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Future development of Frontex and the creation of Eurosur

BRIEFING PAPER



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JUSTICE, FREEDOM AND SECURITY

AN ANALYSIS OF THE COMMISSION COMMUNICATIONS ON FUTURE DEVELOPMENT OF FRONTEX AND THE CREATION OF A EUROPEAN BORDER SURVEILLANCE SYSTEM (EUROSUR)

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Abstract

On 13 February 2008, the European Commission tabled a 'border package', consisting of three communications¹ dealing with the issue of EU external border management. Two of these documents, namely the communication on the evaluation and future development of Frontex² and the communication on the creation of a European border surveillance system (Eurosur)³ propose significant evolutions with regard to the role of the Frontex agency and the orientations of the EU integrated border management (IBM) concept. The evaluation of Frontex elaborated by the Commission services is timely: since the beginning of its operational phase in 2005, the agency has considerably developed its activities in all its domains of competence, and the EC subsidy to its budget has more than tripled over the period 2006-2008. The evaluation, however, falls short of critically assessing the consistence of Frontex activities with the fundamental values upheld by the EU. In this regard, it seems important to recall that Frontex is a first-pillar, Community body, which should not only respect the EU fundamental values in its activities, but also work for their promotion, particularly in a field which touches upon critical questions related to migration and freedom of movement.

¹ The note will only deal with the first two communications encompassed in the 'border package'.

² European Commission (2008a). *Report on the evaluation and future development of the FRONTEX Agency*. Brussels, COM(2008) 67 final.

³ European Commission (2008b). *Examining the creation of a European Border Surveillance System*. Brussels, COM(2008) 68 final.

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AN ANALYSIS OF THE COMMISSION COMMUNICATIONS ON FUTURE DEVELOPMENT OF FRONTEX AND THE CREATION OF A EUROPEAN BORDER SURVEILLANCE SYSTEM (EUROSUR)*

On 13 February 2008, the European Commission tabled a ‘border package’, consisting of three communications¹ dealing with the issue of EU external border management. Two of these documents, namely the communication on the evaluation and future development of Frontex² and the communication on the creation of a European border surveillance system (Eurosur)³ propose significant evolutions with regard the role of the Frontex agency and the orientations of the EU integrated border management (IBM) concept. The evaluation of Frontex elaborated by the Commission services is timely: since the beginning of its operational phase in 2005, the agency has considerably developed its activities in all its domains of competence, and the EC subsidy to its budget has more than tripled over the period 2006-2008. The evaluation, however, **falls short of critically assessing the consistence of Frontex activities with the fundamental values upheld by the EU**. In this regard, it seems important to recall that **Frontex is a first-pillar, Community body**, which should not only respect the EU fundamental values in its activities, but also work for their promotion, particularly in a field which touches upon critical questions related to migration and freedom of movement.

1. THE COMMUNICATIONS ON THE FUTURE OF FRONTEX AND THE CREATION OF EUROSUR

1.1. The Report on the evaluation and future development of the FRONTEX Agency

The Commission evaluation of Frontex can be divided in two parts: the assessment of the agency’s activities in the period 2005-2007 on the one hand, and the perspectives for the development of its role and competences on the other. The former, as we will see, remains rather uncritical of Frontex past activities, while the latter is highly ambitious in the possible expansion of the agency’s role and competences. The main criticism expressed in the communication focuses on questions of effectiveness and coherence, but the document does not seek to address the impact of Frontex activities with regard the fundamental freedoms and rights of individuals. While deemed a political evaluation in its opening paragraphs, then, the document only focuses on the technical issues that have arisen in the course of Frontex activities, a perspective which is re-enacted with regard the options for the development of the agency.

1.1.1. The evaluation of Frontex activities over the period 2005-2007

The evaluation of Frontex activities over the period 2005-2007 is divided according to the six domains of competence devolved to the agency in Article 2(1) of Council regulation (EC) 2007/2004⁴: In all these areas, the agency received a favourable appreciation from the Commission. The coordination of joint operations has received particular praise, consistent in

* The author would like to thank Sergio Carrera and Elspeth Guild for their invaluable comments and recommendations on earlier drafts of this note.

¹ The note will only deal with the first two communications encompassed in the ‘border package’.

² European Commission (2008a). *Report on the evaluation and future development of the FRONTEX Agency*. Brussels, COM(2008) 67 final.

³ European Commission (2008b). *Examining the creation of a European Border Surveillance System*. Brussels, COM(2008) 68 final.

⁴ 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. Brussels, 26 October, Official Journal of the European Communities L349.

this respect with the important increase in the number of such operations (8 in 2006, 24 in 2007).

With regard to the **coordination of operational cooperation** between Member states, particularly with regard the realisation of joint operations, the Commission's evaluation delivers an overall *satisfecit* to the agency's activities⁵, with a strong insistence on quantifiable results, while remaining rather evasive in its qualitative evaluation: "Results of joint operations cannot be summarised solely in quantifiable terms. There are other benefits such as exchanging best practices and information between Member States and stimulating day-to-day cooperation between national border guard authorities. Nevertheless the quantifiable results so far must be considered impressive: more than 53 000 persons, for 2006 and 2007 together, have been apprehended or denied entry at the border during these operations. More than 2 900 false or falsified travel documents have been detected and 58 facilitators of illegal migration arrested"⁶. In this respect, the evaluation report also welcomes the launching of the European Patrol Network (EPN)⁷ and the establishment by the agency of the CRATE database⁸.

With regard to **training**, the report notes that a "total of 97 trainings, meetings and workshops including training of border guards and "training of trainers" have been organised with a total of 1 341 participants"⁹. It also highlights that the common core curriculum, established under the former Ad Hoc Centre for Training (ACT)¹⁰ is currently under review.

With regard to **risk analyses**, the report delivers a favourable evaluation of the agency's record in delivering general and tailored risk analyses, as well as two feasibility studies (the so-called BORTEC and MEDSEA studies). It also highlights the collaboration between Frontex and Europol, the former having contributed to the latter's yearly 'Organised Crime Threat Assessment' report (OCTA), and both having jointly elaborated a tailored risk assessment on migration routes through the Balkans. It further stresses the importance for this domain of Frontex competence of having the agency connected to the ICONet information exchange system between the national agencies and services in charge of the management of migrations¹¹. Finally, it welcomes the involvement of Frontex in the discussions of the CIREFI¹²

With regard to **research in the field of border management**, the report notes that the agency "has so far implemented 6 projects and 7 workshops/seminars on research and

⁵ A full list of Frontex joint operations is featured in the statistical addendum to the evaluation report. See: European Commission (2008d). *Report on the evaluation and future development of the Frontex Agency – Statistical data*. Brussels, SEC(2008) 150.

⁶ European Commission, 2008a, p.3.

⁷ The EPN is the result of a request issued to Frontex by the European Council, in the Presidency conclusions of its December 2006 meeting. The EPN started its operations in May 2007, and currently consists of a permanent joint operation in selected areas of the Atlantic Ocean and the Mediterranean, coordinated by the agency and run by the border guard services of 9 Member states (Cyprus, France, Greece, Italy, Malta, Portugal, Slovenia and Spain).

⁸ The *Central record of available technical equipment* database was created by Frontex at the request of the Council. It compiles lists of equipments that can be made available upon request to Member state border guard agencies and services.

⁹ European Commission, 2008a, p.4.

¹⁰ The ACT (Council of the European Union, 2003) was one of several ad hoc centres established in the period 2002-2005 under the SCIFA+ committee, in the follow-up of the 2002 Council *Plan for the management of the external borders* (Council of the European Union, 2002).

¹¹ The *Information and Coordination Network for Member States' Migration Management Services* has been established by Council Decision 2005/267/EC of 16 March 2005, and is operational since 2006, under the supervision of the European Commission.

¹² The *Centre for Information, Discussion and Exchange on the Crossing of Frontiers and Immigration* was created in 1992 as a discussion group within the Council, as a venue for exchanging information about migratory movements between Member states.

development”¹³. Frontex has also been active in implementing the BIOPASS research project on automated biometric border crossing systems¹⁴.

With regard to the **provision of technical and operational assistance to Member states**, the evaluation singles out the setting-up of so-called Rapid border intervention teams (RABITs) as the main evolution for the agency. RABITs were established by Regulation (EC) 863/2007 adopted by the European Parliament and the Council in July 2007. They basically constitute a pool of officials from Member states border guard agencies and services, which can be deployed upon the request of a Member state in situations of “urgent and exceptional pressure”¹⁵. RABIT officials operate under the authority of the requesting state. According to the Frontex evaluation report, there are currently 500 to 600 officials available for RABIT deployment, but the capacity has not been used so far¹⁶.

Finally, with regard **support to return operations**, the evaluation report indicates that the agency “has provided assistance for the organisation of nine joint return operations. A further six projects have been taken forward on issues such as best practices for the acquisition of travel documents and in order to regularly identify common needs for joint return operations”¹⁷. This area has received the least favourable appreciation in the Commission’s evaluation, which points out: “This is a key task of FRONTEX, but results so far have shown that the frequency and intensity of that support is lagging behind the progress made with regard to operation coordination”¹⁸.

1.1.2. Perspectives for future developments

The perspectives for future developments of Frontex consist of short/medium- and long-term proposals and recommendations.

The evaluation report delivers **10 short/medium-term recommendations**¹⁹, distributed in the following domains:

- *Coordination of operational cooperation*: the priorities include the possibility of improving the use of the CRATE database, including by considering how Frontex could acquire and lease equipments. It is also envisaged that some joint operations could be merged within the EPN (thus becoming semi-permanent ventures). Furthermore, the Commission underlines that the possibility given to the agency of opening specialised branches in specific countries²⁰ should be considered, in priority with regard the southern maritime borders.
- *Training*: the report suggests that specialised training should be delivered through the agency “on relevant provisions of European and international rules on asylum, the law of the sea and fundamental rights, in order to contribute to the full respect of these norms and to a consistent approach to situations involving search and rescue coordination”²¹.
- *Risk analysis*: The report stresses that risk analysis activities, particularly joint analyses with other EU agencies, international organisations or border guard authorities of third

¹³ European Commission, 2008a, p.6.

¹⁴ Frontex (2007). *BIOPASS: Study on Automated Biometric Border Crossing Systems for Registered Passenger at Four European Airports*. Warsaw, August. As part of its research activities, it is foreseen in the communication that Frontex will be significantly involved in the 7th Framework Programme thematic research area on security, as well as in the proceedings of the European Security Research and Innovation Forum (ESRIF).

¹⁵ Regulation (EC) 863/2007, Art.1

¹⁶ European Commission, 2008a, p.7.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ See the impact assessment attached to the evaluation report, p. 24-36: European Commission (2008c). *Report on the evaluation and future development of the FRONTEX Agency – Impact Assessment*. Brussels, SEC(2008) 149.

²⁰ Art.3(2) of Council Regulation 2007/2004.

²¹ European Commission, 2008a, p.5.

countries should be encouraged. More importantly, it proposes that Frontex should be granted the management of ICONet and should take over the activities of CIREFI.

- *Research*: The report indicates that Frontex, through its research unit, should make sure that the concerns and operational requirements of border guard services are taken into consideration in the development of new technologies.
- *Technical and operational assistance*: the Commission insists that Frontex should be allowed to acquire its own equipments to be used in the case of RABIT deployments.
- *Return*: The report highlights, firstly, that putting Frontex in charge of the management of ICONet will enhance its profile with regard return-related activities. Secondly, it suggests that the CRATE database could be expanded to include equipments, particularly aircrafts, available for joint return operations.

The communication on the future of Frontex further issues **5 long-term recommendations**²², some of which might require changes in the existing Frontex regulation. These recommendations include the possibility for Frontex to contribute to the Schengen evaluation mechanism, to engage into pilot projects with third countries, particularly those identified as problematic, and to develop activities regarding ‘horizontal integration’ between border guard and customs agencies and services. Two recommendations stand out, however, in that they seem to call for a significant evolution in the current functioning of the agency. With regard operational coordination, the report, while committed to the idea that “[o]perational coordination has already proven itself the key instrument of the European Union in ensuring operational solidarity between Member States”, nonetheless points out that “the Commission intends to return to the question of a fully fledged European Border Guard system when experiences have been gathered” on the functioning of RABITs²³. In the meantime, however, the fifth and most ambitious perspective for the future development of Frontex lies in the suggestion to establish Eurosur.

1.2. The communication on the creation of a European Border Surveillance System (EUROSUR)

The Eurosur communication was prepared through the BORTEC feasibility study tabled in December 2006 by Frontex, and by an earlier study conducted at the request of the Commission’s DG Justice Liberty Security (JLS) by the external consultancy *Civipol Conseil*²⁴.

1.2.1. The rationale of the Eurosur proposal

The general concept of a European border surveillance system is to further integrate existing Member states border surveillance systems, with the long-term objective of developing common tools and instruments for border surveillance at the EU level, which would ultimately lead to the establishment of a “common monitoring and information sharing environment”²⁵ focusing in particular on the southern maritime borders of EU Member States. Indeed, while the Eurosur communication envisages a system that would cover the EU’s land and sea borders, the priority is given to the southern maritime reaches of the Union. Eurosur, in this perspective, should contribute to the enhancement of the surveillance and information sharing capacities of border guard agencies and services. As highlighted in the communication, “[a] European Border Surveillance System [...] should support the Member

²² European Commission, 2008c, p.36-42.

²³ *Ibid*, p.10.

²⁴ It should be noted that *Civipol Conseil* is also a regular sub-contractor of the French Ministry of Interior.

²⁵ European Commission (2008e). *Examining the creation of a European Border Surveillance System (EUROSUR) – Impact Assessment*. Brussels, SEC(2008) 152, p.19.

States in reaching full situational awareness on the situation at their external borders and increase the reaction capability of their law enforcement authorities”²⁶. This is deemed necessary to meet three main objectives:

- “Reduction of the number of illegal immigrants who manage to enter the EU undetected”
- “Increase internal security of the EU as a whole by contributing to the prevention of cross-border crime”
- “Enhancing search and rescue capacity”²⁷

1.2.2. The Commission’s roadmap for the setting-up of Eurosur

The Eurosur communication and its accompanying impact assessment map out **four “policy options”**, for a period running up to 2013. These constitute both alternatives to be chosen from, and a road-map to be followed should the Eurosur initiative be developed to its full potential.

Policy Option 1 is the *status quo* option. It entails that the development of EU border management activities follows the plans established in the 2004 Hague Programme and the May 2005 communication from the Commission on *The Hague Programme: Ten priorities for the next five years*²⁸.

Policy Option 2 involves the “[i]nterlinking and streamlining [of] existing surveillance systems and mechanisms at Member States level”²⁹. As a first step, national coordination centres (NCC) would be created in the 8 Member states concerned with the EU’s southern maritime border. The NCC would act as information and intelligence gathering hubs for border surveillance activities at the national level. The second step would involve interlinking the NCC in a computerised network for the continuous, real-time sharing of information and intelligence, which would also include Frontex, which, in this situation, could act as a border management situation centre. In a third stage, activities will be focused on third countries, particularly those of the EU neighbourhood, for capacity-building purposes (equipment and training).

Policy Option 3 includes Policy Option 2 and takes it further by envisaging the “[d]evelopment and implementation of common tools and applications for border surveillance at EU level”³⁰. This would allow for covering ‘blind spots’ in existing national border surveillance systems, via the development of new technologies (particularly UAV³¹ and earth observation technologies), new applications for information sharing (going beyond the question of interoperability between national information systems), and the establishment by Frontex, via its connection to such new applications, of a “common pre-frontier intelligence picture”³².

Policy Option 4 includes all of the previous within the objective of creating a “common monitoring and information sharing environment for the EU maritime domain”, based on an “integrated network of maritime monitoring and surveillance systems” (a so-called *system of systems*)³³. While previous policy options can involve all types of borders, the advanced elements proposed in Policy Option 4 will concentrate more specifically on EU maritime borders: firstly the Mediterranean, the Canary Islands region and the Black Sea, and later on the whole Atlantic Ocean area, the North Sea and the Baltic Sea. The core of the

²⁶ European Commission, 2008b, p.4.

²⁷ *Ibid.*

²⁸ COM (2005) 184 final.

²⁹ European Commission, 2008e, p.25.

³⁰ *Ibid.*, p.29.

³¹ Unmanned Aerial Vehicles.

³² European Commission, 2008e, p.33.

³³ *Ibid.*, p.34.

option would be to integrate within a common informational structure the various systems of maritime monitoring and surveillance in operation, European and international alike, whether they are used for maritime safety, environmental protection, fishing activities or border monitoring purposes³⁴. The objective would be to provide a structure for collecting, fusing, analysing and disseminating information about all the movements occurring in the territorial waters of EU Member states and beyond, operating 24 hours a day and in real time. Frontex, through an envisaged 'Frontex information system', would play the role of a hub for analysing and disseminating information and intelligence.

2. ANALYSIS

The present section puts the Frontex evaluation report and future plans for the development of the agency in perspective, with regard their relationship to the current EU integrated border management model (2.1.), legal issues (2.2.), budgetary issues (2.3.), fundamental freedoms and rights issues (2.4.).

2.1. The reinforcement of the logic of control and surveillance in the EU border management model

The current EU model for integrated border management formally comprises³⁵:

- Border control, including border checks and the surveillance of borders, risk analysis and the gathering of intelligence.
- Detection and investigation of cross-border crime.
- A four-tiers access control model, including measures in third countries, cooperation with neighbouring countries, border controls, controls within the area of free movement.
- Inter-agency and international cooperation for border management.
- Coordination and coherence between the Member states and with EU bodies.

As such, **the emphasis on control and surveillance is already very strong in the initial formulation of the EU integrated border management model**. As stated unambiguously by the Council in earlier deliberations about the EU IBM concept, "[b]order management is a security function in which all Member States have a common interest that stems from the Schengen arrangement. First and foremost, border management is an area of policing, where security interests have to be met while fully recognizing the commitments in the field of international protection and human rights"³⁶. In others words, freedom is balanced against security in EU border management, but security comes first. The proposals for the future development of Frontex encompassed in the Commission's evaluation report and the Eurosur communication, by putting emphasis on additional mechanisms of control and surveillance, participate from this logic. Beyond this, they do not add significantly to the EU IBM model, nor do they come to modify it fundamentally.

2.2. Legal issues: the expansion of Frontex competences

The two communications on the future of Frontex and the setting-up of Eurosur open up significant developments for the role and competences of the agency. In particular, should

³⁴ This is also proposed in the Commission communication on *An Integrated Maritime Policy for the European Union* (COM(2007) 575 final).

³⁵ Council of the European Union (2006b). *Justice and Home Affairs, 2768th Council Meeting*. Brussels, Press release, 15801/06, p.27.

³⁶ Council of the European Union (2006a). *Integrated Border Management; Strategy Deliberations*. Brussels, 13926/06, FRONT 207/COMIX 826, p.3.

the Eurosur roadmap be fully endorsed, this will lead to the establishment of Frontex as a node for sharing information and intelligence gathered through the surveillance apparatus deployed at the EU external borders. The implications of this expansion should be properly stressed out, even more so **since Frontex is a first-pillar agency** (falling under Title IV TEC) and **not a third-pillar body** (Title VI TEC). Since the perspectives of entry into force of the Lisbon treaty, which puts an end to the pillar structure, are uncertain at this time, such a consideration remains crucial for the future development of Frontex.

Will the measures proposed by the Commission entail a modification of the legal basis of Frontex? The Commission's proposals for the future development of the agency envisage an incremental, step-by-step approach. This incremental approach raises the issue of respect for the principle of legality and rule of law. It seems to have become a habit of EU agencies to develop activities in many fields without the proper legal basis, with legal aspects coming in ex-post to validate these activities de facto (e.g. Europol). In this perspective, the short/medium-term recommendations issued in the Commission's evaluation report of the agency will not, except for the possibility to use the CRATE database in the context of return operations, require the modification of Regulation 2007/2004. The first three abovementioned long term measures will widen the range of Frontex activities and competences, thus requiring a modification of the Frontex regulation, albeit in a reasonable fashion. The last two recommendations, namely the possibility for the agency to obtain direct operational capacities, and the development of Eurosur, will change the scope of Frontex activities and **require a significant revision of Regulation (EC) 2007/2004.**

Will the measures change the repartition of competences between the Community and the Member States? The long-term recommendations issued by the Commission will result into a significant modification of the current repartition of competences between the Community and the Member States in the area of external borders, where the latter currently enjoy an "exclusive" competence. The participation of Frontex in the Schengen evaluation mechanism will put the agency in a position to scrutinise Member States activities in this area. Granting Frontex the possibility of running pilot projects with third countries in the area of border management will give the agency an added degree of autonomy in EU external relations and within the Common foreign and security policy. Opening the possibility for Frontex to run "horizontal integration" activities creates opportunities for the agency to intervene into the internal organisation of state agencies and services of EU countries. Granting the agency operational capacities will open up the way for the creation of an EU "border police", an orientation that was initially envisaged before the setting-up of Frontex, but was explicitly turned down by the Member States in the negotiations previous to the adoption of Regulation (EC) 2007/2004.

The creation of Eurosur, finally, could also result in important modifications:

- **Policy Option 2:** The creation of NCC, insofar as such centres do not exist yet, will amount to an EU-sponsored modification of the internal security apparatus of Member States. The interlinking of NCC into a computerised network for information exchanges will, in this respect, raise the question of the principle of availability, which can be construed as an encroachment onto Member States sovereignty.
- **Policy Option 3:** The envisaged development of common tools and applications in the field of border surveillance amounts to the establishment of a common research and procurement policy in border security, and presupposes the establishment of a common market for security, and arguably defence, goods. While this orientation has been in preparation for some time, notably through the Commission's Preparatory Action for Security Research³⁷, it has been consistently resisted by Member States over the past two

³⁷ See: D. Bigo, J. Jeandesboz (2008). *Review of security measures in the 6th Research Framework Programme and the Preparatory Action for Security Research*. Standard Briefing Note for the European Parliament, FWC LIBE, Lot 7, C1/SC6.

decades, on the basis that defence and security procurements are an essential parts of their sovereign attributes.

- **Policy Option 4:** The integration of existing systems for the monitoring and surveillance of Member States maritime domains is bound to create tensions, as it will result into the establishment of a common informational environment for borders that are still, under the current format, considered as the exclusive competence of Member States. This juxtaposition could be construed by the latter as an encroachment upon this exclusive competence.

2.3. Budgetary issues: current and foreseeable costs of EU border surveillance activities

As indicated in our introductory remarks, **the EC subsidy allocated to Frontex has been multiplied by three and a half over the period 2006-2008, from 18.940.000 euros in 2006 to a foreseen 68.000.000 euro in 2008.** The EC is the main contributor to the budget of the agency. The figures for 2008 are likely to be eventually higher than anticipated, as was the case in 2006 and 2007 which saw the EC subsidy to the agency increased through subsequent amendments by a rough 7 million euros for each year. 68,17% of this funding was allocated to operational matters in 2006, and 65,54% in 2008. Within the operational budget, sea border operations amount for the highest proportion, reaching 70,63% in 2006 and 40,17% in 2007 (which has seen an increase in the amounts spent on land operations, from 6,96% to 17,71%). The overall increase for operational expenditures, in this respect, amounts to 140% (2008 perspectives included)³⁸. These figures are substantially higher than the initial funding scheme envisaged for the agency: the impact assessment document notes in this respect that “the 2008 budget will be approximately 70 million € which is as high as the 2013 budget initially foreseen for the Agency”³⁹. Frontex is thus turning into a costlier than expected venture for the EU budget, and will likely be even more so with regard the evolutions proposed by the European Commission.

Are these expenses justified in terms of results? The evaluation report presents as an achievement the fact that, through Frontex operations, a rough 53 000 persons were arrested or denied entry over the period 2006-2007. However, the report falls short of providing a qualitative assessment of this result. According to OECD data, net migration for the EU-25 (plus Norway and Switzerland) in 2005 was more than 2,5 millions. In addition, based on the Commission’s own data, 800 000 persons were refused entry in the EU-25 the same year.⁴⁰ In the meantime, the agency spent 24 128 619 euros in operational expenses (all borders included), which makes for a ratio of 455 euros per person. This evaluation, of course, does not include the operational costs taken up by the Member States and does not take into account the so-called return operations coordinated by Frontex, which concerned 287 persons in 2006-2007, and for which budget details are not included in the statistical annex. In addition, it does not take into account the personal injury costs linked with individuals who might have died during Frontex operations. In a recent series of decisions involving acts of violence perpetrated by the Turkish authorities upon migrants⁴¹, the European Court of Human Rights has held Turkey to pay the plaintiffs for pecuniary damage,

³⁸ House of Lords European Union Committee (2008). *FRONTEX: the EU external borders agency: report with evidence*. London, The Stationery Office Limited, 9th Report of Session 2007-08.

³⁹ European Commission, 2008c, p.7.

⁴⁰ European Commission (2006). *Second annual report on the development of a common policy on illegal immigration, smuggling and trafficking of human beings, external border controls and the return of illegal residents*. Brussels, SEC(2006) 1010.

⁴¹ European Court of Human Rights (2005a). *Case of Süheyla Aydin v. Turkey (Application no. 25660/94) Judgement*. Strasbourg, Second Section, 24 May 2005; European Court of Human Rights (2005b). *Case of Yasin-Ates v. Turkey (Application no. 30949/96) – Judgement*. Strasbourg, Second Section, 31 May 2005; European Court of Human Rights (2006). *Case of Erdogan and others v. Turkey (Application no. 19807/92) - Judgement*. Strasbourg, Fourth Section, 25 April 2006.

for amounts reaching respectively 74500, 96000 and 183 000 euros (the latter for a case involving several applicants). Such costs, which might arise in the future, also have to be taken into account in evaluating the results of Frontex activities. As a general conclusion, then, it is worth indicating that, considering the amounts spent by the agency, the results are unimpressive. This has been stressed in a recent report of the United Kingdom House of Lords European Union Committee with regard the increase in the resources allocated to Frontex for 2008: “We believe the increased resources may usefully lead to a modest increase in the number of operations in 2008, but should be concentrated on further increasing the quality of those operations”⁴².

What are the foreseeable costs of the measures proposed by the European Commission? So far, the Commission has not proposed a detailed costs analysis for the measures envisaged under the Frontex evaluation and Eurosur communications:

- **Short/medium term measures for the development of Frontex:** Most of the costs incurred by these measures will have to be met through the Frontex budget. In particular, measures related to the expansion of the agency’s operational capacities, in view of past trends, are likely to have a strong impact. These include the merger of joint operations with the EPN, which will eventually cut down operational deployment costs but will nonetheless have a significant initial set-up cost as well as cumulated costs for the deployment and maintenance of equipments co-financed by Frontex. The possibility for the agency to acquire its own equipment will also put additional strain on the Frontex budget, as well as its envisaged expanded role in return operations, which might include the deployment of equipments and personnel. The other costs will most likely represent a smaller increase. Finally, the involvement of Frontex in research on border management technologies will not have a direct impact on the agency’s budget, but it is likely to have an impact on other elements of the EU’s budget, particularly with regard the 7th Community Research Framework Programme (FP7)⁴³ or other initiatives that the Commission might want to set up⁴⁴.
- **Long-term measures:** The cost of the long-term measures, aside from Eurosur which is dealt with below, remains difficult to assess. Participation in the Schengen evaluation mechanisms and activities of horizontal integration between Member States border guard and customs agencies and services will probably not add significant expenses, since they do not involve the deployment of equipment, and rely on existing structures. The budgetary impact of the possibility for Frontex to set up joint projects with third countries will depend on whether Frontex is funding these projects off its own budget or whether it is implementing projects funded under the EU’s external relations instruments. Costs will also be linked to the scope of such projects⁴⁵. With regard the development of direct operational capacities within Frontex, finally, there are no previous experiences that can allow even for a rough evaluation of costs. Frontex would become the first EU security agency with such capacities. Such developments would involve a major increase in both administrative and operational costs.
- **Eurosur:** The main costs pertaining to the development of Eurosur will not be borne by the Frontex budget. The development of national coordination centres and national border

⁴² House of Lords European Union Committee, 2008, op.cit., p.29.

⁴³ Under the FP7, Theme 9 (Space) has been allocated 1430 million euros and Theme 10 (Security) 1400 million euros. Border security is one of the four priorities in these themes.

⁴⁴ For example, the Preparatory Action on Security Research, which was set up in 2004 by the Commission and included projects on border surveillance technologies, was allocated a budget of 44,5 million euros in Community contribution. See D. Bigo, J. Jeandesboz, *Review of security measures in the 6th Research Framework Programme and the Preparatory Action for Security Research*, op.cit.

⁴⁵ As an illustration, the EU has been running such a project in its neighbourhood since November 2005, the European Union Border Assistance Mission to Moldova and Ukraine (EUBAM). The EUBAM was initially allocated 4 million euros under the Commission’s Rapid Reaction Mechanism for the first 6 months, completed by another 16 million euros for the following 18 months (amounting to 20 million euros for the first 24 months of the mission) under the TACIS instrument.

surveillance systems, and the interlinking of these centres and systems with Frontex are covered under the 2004-2006 Schengen Facility (961,4 million euros) and the 2007-2009 Cash Flow and Schengen Facility (799,3 million euros). Under the 2007-2013 External Borders Fund (1820 million euros total commitment), these issues have been flagged as specific priorities, increasing the rate of Community contribution from 50 to 75%. The support to border management infrastructure in third countries, while not evaluated yet, will be taken up by existing Community external relations instruments (most likely the European neighbourhood and partnership instrument). Research and development for common application tools will be taken up by the FP7. The establishment of the mechanisms for the “common pre-frontier intelligence mechanism” will also fall under the EBF. Finally, for the last steps in the development of Eurosur, namely the establishment of an information sharing environment about select areas of the EU external maritime borders and its later extension, figures and funding schemes are not available⁴⁶.

The main point that can be made out of this survey is that the proposed measures for the future development of Frontex and Eurosur will represent **a major financial effort for the Community, through the budget of the agency, but also through a variety of other instruments, including the EBF and external relations instruments.**

2.4. Fundamental freedoms and rights: the current and foreseeable impact of Frontex activities on EU fundamental values

The evaluation report produced by the Commission services **fails to address satisfactorily the issue of the impact of past Frontex activities on the fundamental freedoms and rights of individuals.** This also holds true with regard the envisaged developments for the agency’s role and competences. In particular, the principle of proportionality seems to receive very little attention: the question, in this perspective, is whether the measures proposed by the Commission are suitable and necessary, particularly with regard the agency’s record of activities. Again, it is important to recall that Frontex is a first-pillar, Community body, which implies that it not only has **an obligation to uphold the fundamental values of the EU, but also to promote and expand their reach as necessary.**

With regard past activities, the Commission evaluation makes no mention of some of the questions raised by the operations coordinated by Frontex, particularly in the Canary Islands region. These operations aimed in part at intercepting crafts suspected of carrying irregular migrants in the territorial waters of Mauritania and Senegal and bring them back to the coast, thus denying the passengers of these crafts the possibility of lodging an asylum application except if the interception took place beyond the territorial waters of those states. Such practices are already problematic from the point of view of fundamental freedoms and rights, and all the more since the interception in Mauritanian and Senegalese territorial waters took place on the basis of bilateral agreements between Spain and the relevant authorities of both countries that have not been made public⁴⁷. In this case, Frontex is found in a position where **it has facilitated what can be construed as a breach in the principle of protection** for asylum-seekers and refugees, but also **participated in practices of secrecy** which run against all EU and Member State **principles of democratic scrutiny and transparency.**

The envisaged development of the agency’s activities also raises a set of interrogations with regard fundamental freedoms and rights. These issues, firstly, have not been included in the scope of the Commission’s evaluation of the agency. The Eurosur

⁴⁶ See the Eurosur impact assessment document – European Commission, 2008e, p.54.

⁴⁷ S.Carrera (2007). *The EU Border Management Strategy: Frontex and the Challenges of Irregular Immigration in the Canary Islands*. Brussels, CEPS Working Documents, n°261, March; M.Mir (2007). *Managing the EU’s External Frontiers: Lessons to be Learned from FRONTEX’s Action in the Canary Island*. Brussels, Standard Briefing Note for the European Parliament, April.

communication, furthermore, is particularly expeditious, since it dedicates only one paragraph to the issue: “The different activities referred to in the previous sections may involve the processing of personal data. Thus the principles of personal data protection law applicable in the European Union are to be observed, meaning that personal data must be processed fairly and lawfully, collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes. The processing of personal data within the context of EUROSUR must therefore be based on appropriate legislative measures, which define the nature of the processing and lay down appropriate safeguards”⁴⁸.

The possibility opened up for Frontex to handle personal data in the close future is something that was not envisaged in the original attributions of the agency, and one might wonder if this is necessary for the agency to perform its tasks. The sharing of personal data in a system such as the one envisaged by the Eurosur communication, through which information would be gathered, handled and dispatched in real time to a very large contingent of agencies and services across eight or more Member States, **will not offer the necessary guarantee in terms of privacy and purposive collection, which lie at the heart of EU values regarding the operation of databases and information systems.**

Furthermore, the Eurosur proposal is based on the notion that Frontex, via new accesses to information, will be able to provide a “common pre-frontier intelligence picture”. “Pre-frontier” seems to imply that cooperation with third countries in intelligence gathering will be increased. This also relates to the possibility of Frontex to have a mandate for running pilot projects with relevant third countries⁴⁹. While cooperation with third countries should undeniably be welcomed, such ventures cannot be undertaken at the expense of EU fundamental values. Cooperation with several of these countries in areas as sensitive for fundamental freedoms and rights as border management is a troubling prospect, and even more so if this should lead, in the perspective of Eurosur’s “common pre-frontier intelligence picture”, to collaboration with intelligence services. **There are no guarantees that the principles of democratic scrutiny, transparency, proportionality and privacy can be upheld should such cooperative ventures take place, and no mechanism to ensure the proper scrutiny of such developments.**

Underlying these issues, finally, is a twofold question:

- **Should Frontex activities, being those of a first-pillar body, be more developed in the field of fundamental freedoms and rights?** The answer is clearly positive. Some of the measures proposed by the Commission, such as the development of specialised courses in asylum and human rights law in Frontex training activities, are thus welcome. They should be further developed. In particular, the possibility of Frontex contributing to the rights of individuals seeking protection in the course of its operations could be explored. It seems that the agency is lacking the capacity to provide legal support to persons seeking protection, and has no means of ensuring that the rights of these persons are guaranteed in the operations it coordinates. There is furthermore a necessity to make the agency more accountable and more transparent to democratic scrutiny. **The upholding and promotion of fundamental freedoms and rights should be considered as a crucial part of a comprehensive integrated border management doctrine, and an integral part of the mandate and activities of Frontex.**
- **Do the EU and its Member States need additional measures of surveillance of their external borders?** The argument of the EU institutions and the Member States, in this respect, has always been that a balance should be found between security requirements and obligations in the field of fundamental freedoms and rights. The case of Frontex

⁴⁸ European Commission, 2008b, p.11.

⁴⁹ Frontex has working arrangements with Switzerland, Russia and Ukraine. Mandates have been issued for negotiations with (among others) Cape Verde former Yugoslave republic of Macedonia, Egypt, Libya, Mauritania, Morocco, Senegal and Turkey. The evaluation report itself also notes that “the possibility of developing a cooperation between FRONTEX and Belarus could be explored” (European Commission, 2008a, p.9.)

highlights how such a “balance” mechanism operates, **namely by playing out almost systematically in favour of security requirements**. It is important to recall again, in this view, that security cannot be considered as of equal value to freedom, and an objective in itself. **Security is a means towards greater freedom and the protection of fundamental rights**.

3. RECOMMENDATIONS

1. The activities of Frontex should be submitted to a full evaluation with regard their impact on fundamental freedoms and rights, including the responsibility to protect. The European Parliament should insist that such a focus be included in the parameters of the independent evaluation of the agency to be commissioned in 2008 by the Frontex Management Board, and insist that the results of this report are made public. Should this evaluation be found lacking in this respect, the European Parliament should commission its own assessment.
2. The European Parliament should insist that a unit focusing on legal assistance to persons seeking international protection is set up within Frontex. Officials from this unit would be present in all Frontex joint operations, to assist asylum-seekers and persons seeking international protection. In addition, the efforts to establish an Agreement of Co-operation between Frontex and the United Nations High Commissioner for Refugees (UNHCR) should be accelerated. It could in particular open the possibility for UNHCR officials to participate in Frontex operations, with possible support from the External Borders Fund, and give UNHCR an observer status on the agency’s Management Board⁵⁰.
3. The development of Eurosur should be conditioned to the previous two outcomes. In particular, the need for the foreseen Frontex information system to include personal data should be assessed. In this regard, the opinion of the European Data Protection Supervisor should be requested before any new developments can take place. Further progress concerning the Eurosur initiative, additionally, should be halted until the objectives set out in the Hague Programme are fulfilled.
4. The European Parliament should request that Frontex documents, including the evaluation reports on the joint operations conducted by the agency, its risk analyses and feasibility studies are made publicly available. This would enhance the transparency of EU activities in this area for European citizens, and allow for independent external analyses and evaluations of Frontex to be developed.

⁵⁰ So far, the UNHCR has established a liaison team in the Frontex Warsaw headquarters. See the declarations of M. Soufiane Adjali, UNHCR Senior Liaison Officer to Frontex, in the House of Lords 2008 report on the agency (op.cit., p.70-73).

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

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