

- Monar, J. (1995). Democratic Control of Justice and Home Affairs: The European Parliament and the National Parliaments. In Bieber, R. and Monar, J. (eds), *Justice and Home Affairs in the European Union: The Development of the Third Pillar*. Brussels: European Interuniversity Press.
- Neuwahl, N. (1995). Judicial Control in Matters of Justice and Home Affairs: What Role for the Court of Justice. In Bieber, R. and Monar, J. (eds), *Justice and Home Affairs in the European Union. The Development of the Third Pillar*. Brussels: European University Press.
- Peers, S. (2006). From Black Market to Constitution: The Development of the Institutional Framework for EC Immigration and Asylum Law. In Peers, S. and Rogers, N. (eds), *EU Immigration and Asylum Law: Text and Commentary*. Leiden: Martinus Nijhoff.
- Peers, S. (2011). *EU Justice and Home Affairs, Third Edition*. Oxford: Oxford University Press.
- Pokki, S. (2016). Interparliamentary Cooperation in the European Union – Differences across Policy Areas. *PACO Working Papers*, WP02.
- Ripoll Servent, A. (2015). *Institutional and Policy Change in the European Parliament. Deciding on Freedom, Security and Justice*. Basingstoke: Palgrave Macmillan.
- Rozenberg, O. and Heffler, C. (2015). Introduction. In Heffler, C., Neuhold, C., Rozenberg, O. and Smith, J. (eds), *The Palgrave Handbook of National Parliaments and the European Union*. Basingstoke: Palgrave Macmillan.
- Saulnier, E. (2002). *La participation des parlements français et britannique aux communautés et à l'Union européennes: lecture parlementaire de la construction européenne*. Paris: L.G.D.J.
- Strelkov, A. (2015). *National Parliaments in the Aftermath of the Lisbon Treaty Adaptation to the 'New Opportunity Structure'*. PhD, University of Maastricht.
- Tacea, A. (2016a). Speaking With One Voice? The Use of the Early Warning Mechanism by the Two Houses of the French Parliament. In Cornell, A.J. and Goldoni, M. (eds), *National and Regional Parliaments in the EU Legislative Procedure after Lisbon: The Impact of the Early Warning Mechanism*. Oxford: Hart Publishing.
- Tacea, A. (2016b). Towards More Security? The Involvement of the National Parliaments in the Reform of the Schengen Agreements. In Bossong, R. and Carrapico, H. (eds), *EU Borders and Shifting Internal Security – Technology, Externalization and Accountability*. Heidelberg: Springer International.
- Tacea, A. (2017). *Governments under the watchful eye of their parliament. The involvement of the French, Italian and the British parliaments in the scrutiny and the decision-making process in the Area of Freedom, Security and Justice*. PhD, Sciences Po Paris.
- Trauner, F. and Ripoll Servent, A. (2015). *Policy Change in the Area of Freedom, Security and Justice: How EU Institutions Matter*. London; New York: Routledge.
- Walker, N. (2000). *Policing in a Changing Constitutional Order*. London: Sweet & Maxwell.
- Walker, N. (2004). *Europe's Area of Freedom, Security, and Justice*. Oxford: Oxford University Press.
- Wilde, P.D. (2012). Why the Early Warning Mechanism Does not Alleviate the Democratic Deficit. *OPAL Online Paper*, No. 6.

## THE EU'S AGENCIES

### Ever more important for the governance of the Area of Freedom, Security and Justice

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#### Introduction

The Area of Freedom, Security and Justice (AFSJ) has gone through a process of agencification, as has happened with many other EU policies. European agencies represent 'an important part of the EU's institutional machinery' (Chiti 2009: 1395). The development of the AFSJ has led to a multiplication of the activities carried by EU agencies, which were created to reinforce operational cooperation among national authorities. The AFSJ agencies have not only offered operational and technical support to the member states, but they have also provided 'useful evidence-based input to the policy debate and the decision process' at the EU level (AFSJ Agencies 2014). The AFSJ agencies are also bound to play a key role in relations with third states and international organizations. In the past years, AFSJ agencies have been called upon by the institutions to increase their cooperation with those third countries considered to be a priority for the EU.

The role of the home affairs agencies in the development of the AFSJ should be framed within the debate on decentralized agencies of the EU, which has taken place over the past years. The significant degree of autonomy enjoyed by agencies in their activities does not, however, mean that they are immune to all controls. Attention has recently been paid to the need to strike a balance between the autonomy of EU agencies and their accountability (Busuic et al. 2011). In 2008, the Commission stated that the varied roles, structure and profile of regulatory agencies raise doubts about their accountability and legitimacy (European Commission 2008). The 2012 Joint Statement of the European Parliament, the Council of the EU and the European Commission on decentralized agencies aims to develop a common framework for the accountability of agencies (European Parliament, Council and Commission 2012). In contrast to the great majority of regulatory agencies, AFSJ agencies' operational activities may have direct or indirect implications for the fundamental rights of individuals, and particularly for third-country nationals and asylum-seekers. Since AFSJ agencies' operational activities may have negative impacts upon human rights, *ex-post* accountability is not an adequate option, and ongoing scrutiny is the only satisfactory mechanism to ensure accountability (Carrera et al. 2013: 338). Even though the main focus of this chapter lies in parliamentary and judicial controls over the activities of the AFSJ agencies, the *ex-post* accountability is also taken into account. Accountability is understood in this context as 'a relationship between an actor and a forum, in which

the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgment, and the actor may face consequences' (Bovens 2007: 450).

As has happened with agencies in general, the establishment and development of agencies in the AFSJ 'has not been accompanied by an overall vision of the place of agencies in the Union' and 'the lack of such a global vision has made it more difficult for agencies to work effectively and to deliver for the EU as a whole' (European Commission 2008: 2). The 2012 Joint Statement of the European Parliament, the Council of the EU and the European Commission on decentralized agencies has adopted a more critical approach towards the creation of new agencies in general. However, it is not possible to understand the development of the AFSJ without the agencies.

The existing AFSJ agencies are Europol, Eurojust, the European Border and Coast Guard Agency (Frontex), the European Police College (CEPOL), the European Asylum Office (EASO) and the EU Agency for large-scale IT systems within the Area of Freedom, Security and Justice (EULISA). The European Union Agency for Fundamental Rights and the European Monitoring Centre for Drugs and Drug Addiction develop some of their activities under the aegis of the AFSJ, but they are not strictly AFSJ agencies. This chapter will mainly focus on the practices of Europol, Frontex and EASO. The three agencies present characteristics which clearly differentiate them from Eurojust and CEPOL due to the fact that their powers are not merely regulatory and have undertaken relevant operational activities. The second section of this chapter will focus on examining the establishment and development of Europol, Frontex and EASO over the years, as well as on the main activities carried out by them. The third section will be devoted to analyzing democratic control over the activities of the AFSJ agencies. The fourth section provides a detailed examination of the mechanisms available to the individuals in case of fundamental rights violations occurring as a result of the AFSJ agencies.

### The development of AFSJ agencies

The activities carried out by AFSJ agencies are very diverse, and have continued to expand in recent years. This expansion of competences has taken place not only through the legislative process, but has also developed through dynamic development in the performance of its activities which has allowed them to expand the powers originally granted by the founding legal act. This dynamism has been accepted by member states as new challenges have been raised to which member states in isolation cannot provide a satisfactory answer. As a result, 'their competences and areas of intervention are in constant mutation, struggle and redefinition' (Carrera *et al.* 2013: 342). The large-scale and uncontrolled arrival of migrants and asylum-seekers to the Union has led to an expansion of the operational powers of Frontex, Europol and EASO beyond original expectations. This section examines the development of the AFSJ agencies and the main activities carried out by them.

In the past, a formal distinction could be made between the agencies that were created within the framework of the former third pillar and the agencies established under the former first pillar. Europol, Eurojust and CEPOL were established under the former third pillar. After the entry into force of the Lisbon Treaty, the Treaties included for the first time an explicit legal basis for the establishment of Europol and Eurojust in Articles 85 and 88 TFEU. With the adoption of Regulation 2016/794, Europol has recently been integrated within the TFEU. Other agencies have been created on the basis of specific policy areas regulated in the Treaties and without a specific legal basis for their creation. The only AFSJ agency that was originally set up under the former first pillar was Frontex. EASO and EULISA were formally established after the

entry into force of the Lisbon Treaty. The activities undertaken by Frontex and Europol have recently been expanded through the legislative process. It is expected that the powers of EASO will also be reinforced in 2017.

### Europol

Europol was set up by the Council Decision of April 6, 2009 establishing the European Police Office, which legally established it as a EU agency. Europol's objective, as laid out in Article 88 TFEU, is to support and strengthen action by competent authorities of the member states and their mutual cooperation in preventing and combatting organized crime, terrorism and other forms of serious crime affecting two or more member states. The Europol Council Decision of 2009 replaced the Convention of 1995 (see De Moor and Vermeulen 2010; Santos Vara 2010). The operational powers of Europol have been developed through the protocols that modified the Europol Convention. Europol may participate in joint investigation teams and was granted operational powers to help member states conduct or coordinate investigations and to suggest the setting up of joint investigation teams (JITs).

Since the Europol Decision of 2009 was adopted within the framework of the former third pillar, a need arose to fully integrate Europol within the framework of the TEU and TFEU in order to enhance the democratic legitimacy and accountability of Europol to the Union's citizens. Article 88 TFEU provides for Europol to be governed by a regulation to be adopted in accordance with the ordinary legislative procedure. Therefore, the Europol Council Decision was replaced by Regulation 2016/794. The new Europol Regulation has continued the trend to extend the powers of the agency. It reinforces the powers of Europol to participate in JITs, and to initiate and conduct criminal investigations when it considers that it provides an added value. As a consequence of the refugee crisis, Europol's operational efforts to fight criminal activities associated with migration have been reinforced, in particular within the 'hotspots'.

### Frontex

Frontex was established with the aim of coordinating and assisting member states' actions in the surveillance and control of the external borders of the EU (see Carrera 2007). Frontex has been characterized as an agency with a dual character (Rijpma 2012: 90). On the one hand, it assists member states in the implementation of a common integrated management of the external borders through the provision of technical support. On the other hand, Frontex is entrusted with the coordination of joint operations between member states' national border guards. Since its establishment, Frontex has coordinated many joint operations covering the air, land and sea borders of the member states. Frontex is the AFSJ agency which has experienced the greatest growth in its powers in past years. The first amendment of Frontex's founding regulation took place in 2007. Frontex was authorized to deploy Rapid Border Intervention Teams (RABITs) to assist member states faced with the arrival of large numbers of third-country nationals trying to cross the external borders irregularly. The reform introduced by Regulation 1168/2011 conferred upon Frontex stronger powers in the coordination of joint operations and in the deployment of Rapid Border Intervention Teams (RABITs), which were renamed European Border Guard Teams (EBGTs).

One of the most relevant proposals presented by the Commission to address the refugee crisis was the establishment of a European Border and Coast Guard (EBCG). The EBCG is a legal fiction comprising the new European agency that replaced Frontex and the national border guards (de Bruycker 2016: 6). Regulation 2016/1624 does not create a true European border and coast guard, understood as a European body replacing national border guards, but rather a

Frontex-plus agency (Carrera and den Hertog 2016: 2). However, the EBCG Regulation substantially expands the powers of the agency over the member states. The agency shall evaluate member states' capacity to control their sections of the external border through a 'vulnerability assessment' (Article 12). The EBCG Regulation contains a provision giving the agency the power to intervene in a member state in the case that it does not implement the corrective measures proposed after a vulnerability assessment or in case of 'disproportionate migratory pressure at the external border risking to jeopardize the Schengen Area' (Article 19).

### EASO

The adoption of Regulation 439/2010 in 2010 established the European Asylum Support Office. The EASO's formal objective is to facilitate, coordinate and strengthen practical cooperation among member states in order to improve the implementation of the Common European Asylum System (CEAS). One of its most well-known tasks is to deploy Asylum Support Teams on the territory of a member state affected by particular pressure on their asylum and reception systems. As has happened with Europol and Frontex, the operational tasks undertaken by the EASO have progressively evolved so as to meet the growing needs of member states and of the CEAS as a whole.

As part of the package to reform the CEAS, on May 4, 2016 the Commission presented a proposal to strengthen the role of the EASO. The Commission considers that the agency is one of the tools that may be used to effectively address the structural weaknesses in the CEAS which have been further exacerbated by the large-scale and uncontrolled arrival of migrants and asylum-seekers to the EU in the past years. The new EASO should be able to 'reinforce and complement the asylum and reception systems of Member States' (European Commission 2008: 1). Accordingly, the proposal renames the EASO as the European Union Agency for Asylum. The Regulation would reinforce its operational activities. New tasks will be conferred onto the EASO to ensure a high degree of uniformity in the application of EU asylum law across the Union, to assess compliance with the CEAS and other key tasks such as the provision and analysis of country of origin information, to increase operational and technical support to member states and to enable more convergence in the assessment of applications for international protection across the Union. Member states may seek assistance from the agency 'when their asylum and reception systems are subject to disproportionate pressure' (Article 16). Similarly to Frontex, the new EASO would have the power to intervene in member states subject to disproportionate pressures on their asylum and reception systems when these states do not seek assistance from the agency or do not take sufficient action to address that pressure (Article 22).

### The democratic control over AFSJ agencies' activities

The above examination of the development of agencies has shown that the large-scale and uncontrolled arrival of migrants and asylum-seekers to the Union has led to a reinforcement of the operational powers of Frontex, Europol and EASO. The agencies contribute to the achievement of the objectives of the AFSJ. The agencies allow member states to increase their cooperation in policy areas closely linked to their national sovereignty. Furthermore, the operational activities developed by some AFSJ agencies also contribute to the Europeanization of policies not transferred to the EU. Therefore, AFSJ agencies allow the EU to tackle migration and other issues more efficiently. In light of the legislative changes already introduced or proposed, it is necessary to examine whether they have also brought about a reinforcement of democratic control over the activities of these agencies.

The increasing tasks and powers conferred upon AFSJ agencies have been coupled with concerns for democratic accountability (De Witte and Rijpma 2011; Trauner 2012; Santos Vara 2015). In the case of the three agencies set up under the former third pillar, parliamentary control was originally very limited, although as will become clear below, subsequent reforms have improved their accountability. This situation arose because these agencies were set up as the result of an intergovernmental procedure in which the European Parliament and the Commission were left outside of the decision-making process. Even though Frontex was established under the former first pillar, democratic control over its activities was also very weak. EASO and EULISA were established after the Treaty of Lisbon entered into force, which has not in either case led to the introduction of democratic controls adequate for the important roles these agencies fulfill. Despite the fact that the introduction of the community method in most policy areas of the AFSJ after the Lisbon Treaty has not substantially transformed them (Trauner and Ripoll Servent 2016: 1421), the application of the co-decision to the establishment and modification of Frontex, Europol and EASO has led to an improvement in democratic control over the activities of these agencies (Santos Vara 2015: 122). The changes introduced by the Lisbon Treaty have led to 'new and more EU-based accountability structures' (Trauner 2012).

There is no doubt that the most important control the European Parliament has over AFSJ agencies stems from the fact that they are largely financed through the general EU budget. As the Parliament, along with the Council, is the budgetary authority, the Budgets and Budgetary Control Committees are involved in the establishment and monitoring of the agencies' budget. Furthermore, in accordance with the agencies' founding regulations, the Parliament monitors the implementation of agency budgets. The discharge procedure provides the Parliament with the means to control and monitor the implementation of the agencies' budgets, and the debates in the two parliamentary committees in charge provide the Parliament with the chance to demand changes and improvements in the governance of the agencies (Busuioc 2011).

The AFSJ agencies, like others, are required to prepare an annual and a multi-annual working program and to adopt an annual activity report of the agency's activities for the previous year, which must be submitted to the European Parliament for information. Although these documents report on the activities of the agencies and are reviewed by the Civil Liberties, Justice and Home Affairs Committee (LIBE), they do not result in a parliamentary evaluation of the activities of each of the agencies. The LIBE Committee should be more active by requiring relevant information and monitoring the implementation of its demands by the agencies.

Traditionally, one of the main weaknesses in the democratic control of the AFSJ agencies stemmed from the fact that the European Parliament was not involved in the appointment of the directors of the agencies. The Parliament was not consulted in the past during the appointment process for the directors of Europol, Frontex and CEPOL. In the two agencies established after the entry into force of the Lisbon Treaty (EASO and EULISA), the candidate selected by the Management Board has to appear before the relevant parliamentary committee or committees of the Parliament and answer questions put by their members. The 2016 Regulations of Frontex and Europol have also adopted the same system for the appointment of director. The Parliament must emit an opinion on the proposed candidate or candidates and may indicate a preferred candidate. The Management Board of the agency must inform the Parliament of the manner in which its opinion was taken into account, in particular when it appoints a candidate other than the one preferred by the Parliament. This new formula may be interpreted as a positive response to the efforts made to improve the governance and accountability of the agencies. In contrast with other agencies, where the management board depends directly on the Commission, member states control most of the management boards in the case of AFSJ agencies, which makes the choice of director a more intergovernmental decision. The 2016 Europol

Regulation includes highly significant measures to increase the democratic accountability of the agency, with a view to improving the democratic control of the agency's activities. Article 42 of the TFEU requires the establishment of procedures for the scrutiny of Europol's activities by the European Parliament, together with national parliaments, in order to enhance the democratic legitimacy and accountability of Europol to the Union's citizens. Article 51 of the Regulation foresees the constitution of a Joint Parliamentary Scrutiny Group established together by the national parliaments and the European Parliament. The Joint Parliamentary Scrutiny Group is entrusted to monitor Europol's activities in fulfilling its mission, including the impact of agencies' activities on the fundamental rights and freedoms of natural persons. Europol has to inform and report to the European Parliament and to national parliaments on assessments of threats, strategic analyses and general updates related to the objectives of Europol, the multi-annual programming and the annual work program of Europol, the consolidated annual activities report on Europol's activities, as well as on cooperation agreements concluded with third countries and international organizations. Therefore, the Europol Regulation acknowledges the relevance of interparliamentary cooperation in the supervision of the agency. Since national parliaments were conferred an important role after the Lisbon Treaty in the EU institutional framework, the joint supervision of AFSJ policies and agencies is a welcome development (Mitsilegas 2007). The constitution of the Joint Parliamentary Scrutiny Group introduces a positive innovation that alleviates the democratic deficit of a body which performs a role of major importance in the fight against organized crime.

The obligation of the director to inform the Parliament when requested has been included in the founding regulations of the two agencies established after the Lisbon Treaty (EASO and EULISA). The 2016 Regulations of Frontex and Europol also foresee the possibility of inviting the executive director to report to the Parliament on the performance of the agency. In the past, senior Frontex officials have declined to take part in debates organized by the Parliament on the management of maritime borders in Southern Europe (Baldaccini 2010: 236). The regulation establishing the EBCG has provided a satisfactory solution to this weakness in the democratic control over Frontex. According to the regulation establishing the EBCG, the new Frontex is accountable to the European Parliament. The agency also has to report on its activities to the European Parliament and to the Council to the fullest extent, and in particular, regarding the general risk analyses, the results of the vulnerability assessment, the situations at the external borders requiring urgent action and decisions taken in response, the composition and deployment of European Border and Coast Guard teams, and the research and innovation activities relevant for European integrated border management.

One of the difficulties involved in the parliamentary scrutiny of Frontex, as with AFSJ agencies as a whole, is that of access to classified information. In the case of Frontex, the transmission of classified information to the European Parliament has to comply with the rules applicable to the Parliament and the Commission. Access by the European Parliament to Europol's classified information has to be consistent with the Interinstitutional Agreement of March 12, 2014 between the European Parliament and the Council concerning the forwarding and handling of classified information by the European Parliament held by the Council on matters other than those in the area of the Common Foreign and Security Policy. For this purpose, Europol and the Parliament will have to conclude working arrangements regulating the access allowed to the Parliament. The creation of a LIBE subcommittee dedicated solely to the parliamentary supervision of AFSJ agencies has been proposed (De Witte and Rijpma 2011). A subcommittee of this type would be the ideal solution to address the weaknesses that characterize the democratic accountability of AFSJ agencies as regards classified information, while at the same time ensuring the confidentiality of information.

As was pointed out in the introduction to this chapter, the issue of the control and accountability of AFSJ agencies should be framed within the debate on the decentralized agencies of the EU, which has taken place in the past few years (Bernard 2012; Comte 2008). In order to improve the existing situation, specifically the coherence, effectiveness, accountability and transparency of these agencies, the Parliament, the Council and the Commission agreed in 2009 to create an inter-institutional working group on decentralized agencies. The results of this inter-institutional dialogue are laid out in the 2012 Joint Declaration on decentralized agencies and the Commission roadmap on the follow-up to the Common Approach. The Joint Declaration includes proposals to harmonize practices of democratic control over all of the agencies. A novel measure was devised to ensure political control over the agencies. If the Commission has a serious cause for concern that an agency's Management Board is about to take a decision which contravenes the mandate of the agency or violates EU law, 'the Commission will formally raise the question in the Management Board and request it to refrain from adopting the relevant decision' (European Parliament, Council and Commission 2012: 13). Should the Management Board not follow the Commission's recommendations, the latter will then inform the European Parliament and the Council in order to allow these institutions to react in good time. This warning system confirms that the Commission has significant authority over the supervision of the agencies, and that it may influence their operation through its participation in the management board.

### Redress in the case of fundamental rights breaches

The dynamic evolution of the tasks undertaken by the AFSJ agencies, in particular by Frontex, Europol and EASO in the past years, has not led the institutions to admit that the agencies' activities may have potential fundamental rights implications. It is considered that these agencies were set up in order to facilitate and coordinate operational cooperation among the authorities of the member states. Therefore, AFSJ agencies are not granted the powers to make decisions which have a binding legal effect on third parties; nor do they have the power to make operational decisions. However, 'closer examination of these agencies' tasks reveals that they are entitled to act not only as coordinators, but also as the planners and initiators of operational actions' (Carrera *et al.* 2013: 344). The relevance of human rights has been taken into account by the AFSJ agencies themselves in the development of their activities, and new mechanisms have been introduced through the legislative process to ensure accountability. The question remains to what extent the human rights mechanisms devised thus far provide a satisfactory answer to the issues at stake.

### Human rights challenges

Since the powers of Frontex are mainly directed towards managing the external borders, its activities have raised many complex issues. The respect for the right of asylum, the right to an effective remedy and the principle of non-refoulement may be at stake in the operations coordinated by Frontex. This discussion has dealt mainly with the treatment that must be granted to persons on board the vessels intercepted on the high seas and in the territorial waters of third states (Santos Vara and Sánchez-Tabernero 2016; Papastavridis 2010; Fischer-Lescano *et al.* 2009; Klepp 2010). Frontex has been severely criticized since its early days for not carrying out sea surveillance operations in full compliance with human rights obligations (Cederbratt 2013). Regulation 1168/2011, which modified the 2004 Frontex Regulation, constantly stated that the agency was fully committed to respecting fundamental human rights both when it was

acting independently and when it was in cooperation with third countries and international organizations. Furthermore, Frontex has undertaken a number of initiatives with a view to integrating fundamental human rights in its activities, such as the development of the Frontex Fundamental Rights Strategy and the establishment of the Frontex Consultative Forum on human rights and the appointment of a fundamental rights officer. These amendments did not constitute an effective remedy in the case of fundamental rights breaches, but they have raised awareness and contributed to mainstreaming fundamental rights in the work of the agency (Rijpma 2014: 67).

Frontex and the European Commission have always held that the responsibility for fundamental rights breaches lies exclusively with the member states. In 2012, the European Ombudsman opened an own-initiative inquiry to assess the implementation by Frontex of fundamental rights obligations. The European Ombudsman pointed out the absence of any procedure to deal with human rights infringements that occurred during joint operations coordinated by Frontex (European Ombudsman 2013). The EBCG Regulation introduces a new complaint mechanism to monitor and ensure respect for fundamental rights. According to Article 72, anyone who considers that he or she is the victim of fundamental rights violations committed during an operation coordinated by Frontex may submit a complaint to the agency. The complaints are handled by the fundamental rights officer. If a complaint is admitted by the fundamental rights officer, the member states or the agency will ensure an 'appropriate follow-up' depending on whether the complaint concerns a staff member of the agency or a member state (Article 72 of the EBCG Regulation). The new procedure brings a positive development to deal with human rights violations, since the victims have a complaint mechanism at their disposal. However, it is an administrative procedure that cannot substitute the right to an effective remedy under Article 47 of the Charter of Fundamental Rights (Peers 2015; Rijpma 2016: 30).

As regards Europol, the rules on data protection are very important in achieving the development of European police cooperation while not negatively affecting fundamental rights, and in particular, the right to private life of all citizens (Santos Vara 2010). Even though data protection has been reinforced in the 2016 Europol Regulation, data processing raises very sensitive issues. The activities developed by Europol in its external dimension raise also fundamental rights concerns. The main external activity carried out by Europol is the possibility of interchanging information with third countries within the framework of the agreements concluded by the agency. The exact nature of the cooperation involved depends on the type of agreement reached. While strategic agreements only allow for the exchange of generic information, operational agreements also facilitate the exchange of personal data.

As regards the external dimension of AFSJ agencies, Frontex is the agency which has experienced the greatest growth in its cooperation with third states in the past years. The working arrangements concluded with third countries constitute a very important instrument for the development of Frontex's external relations (Fink 2012: 20). These agreements include undertakings in the field of information exchange and the creation and coordination of joint operational measures and pilot projects, as well as cooperation in risk analysis, technical development of border procedures and training. The agency may deploy liaison officers in third countries and receive liaison officers from third countries on a reciprocal basis, with a view to contributing to the prevention of and fight against irregular immigration and the return of irregular migrants. The agency may also invite observers from third countries to take part in its activities. The Regulation on the EBCG even foresees the possibility that the agency may coordinate operational cooperation among member states and third countries with respect to management of the external borders and even implement operations on the territory of third countries.

### Judicial review over AFSJ agencies

Given that, from the perspective of fundamental rights, AFSJ agencies are acting in a particularly sensitive area, it is essential that they are fully accountable for their activities. The substantial autonomy enjoyed by AFSJ agencies in developing their activities does not mean that they are immune to judicial controls. Since AFSJ agencies were created to reinforce operational cooperation among national authorities and to assist them, they can avoid judicial accountability, arguing that the member states are responsible vis-à-vis the individuals. It is necessary to examine the options offered by the European Union's legal order for obtaining redress in case violations occur as a result of the activities undertaken by the AFSJ agencies.

The Treaty of Lisbon expressly introduced the possibility of taking legal action to annul legal acts of the agencies. In Article 263 TFEU, it is stipulated that the Court of Justice 'shall review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties'. All EU agencies may be included within the concept of an 'office' or 'agency' outlined in Article 263 TFEU, with the exception of the CFSP agencies, given that the jurisdiction of the Court of Justice is excluded by Article 24 TEU. Therefore, in the case of fundamental rights violations against an individual, he or she may seek legal redress on the basis of Article 263 TFEU. In addition, Article 340 TFEU gives an individual the right to sue an institution or agency seeking compensation for damages.

Before the entry into force of the Lisbon Treaty, the General Court had already accepted the possibility of bringing an annulment action against the act of an agency in *Solgema*. On the basis of the *Les Verts* judgment, the General Court held that 'an act emanating from a Community body intended to produce legal effects vis-à-vis third parties cannot escape judicial review by the Community judicature' (*Solgema*: par. 48). It must also be kept in mind that the Court of Justice interprets the access to its jurisdiction restrictively. Therefore, the applicants that lodge an action for annulment have to demonstrate that an act has been addressed by an agency directly to them. Apart from that, there is also sometimes uncertainty regarding the distribution of responsibility among the different actors involved in the agencies' activities in the AFSJ. A good illustration is the hotspots set up to manage the massive arrival of refugees to Italy and Greece, developed within the framework of the Agenda for Migration of 2015. The EASO, Frontex, Europol and Eurojust work on the ground with the authorities of member states to help them fulfill their obligations under EU law and swiftly identify, register and fingerprint incoming migrants. Frontex joint operations at sea also raise complex issues regarding the allocation of responsibility between the agency and the member states involved in cases of human rights violations, or even among the member states participating in Frontex joint operations. Furthermore, the possibility of developing and coordinating operations on the territory of third countries exacerbates the difficulty in the delimitation of responsibility between the actors involved. The EBCG Regulation does not introduce a clarification on the allocation of responsibility between the actors involved in Frontex joint operations implemented in the territory of third countries (Fink 2016: 3). The broadening powers conferred upon Frontex by the new regulation may exacerbate the problems facing the individuals who are victims of human rights violations and who try to obtain judicial redress.

### Conclusions

This chapter has shown that the substantial autonomy enjoyed by AFSJ agencies in developing their activities does not mean that they are immune to political and judicial controls. The development of the AFSJ has resulted in new tasks and powers entrusted to these agencies as well as

new concerns for effective accountability and respect of fundamental rights. The AFSJ agencies have been presented as instruments to facilitate or reinforce operational cooperation among the authorities of the member states. The activities performed by Frontex, Europol and the EASO go beyond mere coordination, as they have assumed relevant operational activities which may have negative implications for fundamental rights. The operational activities developed by these agencies contribute to the Europeanization of national actors and policies closely linked to national sovereignty. However, there is still a gap in the literature regarding the practical working of AFSJ agencies and their impact upon operational cooperation among member states.

Democratic control over the activities of these agencies has not been adequately considered in the successive reforms of the treaties and has not been well developed in practice. It must be recognized that despite the limited prerogatives conferred upon the European Parliament regarding AFSJ agencies, the Parliament has been very active in exerting an increasingly strong political influence, especially the need to take into account the implications of the agencies' activities on fundamental rights. The application of the co-decision to the modification of Frontex, Europol and the EASO after the entry into force of the Treaty of Lisbon has led to an improvement of democratic control over the activities of these agencies. In regards to Europol, the constitution of the Joint Parliamentary Scrutiny Group introduces a positive innovation that alleviates the democratic deficit of an agency which performs a role of major importance in the fight against organized crime. The operational activities developed by Frontex in the past years have raised fierce criticism in terms of democratic accountability. The regulation establishing the EBCG has introduced and reinforced obligations to report on the activities of the new Frontex to the European Parliament. It seems that the ongoing scrutiny by the Parliament has been strengthened in the cases of Frontex and Europol. Since the activities carried out by the AFSJ agencies will probably continue to expand through dynamic development in the future, it should be researched whether these new democratic controls can truly offer a satisfactory solution to ensure accountability.

As has been shown in this chapter, the agencies' activities may have implications for fundamental human rights and could lead to fundamental human rights breaches. The relevance of human rights has been taken into account by the AFSJ agencies setting up interesting initiatives to ensure accountability as regards fundamental rights. The Europol and EBCG Regulations and the Proposal on the European Union Agency for Asylum would lead to reinforcing the operational activities undertaken by the agencies. The expansion of activities carried out by the AFSJ agencies would probably continue to raise tensions concerning the right to an effective remedy. Since Frontex, Europol and the EASO have undertaken relevant operational activities, it is not unlikely that in the future the Court of Justice will have to deal with actions for annulment (Article 263 TFEU) and compensation for damages (Article 340 TFEU), in particular regarding its involvement in hotspots. This issue clearly deserves further research in the future. Apart from that, the distribution of responsibility among the different actors involved in the agencies' activities should be further explored by academia. In the case of Frontex, the new complaint procedure brings a positive development in dealing with human rights violations, since the victims have an administrative mechanism at their disposal. It should be further researched to what extent the complaint mechanism provides a satisfactory solution to the main issues at stake.

One of the major avenues of further research is the cooperation among AFSJ agencies. This cooperation is becoming more and more necessary to achieve AFSJ objectives. One of the most relevant developments in the cooperation among agencies are the hotspots. The hotspots will develop an important role in the future as is acknowledged by the EBCG Regulation, which regulates them for the first time and entrusts Frontex to assist the Commission in the coordination among the different agencies on the ground. The need to cooperate is even extended to

agencies created outside of the AFSJ. According to the EBCG Regulation, Frontex, the European Fisheries Control Agency and the European Maritime Safety Agency will have to increase their cooperation in the management of external borders.

It should be analyzed whether the strengthening of these AFSJ agencies is well perceived and accepted by national actors. The new supervision role conferred upon the EASO and Frontex in the management of borders and asylum policy respectively deserves special attention in the literature in the future. More attention should also be devoted to examining whether the new tasks allocated to the agencies allow the EU to more efficiently tackle the challenges member states face in areas such as asylum and migration.

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### Bibliography

- AFSJ Agencies (2014). The EU Justice and Home Affairs Agencies' Cooperation in 2014: Working Together to Achieve Common EU Objectives.
- Baldaccini, A. (2010). Extraterritorial Border Controls in the UE: The Role of Frontex in Operations at Sea. In B. Ryan and V. Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges*. Leiden: Martinus Nijhoff, pp. 229-255.
- Bernard, E. (2012). Accord sur les agences européennes: la montagne accouche d'une souris. *Revue du Droit de l'Union Européenne*, 3, pp. 399-446.
- Bovens, M. (2007). Analysing and Assessing Accountability: A Conceptual Framework. *European Law Journal*, 13, pp. 447-468.
- Busuioc, M., Curtin, C. and Groenleer, M. (2011). Agency Growth between Autonomy and Accountability: The European Policy Office as a Living Institution. *Journal of European Public Policy*, 19, pp. 848-867.
- Carrera, S. (2007). The EU Border Management Strategy FRONTEX and the Challenges of Irregular Immigration in the Canary Islands. CEPS Working Document No. 261, Brussels.
- Carrera, S. and den Hertog, L. (2016). A European Border and Coast Guard: What's in a Name? CEPS Paper No. 88.
- Carrera, S., den Hertog, L. and Parkin, J. (2013). The Peculiar Nature of EU Home Affairs Agencies in Migration Control: Beyond Accountability versus Autonomy? *European Journal of Migration and Law*, 15, pp. 337-358.
- Cederbratt, M. (2013). *Frontex: Human Rights Responsibilities*. Doc. 13161, April 8. Strasbourg: Parliamentary Assembly of the Council of Europe.
- Chiti, E. (2009). An Important Part of the EU's Institutional Machinery: Features, Problems and Perspectives of European Agencies. *Common Market Law Review*, 46, pp. 1395-1442.
- Comte, F. (2008). Agences européennes: relance d'une réflexion interinstitutionnelle européenne. *Revue du Droit de l'Union Européenne*, 3, pp. 461-501.
- De Bruycker, P. (2016). The European Border and Coast Guard: A New Model Built on an Old Logic. *European Papers: A Journal of Law and Integration*, 2, pp. 1-12.
- De Moor, A. and Vermeulen, G. (2010). The Europol Council Decision: Transforming Europol into an Agency of the European Union. *Common Market Law Review*, 47, pp. 1089-1121.
- De Witte, B. and Rijpma, J. (2011). Oversight of the European Union's Area of Freedom, Security and Justice (AFSJ): Parliamentary Scrutiny of Justice and Home Affairs Agencies. LIBE Committee of the European Parliament, Thematic Study.
- European Commission (2008). *Communication from the Commission to the European Parliament and the Council - European Agencies - The Way Forward*. COM (2008) 135 final.
- European Parliament, Council and Commission (2012). Joint Statement of the European Parliament, the Council of the EU and the European Commission on Decentralized Agencies, Brussels.

- Fink, M. (2012). Frontex Working Arrangements: Legitimacy and Human Rights Concerns Regarding Technical Relationships. *Utrecht Journal of International and European Law*, 28, pp. 20–35.
- Fink, M. (2016). Salami Slicing Human Rights Accountability: How the European Border and Coast Guard Agency May Inherit Frontex' Genetic Defect. *EJIL Analysis*, March 10.
- Fischer-Lescano, A., Löhr, T. and Tohidipur, T. (2009). Border Controls at Sea: Requirements under International Human Rights and Refugee Law. *International Journal of Refugee Law*, 21, pp. 256–296.
- Klepp, S. (2010). A Contested Asylum System: The European Union between Refugee Protection and Border Control in the Mediterranean Sea. *European Journal of Migration and Law*, 12, pp. 1–21.
- Mitsilegas, V. (2007). Interparliamentary Cooperation in EU Justice and Home Affairs. Fifty Years of Interparliamentary Cooperation Conference, Stiftung Wissenschaft und Politik, Berlin.
- Papastavridis, E. (2010). Fortress Europe and FRONTEX: Within or Without International Law? *Nordic Journal of International Law*, 79.
- Peers, S. (2015). The Reform of Frontex: Saving Schengen at Refugees' Expense? *EU Law Analysis*.
- Rijpma, J. (2012). Hybrid Agencification in the Area of Freedom, Security and Justice and its Inherent Tensions: The Case of Frontex. In M. Busuioc, M. Groenleer and J. Trondal (eds), *The Agency Phenomenon in the European Union: Emergence, Institutionalisation and Everyday Decision-making*. Manchester: Manchester University Press.
- Rijpma, J. (2014). Institutions and Agencies: Government and Governance after Lisbon. In D. Acosta Arcarazo and C.C. Murphy (eds), *EU Security and Justice Law: After Lisbon and Stockholm*. Oxford: Hart Publishing.
- Rijpma, J. (2016). The Proposal for a European Border and Coast Guard: Evolution or Revolution in External Border Management? Study for the *LIBE Committee of the European Parliament*.
- Santos Vara, J. (2010). Las consecuencias de la integración de Europol en el Derecho de la Unión Europea (Comentario a la Decisión del Consejo 2009/371/JAI, de 6 de abril de 2009). *Revista General de Derecho Europeo*, 20, pp. 1–24.
- Santos Vara, J. (2015). The External Activities of AFSJ Agencies: The Weakness of Democratic and Judicial Controls. *European Foreign Affairs Review*, 20(1), pp. 118–136.
- Santos Vara, J. and Sánchez-Taberner, R. (2016). In Deep Water: Towards a Greater Commitment for Human Rights in Sea Operations Coordinated by FRONTEX? *European Journal of Migration and Law*, 18(1), pp. 65–87.
- Trauner, F. (2012). The European Parliament and Agency Control in the Area of Freedom, Security and Justice. *West European Politics*, 35(4), pp. 784–802.
- Trauner, F. and Ripoll Servent, A. (2016). The Communitarisation of the Area of Freedom, Security and Justice: Why Institutional Change does not Translate into Policy Change. *Journal of Common Market Studies*, 54(6), pp. 1417–1432.

### **Legislation, proposals for legislation and judgements**

- Regulation (EU) 2016/794 of the European Parliament and of the Council of May 11, 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and Replacing and Repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA [2016] OJ L 135/53.
- Council Decision of April 6, 2009 establishing the European Police Office (Europol) (2009/371/JHA), OJ L 121/37.
- Council Regulation (EC) No. 2007/2004 of October 26, 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2004] OJ L 349/1.
- Regulation (EC) No. 863/2007 of July 11, 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No. 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers [2007] OJ L 199/30.
- Regulation (EU) No. 1168/2011 of October 25, 2011 amending Council Regulation (EC) No. 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2011] OJ L301/1.
- Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No. 439/2010, COM(2016) 271 final.
- Regulation No. 439/2010 of the European Parliament and of the Council of May 19, 2010 establishing a European Asylum Support Office [2010] OJ L 132/11.

- Regulation No. 439/2010 of the European Parliament and of the Council of September 14, 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No. 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No. 2007/2004 and Council Decision 2005/267/EC [2010] OJ L 251/11.
- Inter-institutional Agreement of March 12, 2014 between the European Parliament and the Council concerning the forwarding to and the handling by the European Parliament of classified information held by the Council on matters other than those in the area of the common foreign and security policy [2014] OJ C 95/11.
- Judgment of *Sogelma*, T-411/06, ECLI:EU:T:2008.