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EXTERNAL BORDER CONTROL AS A SECURITY TOOL: AN APPROACH TO THE NEW FRONTEX LEGAL FRAMEWORK

This paper provides a legal analysis of the European Area of Freedom, Security and Justice arising from the Treaty of Lisbon. One of the most interesting aspects of its application and configuration is the development of the competences of the European Union and the Member States for control of Europe's external borders. In this work, we consider that the European Space has demonstrated its effectiveness in controlling the arrival of immigrants into Europe. Given the usefulness of these legal mechanisms, we can expect it to be developed over the coming years to correct some of the deficiencies identified so far.

Effective control of Europe's external borders will result in greater security for the Member States and for the Union as a whole.

European Union, Treaty of Lisbon, European Area of Freedom, Security and Justice, FRONTEX

I. INTRODUCTION

The European Agency for the Management of Operational Cooperation at the External Borders, known as FRONTEX, came into operation in 2005. This gave the European Union an eminently technical tool to ensure technical assistance and cooperation between Member State border control agencies, and the creation of technology exchange and transfer programmes, particularly for sea borders[1]. There are many reasons why FRONTEX is useful. Some of these can be found in *Spain's Security Strategy*[2], which reports how demographic imbalances[3] are risk factors, and that uncontrolled migration flows[4] have clear security implications[5]. In order

1 An initial study of FRONTEX is contained in our paper "Control de fronteras exteriores y seguridad interna en la Unión Europea: la puesta en marcha de Frontex", in ALDECOA LUZARRAGA, F. and SOBRINO HEREDIA, J.M. (coords.), *Migraciones y desarrollo: II Jornadas Iberoamericas de Estudios Internacionales*, Marcial Pons, Madrid, 2007, pp. 469-482. It is also addressed more recently in RIJPMA, J.J.: "Frontex: Successful Blame Shifting of the Member States?, *Real Instituto Elcano*, ARI, num. 69, 2010.

2 Available at http://www.lamoncloa.gob.es/NR/rdonlyres/D0D9A8EB-17D0-45A5-ADFF-46A8AF4C2931/0/ EstrategiaEspanolaDeSeguridad.pdf.

3 *Estrategia Española de Seguridad. Una responsabilidad de todos*, in pp. 34-37.

4 *Estrategia Española de Seguridad. Cit.*, in pp. 70-73.

5 We refer, in the terms detailed in *Spain's Security Strategy,* to social conflict; the growth of urban ghettos; exploitation of immigrants by criminal organisations; destabilisation of some productive sectors of the national economy; extremist and identity radicalisation, and the presence of people from other countries, with no information about their real identities or nationalities, not knowing how many of them there actually are and whose activities might be difficult to control.

to combat these risks, Spain's Security Strategy proposes[6] making the control and monitoring of Spain's external borders that are part of the outer limits of the European Union more effective.

With this approach, we must be aware that the creation of FRONTEX as a tool to help with border control and monitoring has been made possible by a gradual transfer of competences from Member States -including Spain- to the European Union. This has involved a lengthy, ongoing process of "communitisation" that has not been without difficulties[7]. It has been achieved through reforming Treaties such as those of Amsterdam, Nice and Lisbon; this has consolidated the design of a real Area of Freedom, Security and Justice in the Union[8].

Keeping this in mind, our objective in this paper is to analyse the current capabilities of FRONTEX as a tool for controlling the European Union's external borders. We will therefore discuss the competences of FRONTEX (II), which we will undertake focusing on the substantial reforms introduced by Regulation 1168/2011 to FRONTEX as originally established[9]. We will also address FRONTEX's external dimension and, therefore, its capacity to sign agreements with other states. Whilst these differ significantly from formal international agreements, they do raise some interesting issues that have not been fully resolved (III).

Having addressed these issues, we will turn our attention to some of the legal provisions that have extended FRONTEX's competences. In this regard, we will raise some of the legal problems that have arisen in operational cooperation over external borders coordinated by FRONTEX; in doing this, we will look at the regulations governing monitoring of external sea borders (IV). This legal instrument has not been free of controversy for the Commission and the European Parliament relating to the

6 *Estrategia Española de Seguridad. Cit.*, in pp. 71-72.

7 Without going into too much details, it should be remembered that in the progressive erosion of intergovernmental policies (such as the original Cooperation in Justice and Home Affairs until its partial conversion into Title IV of the now outdated TEC, on visas, asylum, immigration and other policies related to the free movement of people (articles 61-69 TEC)), Member States demanded, among other guarantees, exclusion from control by the Court of Justice. For further details, refer to URREA CORRES, M.: "El Espacio de libertad, seguridad y justicia y la competencia del Tribunal de Justicia de las Comunidades Europeas: hacia una jurisdicción flexible", *Bulletin of the Law Faculty of the Universidad Nacional de Educación a Distancia*, num. 23, 2003, pp. 65-101.

8 For more information on this issue, refer to MARTÍN Y PÉREZ DE NANCLARES, J.: "El espacio de libertad, seguridad y justicia", in MÉNDEZ DE VIGO, I. (coord.*), ¿Qué fue de la Constitución europea? —El Tratado de Lisboa: un camino hacia el futuro*, Planeta, Madrid, 2007, pp. 163-172.

9 Regulation 1168/2011 of the European Parliament and the Council of 25 October 2011 modifying Regulation (EC) 2007/2004 of the Council creating a European Agency for the management of operational cooperation at the external borders of European Union Member States (OJ L 304, of 22.11.2011).

procedure followed for its adoption. However, the progress it has made in consolidating regulations imposed by international law on operations on sea borders cannot be questioned (IV.1). We will also address the guidelines that cover the way it works and the attribution of responsibilities to states for search and rescue and disembarkation at sea operations coordinated by FRONTEX (IV.2). We conclude with some final reflections that should help us to assess the importance of having a robust legal framework that enables FRONTEX to function effectively, whilst rigorously respecting international law and, in particular, provisions relating to the fundamental rights of individuals affected by external border controls (V).

II. FRONTEX'S COMPETENCES FOR BORDER CONTROL UNDER THE NEW REGULATION: COMMITMENT TO PROTECTING HUMAN RIGHTS AND RESPECT FOR INTERNATIONAL LAW

On 26 October 2004, the European Union Council approved the Regulation creating FRONTEX[10]. However, the Agency did not become effective until October 2005[11]. Following a suitable period since its launch and assessments of its operations[12], on 25 October, Regulation 1168/2011 of the European Parliament and the Council thoroughly reformed FRONTEX's Regulation[13]. In the Commission's opinion, this reform was required to ensure that the Agency would work successfully and in a clearly defined way over the coming years, clarifying its mandate and correcting some deficiencies that had been identified[14]. Some of these deficiencies in the functioning of FRON-

10 Regulation 2007/2004/EC of the Council, of 26 October 2004, creating a European Agency for the management of operational cooperation at the external borders of European Union Member States (OJ *L* 349, of 25.11.2004, pp. 1-11). This Regulation was the object of an appeal for annulment from the United Kingdom that the Court of Justice dismissed in a ruling dated 18 December 2007. Refer to the commentary on this ruling by GARCÍA GUTIÉRREZ, L.: "ECJ – Decision of 18.12.2007, United Kingdom/Council, C-77/2005. Creación de la agencia FRONTEX – Validez – Exclusión del Reino Unido – Acervo y Protocolo de Schengen", *Revista de Derecho Comunitario Europeo*, num. 34, 2009, pp. 1083-1093.

11 Decision 2005/358 of 26 April establishing the headquarters of the European Agency for the management of operational cooperation at the external borders of European Union Member States (OJ L 144, of 04.05.2005, p. 13).

12 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. *Report on the evaluation and future development of the FRONTEX Agency* (COM (2008) 67 final, of 13 February).

13 OJ L 304, of 22.11.2011.

14 Before examining the proposed modification to the FRONTEX Regulation, it is worth understanding the thinking at the European Council meeting held in Brussels on 29 and 30 October 2009,

TEX are intimately related with the way the Agency works and its adequacy under international law, in particular with regard to Human Rights. FRONTEX's original Regulation are silent on this issue and this had to be addressed. The many references in the new Regulation to the Agency's commitment to human rights and international law should be understood in this context[15]. Of these, the Agency's commitment to perform its role "fully respecting applicable Union law, including the Charter of Fundamental Rights of the European Union; applicable international law, including the Geneva Convention relating to the Status of Refugees (…) and obligations relating to access to international protection, particularly the principle of non-return (…)"[16] is of particular importance. The Agency's undertaking to prepare a Code of Conduct applicable to all of the operations it coordinates is also to be welcomed. This establishes "procedures destined to ensure the principles of the rule of law and respect for basic rights, paying particular attention to unaccompanied minors and vulnerable persons, and those seeking international protection" [17]. Likewise, FRONTEX's commitment to prepare, develop and apply a *fundamental rights strategy* and to set up an effective mechanism to control respect for such rights in all of the Agency's activities[18] is also noteworthy.

Bearing this now explicit commitment to international law and fundamental rights in mind, the new FRONTEX Regulation reinforce the Agency's competences to help it achieve the objective for which it was created[19]. Let us examine how these are regu-

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and the position of the European Parliament as set out in Resolution 2008/2157 (INI), of 18 December 2008, on the evaluation and future development of the FRONTEX Agency and a European border control system (EUROSUR).

15 There are references in Considers 18 and 29 of Regulation 1168/2011, and in article 1.2.2; article 2b), section 1 a); article 2 a); article 5.1; article 9, 1.3; article 14 and article 26 a.

16 Article 1.2.2 of Regulation (EC) 2007/2004 of the Council in the new draft set out in Regulation 1168/2011 of the European Parliament and the Council, of 25 October 2011, *cit.*

17 The new article 2 a) of Regulation (EC) 2007/2004 of the Council in the new draft set out in Regulation 1168/2011 of the European Parliament and the Council, of 25 October 2011, *cit.*

18 The new article 26 a) of the FRONTEX Regulation states that FRONTEX shall establish a Consultative Forum to assist the Executive Director and management board in fundamental rights matters. The European Asylum Support Office, the Fundamental Rights Agency, the UN High Commissioner for Refugees and other relevant organisations will be invited to the Forum. The Forum will be consulted on the latest developments and application of strategy relating to fundamental rights, the Code of Conduct and core training programmes as referred to in the FRONTEX Regulation.

19 In this regard, the new article 1.2 of the FRONTEX Regulation states "while considering that the responsibility for the control and surveillance of external borders lies with the Member States, the Agency, as a body of the Union as defined in Article 15 and in accordance with Article 19 of this Regulation, shall facilitate and render more effective the application of existing and future Union measures relating to the management of external borders, in particular the Schengen Borders Code established by Regulation (EC) No 562/2006. It shall do so by ensuring the coordination of the actions of the Member States in

lated. Firstly, FRONTEX is assigned the function of coordinating operational co-operation among Member States in managing external borders[20]. In this regard, the Agency isresponsible for examining, improving and coordinating proposals for joint operations, including requests from Member States related to situations requiring operational assistance and technical reinforcement, particularly in cases of specific and overwhelming pressures. The Agency may also initiate and carry out joint operations and pilot projects in collaboration with Member States in agreement with the host states[21]. In this regard, FRONTEX may put its technical team at the disposal of the Member States involved in the joint operations or pilot projects. The Agency may bring joint operations or pilot projects to an end if the conditions for these no longer persist. The Agency may finance or jointly finance joint operations or pilot projects through subsidies from its budget. The Agency will assess the results of such operations and report these to FRONTEX's management board. One major development in the new legal Regulation relates to the Agency's capacity to create a contingent of border guards called European Border Guard Teams, which it can deploy in joint operations or pilot projects[22].

Secondly, FRONTEX has the competence to provide members of the European border guard teams with advanced training relating to their functions and competences. Prior to their taking part in operating activities, the Agency will ensure that all of its border guards and other Member State personnel involved in the European border guard teams "have received training in relevant Union and international law, in particular with regard to basic rights and access to international protection, together with guidelines relating to identifying people in search of protection so as to direct them as appropriate" [23]. Furthermore, the Agency will develop common core material for training border guards and will provide training at the European level for Member State border guards; this will include training in fundamental rights, international protection and maritime law.

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the implementation of those measures, thereby contributing to an efficient, high and uniform level of control on persons and of surveillance of the external borders of the Member States".

20 Article 3 of Regulation (EC) 2007/2004 of the Council in the new draft set out in Regulation 1168/2011 of the European Parliament and the Council, of 25 October 2011, *cit.*

21 The new article 3 a) of the FRONTEX Regulation, detailing organisational aspects of joint operations and pilot projects, and more specifically, the obligation to prepare an operating plan stipulating organisational aspects with sufficient notice of the planned start of such joint operations and pilot projects, is of particular interest.

22 New article 3.1 *3* of Regulation (EC) 2007/2004 of the Council in the new draft set out in Regulation 1168/2011 of the European Parliament and the Council of 25 October 2011, *cit.* Refer to the new articles 3 *3* and *4* for the composition and deployment of these European Border Guard Teams.

23 Article 5 of Regulation (EC) 2007/2004 of the Council in the new draft set out in Regulation 1168/2011 of the European Parliament and the Council of 25 October 2011, *cit.*

Thirdly, FRONTEX is empowered to analyse risks. It will prepare a common comprehensive risk assessment method that it will apply in general and specific cases; the results of these will be submitted to the Council and the Commission. Having consulted the Member States affected, FRONTEX may assess their capacity to handle future challenges, including current and future threats and pressures on the external borders of the European Union. This applies particularly to Member States faced with specific and excessive pressures. To this end, the Agency may assess the Member State's border control team and resources. The Member States will provide the Agency with the information it needs on the situation and potential threats on its external borders[24].

Fourthly, FRONTEX will proactively supervise and contribute to research into the control and monitoring of external borders. The results of this will be presented to the Commission and the Member States[25].

Fifthly, FRONTEX is empowered to offer assistance to Member States subject to specific and excessive pressures or a situation that requires reinforced operational and technical assistance on its external borders[26]. Such aid may consist of: *coordination work,* assisting with coordination between two or more Member States to resolve problems on external borders; *assistance work,* sending experts and their own technical control and monitoring teams during the time needed by the competent authorities in the Member States affected; and *provision work,* deploying border guards from the European Border Guard Teams[27].

Sixthly, FRONTEX will provide the assistance required for joint return operations by Member States, on request from the participating Member States. It will ensure the coordination and organisation of such joint operations, including contracting aircraft, in accordance with EU policy,[28] whilst not considering the suitability of deportation deci-

24 Article 4 of Regulation (EC) 2007/2004 of the Council in the new draft set out in Regulation 1168/2011 of the European Parliament and the Council of 25 October 2011, *cit.*

25 Article 6 of Regulation (EC) 2007/2004 of the Council in the new draft set out in Regulation 1168/2011 of the European Parliament and the Council of 25 October 2011, *cit.*

26 In relation to this function, the FRONTEX Regulation was soon modified to establish a mechanism to create rapid border response teams capable of providing the rapid technical and operational assistance required for FRONTEX to be able to handle situations such as the arrival of a large number of nationals of non-EU countries at its external border intending to enter the European Union clandestinely. Regulation 863/2007 of the European Parliament and the Council of 11 July 2007 establishing a mechanism for the creation of rapid border intervention teams and modifying Regulation 1007/2004 of the Council with regard to this mechanism and regulating the functions and competences of the agents invited ("RABIT Regulation"); OJ L 199 of 31.07.2007, pp. 30-39).

27 Article 8 of Regulation (EC) 2007/2004 of the Council in the new draft set out in Regulation 1168/2011 of the European Parliament and the Council of 25 October 2011, *cit.*

28 Directive 2008/115/EC of the European Parliament and Council of 16 December 2008, on common standards and procedures in Member States for returning illegally staying third-country nationals.

sions. The Agency will prepare a Code of Conduct for the return citizens of other countries who are present illegally. It will apply this in all return operations that it coordinates. The Code of Conduct will specify standardised procedures to simplify the organisation of return activities, ensuring that these are applied humanely and fully respecting basic rights. The Agency will cooperate with the authorities in non-EU countries to determine best practice for obtaining travel documents and the expulsion of illegal immigrants[29].

III. THE EXTERNAL DIMENSION OF FRONTEX: ITS CAPACITY TO ENTER INTO AGREEMENTS WITH THIRD COUNTRIES

The FRONTEX Regulation originally provided for the Agency establishing appropriate cooperation with Europol for the performance of its functions. The new Regulation extends this collaboration to the European Asylum Support Office and the Fundamental Rights Agency and other Union agencies and bodies and relevant international organisations[30]. The Agency must also provide operating cooperation between Member States and third countries in the context of the Union's external relations policies[31]. In order to implement this mandate, on 1 September 2006 the Management Board of FRONTEX approved a Decision[32] setting out procedures for negotiating and concluding agreements with third countries and international organisations[33].

The above poses two questions that should be clarified. One relates to the international capacities to act of FRONTEX and the other to the legal nature of the agreements FRONTEX can enter into. With regard to international capacity to act, we have no doubt that FRONTEX, as an Agency of the Union -i.e. a body governed by European

29 Article 9 of Regulation (EC) 2007/2004 of the Council in the new draft set out in Regulation 1168/2011 of the European Parliament and the Council of 25 October 2011, *cit.*

30 Article 13 of Regulation (EC) 2007/2004 of the Council in the new draft set out in Regulation 1168/2011 of the European Parliament and the Council of 25 October 2011, *cit.*

31 Article 14 of Regulation (EC) 2007/2004 of the Council in the new draft set out in Regulation 1168/2011 of the European Parliament and the Council of 25 October 2011, *cit.*

32 This Decision is available at http://www.frontex.europa.eu/minutes_and_decisions/decisions/page5.html. Just twenty days following approval of this Decision, FRONTEX's Management Board authorised its Executive Director to negotiate operational cooperation with Croatia.

33 This procedure, which is described on FRONTEX's web site, involves the Executive Director presenting a draft mandate to the Management Board detailing the negotiation guidelines. The Agency then consults the Member States and the Commission about these. Once the Management Board has approved the mandate, the Executive Director begins negotiations with the other country or international organisation. Once agreement is reached, and after consulting the Commission again, the Executive Director submits this to the Management Board to ratify the definitive version. The Executive Director can then sign the agreement.

public law and created by law to perform a specific technical, scientific or management task in the European Union- has its own legal personality. However, it lacks international capacity to act and, therefore, does not have the capacity to enter into international agreements. We can therefore conclude that the FRONTEX Regulation cannot refer to international agreements but rather to working arrangements, sometimes known as technical or operational arrangements, with the *bodies* of other states; this is the case, as a general rule, with Border Guard Services and the Ministry for the Interior.

In exercise of this competence, FRONTEX has signed agreements of this kind with a number of states and even some international agencies[34]. Agreements with states have been signed with Russia, Ukraine, Croatia, Moldavia, Belarus, Georgia, Serbia, Albania, Bosnia-Herzegovina, Montenegro, Macedonia and Cape Verde. Although it seems rather strange[35], agreements have also been signed with the United States and Canada. FRONTEX has a mandate to open negotiations with Turkey, Libya, Morocco, Senegal, Mauritania, Brazil, Nigeria and Egypt[36].

Whilst this is not the appropriate place for a more in-depth analysis, there are two aspects that do seem particularly interesting. The first is that these working arrangements are not published. We can only find out about their existence from press releases issued by FRONTEX when they are signed or from information in the Agency's annual report. Irrespective of the security issues that may on occasion condition access to the content of such agreements, it does not appear acceptable that we should resign ourselves to secrecy being the general rule for FRONTEX's operations.

The second interesting aspect relates to the content of the working arrangements, which set out how FRONTEX will cooperate with a State pursuant to the competences in its Regulation. It is difficult to address this issue when, as we mentioned above, these arrangements are not generally published. However, taking the functions delegated to the Agency as a reference point, the arrangements it enters into with other states to fulfil these functions will always include an information-sharing commitment. In addition to this commitment, there are arrangements that provide for

34 FRONTEX's agreements with INTERPOL are of particular interest. This is one of the agreements announced in article 13 of the FRONTEX Regulation. FRONTEX has also reached agreements with ACNUR, Europol, the International Organization for Migration, the European Maritime Safety Agency, the European Fisheries Control Agency and the European Fundamental Rights Agency.

35 These may be surprising as they are not countries that the Agency has identified as priorities, which are usually countries that are candidates for membership, neighbouring countries and countries that are the source or transit points for illegal immigration. See www.frontex.europa.eu/external_relations/.

36 The Commission document *A dialogue for migration, mobility and security with the southern Mediterranean countries*, in COM (2011) 292, of 24 May 2011, describes the importance that the Commission attributes to such agreements.

cooperation on risk analysis, cooperation with the authorities of other countries on research into border control and surveillance, training cooperation, and joint return operations.

As well as these working arrangements agreed by FRONTEX and other countries, European Union Member States may (and sometimes must) enter into their own cooperation-mechanism agreements with other countries. As FRONTEX does not have a legal personality, and because of the need to patrol the sovereign waters of other countries in joint operations, the Member States must enter into agreements with other countries. For example, Spain has such agreements with Morocco, Senegal, Mauritania, Cape Verde, Gambia, Guinea and Guinea Bissau. Of these, only the 21 February 2008 agreement with Cape Verde has been published. This was reported some two months after it came into effect[37] providing us with information on its content.

IV. REINFORCING THE COMPETENCES OF FRONTEX: SEA BORDER SURVEILLANCE OPERATIONS

The European Union wanted FRONTEX to have the capacity to act outside waters under the jurisdiction of its Member States[38]. This involved establishing a mechanism that would enable the operations on sea borders coordinated by FRONTEX to be carried out in accordance with the provisions of international law and that rescue and disembarkation operations should be carried out under a set of common guidelines.

37 The *Agreement between the Kingdom of Spain and the Cape Verde Republic on joint surveillance of Maritime Spaces under the Sovereignty and Jurisdiction of Cape Verde* came into effect on 3 April 2009 and was published in the Official State Gazette on 5 June 2009. Refer to Official State Gazette number 136, dated 5 June 2009, pp. 47545-47548. However, this did not stop Spain and Cape Verde carrying out joint patrols using Spanish naval and aerial resources in the sovereign waters of another country from March 2007 onwards under the Memorandum of Cooperation signed by the Ministry for the Interior and a Cooperation Protocol between the Ministries of Defence of Spain and Cape Verde.

38 As Gabriela OANTA correctly states "the provisions of the Schengen Border Code do not include the possibility for this European Agency [FRONTEX] to carry out interception and disembarkation operations. With regard to existing practice in this regard, it has been found that FRONTEX must be able to operate beyond the waters under the sovereignty and jurisdiction of its Member States, if these operations are to really meet their objectives. In other words, FRONTEX must be able to operate on the high seas and even in the territorial waters of other states". In OANTA, G.A.: "Desarrollos jurídicos controvertidos en la vigilancia de las fronteras marítimas exteriores de la Unión Europea en el marco FRONTEX. A propósito de la Decisión 2010/252/UE", in *El desarrollo del Tratado de Lisboa: un balance de la Presidencia española*, Colección Escuela Diplomática, num. 17, 2011, pp. 171-196, en p. 173.

To this end, the Council approved Decision 2010/252[39] to compete the Schengen Borders Code[40] with regard to surveillance of external sea borders through operational cooperation coordinated by FRONTEX. This Decision set out the need to establish complementary regulations for border surveillance activities by air and naval units of a Member State on the sea border of another Member State in the context of operational cooperation coordinated by the Agency. Two main objectives were established for achieving this. The first was to establish a number of regulations to be respected by FRONTEX as the coordinator of joint operations on sea borders (Annex, Part I). The second objective was to establish a number of (non-binding) guidelines relating to search and rescue of people in danger and the disembarkation of people intercepted or rescued during operations coordinated by FRONTEX (Annex, Part II). We will now look at the scope and content of these in greater detail.

1. Regulations applicable to operations on the sea borders coordinated by FRONTEX

In order to exclude the possibility of any breach of rights in operations on sea borders coordinated by FRONTEX, Decision 2010/252/EU set out a set of principles to be respected by the Agency in the sea border surveillance operations it coordinates. These principles are fully consistent with international law and human rights. For example, this is the case with the principle of non-return, under which it is not permitted to return any refugee whose life would be in danger to their country of origin or any other countries. However, it is also true that this Decision did not add anything more than the obvious need that such operations should comply with international law[41]. Nevertheless, the Decision was a substantial improvement on the original Regulation

39 OJ L 111, of 4.05.2010. For further information on this Decision, refer to the works of OANTA, G.A.: *loc. cit.* ("Desarrollos jurídicos controvertidos en la vigilancia de las fronteras marítimas exteriores de la Unión Europea en el marco FRONTEX. ...") pp. 171-196; MORENO LAZ, V.: "The EU Regime on Interdictions, Search and Rescue, and Disembarkation: The Frontex Guidelines for Intervention at Sea", *The International Journal of Marine and Coastal Law*, 25, 2010, pp. 621-635.

40 Regulation 562/2006 of the European Parliament and Council, of 15 March 2006, establishing a Community Code for border crossing (Schengen Border Code); (OJ L 105, 13 April 2006). Subsequently modified by Regulation 296/2008 of 10 April 2008 (OJ L 97, 9.04.2008); Regulation 81/2009, of 24 February 2009 (OJ L 35, 4.02.2009), Regulation 810/2009, of 5 October 2009 (OJ L 243, 15.09.2009) and Regulation 265/2010 of 5 April 2010 (OJ L 85, 31.3.2010). This regulation is completed by the Schengen Guide (C(2006 5186 final, of 6 November 2006); rules relating to local border traffic on external frontiers (Regulation 1931/2006, OJ L 405, 30.12.2006) and the External Borders Fund for 2007-2013 (Decision 574/2007/EC, OJ L 144, 6.06.2007).

41 "No person shall be disembarked in, or otherwise handed over to the authorities of, a country in contravention of the principle of non-refoulement, or from which there is a risk of expulsion or return to another country in contravention of that principle (...)", Council Decision of 26 April 2010, *cit.,* Annex, Part I, section 1.2.

as it ended the legal debate about the silence on this issue in the original FRONTEX Regulation. As we have stated elsewhere in this paper, this silence has been more than sufficiently overcome by the drafting of the FRONTEX Regulation 1168/2011[42].

It is also worth noting the requirement expressly imposed by the Council Decision that "the special needs of children, victims of trafficking, persons in need of urgent medical assistance, persons in need of international protection and other persons in a particularly vulnerable situation shall be considered throughout all the operation" (Annex, Part I, section 1.3)[43]. This aspect is intimately linked to the training requirements of all agents involved in such operations, as we have mentioned above.

We would also like to highlight the Council Decision's reference to measures that could be applied during surveillance operations against ships and other shipping that is reasonably suspected of carrying persons and trying to evade border controls[44]. The Decision differentiates between whether the measures are adopted in *territorial waters or contiguous areas* (point 2.5.1), in which case prior authorisation is required from the host Member States, whose instructions must be respected, or on the *high seas outside such contiguous areas* (point 2.5.2.), in which case authorisation depends on whether the ship is under the flag of one of the states involved in the operation[45]. However, there is no mention of the procedure to be followed in an exclusive economic zone or in territorial waters. Rather than excluding such actions on the part of FRONTEX, it would appear reasonable to accept that the same procedure would apply as in the case of territorial waters and contiguous areas, accepting the legal regime of the waters in question. The procedure for cases in which there is reasonable

42 *See.* Section II.

43 Article 2b) 1 a) also establishes that "the special needs of children, victims of trafficking, persons in need of urgent medical assistance, persons in need of international protection and other persons in a particularly vulnerable situation shall be considered in accordance with EU and international law".

44 This involves the following measures: a) requesting information and documentation on ownership, registration and elements relating to the voyage, and on the identity, nationality and other relevant data on persons on board; (b) stopping, boarding and searching the ship, its cargo and persons on board, and questioning persons on board; (c) making persons on board aware that they are not authorised to cross the border and that persons directing the craft may face penalties for facilitating the voyage; (d) seizing the ship and apprehending persons on board; (e) ordering the ship to modify its course outside of or towards a destination other than the territorial waters or contiguous zone, escorting the vessel or steaming nearby until the ship is heading on such course; (f) conducting the ship or persons on board to a third country or otherwise handing over the ship or persons on board to the authorities of a third country; (g) conducting the ship or persons on board to the host Member State or to another Member State participating in the operation. Council Decision of 26 April 2010, *cit.*, Part I, section 2.4.

45 In the first case, authorisation is the responsibility of the flag state. In the second case, confirmation of registration is requested from the flag state through the appropriate channels. If nationality is confirmed, the flag state is asked for authorisation, in accordance with the Palermo Protocol.

suspicion that the ship has no nationality or could be treated as lacking nationality is also regulated[46]. If authorisation from the flag state is not received, the ship will be monitored from a prudent distance.

To conclude, the Council Decision does not allow for any measures to be adopted other than those indicated without authorisation from the flag state "except those necessary to relieve imminent danger to the lives of persons" (Annex, Part I, point 2.5.2.6.).

2. Guidelines for search and rescue and disembarkation in the context of sea border operations coordinated by FRONTEX

Decision 2010/252/EU sets out the guidelines applicable to two types of situations: search and rescue and when disembarkation is required. As stated elsewhere, these guidelines are not binding. This does not stop it being necessary to include these in operational plans for joint operations coordinated by FRONTEX. However, whilst they are not legally required, it is obvious that they will affect the *modus operandi* of the operation[47].

In *search and disembarkation situations*, European regulations establish an obligation on states to provide assistance to people in danger at sea, respecting the applicable provisions of international agreements on search and rescue and fundamental rights. Decision 2010/252/EU also sets out that units participating in operations at sea shall provide assistance to any vessel or person in distress at sea regardless of the nationality or status of such a person or the circumstances in which that person is found (Annex, Part II, 1.2). The Decision further establishes guidelines for shipping in an emergency situation but where the people on board refuse to accept such assistance. In this case, the unit must inform "the Rescue Coordination Centre and continue to fulfil a duty of care, taking any measure necessary to the safety of the persons concerned, while avoiding taking any action that might aggravate the situation or increase the chances of injury or loss of life" (Annex, Part II, 1.4).

Finally, with respect to *disembarkation*, the Regulation clearly sets out how disembarkation of people intercepted or rescued should be dealt with in accordance with international law and bilateral agreements. The operational plan shall not have the effect of imposing obligations on Member States not participating in the operation (Annex, Part II, 2.1). Except when otherwise specified in the rescue plan, the Deci-

46 In this case, the unit involved "may send a boat under the command of an officer to the suspected ship". If suspicions persist "[the participating unit] shall proceed to a further examination on board the ship, which shall be carried out with all possible consideration"; Annex, Part I, section 2.5.2.5; Council Decision of 26 April 2010, *cit.*

47 This opinion is shared in OANTA, G.A.: *loc. cit.* ("Desarrollos jurídicos controvertidos en la vigilancia de las fronteras marítimas exteriores de la Unión Europea en el marco de FRONTEX..."), on p. 178.

sion establishes that "priority should be given to disembarkation in the third country from where the ship carrying the persons departed or through the territorial waters or search and rescue region of which that ship transited" (Annex, Part II, 2.1).

In the event that this option is impossible, priority should be given to disembarkation in the host Member State unless it is necessary to act otherwise to ensure the safety of persons. Although this is a subsidiary responsibility, the inclusion of a responsibility on the host country has caused some consternation in some Member States that often assume this condition in certain FRONTEX operations. In addition to doubts that might arise around the capacity to make use of this clause when preparing the operational plan, I think it is worth considering the extent to which a guideline such as Decision 2010/252/EU might limit the viability of FRONTEX cooperating with certain states whose questionable compliance with some international standards means disembarkation would not be in a safe country. In other words, disembarkation would be taking place in a country where the physical and mental integrity of persons cannot be guaranteed and fundamental rights are not respected. The new FRONTEX Regulation considers this, stating: "in accordance with Union and international law, no person shall be disembarked in, or otherwise handed over to the authorities of, a country in contravention of the principle of non-refoulement, or from which there is a risk of expulsion or return to another country in contravention of that principle"[48].

V. FINAL REFLECTIONS

The gradual "communitisation" of policies traditionally associated with the intergovernmental method is now well established in the European Union; this is demonstrated by the regulation of the European Area of Freedom, Security and Justice under the Treaty of Lisbon. In this regard, the way that border control competences are exercised by the Union and the Member States has been effective and useful in terms of controlling immigration flows. The contribution of FRONTEX is beyond question. Irrespective of the reservations raised in this paper, it has established itself as an instrument that is useful and effective for border control. The approval of a new legal framework for its activities will further improve its effectiveness. As its regulation states "border control at the external borders is in the interest not only of the Member State at whose external borders it is carried out, but also of all Member States which have abolished internal border controls"[49].

48 Refer to the new article 2b) 1 *a* of Regulation (EC) 2007/2004 of the Council in the new draft set out in Regulation 1168/2011 of the European Parliament and the Council of 25 October 2011, *cit.*

49 Whereas 5 of Regulation 1168/2011 of the European Parliament and the Council of 25 October 2011, modifying Regulation (EC) 2007/2004 of the Council creating a European Agency for the man-

The European Union must continue strengthening the principles, regulations and guidelines that every Member State must respect for all external border control activities carried out jointly or coordinated by FRONTEX. It is therefore essential to squash any temptation for Member States to question the legality of making all such operations subject to international regulations on asylum, refuge and human rights. There can therefore be no doubt that the regulation in this area introduced by Decision 2010/252/EU of the Council, and the insistence of the new FRONTEX Regulation on this, is therefore the right strategy.

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