

The Cooperation Between Frontex and Third Countries in Information Sharing: Practices, Law and Challenges in Externalizing Border Control Functions

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The aim of this article is to investigate whether the cooperation of Frontex with third countries in information sharing is in compliance with EU's constitutional normative rules and values.

Since more than a decade, border control and surveillance have been developed as policies instrumental to migration control. The shift towards risk management in many areas of public governance has implied that EU's action at the external borders is built upon a combination of policies of securitization of migration and externalization of border management.

Against this theoretical background, the article focuses on the external competences or powers of Frontex, mapping in particular practices of information sharing with third country authorities, which are functional to risk analysis, one of the core tasks of Frontex. It analyses working arrangements, intelligence sharing communities and cooperation taking place within the context of technical assistance.

The article further discusses the legal challenges these types of cooperation brings to the EU, as a governance system based on the rule of law. These are indicated in transparency and accountability, respect for fundamental rights and privacy challenges.

Keywords: Frontex, external relations, information-sharing, cooperation with third countries, transparency and accountability, fundamental rights, data protection

1 INTRODUCTION: THE EXTERNALIZATION OF BORDER CONTROL POLICIES AND 'GREEDY' INFORMATION SHARING FOR BORDER MANAGEMENT

The developments of the policy on migration and border controls can be described as a combination of processes of externalization, securitization and agencification.

The external dimension of migration has been set up as a competition of the internal dimension of the policies of the Area of Freedom, Security and

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Justice.¹ Imperative to combating irregular migration are the policies of border controls and border surveillance – borders being the interface between the inner and the outer space of a given polity. In the EU, the concept of Integrated Border Management is illustrative of this relation of connection and interdependence between external and internal policy goals.

First introduced in the Schengen Catalogue of 2002,² and recently codified in the Frontex 2016 Regulation,³ European Integrated Border Management has always featured cooperation with various categories of third countries as one of its core aspects. Hence, externalization of border management has its roots in the core structure of the policy. The Malta Declaration of 2017, as one of the answers of the so-called migration crisis of 2015, witnesses a continuous process of consolidation of this approach.⁴

While this external dimension has always been a core pillar of EU's efforts in border management, in recent years it has expanded its size and importance, not simply under the external pressures of migration, but also as a policy alternative to 'escape' several policy failures of the European asylum system: it is here referred, first, at the lack of agreement on a reform of the Dublin system,⁵ and second, at the poor results attained on the schemes for the relocation of migrants. The ensuing situation of political stalemate and 'solidarity crisis' has put trust between Member

¹ S. Lavenex, *Shifting Up and Out: the Foreign Policy of EU Immigration Control* 29, West Eur. Pol. 329–350 (2006); K. Eisele, *The External Dimension of the EU's Migration Policy* (Brill 2014). For an overall research on other policies of the AFSJ spectrum, see *The External Dimension of the European Union's Area of Freedom, Security and Justice* (M. Cremona, J. Monar & S. Poli eds, Brussels: PIE Peter Lang 2011).

² The Council of the European Union, *EU Schengen Catalogue. External Border Controls, Removal and Readmission: Recommendations and Best Practices* 9 (2002), <http://www.consilium.europa.eu/en/documents-publications/publications/2002/eu-schengen-catalogue/>. Later on, after the creation of Frontex, the concept has been made pivotal for its mandate. See Press Release, *Justice and Home Affairs Council Meeting* (4–5 Dec. 2006), No. 15801/2006, https://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/jha/91997.pdf [all documents in the file last accessed on 10 Oct. 2019, unless indicated otherwise].

³ While this article was going to press, the last reform of the European Border and Coast Guard entered into force: Regulation (EU) 2019/1986 of the European Parliament and of the Council of 13 Nov. 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624, OJ L 295, at 1–131 (hereafter: Frontex 2019 Regulation). This article has been written when the previous regulation was in force. See Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 Sept. 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, OJ L 251/2016, at 1–76 (hereinafter: Frontex 2016 Regulation).

⁴ European Council, *Malta Declaration by the Members of the European Council on the External Aspects of Migration: Addressing the Central Mediterranean Route* (3 Feb. 2017), <https://www.consilium.europa.eu/en/press/press-releases/2017/02/03/malta-declaration/>.

⁵ S. Lavenex, *Failing Forward Towards Which Europe? Organized Hypocrisy in the Common European Asylum System*, in *Journal of Common Market Studies* 1195–1212 (2018).

States under pressure and it has also questioned the smooth implementation of the Schengen integration.⁶

Against the background of this complex web of intertwined policies, securing the borders of the EU and stretching the concept of border management up to controlling and preempting migration are, as expensive they might be, politically affordable solutions, especially in years of populism, fuelled by anti-Europe parties which capitalize on the fears of electorates.⁷

In this light should be interpreted the continuous process of reforms which has concerned the EU's border agency Frontex; only recently, it has been reformed in 2016, and renamed into European Border and Coast Guard Agency, and subsequently in 2018–2019. Especially with the 2019 reform, Frontex has gained an increased operational mandate, moved a step ahead towards full operational capacity and progressive autonomy from Member States, in terms of assets and human resources.⁸ A crucial component of the last reform is the increased mandate for cooperation with third countries, in particular for return purposes but also for risk analysis and information sharing.

This article aims precisely at casting light upon the information sharing practices of Frontex for risk analysis and border management purposes. Cooperation for return procedures does not fall within the scope of this article. Starting from the premise that since its set up, Frontex has been under the observation and scrutiny of parliaments, scholars and civil society in respect of accountability and fundamental rights implications of its activities,⁹ this article is indeed developing a zoom-in perspective in the different cooperation practices set-up by the agency with third countries' authorities in its external relations. This topic is relevant from the perspective of the legislative reforms and policy trends sketched above, but also for the ongoing scientific debate on the external relations of Frontex, to which this article aims to contribute.¹⁰

⁶ Alongside these issues, it has created the ground for the emergence of informal and administrative 'bricolage solutions' to persistent long-standing issues, such as secondary movements and disembarkation, which challenge the very nature of the EU as a governance system based on the rule of law. Cf. L. Marin, *Waiting (and Paying) for Godot: Analyzing the Systemic Consequences of the Solidarity Crisis in EU Asylum Law*, in *Migration Crises and the Principle of Solidarity in Times of Sovereignism: Challenges for EU Law and Polity* (special issue for Eur. J. Migration & L. forthcoming 2020).

⁷ See S. Penasa & G. Romeo, *Sovereignty-Based Arguments and the European Asylum System: Searching for a European Constitutional Moment?*, in *Migration Crises and the Principle of Solidarity in Times of Sovereignism: Challenges for EU Law and Polity* (special issue for Eur. J. Migration & L. forthcoming 2020).

⁸ M. Gkliati, *The New European Border and Coast Guard: Do Increased Powers Come with Enhanced Accountability?*, *EU Law Analysis* (17 Apr. 2019), <http://eulawanalysis.blogspot.com/search?q=gkliati>.

⁹ Cf. literature quoted in L. Marin, *Policing the EU's External Borders: A Challenge for the Rule of Law and Fundamental Rights in the Area of Freedom, Security and Justice? An Analysis of Frontex Joint Operations at the Southern Maritime Border*, *J. Contemp. Eur. Res.* 468–487 (2011).

¹⁰ With the exceptions of F. Coman-Kund, *European Union Agencies ad Global Actors* (Routledge 2018); M. Fink, *Frontex Working Arrangements: Legitimacy and Human Rights Concerns Regarding 'Technical Relationships'*, 28(75) *Merkourios – Utrecht J. Int'l & Eur. L.* (2012); A. Ott, E. Vos & F. Coman-

Considering the research framing Frontex as a ‘normative power Europe’ actor,¹¹ capable of exporting European standards to third countries, this article sets as its background reports of international agencies, NGOs and media offering evidence of violence, torture and degrading treatment at the external borders of the EU.

For example, on the Eastern migration route, there are documents which witness malpractices of Croatian, Serbian and Bosnian police authorities towards migrants.¹² On the African route, Libya, with its ‘lagers’, is known to be a dangerous place for migrants,¹³ and also to be an example of a failed state. Agreements with Libya can be tricky: recent evidence of internationally sought Libyan human traffickers known as ‘Bija’, who managed to attend Italian–Libyan bilateral negotiations in 2017 in representation of the Libyan government, suggests that cooperation with some states can be, to some extent, counterproductive.¹⁴ The examples are many and the ‘belt’ of states to be involved in this process of preemption of migration is large, reaching states as Niger¹⁵ and Rwanda.¹⁶ While externalization of migration control takes place through a variety of instruments, from Common Foreign and Security Policy (CFSP) missions (e.g. EUBAM Lybia and EU NAVFOR MED)¹⁷ to

Kund, *EU Agencies and Their International Mandate: A New Category of Global Actors?*, CLEER Working Paper 2013/7, 32 (2013); J. Rijpma, *External Migration and Asylum Management: Accountability for Executive Action Outside EU-Territory*, Eur. Papers 571–596 (2017).

¹¹ Cf. H. Ekelund, *Normative Power FRONTEX? Assessing Agency Cooperation with Third Countries*, TARN Working Paper 15/2017 (Nov. 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3082300; Ekelund’s article focuses on the role of Frontex as a normative power Europe actor, focusing on the normative basis, and on the action of transfer of norms, but without analysing the impact of the transfer of norms, which is one of the constitutive elements of Ian Manners’ theory on normative power Europe, but also of the empirical developers of normative power Europe narrative. Cf. I. Manners, *Normative Power Europe: A Contradiction in Terms?*, 40(2) J. Common Mkt. Stud. 235–258 (2002).

¹² Reuters, *Serbia Raps Croatia over Treatment of Afghan Migrants* (5 Sept. 2019), <https://www.reuters.com/article/us-europe-migrants-serbia/serbia-raps-croatia-over-treatment-of-afghan-migrants-idUSKCN1VQ1MF>; Osservatorio Balcani e Caucaso (2018), *Croatia, Refugees and Responsibilities*, <https://www.balcanicaucaso.org/eng/Areas/Croatia/Croatia-refugees-and-responsibilities-188573>; ECRE, *Report on Illegal Pushback and Border Violence* (30 Aug. 2019), https://reliefweb.int/sites/reliefweb.int/files/resources/Report%20on%20Illegal%20Pushback%20and%20Border%20Violence%20_%20European%20Council%20on%20Refugees%20and%20Exiles%20%28ECRE%29.pdf; Vita, *Il confine croato simile alla Libia: ecco come torturano i migranti* (4 Oct. 2019), <http://www.vita.it/it/article/2019/10/04/il-confine-croato-simile-alla-libia-ecco-come-torturano-i-migranti/152861/>.

¹³ M. Veglio, *L’attualità del male. La Libia dei «Lager» è verità processuale*, SEB 27 (2018).

¹⁴ N. Scavo, *La trattativa nascosta. Dalla Libia a Mineo, il negoziato tra l’Italia e il boss* (4 ottobre 2019), <https://www.avvenire.it/attualita/pagine/dalla-libia-al-mineo-negoziato-boss-libico>.

¹⁵ A. Lebovich, *Halting Ambition: EU Migration and Security Policy in the Sahel*, in ECFR.eu, https://www.ecfr.eu/publications/summary/halting_ambition_eu_migration_and_security_policy_in_the_sahel#.

¹⁶ *Europe Keeps Asylum Seekers at a Distance, This Time in Rwanda*, The New York Times (8 Sept. 2019), <https://www.nytimes.com/2019/09/08/world/europe/migrants-africa-rwanda.html>.

¹⁷ EUBAM Lybia is a Common Security and Defence Policy (CSDP) mission of the EU, set up in 2013, as a Border Assistance Mission, with the aim of supporting the Libyan authorities in developing border management and security at the country’s land, sea and air borders. It has a capacity building mandate,

development cooperation instruments (DCI), this article will focus on Frontex' external relations, which are one piece of this puzzle.

An additional reason for this research originates from the unclear nature of these relations; the cooperation of Frontex with Third countries is not considered to be international in nature, and working arrangements are not considered international treaties. They belong to a 'small I' type of international relations, a kind of 'underwood' of the EU's external executive or administrative relations,¹⁸ which also deserves attention and research to scrutinize its compliance with EU's constitutional (and administrative) normative rules and values.

The scientific relevance of this article is embedded into EU's border management practices, which, since 2005, when Frontex became operational, has shown an increased reliance on knowledge. Frontex is a 'knowledge hub' for the institutions of the EU, especially Commission and Council, and indirectly also for the Member States.¹⁹ The production of knowledge is assured with risk analyses, with European Border Surveillance System (EUROSUR), with deployment of various technologies, from dual-use to space technologies (drones and satellites), and these instruments concur in the creation of knowledge, which should further generate new spaces of governmentality.²⁰

This article examines the challenges arising from cooperation with third countries in the domain of border controls, with a special focus on information sharing. It proceeds as follows: after this section introducing the context and the research (1), the article moves to the heart of information sharing activities of Frontex (2), describing them in their different forms, and against their legal background; it continues mapping the challenges these activities entail, focusing especially on transparency and accountability, respect for fundamental rights and data protection rights (3), before concluding (4).

which means that EUBAM assists Libyan authorities through advising, training and mentoring Libyan counterparts. Cf. for more information: https://eeas.europa.eu/csdp-missions-operations/eubam-libya_en. The EU NAVFOR MED operation 'SOPHIA' is a CSDP mission set up in 2015 with the mission to dismantle the 'business model' of smuggling and trafficking of migrants; its mandate has been extended until 2020. Since 2018 naval assets are no longer deployed for search and rescue for queries on disembarkation and other reasons. Cf. for more information: <https://www.operationsophia.eu>.

¹⁸ Cf. the special issue *The New Frontiers of EU Administrative Law: Is There an Accountability Gap in EU External Relations?* (Marise Cremona & Paivi Leino eds 2017) for *European Papers*, and in particular: M. Cremona & P. Leino, *Introduction: The New Frontiers of EU Administrative Law and the Scope of Our Inquiry*, *ibid.*, at 467–488. See also F. Coman-Kund, *The International Dimension of the EU Agencies: Framing a Growing Legal-Institutional Phenomenon*, *Eur. Foreign Aff. Rev.* 97–118 (2018).

¹⁹ S. Horii, *The Effect of Frontex's Risk Analysis on the European Border Controls*, *Eur. Pol. & Soc'y* 242–258 (2016).

²⁰ M. Tazzioli, *Spy, Track and Archive: The Temporality of Visibility in Eurosur and Jora*, 49(4) *Security Dialogue* 272–288 (2018).

2 FRONTEX' EXTERNAL RELATIONS IN INFORMATION SHARING ACTIVITIES: THE LAW AND THE CONTEXT

The external relations of Frontex are often labelled as 'technical' and 'operational'; they take place through working arrangements, and, therefore, precisely because of this, are declassified by legal scholarship as 'children of a lesser god', i.e. soft law.²¹ The legal nature of working arrangements is debated: according to some scholars they cannot be qualified as international treaties, nor can be attributed to the EU as a legal actor.²² However, in spite of their formal qualification of administrative acts expression of Frontex, scholarship is turning its attention on legal challenges such as legitimacy and accountability, but also rule of law and protection of fundamental rights, precisely because technical and operational cooperation often conceals important political choices and also displays effect on individuals.²³

This section deals with the cooperation of Frontex with third countries in information sharing activities. This specific strand of Frontex's external relations takes place through working arrangements and intelligence sharing communities, but also liaison officers²⁴; these activities are enabled by Articles 54 and 55 of the 2016 Regulation.

The cooperation with third countries fulfils several functions, which can be summarized in two main aims: the first is supporting Member States' actions in border management and the second is supporting Frontex in achieving its own targets and realizing its own mandate. According to the 2016 Regulation, cooperation with third countries has the function of supporting Member States on technical and operational cooperation with third countries, promoting European border management and return standards. The external cooperation of Frontex must take place 'within the framework of the external relations policy of the Union, including with regard to the protection of fundamental rights and the principle of *non-refoulement*'.²⁵ The reform of 2016 has also further enhanced the powers of Frontex to coordinate operational capacity outside the borders, including on the territory of a third country, for which a status agreement between the Union and the third country is needed.²⁶ The 2019 reform marks another step in the direction of further autonomy of the agency from the Member States, and

²¹ See Ott, Vos & Coman-Kund, *supra* n. 10, at 32; Fink, *supra* n. 10.

²² Fink, *supra* n. 10.

²³ Compare Cremona & Leino, *supra* n. 18; Rijpma, *supra* n. 10, at 571–596; J. Santos Vara, *The External Activities of AFSJ Agencies: The Weakness of Democratic and Judicial Controls*, 20(1) Eur. Foreign Aff. Rev. 118–136 (2015); *Ibid.*

²⁴ Frontex has currently three liaison officers, in Ankara, Belgrade (for Western Balkans) and Niamey. Source: Frontex' webpage.

²⁵ Article 54, s. 2, Frontex 2016 Regulation.

²⁶ Article 54, s. 4, Frontex 2016 Regulation.

expansion of its external competences, which need further research also in the future.²⁷

2.1 INFORMATION SHARING PRACTICES VIA WORKING ARRANGEMENTS. A TYPOLOGY

The working arrangements that Frontex is entitled to conclude since its establishment in 2004, must be ‘in accordance with Union law and policy’ and define the framework for this cooperation, specifying ‘the scope, nature and purpose of the cooperation and be related to the management of operational cooperation’.²⁸

Frontex has a great discretion in the conclusion of these working arrangements, in the sense that a draft arrangement must receive the Commission’s prior approval, and Frontex must inform the Parliament before a working arrangement is concluded.²⁹

In this perspective, while the Commission has to approve it, the European Parliament does not appear to have extensive legal powers to control a working arrangement, which is a source of concern, because of the implications they can have.³⁰ The European Parliament can further scrutinize the agency in the context of its regular monitoring duties on Area of Freedom, Security and Justice (AFSJ) agencies; Frontex has indeed a duty of information towards the European Parliament, but it is questionable whether this mechanism can be effective and focused on this very specific sector of its mandate, i.e. Frontex’s risk analysis function and cooperation with third countries functional to it.

Based on information publicly available on its webpage,³¹ Frontex has currently twenty working arrangements, concluded mainly in the period 2009–2012. The latest one with Kosovo dates 2016. Out of these twenty arrangements, eighteen are concluded with states’ authorities whereas the other two are concluded with CIS (Commonwealth of Independent States) Border Troop Commanders Council Working Arrangement, and the MARRI Regional Centre in the Western Balkans Working Arrangement. MARRI is the Migration, Asylum, Refugees Regional Initiative, including Albania, Bosnia and Herzegovina, Croatia, Montenegro, Macedonia and Serbia.

Next to the working arrangements which are published, there are cooperation instruments which are not public. For example, the cooperation with Moldova has

²⁷ D. Vitiello & E. De Capitani, *Il Regolamento (UE) 2019/1896 relativo alla riforma di Frontex e della Guardia di Frontiera e Costiera Europea: da ‘fire brigade’ ad amministrazione europea integrata?*, in *SIDIBlog* (6 Dec. 2019).

²⁸ Article 54, s. 2, Frontex 2016 Regulation.

²⁹ Article 54, s. 2, Frontex 2016 Regulation.

³⁰ Santos Vara, *supra* n. 23.

³¹ At the link <https://frontex.europa.eu/about-frontex/key-documents/?category=working-arrangements-with-non-eu-countries>.

recently been intensified with an additional informal instrument, referred as ‘cooperation plan for the period 2018–2020’.³² This builds upon a working arrangement of 2008, and it can be defined as a fully fledged working arrangement, in light of its content. Also the press information released by Frontex recognizes that this cooperation expands information exchange on information on migration flows, and the use of relevant data to combat cross border crime and initiatives to support technical assistance to the Moldovan authorities.³³ It therefore has the content of a ‘typical’ working arrangement, and its form begs the question of why this strengthened cooperation does not take place via a ‘codified’ working arrangement and why it is not public.³⁴

Other working arrangements could be called as ‘delegated’ working arrangements, because their conclusion is mandated from the formalized ones. For example, in the working arrangements with Armenia, Azerbaijan and Nigeria, the exchange of classified information or intelligence is made possible by the conclusion of a separate security agreement or protocol on the requirements and procedures to be followed. This type of agreement is not public.

In the case of Kosovo, the working arrangement signed in 2016, provides for the possibility to exchange personal data, for which a specific arrangement/agreement is to be adopted by Frontex and the Ministry of Internal Affairs.³⁵

This suggests that the main or ‘typical’ working arrangement is to be seen as a ‘starting point’ of the cooperation between Frontex and a broad range of third countries; it does not exhaust the further implementation of this cooperation, which in practice takes place also at informal level. All in all, this further increases the need for transparency and accountability mechanisms on cooperation *practices* as expression of external administrative governance.

2.2 THE ‘TYPICAL’ WORKING ARRANGEMENTS AND INFORMATION SHARING NETWORKS

As to the working arrangements which are published, the large majority of them have been concluded with the 2004 Regulation or with the 2011 recast Regulation as applicable legal frameworks. They are all called ‘working arrangements’, with the exception of the ones with CIS, Russia and Turkey, which are called ‘memorandum’, ‘terms of reference’ and ‘memorandum of understanding’.

³² *News Release: Frontex and Moldova Sign New Cooperation Plan* (26 Mar. 2018), <https://frontex.europa.eu/media-centre/news-release/frontex-and-moldova-sign-new-cooperation-plan-glADrH>.

³³ *Ibid.*

³⁴ The author has had access to the document, thanks to a Public Access to Documents (PAD) request to Frontex.

³⁵ Article 7, s. ii) of the Working arrangement between Frontex and Kosovo.

In short, this terminology refers to something informal and less binding, and this is expression of a less close relationship with these countries than with others, in external relations terms.

These texts are similar to each other, they follow a core template, which is the same for the variety of countries which are concerned as counterparts of the cooperation.³⁶ Their scope covers the whole spectrum of the mandate of Frontex, which means the management of operational cooperation (returns, border operations), training programs, information exchange and risk analysis.³⁷ In addition to classical activities of operational cooperation, such as participation in border control operations, and assistance in return operations, these working arrangements provide for cooperation in training, information processing and exchange, research and development and operational interoperability.³⁸

Information processing and exchange are core components of every agreement, with the exception of the one with Russia; exchange of information and data collection covers migrants (age, nationality) and migration routes, and is instrumental to risk analyses undertaken by Frontex. It is precisely this role of information and intelligence hub which contributes to its legitimacy and also to its importance, especially in the relations with other institutions and with the Member States.³⁹ With this ‘informational asset’, Frontex sets itself on the European stage as a very authoritative knowledge actor.

In order to boost this risk analysis function, Frontex maintains relations with Third countries, mostly via ‘typical’ working arrangements, and it manages four regional intelligence sharing communities. They are the Western Balkans – Risk Analysis Network (WB-RAN), the Eastern Balkans (EB)-RAN, now transformed into Eastern Partnership (EaP)-RAN⁴⁰; the Turkey (TU)-RAN; the last one is the AFIC (Africa-Frontex Intelligence Cooperation), and it takes place without working arrangements.

³⁶ See also Fink, *supra* n. 10.

³⁷ C. Jones, *Frontex: Cooperation with Non-EU States*, Statewatch Briefing, 8–9 (Mar. 2017), <http://statewatch.org/analyses/no-309-frontex-third-countries-agreements.pdf>.

³⁸ According to Frontex’ own framing in its annual Programme of Work for 2014, the key task of the Frontex RELEX-third country unit, is ... to work ‘closely with the competent authorities of non-EU/Schengen countries – mainly those countries identified as a source or transit route of irregular migration – in line with general EU external relations policy and internal Frontex policy and assessments to support the Operational and Capacity Building Activities. Key areas for the development of operational cooperation with the competent authorities of partner countries are information exchange, risk analysis, training, research and development, joint operations and pilot projects’. Document linked at https://www.parlament.gv.at/PAKT/EU/XXV/EU/01/89/EU_18907/imfname_10452894.pdf. This confirms the internal strategic discretion Frontex has in the fulfilment of its tasks.

³⁹ Horii, *supra* n. 19, at 242–258.

⁴⁰ EB-RAN recently became the EaP-RAN: Eastern Partnership Risk Analysis Network, after Armenia, Azerbaijan, Georgia association under the Eastern Partnership IBM capacity building project.

These are Frontex-led intelligence sharing communities, based on the model of the FRAN, the Frontex Risk Analysis Network, that play a crucial role in facilitating information and knowledge sharing, as well as joint analysis between the EU and participating countries, in this case, third countries. The exchange covers periodical statistical information, reports, data analysis on incidents, trends, patterns, threats, enforcement actions, migration routes, mass migration planning and prevention strategies, among others, where appropriate and permitted by applicable laws and regulations.

A provision recurring in working arrangements is that Frontex and the corresponding counterpart within the third country intend to exchange information between the Frontex Risk Analysis Unit (Risk Analysis Unit (RAU)) and the relevant unit of the third country. 'Restrictions to the exchange of information are to be justified by legal or operational reasons only'.⁴¹ In another working arrangement, for example, we find that: 'In respect of the possible exchange of classified information or intelligence, a separate security agreement or protocol on the requirements and procedures to be adopted by Frontex and the competent authorities of [the third country] shall be conducted where necessary'.⁴²

These provisions, found in several working arrangements, are suggesting that exchange of information is one of the core elements of Frontex' external relations; that it is in principle possible to a broad extent; its restrictions are to be justified by legal and operational reasons only. Exchange of classified information or intelligence is also possible, and several working arrangements refer to a separate security agreements or protocols.

2.3 A BILATERAL EXCHANGE OF INFORMATION OR A RATHER FLEXIBLE ONE-WAY ROAD COOPERATION?

Other provisions are useful to understand the type of cooperation set up by Frontex with third countries. With some countries (Albania, Bosnia, Cape Verde, Macedonia, Montenegro, Nigeria, Serbia), the working arrangements provide for an additional clause:

Frontex may provide to the relative third country authority with relevant analytical products, in particular those related to border security management issues affecting the third country. The access to Frontex tailored Risk Analyses (RA) or other risk analysis

⁴¹ Working Arrangement establishing operational cooperation between the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex) and the Nigerian Immigration Service, Art. 4.2, https://frontex.europa.eu/assets/Key_Documents/Working_Arrangements/WA_with_Nigeria.pdf.

⁴² *Ibid.*

information will be decided on case-by-case basis by the Executive Director of Frontex.⁴³

This suggests that the main purpose of the information exchange process is seeing Frontex as the recipient of the information collected by Third countries, and this explains why Frontex is providing them with the relevant analytical products. The opposite, i.e. access by third country to the RA undertaken by Frontex, is to be decided on a case-by-case basis, by the Executive Director, who has extensive powers in the daily management of other aspects of the working arrangements. The partners who contribute to the activities of Frontex can benefit from the agency's support in technical assistance and also on financial aspects.

Next to information exchange, training and technical cooperation in R&D can be part of the working arrangement.

Other provisions concern the role of third country officials in RA. Working arrangements also provide for third country officials to be invited as 'observers' for participation in certain joint operations on a case-by-case basis by the Executive Director. For example, the WB-RAN reports are compiled by the Frontex RAU and analysed in cooperation with the regional partners. Here cooperation is the same described as 'observation' in working arrangement, indicating that the boundaries between observation and cooperation are not clearly defined. The same can be observed for liaison officers' tasks, comparing the text of legal instruments (very narrow) with the vacancies descriptions (broad). To some extent, the exchange of information, which entails collecting information only from governmental officials, is ending up in a co-production of analysis which is therefore not considering the whole range of actors which are present in the territories of the Third countries, but simply governments' officials.

The improvement of operational interoperability is also a component of working arrangements, except the ones with Russia and CIS. So, interoperability, here declined as operational interoperability, does not seem to be simply a concern within the EU, but also an objective to be pursued also with third countries. This aspect seems a broadening of the purpose of interoperability, not provided for the in Frontex 2016 Regulation, which talks about interoperability at EU and national level. Overall, the process seems to be one of construction of a buffer zone of countries that work according to EU's needs in order to cooperate with EU countries in the management of the external borders.

To sum up, working arrangements frame cooperation with third countries in a logic of outsourcing border surveillance functions, reaching also the extent of

⁴³ Jones, *supra* n. 37, at 15.

supporting their capacity-building processes, in the clear aim of prevention of irregular migration and cross-border crime.

2.4 THE UNBEARABLE LIGHTNESS OF ... COOPERATION OUTSIDE THE FRAMEWORK OF WORKING ARRANGEMENTS: THE CASE OF AFIC AND RISK ANALYSIS CELLS IN AFRICAN COUNTRIES

AFIC is the Africa-Frontex Intelligence Community and it is the regional information sharing network with African countries. Frontex has set up this information sharing community in 2010, to provide a framework for regular knowledge and intelligence sharing in the field of border security. The model is the one of the Frontex RAN, and follows the models of the WB-RAN and EaP-RAN, described above.

AFIC presents the peculiarity that via this network Frontex engages in cooperation with a range of countries, outside the framework of working arrangements.

Currently the AFIC includes information from authorities of many African countries, from Morocco to Egypt, Angola and Congo, Democratic Republic of Congo, Kenya, Somalia, Eritrea, and including Benin, Burkina Faso, Cape Verde, Gambia, Ghana, Guinea, Guinea-Bissau, Mali, Mauritania, Morocco, Niger, Nigeria, Senegal, Sierra Leone and Togo. However, Frontex has working arrangements only with Nigeria and Cape Verde.

Formally speaking the legal framework for this type of cooperation is now to be found in Article 54, Section 9, of the 2016 Regulation, which provides that Frontex 'may launch and finance technical assistance projects in third countries regarding matters covered by this Regulation', because the agency can 'benefit from Union funding in accordance with the provisions of the relevant instruments supporting the external relations policy of the Union'.⁴⁴ However, in 2010, the applicable Regulation (of 2004) was not formulated in a way to encompass these situations. Therefore, AFIC has, first, been set up, and then the legal framework has given it a place in law.

Another question which arise here is whether this type of cooperation can meet the definition of 'technical assistance', in the sense that the boundary between technical and operational is not that clear, and also whether this can be qualified as assistance. Are African countries technically assisted by Frontex in a process of border management and migration control they probably did not initiate and which is not functional to their ECOWAS integration process?⁴⁵

⁴⁴ Article 54, s. 9, of the Frontex 2016 Regulation.

⁴⁵ ECOWAS is the Economic Community of West African States (ECOWAS). Though it cannot be compared to European integration, one can read in its basic information page that (Italic mine):

Or is Frontex assisted by third countries in its process of risk analysis which requires information sharing or information collection from them? At this purpose it is of vital importance for the EU to enhance transparency and accountability in these processes, at least to enhance coherence of border and migration controls with the overall external relations goals of the EU.

The 2017 AFIC Joint Report, which is a publication of the Frontex RAU, indicates as the basic principles of AFIC its ‘informal nature, expert-level participation, flexibility, cooperation based on mutual benefits and trust among participants’.⁴⁶ The network has now reached a ‘certain level of maturity’, as it has ‘capacity to generate analysis and knowledge, build trust among its partners, expand geographically and extend its portfolio’. It issues now a monthly report, and because of the increased visibility, the Community is an unparalleled platform for information-sharing and joint analysis with Third countries in Africa.⁴⁷

Cooperation with AFIC countries, which therefore takes place outside the framework of working arrangements, is complemented by a technical assistance project of 4 million euros, which has the aim to consolidate and enhance inter-agency and inter-regional information-sharing, with a view to establishing more direct cooperation channels, improve operational capabilities of the partner countries, promoting information exchange that can lead to investigations to dismantle organized crime networks; to increase beneficiary countries to draft and share risk analyses on migration flows, border security and cross-border criminality.⁴⁸

Starting from the fact that cooperation on information sharing with AFIC countries takes place without working arrangements, it is therefore to be questioned how such cooperation does take place, within which boundaries. The designed authorities of third countries come from different administrations, such as ministries of the Interior, National Police or Gendarmerie, or from the National Agency for the Prohibition of Trafficking in Persons (NAPTIP), the Nigerian fighting trafficking agency.

In the AFIC there are ‘full members’ and other officials with ‘observers’ status. It is surprising that, in spite of the informality of the cooperation, there is nevertheless some articulation in the organization distinguishing between participants,

‘The Vision of ECOWAS is the creation of a *borderless region* where the population has access to its abundant resources and is able to exploit same through the creation of opportunities under a sustainable environment. What ECOWAS has created is an *integrated region where the population enjoys free movement*, have access to efficient education and health systems and engage in economic and commercial activities while living in dignity in an atmosphere of peace and security. ECOWAS is meant to be a region governed in accordance with the principles of democracy, rule of law and good governance’.

⁴⁶ Frontex Risk Analysis Unit, *Africa-Frontex Intelligence Community Joint Report 2017 9*, https://frontex.europa.eu/assets/Publications/Risk_Analysis/AFIC/AFIC_2017.pdf (2018).

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

which might therefore also benefit from different types of support from Frontex. Such complex organization with representatives from different administration, different extent of benefits from participation to the network and high level of maturity as reflected in the delivery of monthly reports, seems to be hardly compatible with a totally informal cooperation. It is suggested that, in this context, informal means secretive, and outside the typical legal framework.

One of the key points of the last AFIC report 2017 is that Frontex has launched a three-year capacity building project with an overall objective of contributing to the reduction in illegal immigration attributable to migrant smuggling, and strengthening regional cooperation between AFIC partner countries. So, AFIC is going to be strengthened with the support of the European Commission, and from 2017 till 2020, 4 million euros from 'Instrument contributing to Stability and Peace' of Directorate-General for International Cooperation and Development (DG DEVCO), will enhance capacity-building in the context of 'inter-agency and inter-regional information-sharing, with a view to establishing more direct cooperation channels, thus contributing to more effective border management'; another aim is to improve the operational capabilities of the partner countries, through promoting information exchange that can lead to investigations to dismantle organized crime networks; another aim of this investment of funds from international cooperation and development is to enhance the capacity of these countries in strategic and operational risks analysis. It is therefore questionable which is the accountability for this cooperation which is framed as technical and operational, which entails important budget expenditure towards third countries with a non-solid administrative apparatus behind them and with a similarly weak legal framework, not to mention respect for democracy, pluralism, rule of law principles and fundamental rights.

Another development in the practice in the external relations of Frontex lays in the recent institutions of so-called 'risk analysis cells' in third countries, such as Niger, Senegal, Nigeria and Ghana. There are plans for Risk Analysis Cells in Gambia, Kenya, Guinea and Mali which show that cooperation with AFIC countries is one priority for Frontex and that 'technical assistance' is nothing but an informal forum for cooperation between Frontex and third countries, which mobilizes resources and shapes the policy.⁴⁹

To conclude, this section has shown that the external relations of Frontex are framed by working arrangements, but that there is also another stream of cooperation, very vital and relevant, which take place within the context of technical assistance. This cooperation aims at supporting third countries' capacities in controlling borders and migration more in general. It shows that one of the aims of the external action of

⁴⁹ *News Release: Frontex Opens First Risk Analysis Cell in Niger* (27 Nov. 2018), <https://frontex.europa.eu/media-centre/news-release/frontex-opens-first-risk-analysis-cell-in-niger-HQIoKi>.

Frontex is to realize a preemptive approach of policing borders, to prevent migration from arriving to Member States' shores; provide Member States with robust information and also offer knowledge to EU institutions in order to create a buffer zone of neighbouring third countries, supportive of Frontex's own mission and function.

To attempt an interim reflection here, one can observe that Frontex has a number of working arrangements, which do not constitute international agreements of the EU, and therefore do not go through the scrutiny of the European Parliament, within the umbrella of the executive external governance.⁵⁰ These working arrangements, dealing with participation in Joint Operations (JOs), sometimes also return operations, have a component of information-exchange for risk analyses purposes, but also training, cooperation in R&D, pilot projects and technical assistance. The creation of a web of external partners is functional to the role of Frontex as an information actor in securitizing borders and fighting against cross-border crime, next to other law enforcement agencies, such as Europol.⁵¹

3 WHICH CHALLENGES MATERIALIZE FROM FRONTEX' COOPERATION WITH THIRD COUNTRIES?

The previous section has mapped the external relations of Frontex in the context of information sharing activities. Other activities contribute to this function: it is the case of Frontex liaison officers, which fall outside the scope of this article. In the same vein, this work does not include EU's security missions which might provide for information sharing for migration purposes.

However, based on the mapping of activities conducted above, we can observe that some challenges emerge, mainly in three directions: first, under transparency and accountability; second, under protection of fundamental rights, and third, as to the impact that increased monitoring and surveillance can have on the privacy of third country nationals and on data protection obligations of European actors.

3.1 TRANSPARENCY AND ACCOUNTABILITY: A COMPLEX WEB OF EXTERNAL RELATIONS IN FULL EXPANSION

The Frontex 2016 Regulation provided for a new legal basis for international cooperation with third countries. It requires the prior approval of the European Commission and also that the European Parliament is informed.

⁵⁰ Cremona & Leino, *supra* n. 18.

⁵¹ It should also be recalled that the Frontex 2016 Regulation is enabling Frontex to support third countries in their territories with Frontex-coordinated joint operations, with executive powers. For this, Frontex will have to conclude status agreements, for which there is already a draft model, elaborated by the Council.

The analysis of the practice of the external relations of Frontex has shown that cooperation can be formalized via working arrangements: most of them are public, others are not. Next to it, cooperation with states can also take place informally, without working arrangements: the 2016 Regulation provides for ‘technical assistance’ as legal basis for this informal cooperation.

However, the case of Moldova’s 2018 informal cooperation and the fact that technical assistance does not seem to differ substantially from the cooperation enacted via working arrangements would suggest that forms of scrutiny should be enacted also for technical assistance projects. These would, otherwise, seem to be an option to bypass the requirements of Article 54, Section 2, of the 2016 Regulation. While the problem does not lay in the relations Frontex–Commission, nor Frontex–Council, because of the composition of the Management Board of Frontex, the problem lays precisely in democratic accountability: indeed, the European Parliament might not be able to exercise its scrutiny over such level of administrative external relations, which nevertheless have important implications on the life of individuals, but also on EU’s broader external relations. It therefore touches upon European Parliament’s competences and prerogatives, within the EU’s constitutional framework.

Similar reflections can be developed over social accountability, a type of accountability that within Frontex is represented by the Frontex Consultative Forum (hereinafter: the Forum). It is not clear to which extent the Forum can scrutinize cooperation taking place via informal arrangements and especially the implications on the ground of the external administrative relations of Frontex. More precisely, considering that the information collected from third countries comes from a limited range of actors, the information constructed for and by Frontex is nothing but one perspective of a complex prism, such as the phenomenon of migration. This issue has been raised by the Forum and by other commentators, but the practice did not address this concern (yet).

3.2 FUNDAMENTAL RIGHTS IN FRONTEX’ EXTERNAL RELATIONS: ENSHRINED IN THE LAW, BUT NEGLECTED IN PRACTICE?

The legal framework of the EU has the Charter of Fundamental Rights as a binding text, with the same force of the Treaties. Though the EU has not adhered to the ECHR, the latter does nevertheless have a special significance in the EU system thanks to its recognition in the treaties (Article 6 TEU); the Court of Justice of the EU considers the case-law of the European Court of Human Rights.

When Frontex acts in the context of its external dimension, these actions fall within the scope of the implementation of EU law, for the purpose of Article 51,

Section 1, of the Charter. In addition to the Charter, other EU legal acts make sure that the activities of Frontex respect fundamental rights, for example in the context of its operations, by enacting provisions on *non-refoulement* and asylum protection rights, next to search and rescue obligations.⁵²

When we look specifically at the context of information sharing, we must observe that a comprehensive approach to fundamental rights does suggest that Frontex considers the implications of its mandate also on the situations of fundamental rights of migrants and persons concerned by its activities. Considering that Frontex reforms have strengthened the fundamental rights commitment of the agency, with the creation of a Fundamental Rights Officer and a Consultative Forum (hereinafter: the Forum) for social accountability, it has been chosen to focus indeed on the reports of this body, because of the function it has, its composition, and also the position it enjoys within Frontex for the fulfilment of its mission.

Preliminarily, it must be observed that the Forum scrutinizes cooperation by Frontex with third countries in general, whereas the scope of this work is limited to cooperation finalized to information sharing. However, in spite of the different scope, some of the Forum's concerns are worth being discussed here.⁵³

First of all, and in a preliminary perspective, it must be considered that the Forum does not have full access to all the activities undertaken by Frontex. In the 2018 report, Frontex has advised against the mission of the Forum to Niamey (Niger) on security and operational grounds. The Frontex Liaison Officer in Niamey, instead, has been invited to Warsaw in order to meet the Forum.

Next to it, in all the reports examined, the cooperation of Frontex with third countries in general is seen as problematic in the perspective of its impact on fundamental rights. For this purpose, the Forum has come forward with several suggestions: first of all, before engaging in cooperation with any third country, a fundamental rights risk assessment should take place.⁵⁴ It has also been emphasized that the Frontex Codes of Conduct must apply also to third-country observers, during operations.⁵⁵ Secondly, as to the same working arrangements, the Forum had expanded upon European Ombudsman's recommendation to set up appropriate complaint mechanisms, also to encompass the activities of Frontex in the cooperation with third countries.⁵⁶

⁵² Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 189, 27 June 2014, at 93–107.

⁵³ The reports examined cover the years 2015, 2016, 2017, 2018.

⁵⁴ Forum's report on 2017.

⁵⁵ *Ibid.*

⁵⁶ Forum's report on 2015.

Additionally, the Forum addressed specific recommendations on risk analysis.⁵⁷ For example, the Forum commented on the draft for 2017 of the AFIC Joint Report, which is managed by the Frontex RAU, together with other regional RAN we have seen above (section 2). After recalling the value of risk analysis, from high-level strategic to the operational decision-making of Frontex, the Forum stresses that, in relation to the Central Mediterranean route, the protection needs of migrants, as well as the humanitarian needs arising from the time spent in Libyan infamous detention centres, the ‘lagers’ of our times, should also be considered, which suggests that this is not yet taking place. The Forum unveils the structural problems of the cooperation on the Central Mediterranean route, and specifically complains that Frontex cooperation with Third countries’ on the AFIC report seems to be one-sided. Frontex does not look at the migration phenomenon in general, but only in a law enforcement perspective. The same recommendation was put forward in relation with the cooperation with Turkey, where the Forum suggested also to reach out to NGOs, international organizations and civil society in Turkey, to feed risk analysis with a broader set of information sources and therefore, to have a more complete picture of the situation on the ground.⁵⁸

To conclude, in several reports, the Forum has expressed serious concerns on the cooperation of Frontex with third countries, questioning also risk analysis, as being one-sided and not considering the overall context of the third country and the implications of that cooperation on migrants’ fundamental rights. Overall, the core message one elaborates out of the reports of the Forum is that, next to cooperating with Third countries in order to prevent migrants from arriving, there is an urgent need to investigate and to consider the implications of such cooperation on the situation of migrants. From these reports, it is possible to argue that cooperation between Frontex and third countries takes place irrespective of any fundamental rights consideration, and it is simply based upon ‘internal policy drivers’ requiring to limit the flow of migrants arriving in the EU. This can become very problematic, in legal and ethical perspectives, but also because the external dimension of migration policy must be embedded into EU’s broader external relations and EU’s external security policy.

3.3 PRIVACY CONCERNS FOR FRONTEX’ ROLE OF INFORMATION HUB: THE ROLE OF THIRD COUNTRIES

The role of Frontex in the context of processing of personal data is a complex issue that deserves further research, also in relation to its function in European Travel

⁵⁷ Forum’s report on 2017.

⁵⁸ Forum’s report on 2016.

Information and Authorisation System (ETIAS) and other databases. However, in this context we must limit ourselves to sketching the challenges at stake in the external relations of Frontex in information sharing.

The role of Frontex in processing personal data has been enhanced by the 2016 and 2019 reforms, and also by the Interoperability Regulation.⁵⁹ It can now process personal data in the context of its mission, including also for risk analysis purposes, and for administrative purposes⁶⁰; according to Article 47, Section 1, of the 2016 Frontex Regulation it can process ‘personal data of persons who are suspected (...) of involvement in cross-border crimes’, but also of ‘persons who cross external borders without authorization and whose data is collected by European Border and Coast Guard teams, including when acting in the context of migration management support teams’. This legal framework already shows how migration control purposes are mixed with cross-border crime, and this is a connection which is full of consequences.

Processing of personal data by Frontex is now governed by Regulation (EU) 2018/1725 of the European Parliament and of the Council, the data protection framework applicable to EU institutions, bodies, offices and agencies.⁶¹ The applicable legal framework for Member States is mainly the General Data Protection Regulation (GDPR); however, when they operate in the context of the fight against crime, Directive 2016/680 should apply. The 2016 Regulation provides that nor Frontex nor Member States can transfer data to third countries and third parties, including international organizations, except for the processing of personal data in the context of return operations and return interventions.⁶² According to the EUROSUR Regulation, exchange of data with third countries is possible, though ‘strictly limited to what is absolutely necessary for the purposes’ of maintaining National Situation Pictures. In the European Situational Picture (ESP) and in the Common Pre-Frontier Intelligence Picture (CPIP) only ship identification numbers, which can lead to personal data, can be processed.⁶³

⁵⁹ Regulation (EU) 2019/817 of the European Parliament and of the Council of 20 May 2019 on establishing a framework for interoperability between EU information systems in the field of borders and visa and amending Regulations (EC) No 767/2008, (EU) 2016/399, (EU) 2017/2226, (EU) 2018/1240, (EU) 2018/1726 and (EU) 2018/1861 of the European Parliament and of the Council and Council Decisions 2004/512/EC and 2008/633/JHA, OJ L 135, 22 May 2019, at 27–84.

⁶⁰ Article 47, s. 2, of the Frontex 2016 Regulation.

⁶¹ Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 Oct. 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC (Text with EEA relevance), OJ L 295/2018, at 27–84.

⁶² Article 45, s. 4, of the Frontex 2016 Regulation.

⁶³ Article 20, s. 4, of the Regulation (EU) No 1052/2013 of the European Parliament and of the Council of 22 Oct. 2013 establishing the European Border Surveillance System (Eurosur), OJ L 295, 6 Nov. 2013, at 11–26.

However, in spite of rules which provide for guarantees in situations where Frontex deals with personal data, some longstanding issues remain on the table in the context of Frontex operations, and especially in the context of cooperation with third countries.

The first one concerns the blurred lines between migration controls and fight against crime, internal security, police and judicial cooperation.⁶⁴ This blurred line is getting more problematic because of the entrance into force of the interoperability framework and also because of the role Frontex has in ETIAS.⁶⁵ At the same time, increased inter-agency cooperation at European level, for example between Frontex and Europol,⁶⁶ does contribute to magnify this intertwining between border control and internal security which has also the effect of framing as ‘security risk’ different categories of persons, which could be vulnerable because of the migration process itself, and, in some circumstances, should be rather framed as subjects deserving protection instead of security risks. Already in 2016, the European Data Protection Supervisor (EDPS) observed that the 2016 reform was turning Frontex into a ‘personal data hub’, where massive amounts of personal information would be collected and stored.⁶⁷ The same concern has been expressed in 2018–2019, with the last reform which increased the executive powers, gave Frontex a new operational mandate, entailing direct control on deployed personnel and equipment, with the European Border and Coast Guard (EBCG) standing corps.⁶⁸

The second major concern consisted in blurred responsibilities between EU and Member States when processing personal data, in the context of integrated border management. While this is a general concern, it can display effects also on cooperation with third countries, because for example Member States have bilateral agreements with third countries for the operation of EUROSUR.⁶⁹ One of the suggestions advanced by the Fundamental Rights Agency, and also by the

⁶⁴ ‘Formal comments of the EDPS on the Proposal for a Regulation on the European Border and Coast Guard and repealing Council Joint Action 98/700/JHA, Regulation (EU) 1052/2013 of the European Parliament and of the Council and Regulation (EU) 2016/1624 of the European Parliament and of the Council (hereinafter: EDPS’ comments, 2018), https://edps.europa.eu/sites/edp/files/publication/18-11-30_comments_proposal_regulation_european_border_coast_guard_en.pdf, at 3.

⁶⁵ On these issues, see N. Vavoula, *Interoperability of EU Centralised Databases for Third-Country Nationals: The Deathblow to their Privacy and Data Protection?* (in this special issue).

⁶⁶ See T. Quintel, *Interoperable Data Exchanges Within Different Data Protection Regimes. The Case of Europol and the European Border and Coast Guard Agency* (in this special issue).

⁶⁷ European Data Protection Supervisor, *EDPS’ Recommendations on the Proposed European Border and Coast Guard Regulation*, Opinion 2/2016, 3 (hereinafter: EDPS, Opinion 2/2016) (2016), https://edps.europa.eu/sites/edp/files/publication/16-03-18_ebcg_en.pdf.

⁶⁸ EDPS’ comments, 2018, at 2.

⁶⁹ European Union Agency for Fundamental Rights (FRA), *How the Eurosur Regulation Affects Fundamental Rights* 22–23 (2018), https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-euro-sur-regulation-fundamental-rights-impact_en.pdf.

EDPS, has been to include a data protection clause in the context of cooperation agreements with third countries.⁷⁰

Both actors insisted on several occasions on the necessity to proceed with a fundamental rights assessment on the level of compliance with fundamental rights by the third country, including also the level of data protection. While this is urgent for cooperation based on working arrangements, this is all the more the case for technical cooperation, when the grounds of the cooperation are defined by exchange of letters and operational cooperation, and where the European Parliament is not even informed.

Another major challenge, which is not addressed by the EDPS, nor by the Fundamental Rights Agency, is represented by the practical and theoretical implications of the increased cooperation for the data collection and retention practices in third countries. The ‘greediness’ of Frontex in collecting information for risk analysis purposes and its readiness in financing the capacity building process these countries are pushed to pursue are going to create a belt of countries which are delegated and financed to control migration for the EU.⁷¹ These third countries are very different from each other, but some of them have also pretty low or have no legal standards on privacy, just to mention one. Though third countries’ actions and practices are not governed by EU law, it nevertheless remains a question for the EU as a polity which promotes its internal values also in its external relations, to ask itself which implications can have on the ‘types’ of states it is coopting into this fluid process of border controls, and how these states relate to human persons, which can be irregular migrants but also prospective refugees.

4 CONCLUSIONS: EXECUTIVE COOPERATION CONCEALING CORE CHALLENGES TO NORMATIVE IDENTITY OF THE EU?

The article has described the framework for cooperation between Frontex and third countries. It has mapped practices of cooperation against their legal and policy frameworks: thanks to this analysis, it can be argued that Frontex needs third countries’ cooperation for the fulfilment of its activities of prevention and containment of migration, and also to support EU’s institutions, the Commission in particular, with the knowledge it creates thanks to risk analyses: in particular, the function of risk analysis benefits from information sharing practices, since third countries provide Frontex information, and Frontex and the EU in contrast support generously the capacity building process third countries undergo. This process, taking place as cooperation with working arrangements or informal

⁷⁰ EDPS’ comments, *supra* n. 64, at 4.

⁷¹ *Europe Keeps Asylum Seekers at a Distance*, *supra* n. 16.

cooperation as technical assistance, is certainly driven by migration control logics, and to some extent could also clash with third countries traditions and interests, meaning for example the nomadic style of local populations and also integration African states pursue with ECOWAS.

Frontex can cooperate with third countries via working arrangements, but working arrangements do not exhaust the horizon of the agency's cooperation with third countries. For example, a stream of cooperation takes place under the framework of technical assistance, which is less monitored than the one taking place via working arrangements.

In the case of Moldova, in 2018 parties have revamped the cooperation ongoing via 'new cooperation plans', which have not been formalized in a new working arrangement, nor made public. Technical assistance with the AFIC seems to be especially problematic, as it bypasses the procedural requirements for working arrangements.

While this type of cooperation is firmly in the hands of the Executive Director and of the Management Board, which ensures that Frontex is 'supervised' by the Commission and the Council, the same cannot be said for the European Parliament, which has done and is doing an important work in ensuring democratic accountability in this sensitive domain of external relations of administrative nature, or of executive governance in international relations, depending on the perspective one chooses. Of course, the regular participation of the Executive Director of Frontex to European Parliament's hearings contributes to this function, but the scrutiny of the European Parliament on the external cooperation practices of Frontex is and remains limited. Therefore, it is all the more important that the rules for formalized working arrangements are not bypassed by informal cooperation avenues, and that the European Parliament can scrutinize also actual practices, not simply the text of a working arrangement. The EDPS, the Fundamental Rights Agency, alongside the European Ombudsman do play an important role in this perspective too.

In the same vein, the function fulfilled so far by the Consultative Forum for Fundamental Rights has ensured social accountability and given a contribution Frontex should try and implement, in particular suggesting that fundamental rights assessments should take place before cooperation with a country is launched, including as well analysis on the level of protection data and privacy enjoy in a given third country. At the same time, it has suggested that fundamental rights should be mainstreamed into risk analysis, broadening the scope of the information collected from third countries, including civil society actors operating in the territories of third countries.

To conclude, several institutions and agencies do contribute to keep the external administrative relations of Frontex accountable and transparent, by providing, to the extent possible, scrutiny to its actions, which have an executive nature, are driven by technical rationales, but which nevertheless have important

implications on personal rights and freedoms but also on the overall coherence of the EU as a (law and) governance system.

In years featuring the rise of populist movements, in which fears fuelled for electoral purposes poison the public debate on migration, it is important that the EU increases its efforts to ensure that the external dimension of migration, and thus also the external relations of Frontex, are firmly embedded into EU's core constitutional values and external relations framework, and that border control practices driven by migration control rationales (or fears) do not become its Achilles' heel,⁷² undermining the efforts done in decades of evolution towards a community based on integration through law and rights. What the future will bring, it will not be written in these pages; there is however hope that the EU will stop fearing migration as the biggest challenge it could face, thus putting itself in the position of being blackmailed by third country leaders exploiting persons for immoral goals.⁷³

⁷² C. Woollard, *Editorial: European Agendas on Migration: Risk and Dilemma for EU Foreign Policy*, ECRE Bull. (4 Oct. 2019), on file with the author.

⁷³ The Independent, *Erdogan Threatens to Flood Europe with 3.6 Million Refugees as Syria Offensive Forces Tens of Thousands to Flee* (9 Oct. 2019), <https://www.independent.co.uk/news/world/middle-east/erdogan-syria-turkey-kurds-europe-refugees-invasion-sdf-latest-middle-east-a9150271.html>.

