paper, it might come as a surprise to realise that the competent law enforcement authority responsible for border controls in a majority of the national arenas is actually the police. In very few cases, such as Malta (and to a certain extent Spain), it is still the armed forces in relation to maritime border controls. Few Schengen members have a specialised agency or branch (border guard) dealing specifically with border controls outside the police services. This is only the case in Finland, Latvia, Lithuania, the Netherlands, Poland and Switzerland, where in some instances ‘border guards’ also have ‘police-related’ powers.⁴⁹ Moreover, the national services in charge of external border controls often belong to different ministries, which in a majority of the countries are the ministries of interior, but in others also include the ministry of defence (France, Italy, Norway, Portugal, Spain, Sweden and the Netherlands).

Our surprise might stem from the fact that the military and the police are authorities whose classical competences have little to do with controls over the movement of people. In liberal democratic systems, the military is supposed to intervene on defence (external security) and

⁴⁶ The most telling might be the actual name given to Frontex, which has been denominated as the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (emphasis added).

⁴⁷ Art. 2.2 of the SBC defines the external borders as “the Member States’ land borders, including river and lake borders, sea borders and their airports, river ports, sea ports and lake ports, provided that they are not internal borders”.

⁴⁸ Refer to the website European Day for Border Guards (<http://www.ed4bg.eu/index.html>). Refer also to the speech delivered by Alfredo Pérez Rubalcaba, the Spanish interior minister, on the first European Day for Border Guards (25 May 2010) on the same website.

⁴⁹ Refer for instance to the Finnish Border Guard website at http://www.intermin.fi/rvl/home.nsf/pages/index_eng.

peacekeeping activities, and the law enforcement police on fighting criminal activities, enforcing criminal law and assisting the judiciary in that respect. That human mobility has nothing to do with either war or crime gives rise to the paradox. As Bigo (2005) has shown,⁵⁰ the 25 years of discourse and practices in the Schengen regime have been accompanied by an uncontested presumption that police forces have a legitimate task in the regulation and surveillance of cross-frontier human movements. Along with the dismantling of the internal border controls and the free movement of people, there has been a process of ‘normalisation of policing migration’, which has involved an unquestioned extension of police activities to cover phenomena that go beyond classical spheres of police activity on crime control and as auxiliaries of justice acting after the committed crime. Bigo has also explained how there has been a fundamental structural extension of police force competences with new tasks “which now clearly include migration control, even if it was completely denied at the beginning of Schengen when officials declared that its sole target was criminal activity”.⁵¹ The linkage of border controls with ‘police’ (understood as a law enforcement authority) has led to an underlying presumption that the movement of people is a suspicious activity potentially linked with criminality and organised crime. It has placed certain persons on the move, especially those labelled as ‘immigrants’, at the heart of insecurity discourses and practices.

What does European law tell us about who is a border guard? When looking at the SBC, a border guard is defined in Art. 2.13 as follows: “any public official assigned, in accordance with national law, to a border crossing point or along the border or the immediate vicinity of that border who carries out, in accordance with this Regulation and national law, border control tasks”. Moreover, Recital 12 of the Preamble states that “Member States should designate the national service or services responsible for border-control tasks in accordance with their national law. Where more than one service is responsible in the same Member State, there should be close and constant cooperation between them.” This definition thus leaves things quite open and does not directly solve our dilemma. What is clear, however, is that one of the guiding principles inspiring the entire Schengen machinery, and which has been highlighted in the Schengen Border Catalogue as a ‘best practice’, is that the national border authorities should be of a civilian (non-military) nature.⁵² The Catalogue, which aims at bringing some clarity to the Schengen *acquis* and putting forward recommendations and best practices, was updated in 2008,⁵³ and states that “the competent national authority is a specialised Border Guard or Border Police force (not a military one)”.⁵⁴

The answer to our paradox might perhaps emerge when looking at the question of ‘what’ are border controls in the EU and the consequent ‘functions’ that border guards should have in this regard. The SBC does shed some light on the prevailing European approach(es) covering the nature and tasks of border controls, which considers the border checks carried out at specific

⁵⁰ D. Bigo, “Frontier Controls in the European Union: Who is in Control?”, in D. Bigo and E. Guild (eds), *Controlling Frontiers: Free Movement into and within Europe*, Farnham: Ashgate Publishing, 2005, pp. 49-99.

⁵¹ *Ibid.*, p. 83.

⁵² Council of the European Union, EU Schengen Catalogue: External Border Control, Removal and Readmission, General Secretariat DG H, Brussels, February 2002.

⁵³ Council of the European Union, Updated Schengen Catalogue on External Border Control, Return and Readmission, 3rd Draft, 15250/2/08, Brussels, 2 December 2008.

⁵⁴ Moreover, it also recommends a “[c]entralised and clearly structured responsible public authority with a direct chain of command between Border Guard units at national, regional and local level, ensuring a common approach to border control, a unified planning system and an extensive and fast data flows at all levels of organization” (*ibid.*, p. 18).

crossing points to be primarily concerned with ensuring that people, including their means of transport and the objects in their possession, may be authorised to enter the territory of the member states or authorised to leave it.⁵⁵ The main principle prevailing in the SBC is that of “ensuring that entry into and exit from the territory of Member States is made in a regulated and orderly fashion” and “facilitating fluency of traffic and controls”.⁵⁶ Checking whether individuals on the move have the proper identification or travel documents, and refusing entry if otherwise, is thus the key function entailed in what border checks are mainly supposed to be about in European law.⁵⁷ This has been recently confirmed by Commissioner Malmström:

*Border crossings must be smooth and easy for the vast majority of people who are in full compliance with entry requirements. Long waiting times discourage people from travelling and has a negative impact on trade. It must be possible to attain a high level of security without creating excessive and lengthy procedures for each traveller.*⁵⁸ (Emphasis added.)

It is necessary to recognise that there has been a constant line of EU official discourses acknowledging (or rather artificially constructing) the perceived links between border crossing and criminal activities (the trafficking of human beings and even ‘unauthorised entry’, drugs and other illicit goods, corruption, etc.), which has been qualified as an ‘insecurity continuum of threats’⁵⁹ and is now reflected in the EU internal security strategy.⁶⁰ Such an approach also negatively fosters the criminalisation of human mobility.⁶¹ At the same time, it is also true that

⁵⁵ According to Art. 2.10 (Regulation (EC) No. 562/2006, op. cit.), border checks are to be understood as “checks carried out at border crossing points, to ensure that persons, including their means of transport and the objects in their possession, may be authorised to enter the territory of the Member States or authorised to leave it”. Refer also to Arts. 7-11 of the SBC, which elaborate and provide the rules covering border checks on persons. ‘Border surveillance’ is defined as “surveillance of borders between border crossing points and the surveillance of border crossing points outside the fixed opening hours, in order to prevent persons from circumventing border checks”. Finally, refer also to Art. 12 of the SBC, which deals specifically with border surveillance rules.

⁵⁶ Council of the European Union, Integrated Border Management: Strategy Deliberations, 13926/06, Brussels, 13 October 2006, p. 5.

⁵⁷ To this the SBC adds the category of ‘border surveillance’ activities, the main purpose of which is stated in Art. 12 of the SBC, i.e. that they are intended to “prevent unauthorised border crossings, to counter cross-border criminality and to take measures against persons who have crossed the border illegally”.

⁵⁸ See footnote 5, *supra*.

⁵⁹ See D. Bigo, *Police en Réseaux: L’expérience européenne*, Paris: Presses de Sciences Po, 1996, pp. 258-266; see also D. Bigo, “Security and Immigration: Toward a Critique of the Governmentality of Unease”, *Alternatives: Global, Local, Political*, Vol. 27, Special Issue, February 2002, pp. 63-92.

⁶⁰ Council of the European Union, EU Internal Security Strategy, 6870/10, Brussels, 25 January 2010. The strategy states that it “lays out a European security model, which integrates among others action on law enforcement and judicial cooperation, border management and civil protection” (p. 1). The first draft of the strategy has identified the following as “the main crime-related risks and threats facing Europe today:...terrorism, serious and organised crime, drug trafficking, cyber-crime, trafficking in human beings, sexual exploitation of minors and child pornography, economic crime and corruption, trafficking in arms and cross-border crime” – see Council of the European Union, Draft Internal Security Strategy for the European Union: “Towards a European Security Model”, 7120/10, Brussels, 8 March 2010 (p. 2). It is also striking to see that ‘cross border crime’ is defined as follows: “such as petty or property crime, often carried out by gangs, when it has a significant impact on the daily lives of people in Europe” (p. 6).

⁶¹ On the tensions between the criminalisation of undocumented migration and the respect of fundamental human rights refer to S. Carrera and M. Merlino, *Undocumented Immigrants and Rights in the EU*:

concerning the nexus of freedom of movement and policing in the scope of the Schengen regime, there has also been another consistent official line in EU policy and law that has traditionally distinguished between policies covering ‘border crossing and checks’ from those on ‘police cooperation’. Such an approach finds its most tangible expression in the Treaties and now even in the Stockholm Programme.

Before the entry into force of the Treaty of Lisbon in December 2009, the EU’s AFSJ was split between the first pillar (Title IV of the EC Treaty, “Visas, Asylum, Immigration and other policies related to free movement of persons”) and the third pillar (Title VI of the Treaty on European Union (TEU), Police and Judicial Cooperation in Criminal Matters). The legal basis for measures on crossing the external borders was found in Art. 62.2 EC Treaty (first pillar), which was distant from those provisions on police cooperation “for the prevention, detection and investigation of criminal offences” in Art. 30 TEU (third pillar). Even though the ‘formal’ end of the first–third pillar divide in the AFSJ as a result of the Treaty of Lisbon has been celebrated,⁶² the domain of police cooperation represents a paradigmatic example in which the former ‘pillarisation’ remains valid.

It could even be argued that the Lisbon Treaty has made that distinction more evident. Policies on “border checks” are now to be found in Chapter 2 of the new Title V on “An Area of Freedom, Security and Justice” (Arts. 77-80) of the TFEU, while those dealing with police cooperation are in Chapter 5 (Arts. 87-89). Furthermore, the maintenance of law and order and the safeguarding of internal security remain clearly within the remits of national competence (Art. 72 TFEU), and subject to an intergovernmental method of cooperation (Art. 73 TFEU). The ‘third-pillar spirit’ does in this way continue to greatly inspire any supranational cooperation taking place in this domain, where the European Parliament will (only) be consulted and the right of initiative will be shared between the Commission and a quarter of the member states.⁶³ Also, when moving within the range of police measures on operational cooperation, “involving all the member states’ competent authorities, including police, customs or other specialized law enforcement services in relation to the prevention, detection and investigation of criminal offences”, they are still subject to unanimity, with no right of initiative by the European Commission and consultation with the European Parliament. Art. 276 TFEU also restricts the jurisdiction of the Court of Justice “to review the validity *or proportionality* of operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security” (emphasis added). Last but not least, it is striking to note that according to Art. 10.1 of Protocol No. 36 on Transitional Provisions attached to the Lisbon Treaty, during a transitional period of five years from its entry into force the competences of the European Commission and the Court of Justice shall remain the same as before concerning (respectively) the enactment and interpretation of legal acts on police cooperation.⁶⁴

Addressing the Gap between Social Sciences Research and Policy-making in the Stockholm Programme, CEPS Liberty and Security in Europe Series, CEPS, Brussels, December 2009.

⁶² S. Carrera and F. Geyer, “The Reform Treaty and Justice and Home Affairs: Implications for the Common Area of Freedom, Security and Justice”, in E. Guild and F. Geyer (eds), *Security versus Justice: Police and Judicial Cooperation in the European Union*, Farnham: Ashgate Publishing, 2008, pp. 289-308.

⁶³ See Arts. 74 and 76 TFEU.

⁶⁴ According to Art. 10.2 of the same Protocol these limitations will not apply to amendments of already existing (pre-Lisbon Treaty) legislative acts.

The distinction between ‘border checks’ and ‘police cooperation’ policies within the Treaties thus accentuates the paradoxes that police involvement in border checks pose from a European perspective. Notwithstanding that the Treaties stipulate a predominant national competence in the field of police, the controls carried out now by the (police) border services of the EU member states when exercising them are subject and owe allegiance to the SBC. If border controls are carried out by police forces whose main functions are considered to be safeguarding internal security and maintaining law and order, how can the EU effectively ensure that the SBC is complied with if they are de facto exercising some tasks falling into the sphere of national competence? The involvement of police-related forces in border controls therefore blurs the boundaries between the national and European levels in areas where Europeanisation has already taken place. The current national scenario might also open up important questions about the compliance of EU member states’ authorities (depending on who is involved and what their law enforcement training and mindset is) with the principles of legal certainty and of faithful cooperation, as well as their duty to fulfil their obligations under EU law in the context of the common external-border system, such as the principle of proportionality.

A similar understanding of border controls has also materialised in the establishment of Frontex, an agency specifically covering the coordination of border-related cooperation and the application of the SBC, and differing from those existing in the field of police cooperation – i.e. Europol (the European Police Office)⁶⁵ and CEPOL (the European Police College).⁶⁶ If border controls had been considered to come under the remit of the police, then why was it necessary to set up a brand new (separate) EU agency in charge of their coordination and promotion?

The Stockholm Programme has gone in the same direction by outlining three separate EU policy priorities for the next five years: first, “A Europe that protects”; second, “Access to Europe in a globalised world”; and third, “A Europe of responsibility, solidarity and partnership in migration and asylum”. The “integrated management of the external borders” has not been included in either the first section dealing with internal security or in the third one on migration and asylum. It has been placed between them. The section on “Access to Europe in a globalised world” concentrates on the development of “efficient and effective” access by individuals to Europe, “while guaranteeing the security for their citizens”, and the construction of border management policies to serve this goal. In contrast with its predecessor (The Hague

⁶⁵ Europol has been operation since 1994 and has played a key informative, supporting and analytical role in the field of European police cooperation. Refer to Council Decision No. 2009/371 of 6 April 2009 establishing the European Police Office (Europol), OJ L 121/37, 15.5.2009. According to Art. 5 of the Decision, among others Europol’s tasks are the following: to collect, process, analyse and exchange information and intelligence; to aid investigations in the member states; to ask the competent authorities of the member states concerned to initiate, conduct or coordinate investigations; and to suggest the setting-up of joint investigation teams in specific cases. Refer to W. Bruggeman, “A Vision on Future Police Cooperation with special focus on Europol”, in J.W. de Zwaan and F.S.N.J. Goudappel (eds), *Freedom, Security and Justice in the European Union: Implementation of the Hague Programme*, The Hague: T.M.C. Asser Press, 2006, pp 203-220.

⁶⁶ Refer to Council Decision No. 2005/681 of 20 September 2005 establishing the European Police College (CEPOL), OJ L 256/63, 1.10.2005. Art. 5 of the Decision states that the aim of CEPOL is “to help train the senior police officers of the Member States by optimising cooperation between CEPOL’s various components. It shall support and develop a European approach to the main problems facing Member States in the fight against crime, crime prevention, and the maintenance of law and order and public security, in particular the cross-border dimensions of those problems.” For more information refer to the CEPOL website (www.cepola.eu). According to the website, “CEPOL’s mission is to bring together senior police officers from police forces in Europe – essentially to support the development of a network – and encourage cross-border cooperation in the fight against crime, maintenance of public security and law and order by organising training activities and research findings”.

Programme), the Stockholm Programme has made a distinction between the conditions under which human mobility can take place in Europe (rules and practices surrounding border crossing), and the substantive and operational actions destined to deal with cross-border crime, where agencies such as Europol would be expected to play a role. Therefore, it can be argued that the Stockholm Programme has sent a political message as to how the EU's external border policy should be progressively understood, gradually distancing itself from 'internal security' (police) venues towards a policy dedicated to high-standard and rule of law-compliant administrative checks on human mobility.⁶⁷

These are the premises upon which it should be expected that the future generation of IBM would be built, including any long-term institutional debates. Yet, what would be the added value of any new initiative in contrast with the current European landscape of external border controls and the existing proposals presented by the European Commission?

2.2 Added value: Addressing the unfinished elements of an EU external border policy

The EU *acquis* on external borders has rapidly evolved (especially) during the last five years and now benefits from its main policy foundations. That notwithstanding, the current generation of the EU's policy on external border controls is affected by a number of unfinished elements, which, because of their incomplete character, constitute (and function as) major legal and practical deficits for the entire EU border-policy regime. They turn around the following three axes: first, a lack of (efficient, independent and publicly available) evaluation mechanisms on whether the EU external border *acquis* is being correctly managed and practiced,⁶⁸ as well as its compatibility with the SBC; second, the effectiveness of the regime at the point of ensuring the protection of fundamental rights and guarantees enshrined in the EU Charter of Fundamental Rights and the SBC; and third, the over-politicisation and dependency of the system on member states and its weak democratic accountability. Any evaluation of the feasibility of setting up new institutional structures for the EU's IBM should focus on a wider (independent) study and public deliberation targeting the unfinished elements still pertaining to the current shapes and institutional components of the EU's IBM strategy for the common external borders, which we now turn to analyse.

⁶⁷ While the IBM is expressly mentioned in the section dedicated to the internal security strategy (which falls under "A Europe that protects"), it has been done in such a way that the former is not conceived to come directly under the remit of internal security priorities (security professional cooperation and exchange of information) but is rather at the service of the latter.

⁶⁸ An evaluation process has taken place since 1998 in the context of the so-called 'Schengen evaluation mechanism' to verify that the Schengen *acquis* has been applied by the member states, but the latter has remained purely in the hands of the member states (with the Commission participating only as an observer and the European Parliament being completely absent). So far, the results have remained secret. The efficiency and consistency of the existing Schengen peer-review system and the actual workability (or existence) of any 'follow-up' mechanism remains contested. In 2009, the European Commission presented a proposal to change and improve the current evaluation mechanism (which is still under discussion within the Council), concerning which the shifting of evaluation competences to the European Commission has been a matter of discontent among certain member states' representatives. Refer to Council of the European Union, Proposal for a Council Regulation on the establishment of an evaluation mechanism to verify the application of the Schengen *acquis*, 7348/09, Brussels, 9 March 2009. Refer also to Council of the European Union, Draft Council Regulation and draft Council Decision on the establishment of an evaluation mechanism to verify the application of the Schengen *acquis* – Proposal for the way ahead, 15339/1/09, Brussels, 16 November 2009.

2.2.1 Evaluation

The external borders policy of the EU is been founded on several important assumptions, some of which remain at issue. One of them is the effectiveness of the ways in which the EU can ensure the implementation and correct application of European law across the national arenas, which constitutes a core element for fostering mutual trust and confidence. The SBC has taken the form of a regulation (which is binding upon the participating member states and directly applicable) and has been in force since 2006. Up to now, there has been no publicly available evaluation of whether EU member states' authorities are properly applying its rules and procedures on the ground.⁶⁹ As has been demonstrated in other important fields of European law,⁷⁰ the current monitoring mechanisms at the EU level are proving to be insufficient to guarantee the full, consistent, timely and efficient implementation of European law or its practical application (and good administration) by the member states and their national, regional and local authorities.⁷¹

The need to ensure the correct application of the SBC is exacerbated when looking at the heterogeneity of the very nature of the EU's common, external territorial border. While EU official discourses keep on using phrases such as "coherent and integrated border management", partly because of the diversities in the territorial components of the EU external borders and the false presumption about their coherency and stability, the latter cannot be said to exist as a clearly demarcated geographical line or space differentiating 'an inside' from 'an outside'. This goes along with the fact that the external borders of the EU do not correspond with the territorial contours of the Schengen system. At present, there are only 22 EU member states that are part of the Schengen Area⁷² and four non-EU member states (Iceland, Norway, Switzerland and Liechtenstein). The *imagined* uniform, EU external border is rather a patchwork across a hugely fragmented field of points of entry and scattered practices of control. The SBC has tried to put 'some order' to this by stipulating that the crossing of the external borders is *only* permitted (with few exceptions) through specific border crossing points and during fixed hours.⁷³ The EU member states have been requested to provide information for the list of border crossing points (at air, sea and land borders) compiled by the European Commission.⁷⁴ On the basis of the

⁶⁹ Art. 38 of the SBC only foresaw the presentation of a report by the European Commission to the European Parliament and the Council by October 2009 on the application of Title III of the SBC, which deals with 'internal borders'.

⁷⁰ S. Carrera, S. and A. Faure Atger, *Implementation of Directive 2004/38 in the Context of EU Enlargement: A Proliferation of Different Forms of Citizenship?*, CEPS Liberty and Security in Europe Series, CEPS, Brussels, April 2009.

⁷¹ E. Guild, S. Carrera and A. Faure Atger, *Challenges and Prospects for the EU's Area of Freedom, Security and Justice: Recommendations to the European Commission for the Stockholm Programme*, CEPS Working Document No. 313, CEPS, Brussels, April 2009. See also E. Guild, S. Carrera and D. Bigo, *The CHALLENGE Project: Final Policy Recommendations on the Changing Landscape of European Liberty and Security*, CHALLENGE Research Paper No. 16, CEPS, Brussels, September 2009.

⁷² Ireland and the UK negotiated protocols that have permitted them to remain outside the EU rules on borders. Bulgaria, Cyprus and Romania only partially apply the Schengen *acquis* at the moment, and checks are still carried out at the borders of these three member states. Denmark is in the Schengen area but, for certain provisions, it can choose whether to apply new decisions building upon the Schengen *acquis* in its national law. On the position of the UK, Ireland and Denmark in relation to the Schengen *acquis*, refer to S. Peers, *EU Justice and Home Affairs Law*, Oxford European Community Law Library Series, Oxford: Oxford University Press, 2006, pp. 57-60.

⁷³ See Art. 4 of the SBC (Regulation (EC) No. 562/2006, op. cit.).

⁷⁴ See the Update of the list of border crossing points referred to in Art. 2.8 of Regulation (EC) No. 562/2006 of 15 March 2006 establishing a Community Code of the rules governing the movement of

information provided, it is striking to see that there are thousands of entry points dispersed across their territories, which (even beyond air borders) are far from corresponding to the shared imagery on Europe's external border, in contrast with those delineated on Europe's map.

The fragmentation and dispersion of the EU external border goes along with the diversity of national authorities in charge of border controls highlighted in section 2 above. There is a widely diversified group of services responsible for border-control activities across the EU, which only adds to the uncertainties concerning the correct and harmonious application of EU law on external borders depending on the kind of authority and service involved. Moreover, that there is neither a generally shared notion of what 'police' means and comprises (within and beyond law enforcement activities) across the different national arenas in the EU does not help either. The main concern here is not only that in some member states the authorities in charge of border controls still have a rather ambiguous nature (between border guards and policemen). It also pertains to ensuring a clear and straightforward division of responsibilities and tasks in compliance with the SBC, such as those of 'border policeman', who are perhaps not supposed to be trained on European border crossing rules but might be more worried about 'internal security matters' and 'the fight against' (and sometimes even anticipate) potentially criminal activities.⁷⁵

The need to develop independent and politically accountable evaluations of the ways in which the EU external borders are being managed is also crucial when looking at the results of independent academic research financed by the European Commission. As an illustration, a monitoring report published by the Stefan Batory Foundation in 2008 entitled *Gateways to Europe – Check points in the EU external land border*,⁷⁶ supported by a project under the 6th Framework Research Programme of DG Research called "CHALLENGE" (the Changing Landscape of European Liberty and Security)⁷⁷ provided an independent overview of the conditions and operational practices prevailing in a selection of EU border crossing points between July and September 2007. The report covered 19 border crossing points in Bulgaria, Estonia, Finland, Hungary, Poland, Romania and Slovakia. The emphasis of the report was on those aspects that "still need to be changed". Among the problems identified the following can be underlined: first, poor infrastructure at the border crossing points; second, a lack of access to information about legal rules and border crossing procedures and a lack of communication between travellers and border staff (due to the unsatisfactory foreign language skills of border guards); and third, an insufficient application of non-discrimination rules. All these findings challenge the effective implementation of the SBC on the ground.

persons across borders (Schengen Borders Code), OJ C 316/01, 28.12.2007. Refer also to the Update of the list of border crossing points, OJ C 37/06, 14.2.2009.

⁷⁵ The Council Conclusions on 29 measures for reinforcing the protection of the external borders and combating illegal immigration of February 2010 invited Frontex to develop "an "Erasmus type pilot programme for border guards in order to lay the foundation for a European culture of border guards of the Member States". (See Council of the European Union, Council Conclusions on 29 measures for reinforcing the protection of the external borders and combating illegal immigration, Justice and Home Affairs 2998th Council meeting, Brussels, 25 and 26 February 2010.) Yet, in light of the complex patchwork of national and regional services that are currently responsible for the control of the common European external border, and especially in view of the widespread 'police nature' of the latter, it is not clear whether this kind of initiative is of any added value.

⁷⁶ Stefan Batory Foundation, *Gateways to Europe – Checkpoints on the EU External Land Border*, Monitoring Report, Stefan Batory Foundation, Warsaw, April 2008.

⁷⁷ See the CHALLENGE website (www.libertysecurity.org). See also D. Bigo, S. Carrera, E. Guild and R.B.J. Walker, "The Changing Landscape of European Liberty and Security: The Mid-Term Report of the CHALLENGE project", *International Social Science Journal*, Vol. 192, Blackwell Publishing Limited for UNESCO, 2008.

The complexity of the EU's external borders, the blurring and narrow picture of competent authorities involved in border controls and the various deficits still affecting border control practices impact on the efficiency and legitimacy of the entire European border system, which are central to its survival and added value.

2.2.2 Fundamental rights and guarantees

Art. 6 TEU (as revised by the Treaty of Lisbon) has conferred a legally binding nature on the Charter of Fundamental Rights of the European Union (hereinafter the 'Charter'),⁷⁸ which now has the same legal value as the Treaties. The Charter has included a new fundamental right to asylum in Art. 18 and has reconfirmed the fundamental status of the principle of *non-refoulement* within the EU legal system in Art. 19 (protection in the event of removal, expulsion or extradition). Art. 41.1 of the Charter grants to everyone whose rights and freedoms under EU law have been violated the right to an effective remedy before a tribunal. The right to receive an individual examination of an application for asylum or other forms of protection also arises from its Art. 19.1, which prohibits collective expulsion. In addition, Art. 6 TEU has conferred to the Union the possibility to accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). The Commission tabled the mandate for accession on 17 March 2010, and the Justice and Home Affairs Council Meeting of 23 April 2010 called for its adoption "as soon as possible".⁷⁹ All EU activities, including those involved in border checks and the surveillance of external border crossings, must therefore be in full compliance with the Charter and the ECHR.

The EU's commitment to the respect of fundamental rights has also been included in the SBC. Recital 12 provides that the Code is compatible with fundamental rights and the principles recognised in the Charter. The same Recital states that it "should be applied in accordance with the Member States' obligations as regards international protection and *non-refoulement*". The SBC provides a number of guarantees of special relevance from the perspective of the protection of fundamental rights of third-country nationals (TCNs) on the move and asylum seekers. These can be synthesised as follows: first, during the performance of their duties border guards must fully respect human dignity, the principle of proportionality and non-discrimination on the basis of "of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation".⁸⁰ Second, in the event of refusal of entry, the person has the right to be informed of the precise reasons for refusal based on a substantiated decision, which shall be given in a standard form.⁸¹ Third, persons refused entry have the right of appeal, which shall be conducted "in accordance with national law".

Furthermore, TCNs will need to be given a written indication of the contact points able to provide information on representatives competent to act on their behalf. The appeal, however, will not have a suspensive effect on the decision refusing entry.⁸² Finally, the same provision establishes that

⁷⁸ Charter of Fundamental Rights of the European Union, OJ C 83/389, 30.3.2010.

⁷⁹ See Council of the European Union, Justice and Home Affairs 3008th Council Meeting, 8920/10, press 88, Brussels, 23 April 2010. The Council stated that "[a]mong the outstanding issues are the establishment of a 'co-respondent' mechanism, the safeguarding of the competences of the European Court of Justice (ECJ), the accession of the EU to ECHR protocols as well as the EU negotiator".

⁸⁰ Art. 6, Regulation (EC) No. 562/2006, op. cit.

⁸¹ Ibid., Art. 13.2.

⁸² Ibid., Art. 13.3.

Without prejudice to any compensation granted in accordance with national law, the third-country national concerned shall, where the appeal concludes that the decision to refuse entry was ill-founded, be entitled to correction of the cancelled entry stamp, and any other cancellations or additions which have been made, by the Member State which refused entry. (Emphasis added.)

Beyond the formal value and scope of the rights and guarantees stipulated by the Charter and the SBC, the compatibility between some practices in external border controls and the former might not prove to be as crystal clear as some might contend (or wish). Some EU external border-control activities, and in particular (yet not only) those coordinated by Frontex, have been subject to a series of concerns expressed by academics and civil society all across Europe.⁸³ They have alluded to and provided evidence of⁸⁴ the tensions that certain EU border practices provoke for the protection fundamental human rights, the principle of non-discrimination and the liberties of individuals on the move. There have been three major issues of contention, all of which are relevant for Frontex joint operations: i) their impact on the fundamental rights of asylum seekers and refugees (the principle of *non-refoulement*, human dignity and access to asylum procedures); ii) the lack of clear rules of engagement for joint patrolling and the disembarkation of rescued persons at sea; and iii) the lack of evidence concerning the practical implementation of the SBC guarantees and the tensions of Frontex activities with the principle of non-discrimination.

2.2.2.1 *Fundamental rights of asylum seekers and refugees*

The incomplete nature of the respect by Frontex joint-surveillance operations of the fundamental rights of asylum seekers and refugees was confirmed in the presentation by the Commission (at the end of 2009) of a proposal for a Decision supplementing the Schengen Borders Code as regards the surveillance of the external sea borders in the context of operational cooperation coordinated by Frontex (COM(2009) 658).⁸⁵ The proposal highlighted that its aim was “to make the duty to respect fundamental rights and the rights of refugees

⁸³ Refer to the final results of the CHALLENGE project published in D. Bigo, E. Guild, S. Carrera and R.B.J. Walker (eds), *Europe’s 21st Century Challenge: Delivering Liberty*, Farnham: Ashgate Publishing, forthcoming. By way of example see also Human Rights Watch, *Pushed back, Pushed around: Italy’s Forced Return of Boat Migrants and Asylum Seekers, Libya’s Mistreatment of Migrants and Asylum Seekers*, Human Rights Watch, New York, September 2009 (www.hrw.org). Frontex reacted to this by saying that

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

See Frontex News Releases, 21 September 2009 (http://www.frontex.europa.eu/newsroom/news_releases/art70.html).

⁸⁴ P. Ceriani, C. Fernández, A. Manavella, L. Rodeiro and V. Picco, *Report on the Situation on the Euro-Mediterranean Borders (From the Point of View of the Respect of Human Rights)*, CHALLENGE Working Paper, University of Barcelona, 2009 (<http://www.libertysecurity.org/article2497.html>).

⁸⁵ Council Decision No. 2010/252/EU of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 111/20, 4.5.2010.

explicit in FRONTEX Agency surveillance operations and to *introduce a prohibition on refoulement* of those in danger of persecution or other forms of inhuman or degrading treatment...*regardless of the status of the waters the people were in*" (emphasis added).

The Commission also admitted that most of the operations by Frontex turned out to be "search and rescue operations", and therefore it was necessary to provide a proper legal framework for rendering assistance at sea and the responsibilities of the border authorities involved in the Frontex operation, as well as for 'where' these persons should be disembarked. The proposal for a Decision was based on Art. 12 of the SBC, which allows the Commission to adopt rules on border surveillance outside the ordinary legislative procedure envisaged by the Treaties. The Council adopted Decision No. 2010/252/EU in April 2010, something that has provoked the Committee of Civil Liberties, Justice and Home Affairs (LIBE Committee) of the European Parliament to decide on 10 May 2010 to challenge its validity before the Court of Justice in Luxembourg for annulling the Decision on the basis of the inadequacy of the procedure.⁸⁶

Apart from these open procedural matters, there are some critical aspects that need to be underlined. First, it is surprising that it has taken five long years since the start of Frontex joint operations for the EU to start taking 'seriously' the various allegations concerning their fundamental rights implications and to make the duty to respect fundamental rights "explicit" in that context. Second, it is also striking to see that the Decision aims at introducing the prohibition of *refoulement*, when in fact this is already an essential component of customary international law and EU asylum law⁸⁷ and as such has been legally binding upon EU member states and Frontex since the very start of any EU border practices. Third, it is equally an issue of concern that only as of now the EU member states are requested to ensure that the border guards participating in surveillance operations are properly trained on relevant human rights and refugee law as well as the international regime on search and rescue.

A fourth critical point relates to Part II of the Annex of the Decision, which covers "Guidelines for search and rescue situations and for disembarkation in the context of sea border operations coordinated by the Agency". The latter can be seen as 'soft law', and thus not legally binding for (or enforceable upon) the EU member states. The general rule in the guidelines, subject to conditions and exceptions, is that participating units shall provide assistance to any vessel or person in distress at sea "regardless of the nationality or status of such a person or the circumstances in which that person is found". The rules on disembarkation have been one of the major points of contention for countries like Malta, which declared that if the Decision was going to be adopted it would no longer participate in any Frontex joint operation.⁸⁸ The reason for Malta's reaction was the general principle in the allocation of responsibility for disembarked persons stipulated in the guidelines, according to which

[w]ithout prejudice to the responsibility of the Rescue Coordination Centre, and unless otherwise specified in the operational plan, priority should be given to disembarkation in the third country from where the ship carrying the persons departed or through the territorial waters or search and rescue region of which that ship transited and if this is not possible, priority should be given to disembarkation

⁸⁶ The European Parliament has recommended that the Court retain the effects of the Decision until a new legislative act is adopted.

⁸⁷ G.S. Goodwin Gill and J. McAdam, *The Refugee in International Law*, Third Edition, Oxford: Oxford University Press, 2007, p. 245.

⁸⁸ F. Vella and D. Lindsay, "Malta to no longer host Frontex Missions...PN, PL MEPS trade blows after EP vote", *Malta Independent Online*, 20 June 2010 (<http://www.independent.com.mt/news.asp?newsitemid=103632>).

*in the host Member State unless it is necessary to act otherwise to ensure the safety of these persons. (Emphasis added.)*⁸⁹

While the Decision has clarified some of the rules and principles that should be at the heart of any Frontex joint operation at sea, the current situation continues to be rather unsatisfactory from a fundamental rights viewpoint for several reasons. Among them are the non-legally binding nature of the guidelines on search and rescue and their narrowness concerning which member state will ultimately be responsible for the disembarkation of rescued persons. Furthermore, the Decision does not cover the respect of fundamental rights across the different phases through which the border controls of the common external borders take place in both border surveillance and border checks.

The measure does not deal for instance with the implications of joint maritime operations beyond EU sea borders in the maritime territory of non-EU countries (such as Senegal, Mauritania and Libya) with which the EU cooperates through bilateral agreements (that remain secret and far from a proper democratic accountability at the national or European level) in preventive pre-border surveillance, wherein the goal is to reduce the number of departures of ‘would be’ asylum seekers, refugees and irregular immigrants.

This ‘external dimension’ of EU maritime border surveillance is actually of central importance to Frontex’s activities, even though the SBC does not include any express legal provision on the possibility for diverting boats away from the EU external maritime borders. As stated in the latest Frontex *General Report 2009*, one of the main factors playing a role in the decrease of the number of irregular entries to the EU by sea in 2009 was the ‘effectiveness’ of bilateral cooperation agreements with non-EU countries of departure (such as Libya, Senegal and Mauritania). The report says that these “were very successful in reducing the number of departures of illegal migrants from Africa”.⁹⁰ The compatibility of the preventive rationale guiding pre-border surveillance practices in the maritime territory of non-EU countries with the principle of *non-refoulement* and the fundamental rights of asylum seekers and refugees is questionable, however.⁹¹ It presumes that any person leaving these countries is by definition (even before entering EU territory) an irregular immigrant. These practices are in tension with Europe’s duties in light of the 1951 Geneva Convention on the Status of Refugees, the ECHR and the Charter as well as EU asylum law.⁹²

In addition, the responsibility for fundamental rights protection does not end at the EU external maritime borders, but rather goes as far as EU border surveillance effectively takes place, including not only the high seas but also the maritime territory of non-EU countries. The extraterritoriality of the duty to respect fundamental human rights has been confirmed by the European Court of Human Rights of Strasbourg, which has declared that the concept of

⁸⁹ See point 2.1 of Council Decision No. 2010/252/EU, op. cit.

⁹⁰ See p. 5 of the report.

⁹¹ S. Carrera, *The EU Border Management Strategy: FRONTEX and the Challenges of Irregular Immigration in the Canary Islands*, CEPS Working Paper No. 261, CEPS, Brussels, March 2007.

⁹² A. Faure Atger, “Strengthening EU Borders at the Expense of the Fundamental Right of Asylum? The Externalisation of EU’s Asylum Policy”, in E. Fabry and G. Ricard-Nihoul (eds), *The Contribution of 14 European Think Tanks to the Spanish, Belgian and Hungarian Trio Presidency of the European Union*, Think Global – Act European (TGAE), Notre Europe, Paris, 2010, pp. 112-116.

jurisdiction⁹³ established in the ECHR extends beyond member states' national territories wherever the latter exercise authority or control over a territory or individuals.⁹⁴

All these elements raise serious questions about the effectiveness of the European fundamental rights regime in how the EU's external border policy is being applied by the member states and Frontex. Decision No. 2010/252/EU clearly does not provide a satisfactory answer to a majority of them. It is interesting to note that the Annual Work Programme for 2010 of the European Union Agency for Fundamental Rights (FRA), entitled "Helping to make fundamental rights a reality for everyone in the EU", stated that "[t]here are limited materials that describe the treatment of third country nationals at the external EU borders. Organisations mandated to protect specific groups of persons, such as UNHCR, have highlighted the practical obstacles that asylum-seekers may face in accessing asylum procedures, including their access to redress (complaints mechanisms and follow-ups)."⁹⁵ In light of this, the FRA will launch a research project focusing on the treatment of TCNs at the EU's external borders, which will aim at providing information about the "realities on the ground" and the practical application of the SBC.⁹⁶

2.2.2.2 *Administrative guarantees and the principle of non-discrimination*

Another unsettled issue is the extent to which the procedural guarantees foreseen by the SBC are being duly implemented on the ground in cases where entry is refused to TCNs. There is no indication that individuals who are refused entry at the external borders receive a substantiated decision in writing, stating the reasons for refusal. Even more unclear is the implementation of the duty to inform applicants of how they should exercise their right of appeal. The fact that the right of appeal has no suspensory effect puts TCNs in a vulnerable position whereby they are largely dependent upon a representative who will act on their behalf before the pertinent national authorities. A further issue of concern is that of discrimination. The above-mentioned *Gateways to Europe* study carried out by the Stefan Batory Foundation found out that the discriminatory treatment of travellers was manifested in long waiting times in non-EU queues, disrespectful means of address and detailed inspections of private property. Testimonies by travellers alluded to situations in which both customs officers and border guard officers engaged in discriminatory practices. Some TCNs declared to have received "condescending or even

⁹³ For a study of border zones of policing in maritime spaces beyond the territory of the state refer to T. Basaran, "Security, Law, Borders: Spaces of Exclusion", *International Political Sociology*, Vol. 2, No. 4, December, 2008, pp. 339-354.

⁹⁴ See European Court of Human Rights, *Banković v. Belgium*, N. 52207/99, 12 December 2001, para. 67. See also M.T. Gil-Bazo, "The Practice of Mediterranean States in the Context of the European Union's Justice and Home Affairs External Dimension", *International Journal of Refugee Law*, Vol. 18, Nos. 3/4, September/December, 2006, pp. 571-600; and also A. Fischer-Lescano, *Border Controls at Sea: Requirements under International Human Rights and Refugee Law*, European Centre for Constitutional and Human Rights, Berlin, September 2007; and European Council on Refugees and Exiles (ECRE), *Defending Refugee's Access to Protection in Europe*, ECRE, Brussels, December 2007, pp. 23-24; and also A. Klug and T. Howe, "The Concept of State Jurisdiction and the Applicability of the Non-refoulement Principle to Extraterritorial Interception Measures", in B. Ryan and V. Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges*, Leiden: Martinus Nijhoff Publishers, 2010, pp. 69-102.

⁹⁵ European Agency for Fundamental Rights (FRA), *Annual Work Programme 2010, Helping to make Fundamental Rights a Reality for Everyone in the EU*, FRA, Vienna, October 2009, p. 9.

⁹⁶ The work programme also states that "[t]he findings could inform, amongst other things, discussions concerning whether there is a need to complement the Schengen Borders Code with practical measures to enhance respect for fundamental rights" and that the research will be carried out in cooperation with Frontex and other organisations such as UNHCR (*ibid.*, p. 9).

insulting remarks from officers as they inspected documents and asked questions” and to have been treated disproportionately differently compared with EU citizens on the move, with over-detailed personal inspections considered to fall within the category of harassment.⁹⁷

Some of the Frontex operations also need to be assessed from a non-discrimination perspective. By way of illustration, the Frontex Joint Operation HYDRA (Illegal Chinese Migration by air)⁹⁸ led to the apprehension of 291 Chinese nationals during April-May 2007. In the same vein, a joint operation called ‘NIRIS’ was carried out during a little over a week in June 2007 at a selection of the air and sea entry points of the following participating states: Denmark, Estonia, Finland, Germany, Latvia, Lithuania, Norway, Poland and Sweden. Its main objective was to “decrease the level of illegal immigration from China and India to and via the Baltic Sea Region by strengthening the border controls at sea, land and air borders”.⁹⁹ During the operation, a total of 579 persons were interviewed (273 Chinese nationals and 306 Indian nationals), which resulted in the detection of only 20 irregular border crossings and 16 refusals of entry. These two joint operations show how difficult the relationship is between these operations and the principle of non-racial discrimination enshrined in Art. 6 of the SBC.¹⁰⁰

2.2.3 Politicisation, dependency and lack of accountability

Another ‘unfinished element’ characterising the current EU strategy for external border controls is its high level of sensitivity to (and dependency on) politics and discretion at both the national and European levels. A good example of the politicisation and dependency driving EU policy and practices on external borders is Frontex. Since its kick-off the Agency has been subject to constant demands for action and calls for increasing its budget and reinforcing its competences, which have not as often been accompanied by calls for strengthening its democratic, legal and judicial accountability.

2.2.3.1 The budget

The Agency’s budget has increased dramatically during the last five years: from €6 million in 2005, to €19 million in 2006, €42 million in 2007, €70 million in 2008 and €88 million in 2009.¹⁰¹ Compared with 2006, its budget had increased by 367% in 2008. According to the Frontex *General Report 2008*, 70% of the funds available for 2008 were allocated to joint operations, within which 60% was allocated to joint maritime operations in Mediterranean countries (€42 million).¹⁰² On the basis of Frontex’s *General Report 2009*, 71% of the budget distribution was allocated to operational activities, out of which 55% was committed to maritime operations (€48 million).¹⁰³ There has not been any independent qualitative evaluation as regards the extent to which the increase in the Frontex budget is proportionate in light of the

⁹⁷ See p. 8 of the report, op. cit.

⁹⁸ Refer to Frontex, *General Report 2007*, Frontex, Warsaw, 2007.

⁹⁹ Ibid., p. 27.

¹⁰⁰ For a critical analysis of these and other Frontex joint operations, refer to D. Bigo and E. Guild, “The Transformation of European Border Controls”, in B. Ryan and V. Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges*, Leiden: Martinus Nijhoff Publishers, 2010.

¹⁰¹ European Commission, Impact Assessment accompanying the proposal for a regulation 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), SEC(2010) 149, Brussels, 24 February 2010, p. 10.

¹⁰² See p. 24 of Frontex, *General Report 2008*, Frontex, Warsaw, 2008.

¹⁰³ See p. 23 of Frontex (2009), op. cit.

results – i.e. persons denied entry, and justified on the basis of the risk analysis.¹⁰⁴ According to the *General Report 2008*, there were 140,000 refusals of entry in 2008, which constituted a decrease of 11% in comparison with 2007.¹⁰⁵ The number of irregular border-crossings at the EU external borders experienced a 33% decrease in contrast with 2008 (106,200 detections), while refusals remained “fairly stable” and “very few refusals of entry were reported at the sea borders due to the relative low number of passengers”.¹⁰⁶

When viewing the overall budget allocated to Frontex joint operations in relation to the number of detections of irregular entry, a hugely disproportionate picture emerges, the compatibility of which with the principles of proportionality and effectiveness remains at stake. Furthermore, is the attention to the EU’s external sea borders and joint maritime operations justified when looking at the number of entries that take place in comparison with those reported through airports and land border-crossing points? As the *Frontex General Report 2009* highlights, the entry through sea borders was “very small” during 2009 compared with the number of entries into the EU through airports and land borders. The report also states that “half of the refusals of entry were at air borders (49%) and half at the land borders (47%)”. The report reiterates that “[v]ery few refusals of entry were reported at the sea borders due to a relative low number of passengers”.¹⁰⁷ Only 4% of the refusals took place during joint maritime operations, which again leads to questions of the proportionality of the enormous budget allocated to these activities.

2.2.3.2 Competences and accountability

The calls for reinforcing Frontex’s competences have also been numerous from EU member states,¹⁰⁸ which paradoxically have later shown a lack of political willingness to grant the Agency more powers and autonomy during negotiations in the Council’s rooms. Frontex’s activities in the coordination of operational cooperation continue to be highly dependent on EU member states’ discretion and willingness, which makes it too vulnerable to changing national politics and struggles. Even though Frontex was set up as a ‘first pillar’ agency, there has been a prevailing intergovernmental logic conditioning its competences and functions. The dependency on member states’ willingness not only relates to the effective granting of border control equipment and staff, but also to their participation in joint surveillance operations, which remains fully on a voluntary basis and reveals most transparently the limitations of its powers.¹⁰⁹

¹⁰⁴ The only ‘independent’ evaluation of Frontex did not address this issue. See COWI, *Frontex – External Evaluation of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union*, Final Report, COWI, Denmark, January 2009. The Commission also published its own evaluation of Frontex in 2008: European Commission, *Report on the evaluation and future development of the FRONTEX Agency*, COM(2008) 67 final, Brussels, 13 February 2008. For a critical assessment of the Commission’s evaluation, refer to J. Jeandesboz, *Reinforcing the Surveillance of EU Borders: The Future Development of FRONTEX and Eurosur*, CHALLENGE Research Paper No. 11, CEPS, Brussels, August.

¹⁰⁵ See European Commission, SEC(2010) 149, op. cit.

¹⁰⁶ See p. 5 of Frontex (2009), op. cit.

¹⁰⁷ Ibid.

¹⁰⁸ On the role of Spain, see for instance R. Hernández i Sagraera, “FRONTEX: Projection at the European Level of the Vision of Spain on Border Control?”, in E. Barbé (ed.), *Spain in Europe 2004-2008*, Monograph of the Observatory of European Foreign Policy No. 4, Institut Universitari d’Estudis Europeus, Bellaterra (Barcelona), February 2008.

¹⁰⁹ On how the responsibility for operational activities continues to rely mainly on member states and the limitations of Frontex’s powers, refer to J.J. Rijpma, *Frontex: Successful Blame Shifting of the Member States?*, ARI 69/2010, Real Instituto Elcano, Madrid, April 2010 (www.realinstitutoelcano.org).

Several EU initiatives have been introduced during the last few years primarily seeking, with limited success, to address these issues. In particular, we underline the establishment in 2007 of the RABIT units (Rapid Border Intervention Teams)¹¹⁰ for urgent interventions, which so far have not been used once, or the setting-up of CRATE (the Central Record of Available Technical Equipment), which contains a list of equipment that member states have made available, neither of which member states are obliged to contribute.¹¹¹

Beyond these two measures, the Commission has (yet again) tried to alleviate the over-dependency of Frontex on member states' discretion and politics by presenting in February 2010 a new proposal for a Regulation amending 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 EU (Frontex), (COM(2010) 61).¹¹² The Council adopted in February this year the "29 measures for reinforcing the protection of the external borders and combating illegal immigration", in which the very first measure of the 29 says that an agreement on this proposal would be sought "as a matter of urgency".¹¹³ Yet, it seems that the initiative is currently experiencing the very same anachronistic situation by which the public political discourses calling for a stronger Frontex are in conflict with the actual unwillingness to transfer more competences and autonomy to the Agency.

The major innovations that the initiative, if approved in its current shape, would introduce to the Frontex Regulation are outlined below.

First, a system of compulsory contributions of technical equipment and human resources from member states through

- the setting-up of Frontex joint support teams (FJST) as a pool of border guards of semi-permanent detachment from EU member states to Frontex holding the status of 'national experts'.¹¹⁴ Art. 3.b.3 of the proposal states that member states shall make border guards

¹¹⁰ See Regulation (EC) No. 863/2007 of the European Parliament and of the Council of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No. 2007/2004 as regards the mechanisms and regulating the tasks and powers of guest officers, OJ L 199/30, 31.7.2007. Art. 1 of the Regulation outlines a

mechanism for the purposes of providing rapid operational assistance for a limited period to a requesting Member State facing a situation 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, in the form of Rapid Border Intervention Teams (hereinafter referred to as teams). This Regulation also defines the tasks to be performed and powers to be exercised by members of the teams during operations in a Member State other than their own.

¹¹¹ By 1 January 2008, CRATE contained 18 aircraft, 20 helicopters and 91 vessels, and in 2009 the number of member states contributing increased from 8 to 13. See the European Commission's Impact Assessment, SEC(2010) 149, op. cit., p. 12.

¹¹² European Commission, Proposal for a Regulation 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, Brussels, 24 February 2010.

¹¹³ Council of the European Union, Council Conclusions on 29 measures for reinforcing the protection of the external borders and combating illegal immigration (2010), op. cit.

¹¹⁴ Art. 3.2 (European Commission, COM(2010) 61 final, op. cit.) states that "[t]he Agency shall constitute a pool of border guards called Frontex Joint Support Teams...for possible deployment during joint operations and pilot projects...it shall decide on the deployment of human resources and technical equipment".

available for deployment unless “they are faced with an exceptional situation substantially affecting the discharge of national tasks”;¹¹⁵ and

- the obligation for member states to contribute technical equipment to CRATE.¹¹⁶

Second, the proposal would allow Frontex to contribute to evaluating the performance of member states in the areas of border control.¹¹⁷

Third is the development by Frontex of a common, core European curricula for border guards’ training and its competence to provide training for instructors of the national border guards “including with regard to fundamental rights and access to international protection”.¹¹⁸ The proposal also calls upon member states to integrate curricula in the training of their national border guards. In addition, it sets an obligation for all personnel participating in joint operations “prior to their participation in operational activities organised by the Agency, [to] have received training in relevant EU and international law, including fundamental rights and access to international protection”.¹¹⁹ It is worth signalling here that Frontex concluded a Cooperation Agreement with the FRA in 26 May 2010,¹²⁰ which includes one provision (Art. 5)¹²¹ on

¹¹⁵ Art. 3b.4 (ibid.) establishes that the FJSTs shall, in the performance of their tasks, respect fundamental rights and human dignity, the principle of proportionality and non-discrimination. Also, Art. 3c stipulates the instructions to the FJST, which in its point 4 states that “members of the FJST, while performing their tasks and exercising their powers, remain subject to the disciplinary measures of their home Member State”.

¹¹⁶ Art. 7.3 (ibid.) stipulates that

[t]o the extent that it forms part of the minimum number of equipment for a given year, Member States shall make their technical equipment available within 30 days for deployment at the request of the Agency, unless they are faced with an exceptional situation substantially affecting the discharge of national tasks. Their contributions to the technical equipment pool shall be reviewed annually.

Art. 7 additionally foresees the possibility for the Agency to acquire or lease technical equipment for external border controls during joint operations, pilot projects, RABITs, return operations or technical assistance projects. Paragraph 2 also provides the possibility for the Agency to set up and keep centralised records of equipment in a technical equipment tool.

¹¹⁷ Art. 2.c (ibid.) also includes an obligation by member states to report to Frontex on operational matters at their external borders falling outside the framework of the Agency.

¹¹⁸ Ibid., Art. 4.7 of the proposal.

¹¹⁹ Ibid., Art. 3.b.

¹²⁰ 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, 26 May 2010.

¹²¹ Art. 5 of the Cooperation Agreement stipulates that “[t]he Parties shall cooperate in mainstreaming fundamental rights in the design, implementation and evaluation of training activities for national border guards when dealing with fundamental rights”. Art. 5.3 states that “[t]he FRA will offer its fundamental rights expertise to Frontex in the development and upgrading of Common Curricula...When feasible, the Parties will strive to evaluate the impact on fundamental rights of such curricula. Any evaluation of this kind will be designed and implemented in close cooperation between the Parties.” Finally, paragraph 5 of the same article provides that “Frontex will consult with FRA when designing induction training for Frontex Joint Support Teams and other host or guest officers participating in joint operations in order to ensure a strong fundamental rights component in such trainings”.

training on fundamental rights for border guards and another one (Art. 8)¹²² on the same kind of training for Frontex staff.

Fourth, the initiative also covers certain important elements related to joint operations. Frontex could itself initiate joint operations in cooperation with EU member states.¹²³ The impact assessment prepared by the Commission accompanying the proposals acknowledged that

[t]he current [Frontex] Regulation contains no rules on how operations should be prepared and concluded....depending on *ad hoc* arrangements. While the Agency does draw up an operational plan for each operation such a plan is not foreseen in the legal basis. Neither...does the legal basis specify what the Agency can or should do to ensure that the plan is *actually agreed and properly implemented*. Naturally, border guards from different Member States are accustomed to different *modus operandi* and will have *different expectations* in terms of objectives of the operation...some border guards may initially be unfamiliar with the operational environment and the tasks they are assigned. *As a result the Agency is in no position to ensure that operations are launched and carried out in line with the overall objectives of the Agency and of the overall border management of the Union*. This is foremost a legal problem. Having regard to the scope and number of FRONTEX operations, *the division of tasks and responsibilities between the Agency and the Member States must be clear to ensure legal certainty and transparency*. (Emphasis added.)¹²⁴

As a response, the proposal would introduce an obligation to draw up operational plans “including an evaluation and an obligation to report incidents, agreed prior to the start of the operations amongst participating Member States and the Agency”.¹²⁵ The latter would need to include, among other aspects, a description of the situation; the foreseeable duration and geographical area covered; the tasks and instructions for the guest officers “including on permissible consultation of databases and permissible service weapons, ammunition and equipment in the host Member State”; the composition of the teams; command and control provisions; technical equipment (including conditions for use) and financial provisions; reporting and an evaluation report.¹²⁶

When discussing the enhancement of Frontex’s competences, a crucial issue that is too often set aside is that of their adequate democratic and legal accountability. The lack of clear and solid accountability procedures in Frontex’s activities has been a matter of concern.¹²⁷ In fact, while the European Parliament has a role in the financial accountability of the Agency because of its status as an EU budgetary authority together with the Council,¹²⁸ there is not any democratic mechanism scrutinising the operational activities of the Agency (especially on activities with an

¹²² According to Art. 8 “Such training shall take into account the different needs of Frontex operational units, with a mid-term view of establishing a sustainable mechanism for providing Frontex staff with the necessary fundamental rights knowledge required in their work”.

¹²³ *Ibid.*, Art. 3.1.

¹²⁴ See pp. 13-14 of the Impact Assessment (European Commission, SEC(2010) 149, *op. cit.*).

¹²⁵ Refer to Recital 16 of the Preamble of the proposal ((European Commission, COM(2010) 61 final, *op. cit.*).

¹²⁶ *Ibid.*, Art. 3.

¹²⁷ J. Pollack and P. Slominski, “Experimentalist but not Accountable Governance? The Role of Frontex in Managing the EU’s External Borders”, *West European Politics*, Vol. 32, No. 5, 2009, pp. 904-924.

¹²⁸ S. Puntcher Riekman, “Security, Freedom and Accountability: Europol and Frontex”, in F. Geyer and E. Guild (eds), *Security versus Justice? Police and Judicial Cooperation in the European Union*, Farnham: Ashgate Publishing, 2008, pp. 19-34.

extra-territorial dimension and on the proportionality of operational plans). Nor is there one for scrutinising the quality and reliability of the risk analysis upon which the activities are justified. This was one of the issues highlighted in the conclusions of a report on Frontex by the UK House of Lords (EU Select Committee): “FRONTEX should raise its public profile by ensuring that information which is or should be in the public domain is easily accessible to the public...and should be more formally accountable to the European Parliament.”¹²⁹ The European Parliament itself emphasised the need to enhance the democratic oversight and control of the Agency’s tasks, calling on Frontex to “inform Parliament of negotiations to conclude agreements signed with non-EU countries, to present tactical assessments focused on particular border regions, and to publish evaluation reports on joint operations and other coordinated missions, risk analyses, feasibility studies and statistics on migration trends”.¹³⁰ This will indeed be an issue of critical importance in the future, especially in light of the new competences entrusted to national parliaments after the entry into force of the Lisbon Treaty in the evaluation of AFSJ policies and in keeping watch over the principles of subsidiarity and proportionality in policy domains such as external border controls.¹³¹

The proposal for amending the 2004 Frontex Regulation can be seen as a short- and in some respects medium-term measure intending to address some of the weaknesses and deficits currently affecting the Agency. Time will tell how the EU member states digest some of the innovations that have been put forward by the Commission in the proposal (especially those dealing with ‘mandatory solidarity’ and granting more autonomy to the Agency) and the final output that will emerge from the negotiations with the European Parliament. While some aspects of the proposal are to be welcomed, they will not be capable of fully addressing the dilemmas of either the politicisation and dependency or those related to lack of accountability. What to do?

3. Towards a common European border service? Conclusions and recommendations

This Working Document has taken the ESBG as a case study for reflecting on the approach to and added value of any future institutional elements that could shape the next generation of the EU’s IBM for the common external borders. One of the main arguments put forward is that the approach emerging from the discussions held in 2002 on the ESBG should be redirected towards different configurations and framings. The references to the proposal in the Stockholm Programme and the Commission’s action plan should serve as a chance to shift the focus guiding past debates and studies on a European corps of border police towards more open reflection and independent evaluation – starting from a common European understanding of border controls at the point of answering what kind of ‘border guard’ is needed for what kinds

¹²⁹ UK House of Lords (2008), op. cit., p. 31.

¹³⁰ European Parliament, *Report on the evaluation and future development of the FRONTEX Agency and of the European Border Surveillance System (EUROSUR) (2008/2157(INI))*, Committee on Civil Liberties, Justice and Home Affairs, Rapporteur: Javier Moreno Sanchez, 11 November 2008, para. 35.

¹³¹ Refer to the Protocol (No. 2), on the application of the Principles of Subsidiarity and Proportionality, attached to the Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, OJ C 83/01, 30.3.2010. See also the IPEX Dossier COD/2010/0039 on the Proposal (2010) 61 amending the FRONTEX Regulation, which is a new database intending to facilitate the flow of information between the European Parliament and the national parliaments on EU law proposals subject to review by the national parliaments (http://www.ipex.eu/ipex/cms/home/Documents/dossier_COD20100039/lang/en). From the information provided, the Polish and Austrian national parliaments were the only ones issuing a reasoned opinion on the proposal.

of ‘external border controls’. A parallel priority should be the implementation of an ambitious strategy for addressing the unfinished elements of the common EU external-border policy.

What kind of ‘border guard’ and what kinds of ‘border controls’ does the next generation of the EU’s IBM need in light of the current EU *acquis* on external border crossings? In view of the analysis carried out in this paper, the EU could develop a multilevel administrative service of European officials under the umbrella of a new, common, European border service (EBS). The main priority of the EBS would be to ensure high-standard and rule of law-compliant administrative checks on human mobility (in a respectful and professional manner in full compliance with fundamental rights) across the various European external borders. The uniform application of the SBC would be at the heart of its mandate. For the system to provide added value, the EBS should be composed of a three-layered (mutually interdependent and reinforcing) administrative service as outlined below, which would be open to nationals of all Schengen member states:

First is a category of officials who would have the status of European officials (category – border controls) and whose main competences would be the full and uniform application of the SBC on border checks and surveillance activities. They would not hold any police, intelligence-based, customs or asylum responsibilities or competences, but only those of a purely administrative nature in keeping with the material scope of the SBC. Should any issue arise in relation to, for instance, insecurity or ‘cross-border criminality’,¹³² the European officials would direct the person involved to the relevant national police or customs authorities. These officials could be established under the auspices of Frontex, which would also ensure common European training and curricula. Their mandate and competences could be seen to develop in a gradual, phased-in fashion:

- Phase 1 – they would start by supporting the existing national services on external border checks and surveillance of EU member states that have more work (in terms of number of entries at land, sea or air borders) or face more challenges to duly meet ‘European standards’ (as envisaged by the SBC) in the control of external border crossings. The EBS could practically start working through pilot projects in selected, external border-crossing points.
- Phase 2 – the support (and the number of European officials) would then be extended to all the main border-crossing points of the EU member states.
- Phase 3 – the final aim would be to replace current national services in those activities strictly falling within the scope of application of the SBC, first as regards border checks and later on border surveillance.

Second, another set of officials (category – border monitor) would be competent to carry out a continual evaluation of the border control activities undertaken by the officials described above (category – border controls). They would also be responsible for initiating any disciplinary measures against the latter in cases of improper application of the SBC or misconduct (for instance, disproportionate behaviour) while carrying out their activities. They would additionally form an intermediary between complaints and appeals presented by individuals at the EU external borders (for example, those challenging a negative decision on entry) and the relevant national judicial authorities handling the cases. They should be independent of Frontex. They could come under a new body and secretariat to be set up within the European Parliament,

¹³² This could for example take place after consulting the Schengen Information System (SIS) and identifying the existence of an ‘alert’. Refer for instance to Art. 7.3.vi of the SBC. On the SIS, refer to E. Brouwer, *Digital Borders and Real Rights: Effective Remedies for Third Country Nationals in the Schengen Information System*, Leiden: Martinus Nijhoff Publishers, 2008.

which would decide in the last instance on disciplinary measures to be taken, and would report to the European Parliament on budgetary and proportionality issues pertaining to Frontex's activities. These officials would report periodically on the application of the SBC to that body, which would in turn report to the European Commission.

Third would be a group of officials (category – fundamental rights supervisor, external borders) working under the mandate of the European Agency for Fundamental Rights (FRA). This should go along with an expansion of the FRA's mandate to include evaluation competences and a monitoring remit for European law (including for the SBC in this case and the EU *acquis* on external border crossings) from a fundamental rights perspective.¹³³ These officials would mainly be responsible for the evaluation and conduct of inspections (on the spot and unannounced) focused on the protection of fundamental rights as envisaged in the Charter and the SBC. They would also be in charge of assessing and supporting national, regional and local authorities dealing with complaints about fundamental rights violations in the control of external borders and advice in cases before relevant courts and jurisdictions. They would be competent for ensuring (in cooperation with officials in the category of 'border monitor') the practical effectiveness of remedies and guarantees in the SBC, especially those having an impact on the fundamental rights of individuals.

What would be the added value of this new institutional arrangement from a political, legal and practical viewpoint? The added value of the EBS would be (at least) sixfold:

- ensuring a more uniform implementation and high-standard application of EU border law (the SBC) and the materialisation of the European approach on external border controls as envisaged by the SBC, the Treaty of Lisbon and the Stockholm Programme;
- guaranteeing the respect of fundamental rights and administrative guarantees in all border control activities (border checks and surveillance);
- facilitating (de)politicisation and autonomy from national governments, and the accountability of external border controls and practices;
- addressing issues of (and calls for more) 'solidarity',¹³⁴ the fair sharing of responsibilities and mutual trust building across the common external border of an enlarged EU. The service could in the long run replace the current system of financial solidarity (the European border fund);
- overcoming some of the political obstacles that were encountered by the ESBG initiative in 2002. The administrative (non-police) nature of the service could also positively contribute to alleviating some of the past political sensitivities expressed by certain EU member states about more ambitious (law enforcement-led) supranational institutional proposals in light of their impact on national sovereignty; and finally,
- the nature and tasks of the EBS would also work positively towards improving the image and legitimacy of the EU's immigration and external border policy in the world, which,

¹³³ The need to expand the competences of the FRA was also one of the policy recommendations stemming from the final results of the CHALLENGE project mentioned above. Refer to E. Guild, S. Carrera and D. Bigo (2009), *op. cit.*, pp. 4 and 5.

¹³⁴ The new Art. 80 of the TFEU states that "[t]he policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the Union acts adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle."

especially after the adoption of the Returns Directive¹³⁵ and the message sent abroad by certain Frontex joint operations, have been negatively affected.

Would the EBS be ‘legal’? As has been highlighted in this paper, the entry into force of the Treaty of Lisbon has provided a renewed legal framework that makes possible innovative thinking and ways forward on the EU’s external border policy. The TFEU now offers an express legal basis (Art. 77.2.d) covering measures on border checks and calling for the Union to develop a policy with a view to the gradual introduction of an IBM. Moreover, this same provision grants the competence to the European Parliament and the Council to adopt “any measure necessary for the gradual establishment of an integrated management system for external borders”. The potential legal implications of the proposal (especially when reaching its ‘Phase 3’ of development) for the constitutional regimes of certain Schengen member states should also be subject to close and careful assessment. In any case, the Treaty of Lisbon does provide an open door for ambitious institutional proposals such as a common EBS,¹³⁶ which could play a central role in helping to make the next generation of the EU’s IBM for the common external borders more legitimate, coherent, proportionate, accountable and fundamental rights-compliant.

¹³⁵ See Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348, 24.12.2008, p. 98. Refer for instance to D. Acosta Arcarazo, *Latin American Reactions to the Adoption of the Returns Directive*, CEPS Liberty and Security in Europe Series, CEPS, Brussels, November 2009.

¹³⁶ The only limitation is foreseen in Art. 77.4 of the TFEU, which stipulates “[t]his Article shall not affect the competence of the Member States concerning the geographical demarcation of their borders, in accordance with international law”.

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Appendix 1. List of national services in charge of external border controls in the scope of the Schengen Borders Code*

	Member states	National services	Competent ministries
1.	Austria	– Federal Police (Bundespolizei)	– Ministry of the Interior
2.	Belgium	– Federal Police (Police Fédérale/ Féderale Politie)	– Ministry of the Interior
3.	Bulgaria	– Directorate-General for Border Police of the National Police Service	– Ministry of the Interior
4.	Cyprus	– Cyprus Police – Customs and Excise Department	– Ministry of the Interior – Ministry of Finance
5.	Czech Republic	– Alien and Border Police Service – Customs	– Ministry of the Interior – Ministry of Finance
6.	Denmark	– Danish Police (Danske Politi)	– Ministry of Justice
7.	Estonia	– Police and Border Guard Board (Politsei-ja Piirivalveamet) – Tax and Customs Board (Maksu-ja Tolliamet)	– Ministry of the Interior – Ministry of Finance
8.	Finland	– Border Guard (main responsibility) – Customs – Police	– Ministry of the Interior – Ministry of Finance
9.	France	– Direction Centrale de la Police aux Frontières – Direction Générale des Douanes et Droits Indirects – Direction Générale de la Police Nationale – Gendarmerie Nationale and Marine Nationale	– Ministry of the Interior – Ministry of Defense – Ministry of Finance
10.	Germany	– Federal Police (Bundespolizei) – Customs (Zoll) – Federal State Police in Bavaria, Bremen and Hamburg	– Federal Ministry of the Interior – Federal Ministry of Finance

* According to Art. 2.9 of the SBC, ‘border controls’ are defined as “the activity carried out at a border, in accordance with and for the purposes of this Regulation, in response exclusively to an intention to cross or the act of crossing that border, regardless of any other consideration, consisting of border checks and border surveillance”.

11.	Greece	<ul style="list-style-type: none">– Hellenic Police (Helliniki Astynomia)– Hellenic Coast Guard (Limeniko Soma)– Customs (Telonia)	<ul style="list-style-type: none">– Ministry of Citizen Protection– Ministry of Finance
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Appendix 1. cont'd

12.	Hungary	<ul style="list-style-type: none"> – National Police – Customs and Finance Guard (Vám-és Pénzügyorség) 	<ul style="list-style-type: none"> – Ministry of Justice and Law Enforcement – Ministry of Finance
13.	Italy	<ul style="list-style-type: none"> – Polizia di Stato – Carabinieri – Guardia di Finanza 	<ul style="list-style-type: none"> – Ministry of the Interior – Ministry of Defense – Ministry of Finance
14.	Latvia	<ul style="list-style-type: none"> – State Border Guard (Valsts robežsardze) 	<ul style="list-style-type: none"> – Ministry of the Interior
15.	Lithuania	<ul style="list-style-type: none"> – State Border Guard (Valstybes Sienos Apsaugos Tarnyba) 	<ul style="list-style-type: none"> – Ministry of the Interior
16.	Luxembourg	<ul style="list-style-type: none"> – Special Police Division at the Airport (Service de Contrôle à l'Aéroport) 	<ul style="list-style-type: none"> – Ministry of the Interior
17.	Malta	<ul style="list-style-type: none"> – Immigration Police – Customs Department – Armed Forces 	<ul style="list-style-type: none"> – Ministry of Justice and Home Affairs – Ministry of Finance
18.	Netherlands	<ul style="list-style-type: none"> – Royal Border Guard (Koninklijke Marechaussee) – Customs (Douane) – Rotterdam (port) District Police 	<ul style="list-style-type: none"> – Ministry of Defense – Ministry of Finance
19.	Poland	<ul style="list-style-type: none"> – Border Guard 	<ul style="list-style-type: none"> – Ministry of the Interior and Administration
20.	Portugal	<ul style="list-style-type: none"> – Serviço de Estrangeiros e Fronteiras – Brigada Fiscal da Guarda Nacional Republicana 	<ul style="list-style-type: none"> – Ministry of the Interior – Ministry of Defense
21.	Romania	<ul style="list-style-type: none"> – Border Police – National Customs Authority 	<ul style="list-style-type: none"> – Ministry of the Interior and Administration Reform – Ministry of Public Finance
22.	Slovakia	<ul style="list-style-type: none"> – Border Police – Customs 	<ul style="list-style-type: none"> – Ministry of the Interior – Ministry of Finance
23.	Slovenia	<ul style="list-style-type: none"> – Slovenian Police (Slovenska Policija) 	<ul style="list-style-type: none"> – Ministry of the Interior
24.	Spain	<ul style="list-style-type: none"> – National Police (Cuerpo Nacional de Policía) – Civil Guard (Guardia Civil) – Customs (Servicios de Aduanas) 	<ul style="list-style-type: none"> – Ministry of the Interior – Ministry of Finance – Ministry of Defense
25.	Sweden	<ul style="list-style-type: none"> – Police (main responsibility) – Coast Guard – Customs – Migration Board 	<ul style="list-style-type: none"> – Ministry of Justice – Ministry of Defense – Ministry of Finance – Ministry of Integration and Gender Equality

Appendix 1. cont'd

26.	Iceland	– Directorate-General of National Police – District Police Chiefs	– Ministry of Justice
27.	Norway	– Police (main responsibility) – Customs – Coast Guard	– Ministry of Justice and the Police – Ministry of Finance – Ministry of Defense
28.	Switzerland	– Cantonal Police Force (Geneva, Zurich, Bern, Soleure, Vaud, Valais, Saint-Gall and Les Grisons) – Border Guard Service	– Federal Department of Justice and Police – Federal Customs Administration

Sources: List of national services responsible for border controls for the purposes of Art. 15(2) of Regulation (EC) No. 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ C 247, 13.10.2006, p. 17.

Notification by Romania to the European Commission according to the provisions of Regulation (EC) No. 562/2006 of the European Parliament and of the Council of 15 March 2007 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ C 77, 5.4.2007, pp. 11-14.

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Notification by Bulgaria to the European Commission according to the provisions of Regulation (EC) No. 562/2006 of the European Parliament and of the Council of 15 March 2007 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ C 153, 6.7.2007, p. 3.

Notification by the Swiss Confederation to the European Commission pursuant to Art. 34(1) of Regulation (EC) No. 562/2006 of the European Parliament and of the Council establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ C 331, 31.12.2008, pp. 13-20.

Appendix 2. EU *acquis* on external border controls

- Regulation (EC) No. 863/2007 of the European Parliament and of the Council of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No. 2007/2004 as regards the mechanisms and regulating the tasks and powers of guest officers, OJ L 199/30, 31.7.2007.
- Decision No. 574/2007/EC of the European Parliament and of the Council of 23 May 2007 establishing the External Borders Fund for the period 2007-2013 as part of the General Programme “Solidarity and Management of Migration Flows”, OJ L 144, 6.6.2007.
- Regulation (EC) No. 1931/2006 of the European Parliament and of the Council of 20 December 2006 laying down rules on local border traffic at the external land borders of the Member States and amending the provisions of the Schengen Convention, OJ L 405/1, 30.12.2006.
- Regulation (EC) No. 1987/2006 of the European Parliament and of the Council 20 December 2006 on the establishment, operation and use of the second generation of the Schengen Information System (SIS II), OJ L 381/4, 28.12.2006.
- Recommendation C/2006/5186 of the European Commission establishing a common “Practical Handbook for Border Guards (Schengen Handbook)” to be used by Member States’ competent authorities when carrying out the border control of persons, 6.11.2006.
- Decision No. 895/2006 of the European Parliament and of the Council of 14 June 2006 introducing a simplified regime for the control of persons at the external borders based on the unilateral recognition by Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia, Slovakia of certain documents as equivalent to their national visas for the purposes of transit through their territories, OJ L 167, 20.6.2006.
- Decision No. 896/2006 of the European Parliament and of the Council of 14 June 2006 establishing a simplified regime for the control of persons at the external borders based on the unilateral recognition by the Member States of certain residence permits issued by Switzerland and Liechtenstein for the purpose of transit through their territory, OJ L 167, 20.6.2006.
- Regulation (EC) No. 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ L 105/1, 13.4.2006.
- 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, OJ L 114, 4.5.2005.