

The use of force by the Frontex agency – international legal aspects

Prawnomiędzynarodowe aspekty użycia siły przez agencję Frontex

Международно-правовые аспекты применения силы агентством Frontex

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Summary: This article tackles the issue of legal regulation of the use of force by the European Union based on the example of the European Border and Coast Guard Agency (Frontex), operating in the EU's area of freedom, security, and justice. Due to the risks and threats related to border protection and migration management, Frontex has been endowed with extensive powers to use force in its operations. Using the concept of institutional isomorphism, the author argues that Frontex's activities in the face of specific and extremely difficult challenges at the external borders of the EU have become a component of operations undertaken by the border services of the Member States, leading to an isomorphic "merging" of the activities of EU agencies and national border services, including the legal dimension of the use of force.

Key words: European Union, security, borders, Frontex, use of force

Streszczenie: Artykuł podejmuje zagadnienie prawnych regulacji stosowania siły przez Unię Europejską na przykładzie Europejskiej Agencji Straży Granicznej i Przybrzeżnej (Frontex) funkcjonującej w przestrzeni wolności, bezpieczeństwa i sprawiedliwości UE. Z uwagi na źródła ryzyka i zagrożeń związanych z ochroną granic i zarządzaniem migracjami agencja Frontex została wyposażona w szerokie uprawnienia w zakresie użycia siły w działaniach operacyjnych. Wykorzystując koncepcję instytucjonalnego izomorfizmu, autor argumentuje, że w obliczu szczególnych i wyjątkowo trudnych wyzwań na granicach zewnętrznych UE działania Fronteksu stają się składnikiem czynności podejmowanych przez służby graniczne państw członkowskich, prowadząc do izomorficznego „scalenia” czynności agencji UE i krajowych służb granicznych, również w wymiarze prawa do użycia siły.

Słowa kluczowe: Unia Europejska, bezpieczeństwo, granice, Frontex, użycie siły

Резюме: В настоящей статье рассматривается правовое регулирование применения силы Европейским Союзом на примере Европейского агентства пограничной и береговой охраны (Frontex), действующего в сфере свободы, безопасности и правосудия ЕС. В связи с источниками рисков и угроз, связанных с охраной границ и управлением миграцией, Frontex наделен широкими полномочиями по применению силы в оперативной деятельности. Используя концепцию институционального изоморфизма, автор аргументирует, что перед лицом конкретных и чрезвычайно сложных проблем на внешних границах ЕС операции Frontex становятся компонентом деятельности пограничных служб государств-членов, что приводит к изоморфному «слиянию» деятельности агентства ЕС и национальных пограничных служб, в том числе в аспекте права на применение силы.

Ключевые слова: Европейский Союз, безопасность, границы, Frontex, применение силы

Introduction

The admissibility of the use of force by international organizations is one of the crucial aspects of international public law, and international humanitarian law in particular.¹ Jurisprudence has addressed the issue in conventional terms on the basis of the provisions of the Charter of the United Nations and the competences of regional organizations derived from the Charter in regard to the maintenance of international peace and security. Following the end of the Cold War and the collapse of the bipolar system, the question of the use of force by international organizations was expanded to include humanitarian intervention² and responsibility to protect.³

The use of force, including the use of weapons and coercive measures by international organizations facing the so-called new threats – terrorism, illegal migration, and various forms of transnational organized crime – has been a relatively new area of legal scholarship. In this context, the European Union is a particularly interesting case since it combines the features of an international organization pursuing security policies in two dimensions: a horizontal one (internal security and border protection, international criminal justice, security, and defence) and a vertical one (national security of the Member States, security of the European Union as a supra-national community, global security involving the EU as an international actor). Although the above-mentioned, inevitably brief glimpse of the EU's interests and activities in the security domain does not reflect the complexity of the security architecture of the European Union, it illustrates the cross-sectoral nature of the EU's activities in relation to conditions of, and threats and challenges to, contemporary security.

This article takes up the issue of the legal regulation of the use of force by the European Union, based on the example of the only EU agency equipped with such powers. This is the European Border and Coast Guard Agency (Frontex) operating in the EU's area of freedom, security and justice. The Agency's current legal status was established by the Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019.⁴ The Agency contributes to the management

¹ Cf. *Międzynarodowe prawo humanitarne konfliktów zbrojnych*, ed. K. Lankosz, Dęblin 2006; *Międzynarodowe prawo humanitarne konfliktów zbrojnych*, eds. Z. Falkowski, M. Marcinko, 2nd ed. extended, Warszawa 2014.

² Cf. J. Zajadło, *Dylematy humanitarnej interwencji*, Gdańsk 2007.

³ G. Evans, *The Responsibility to Protect. Ending Mass Atrocity Crimes Once and For All*, Washington 2008; A.J. Bellamy, *Responsibility to Protect*, Cambridge 2009.

⁴ Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624, OJ L 295, 14.11.2019, p. 1.

of the external borders of the EU Member States and takes into consideration key aspects of international migration, including the inflow of refugees. Due to the risks and threats accompanying migratory flows, such as the expansion of organized crime, and growing radicalisation and political extremism, as well as terrorist threats, border protection and migration management have been for years among the key areas of the internal security policy of the European Union.⁵ Thus, Frontex aims not only to contribute to the more effective protection and control of the external borders of the EU Member States, but also to engage in the prevention and combating of security threats from outside the European Union.

The above-mentioned determinants created the basis for the expansion of the operational capabilities of the Agency on an unprecedented scale. Thus, the issue of the use of force and coercion in Frontex's operations must be considered with reference to the European Border and Coast Guard Regulations, and to the provisions of EU Treaties and relevant elements of EU secondary law.

The problem of the use of force by Frontex officials has been raised by the media and some NGOs since the mid-2010s, in the context of the migration crisis. In mid-2019, a joint investigation by several media outlets resulted in accusations of Frontex's complicity in the illegal and dangerous pushbacks of migrants on the Aegean Sea. The Agency categorically rejected the allegations, but – under public pressure – launched an internal investigation in October 2020.⁶ Soon after, separate inquiries were undertaken by several institutions and bodies of the European Union: the European Parliament, the European Ombudsman, and the European Anti-Fraud Office. The issue of the alleged use of force by Frontex raises a fundamental question as to the scope of the Agency's powers in the context of the changes produced by Regulation (EU) 2019/1896, especially the appointment of statutory staff composed of persons employed by the Agency and having the status of officials of the European Union.

In this article, the principles and norms concerning the right to use force and weapons by Frontex as an agency of the European Union will be discussed with the use of the doctrinal legal research, reflecting a static approach to the subject of

⁵ M. Gębska, *Human Trafficking as a Challenge for International Security and Security in Europe*, Toruń International Studies 2020, vol. 1, no. 13, pp. 41–56.

⁶ Frontex, *Frontex launches internal inquiry into incidents recently reported by media*, News Release, 27 October 2020, <https://frontex.europa.eu/media-centre/news/news-release/frontex-launches-internal-inquiry-into-incidents-recently-reported-by-media-ZtuEBP> [access: 2.11.2020]. Cf. Fundamental Rights and Legal Operational Aspects of Operations in the Aegean Sea. Final Report of the Frontex Management Board Working Group, 1 March 2021, https://frontex.europa.eu/assets/Key_Documents/MB_Documents/Agenda_Point_WG_FRaLO_final_report.pdf [access: 5.03.2021].

the research, independent of ongoing investigations. Regulation (EU) 2019/1896, currently in force, repeals previous EU legislation which established the status of Frontex and changes the structure and remit of this agency. At the same time, it transfers most of the provisions relating to the Agency's mandate, its core tasks, and the conditions for joint operations and rapid interventions at the external borders of the Member States. For this reason, in this article the process of tracing political, organizational, and normative changes will be limited to the necessary minimum, and the emphasis will be placed on the current legal status and its effects.

The above-mentioned research methods test the hypothetical assumption that Frontex, as an agency committed to strengthening the European Union as an area of freedom, security, and justice, is endowed by the EU legislators with powers traditionally reserved to sovereign nation states. The tendency to institutional isomorphism⁷ in the EU's security policy is reflected in the activities of Frontex as an agency exposed to strong external impacts. Concurrently, it should also be seen as an important prerequisite for the interpretation of the provisions of European Union law on the use of force.

1. Frontex – legal status and specific competences

The European Union as an area of freedom, security and justice is endowed with appropriate measures concerning the protection of external borders, asylum and migration management, and the prevention of and fight against crime. Concurrently, EU treaty law stipulates that the above measures are without prejudice to the Member States' ability to adopt and exercise domestic rules to protect their essential security interests, comprising the maintenance of law and order and the safeguarding of internal security.⁸ This results directly from the provision of Article 4 (2) of the Treaty on European Union: "In particular, national security remains the sole responsibility of each Member State."⁹ Since the modern nation-state is also

⁷ The concept of institutional isomorphism was formulated by P.J. DiMaggio and W.W. Powell in: *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, *American Sociological Review* 1983, vol. 48, no. 2, pp. 147–160.

⁸ Cf. Article 72 of the Treaty on the Functioning of the European Union [hereinafter: TFEU], in: Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, OJ C 202/1, 7.06.2016, p. 74.

⁹ Cf. Article 4 (2) of the Treaty on European Union [hereinafter: TEU], in: Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, OJ C 202/1, 7.06.2016, p. 18.

the sovereign territorial entity, the doctrine of international law recognizes that the principle of inviolability of borders has not only a territorial but also a functional dimension.¹⁰ This is confirmed in EU treaty law, especially in Article 77 (4) TFEU, which stipulates that “This Article shall not affect the competence of the Member States concerning the geographical demarcation of their borders, in accordance with international law.”¹¹ The connection of the state border with the realm of sovereign jurisdiction and the national security doctrine implies the recognition of the primacy of the state as an actor devising and exercising rules, norms, and policies for the protection and surveillance of its borders. In this respect, it is the governments of the EU’s Member States who take decisions on any form of participation of other actors in the implementation of this policy.

The incorporation of the Schengen acquis into the European Union by the 1997 Amsterdam Treaty was a crucial element in the process of the development of supranational structures of internal security and border management. Consequently, in 2002, some EU Member States and the European Commission formulated legislative proposals on measures and mechanisms supporting respective national authorities in the management of external borders, as well as in the prevention and combating of cross-border crime. As a result, the Regulation establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union – Frontex – was adopted in October 2004.¹² The agency became operational in May 2005 and was based in Warsaw.

Frontex was established as an agency supporting the Member States in the field of management of the external borders, providing them with technical and operational assistance and facilitating joint return operations.¹³ Over time, Frontex gradually developed capabilities for responding effectively to problems encountered at the external borders, especially in the event of sudden and unpredictable migration pressures. Specifically, the agency was entitled to coordinate operational cooperation between the Member States in the case of massive irregular crossings of the external borders and the escalation of criminal activities threatening internal security

¹⁰ Cf. A. Riccardi, T. Natoli, *Borders and International Law: Setting the Stage*, in: *Borders, Legal Spaces and Territories in Contemporary International Law. Within and Beyond*, eds. T. Natoli, A. Riccardi, Cham 2019, pp. 8–12.

¹¹ Cf. Article 77 (4) TFEU...

¹² Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 349, 25.11.2004, p. 1.

¹³ Cf. A.M. Kosińska, *Rola unijnych agencji migracyjnych w kreowaniu standardów zarządzania bezpieczeństwem migracyjnym w dobie europejskiego kryzysu migracyjnego*, *Studia Migracyjne. Przegląd Polonijny* 2019, no. 2, pp. 101–129.

and undermining public order.¹⁴ For those purposes, Frontex was authorised to set up, deploy and coordinate Rapid Border Intervention Teams (RABIT)¹⁵ and European Border Guard Teams.

The migration crisis that broke out in 2015 was induced by the collapse of external border protection mechanisms, especially in southern Europe, which resulted in the massive and uncontrolled influx of third-country nationals to the European Union. In reaction to those turbulent developments, the Regulation on the European Border and Coast Guard (EBCG) was adopted in September 2016.¹⁶ Frontex was transformed into the European Border and Coast Guard Agency, with the aim of improving the coordination of operational activities with the national authorities of the Member States responsible for border management, to render more effective the application of EU measures relating to the management of the external borders.¹⁷

Despite a significant decrease in the number of illegal crossings of the EU's external borders, the migration situation has remained far from stable. Hence, in mid-2018, the European Commission proposed several amendments to the EBCG Regulation aiming to expand Frontex's competences and capacities, strengthen its border surveillance and situational awareness capabilities, increase the effectiveness of return operations, and extend operational activities beyond the European Union. The new Regulation (EU) 2019/1896 was adopted in November 2019 and contained many important changes regarding the organization, mandate, and tasks of the European Border and Coast Guard Agency. In addition to the participation in the management of the external borders and organization of return operations, Frontex's mission included contributing to the detection, prevention and combating of cross-border crime at the external borders.¹⁸ By 2027, Frontex will comprise a standing corps with a capacity of up to 10,000 operational staff, subject to

¹⁴ M. Chillaud, *Frontex as the Institutional Reification of the Link between Security, Migration and Border Management*, Contemporary European Studies 2012, no. 2, pp. 49–51.

¹⁵ Regulation (EC) No 863/2007 of the European Parliament and of the Council of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers, OJ L 199, 31.07.2007, p. 30.

¹⁶ Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 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, 16.09.2016, p. 1.

¹⁷ Cf. K. Zarychta-Romanowska, M. Szostak, *Frontex 3.0 – rewolucyjny czy rewelacyjny? – legislacyjno-policyjny paradygmat bezpieczeństwa granic Unii Europejskiej. Paneuropejska interpretacja i implementacja Intelligence-Led Policing*, Nowa Kodyfikacja Prawa Karnego 2018, vol. L, pp. 116–119.

¹⁸ Article 1 Regulation (EU) 2019/1896..., p. 18.

a multi-stage process of the Agency's capability building as well as the training and employment of officers.

A broad register of Frontex's tasks encompasses, *inter alia*, the following relevant elements:

- monitoring migratory flows and carrying out risk analysis as regards all aspects of integrated border management;
- assisting Member States in circumstances requiring increased technical and operational assistance at the external borders by coordinating and organising joint operations, taking into account that some situations may involve humanitarian emergencies and rescue at sea;
- launching rapid border interventions at the external borders of those Member States facing specific and disproportionate challenges;
- deploying the standing corps in the framework of border management teams, migration management support teams and return teams during joint operations, as well as in rapid border interventions, return operations, and return interventions.¹⁹

Pursuant to Article 37 of Regulation (EU) 2019/1896, joint operations and rapid interventions at the external borders are undertaken at the request of an EU Member State (referred to as the host country). The objectives may be achieved as part of a multipurpose operation involving coastguard functions and the prevention of cross-border crime, focusing on the fight against migrant smuggling or trafficking in human beings, and migration management. Responsibility for the preparation and implementation of joint operations and rapid interventions lies with the Executive Director of the EBCG Agency. Faced with specific and disproportionate challenges resulting from the high number of illegal third-country nationals, Frontex may carry out rapid return interventions. The agency's return teams may be quickly deployed in a host Member State and assist in the implementation of return procedures and the organisation of return operations.²⁰

2. General principles and specific rules on the use of force by Frontex

The organisation, planning, and launching of operational activities involving the EBCG Agency's staff require the establishment of rules on the use of force. This

¹⁹ Article 10 Regulation (EU) 2019/1896..., pp. 24–26.

²⁰ Cf. Article 53 Regulation (EU) 2019/1896..., p. 52.

applies in particular to the teams deployed by Frontex in joint operations at the external borders, as a support for migration management and to carry out return operations and return interventions.²¹

Members of the teams during a deployment requiring the use of force, including the carrying and use of service weapons, ammunition, and equipment, must be authorized by the host Member State, which examines the staff's relevant profiles. In addition, the consent of the home Member State of a deployed team member is necessary. The same mechanism applies to statutory staff, made subject to the consent of the Agency.

The host Member State informs the Agency in advance of the deployment, and the latter makes this information available to the other Member States as regards the permissible service weapons, ammunition, and equipment and of the conditions for their use. The use of force must comply with the national law of the host Member State and requires the presence of border guards of that country. The host Member State, with the consent of the home country of the team member, or the Agency in the case of statutory staff, may authorise team members to use force in its territory in the absence of border guards from the host Member State.²² Pursuant to Article 82 (9) of Regulation (EU) 2019/1896: "Service weapons, ammunition and equipment may be used in legitimate self-defence and in legitimate defence of members of the teams or of other persons in accordance with the national law of the host Member State in line with relevant principles of international human rights law and the Charter (of Fundamental Rights European Union)."²³

The provisions of Regulation (EU) 2019/1896 define four categories of operational staff within the Agency's standing corps:

- Category 1: statutory staff, i.e., officials employed by Frontex;²⁴
- Category 2: staff seconded from Member States to the Agency for the long-term (in principle 24 months, with the possibility of extension for a further 12 or 24 months);
- Category 3: staff from Member States ready for a short-term deployment (generally up to 4 months);
- Category 4: the reserve for rapid reaction, consisting of staff from the Member States ready for rapid border interventions.²⁵

²¹ This is one of the Agency's main tasks defined in Article 10 (1) (j) Regulation (EU) 2019/1896...

²² Cf. Article 82 (8) Regulation (EU) 2019/1896..., p. 75; Annex V (3) Regulation (EU) 2019/1896..., p. 110.

²³ Regulation (EU) 2019/1896..., p. 75.

²⁴ The provisions of Protocol (No 7) on the Privileges and Immunities of the European Union are applied in this regard. Cf. TFEU..., p. 266.

²⁵ Article 54 (1) and Annex I to Regulation (EU) 2019/1896...

With regard to the use of force and the carrying and use of service weapons, statutory staff²⁶ are subject to the specific regulations set out in Article 55 of Regulation (EU) 2019/1896. The Management Board of the EBCG Agency, acting on a proposal from the Executive Director, establishes the rules on the use of force and on the carriage and use of service weapons and equipment, as well as an appropriate supervisory mechanism. That mechanism takes into account rules on reporting and measures of a disciplinary nature regarding the use of force during deployments.

Article 55 (5) (b) provides a direct link between the authorization of the Management Board to lay down the rules on the use of force with the provisions of Article 82 (7)²⁷ and Annex V to Regulation (EU) 2019/1896. Annex V contains detailed “Rules on the use of force, including training and the supply, control and use of service weapons and non-lethal equipment, applicable to statutory staff deployed as members of the teams.”²⁸ The term “use of force” has been defined as follows: “recourse by statutory staff deployed as members of the teams to physical means for the purposes of performing their functions or ensuring self-defence, which includes the use of hands and body and the use of any instruments, weapons, including firearms, or equipment.”²⁹ It is specified that the carrying or use of weapons, ammunition and equipment is permitted only during operations.³⁰ Accordingly, each operational plan adopted by the Executive Director and the host Member State must define the conditions for carrying and using weapons in accordance with the host country’s national law or procedures during operations. Detailed rules on the use of firearms and coercive measures³¹ are set out in paragraph 2 of Annex V. The training of statutory personnel is also covered by Annex V to Regulation (EU) 2019/1896. It is organised

²⁶ It is stipulated that the number of statutory staff will increase from 1,000 persons in 2020 to 3,000 in 2027 and thereafter. Cf. Annex I Regulation (EU) 2019/1896..., p. 101.

²⁷ “The ability to carry and use service weapons, ammunition and equipment by the statutory staff who are deployed as members of the teams shall be subject to the framework and detailed rules laid down in this Article and Annex V.” Regulation (EU) 2019/1896..., p. 75.

²⁸ Regulation (EU) 2019/1896..., p. 108.

²⁹ Ibidem.

³⁰ Based on Article 55 (5) (b) of Regulation (EU) 2019/1896... Frontex’s Management Board adopted on 15 January 2021 a decision laying down rules for the Executive Director to authorise statutory staff to carry out and use service weapons. Cf. Frontex, Management Board Decision 3/2021 of 15 January 2021 adopting rules for the Executive Director to authorise statutory staff to carry and use weapons, including on mandatory cooperation with the competent national authorities, and ensuring that the conditions for issuing such authorisations continue to be met by statutory staff, https://frontex.europa.eu/assets/Key_Documents/MB_Decision/2021/MB_Decision_3_2021_establishing_rules_to_carry_and_use_weapons.pdf [access: 18.02.2021].

³¹ They encompass non-lethal weapons such as: batons, lachrymatory agents (e.g., pepper spray) and handcuffs.

as an annual ongoing training programme, covering theoretical and practical aspects of the prevention and the use of force.³²

As for the other categories of operational staff, their tasks and powers are set out in Article 82 of Regulation (EU) 2019/1896, which contains, amongst other things, provisions on the carrying and use of service weapons, ammunition, and equipment by members of Frontex's teams. Members of the teams should be authorised by the host Member State to perform tasks during a deployment that require the use of force, including the carrying and use of service weapons, ammunition, and equipment. The use of force is subject to the national law of the host Member State and may be exercised in the presence of border guards of that state. It is exclusively the host Member State which may authorise members of the teams to use force on its territory in the absence of national border guards. Concerning staff seconded to the Agency or deployed from a Member State for a short term, the terms of the carrying and use of service weapons, ammunition, and equipment are governed by the national law of the home Member State.

The host Member State may prohibit the carrying of certain service weapons, ammunition, and equipment, provided that the same prohibition applies to its own border guards or staff involved in return operations. In such cases, the host Member State should inform the other Member States via Frontex of the permissible categories of service weapons, ammunition, and equipment and the conditions for their use, prior to deployment of the members of the Frontex teams.

3. The legal implications of the use of force by Frontex

The unique competence Frontex was endowed with by Regulation (EU) 2019/1896 has several implications:

- 1) It entails a reference to rules of engagement which are proper for law-enforcement and military operations in circumstances of instability, risk of involvement in hostilities, and exposure to violence.
- 2) It highlights the issue of control and scrutiny over Frontex's potential use of force, including firearms.

³² The theoretical training includes psychological exercises and techniques for avoiding the use of force, such as negotiation and mediation. This is followed by obligatory theoretical and practical training on the use of force, weapons, ammunition, and equipment. It ends with a practical simulation relevant to the activities undertaken during the deployment.

- 3) It has implications for responsibility and liability of Frontex officials under the legislation applicable in a host state, particularly in extreme circumstances involving intentional non-lethal and lethal use of force and firearms.
- 4) It raises several legal questions and issues regarding the acquisition, storage, and transport of weapons and ammunition by the Agency's personnel, specifically by its statutory staff.
- 5) It leaves unsettled the matters of necessity and proportionality of the use of force in terms of operational situational assessment, intelligence support, and real-time awareness.

Due to the word count limit of the present article, three points are discussed in this section.

The controversies over Frontex's alleged participation in unlawful pushbacks must be transposed into possible scenarios assuming a high probability of critical situations triggering the use of force of Frontex's standing corps, including the use of firearms with both non-lethal (although harmful) and lethal effects. In 2021, the Frontex Scrutiny Working Group (FSWG) of the European Parliament's LIBE Committee conducted a multi-party enquiry into alleged breaches of fundamental rights during joint operations with the participation of Frontex team members. FSWG identified irregularities and deficiencies in the Agency's response to probable human rights violations. MEPs concluded that Frontex had failed to prevent those incidents and to reduce the risk of future violations.³³ Serious concerns raised by EU institutions imply the probability of insufficient supervision during Frontex-led joint operations which may pose a risk to Frontex's personnel and bystanders. Taking numerous critical opinions, accounts, and reports into consideration, the question of an appropriate incorporation of the rules of engagement into operational planning seems to be particularly relevant for the assessment of the previous activities as well as potential operations in the future. It should be stressed that the interim or final reports presented by EU institutions and agencies, as well as international human rights watchdogs, revealed many years of neglect in ensuring sufficiency and effectiveness of Frontex's rules and mechanisms of control and supervision. They addressed in particular the serious incidents reporting system and the complaints procedure. A long-established opacity, a non-reporting culture, and the lack of an accountable mechanism of relaying the incidents in a systematic manner are the most concerning aspects from the legal and formal points of view.

³³ European Parliament, Report on the fact-finding investigation on Frontex concerning alleged fundamental rights violations, LIBE Committee on Civil Liberties, Justice and Home Affairs, 14 July 2021, https://www.europarl.europa.eu/cmsdata/238156/14072021%20Final%20Report%20FSWG_en.pdf [access: 26.11.2021].

They undermine the principles of legal certainty, procedural transparency, and the avoidance of arbitrariness. An inadequate human rights regime erodes the humanitarian protection and fundamental rights safeguards of international migrants and asylum seekers. On the other hand, it questions the effectiveness of institutional accountability, as well as the civil and criminal liability of the Agency's personnel, especially its statutory staff. The incidents involving Frontex thus far have been downplayed by the Agency's authorities and considered formally by relevant EU institutions as isolated. However, the systemic deficiencies of control and supervision mechanisms are still pending a feasible and comprehensive solution.

The acquisition, storage and transport of weapons and ammunition by the Agency's statutory staff raises several reservations and practical obstacles. They are not new, since the RABIT Regulation authorized members of the teams to use force while performing their tasks and exercising their powers, including service weapons, ammunition, and equipment.³⁴ However, already during the first RABIT exercise in Portugal in 2007, the presence of armed officers from Member States aroused controversies over the requirement to obtain a Portuguese firearms permit before the weapons could be carried in public by those officers, given that Portuguese border guards were obliged to have such a permit. Frontex argued that, as a rule, the Regulation takes precedence over national legislation, and in that case guest officers are absolved of their obligation to get these permits. That argument was accepted by the Portuguese authorities, although they nevertheless had decided to issue the national permits for the guest officers. The issue of formal authorization for Frontex's statutory staff to carry and use weapons on the territory of Member States resurfaced in 2020–2021 in relation to allegations of the illegal use of force. In January 2021, the Management Board, on the basis of a proposal from the Executive Director, established the rules of authorization. Those rules were amended in March 2021. Interestingly, in a letter from Frontex's Executive Director to the European Commission,³⁵ the right to perform tasks requiring executive powers by the statutory staff, in accordance with Article 55 (7) of the Regulation and pursuant to the principle of the supremacy of European Union law in relation to the provisions of national law, was pointed out by the Executive Director. Nonetheless the rules adopted by the Management Board allow the Executive Director to issue personal permits for statutory staff, embracing all types of weapons (including lethal ones).

³⁴ Article 6 (6) Regulation (EC) No 863/2007..., p. 33.

³⁵ Frontex, Letter from Fabrice Leggeri, Executive Director, to Matthias Oel, Director, Directorate-General for Migration and Home Affairs, Directorate B: Borders, Interoperability and Innovation, European Commission, ref: CBD/GIBA/11356/2020, Warsaw, 7 January 2021, https://oezlem-alev-demirel.de/wp-content/uploads/2021/02/Annexe-2_R_6321_20_EN.pdf [access: 26.11.2021].

However, before granting the statutory staff official authorization, the Executive Director is obliged to inform the Member State of the nationality and/or of the residence of the statutory staff about the intention to issue such authorization. The concerned Member State should issue an updated criminal record as a precondition for granting such authorization. This Member State may demand suspension or termination of the issued authorization. The rules adopted by the Management Board granted the Executive Director relatively broad competences. Member States represented in the Management Board built safeguards into the procedure of the authorization, enabling the statutory staff to carry and use weapons during and outside Frontex's operational activities. Bearing in mind the provisions of Article 4 (2) of TEU, which stipulate that national security remains the sole responsibility of each Member State, a tendency toward a rigid or reluctant attitude by Member States to such authorization cannot be ruled out. This may provoke new tensions around the management or protection of the EU's external borders, with or without a reinforced Frontex corps.

Proper preparedness, planning, and conduct of joint operations at the external borders, as well as return operations and interventions, entail the establishment and maintenance of a permanent system of situational assessment, intelligence support, and real-time awareness. This is of utmost importance for the effectiveness of decision-making processes, as well as the legality and permissibility of the actions taken. A decision to get Frontex prepared to use force, including weapons, to stand alert and get ready to resort to force, in a potential confrontation with criminals, terrorists or other dangerous individuals, must be preceded by a comprehensive, reliable, and actionable assessment, based on reconnaissance and intelligence. This reduces the risk of failure and gives Frontex's personnel a higher degree of certainty in operations.

From the very beginning Frontex has developed its analysis and situational awareness capacities. In 2013, the European border surveillance system (EUROSUR) was established as a framework for information exchange between Member States and Frontex to improve situational awareness at the external borders. However, those efforts have only partially been successful. The European Court of Auditors, in a special report on Frontex, found deficiencies in risk assessment, in the construction of a complete situational picture, and in vulnerability assessments done by Frontex.³⁶ It is important to note that Member States have remained the main source

³⁶ European Court of Auditors, Special Report 08/2021: Frontex's support to external border management: not sufficiently effective to date, <https://op.europa.eu/webpub/eca/special-reports/frontex-8-2021/en/> [access: 26.11.2021].

of information and the originator of actionable intelligence. Frontex's reliance on data and information, often sensitive and even classified by Member States, entails certain limitations and requires mutual confidence with regard to the management and use of information and intelligence in Frontex-led operations. EUROSUR's stronger incorporation into the exchange of information and operational cooperation, enhanced by Regulation (EU) 2019/1896, must be considered as a significant element in the process of activation of Frontex's assets, including coercive measures and lethal weapons. Frontex's institutional build-up must be accompanied by improved situational awareness capacities to avoid the risk of the wrong assessment of threats and imminent dangers, which might imply the use of forces, and to mitigate risk-prone factors during operational activities. The legal consequences of Frontex's actions are, to a considerable extent, subject to a proper situational assessment and the use of actionable intelligence.

Conclusion

The operational dimension of Frontex is one the most relevant aspects of the Agency's activities, posing serious challenges and raising numerous controversies. It depends on a combination of political, organizational, and logistical factors, as well as material, human and technical resources remaining at the disposal of both Frontex itself and of the Member States.

The protracted nature of international armed conflicts and civil wars, permanent socio-political instability, as well as poverty and economic underdevelopment in many parts of the world, combined with demographic factors (high birth rates in African and South Asian countries) and communication technologies are among the strong triggers of intense migratory movements towards the European continent. It should therefore be assumed with a high degree of probability, that the migration crisis that broke out in the mid-2010s was not a spectacular and exceptional event but marked the beginning of an accelerating process of the global circulation of migrants and refugees. The most-developed high-income economies of the European Union will continue to be seen as a final destination for masses of third-country nationals. This pressure will have serious political, social, legal, and institutional consequences domestically, regionally, and internationally. Faced with persistent, and periodically mounting, migration pressures, the EU's Member States may be more inclined to apply preventive, dissuasive, and even coercive measures

at their borders.³⁷ The implementation of such measures may take place in the presence of the Frontex teams performing their activities as part of joint operations.

Therefore, one should not rule out hypothetical situations, in which the use of force will have consequences in the form of violations of human rights, or even the risk of serious injury or death in individual or group cases. Such incidents may be provoked either by operational activities involving Frontex's staff or may occur because of inaction.³⁸ Regardless of the results of the ongoing investigations and enquiries yet taking into account the results of the initial reports,³⁹ Frontex's authorities have consistently underlined the importance of the full application of the provisions of Regulation (EU) 2019/1886. In March 2021, Frontex began preparations for the deployment in Greece of the first group of statutory staff equipped with service weapons.⁴⁰ This might be interpreted as a safeguarding measure aimed to protect the Agency's staff during operational activities under Article 82 (9) of Regulation (EU) 2019/1896. However, an involvement of statutory staff in activities carried out by the border services of the host state, involving the use of force, cannot be ruled out.

The rules on the use of force by the Frontex agency, discussed in the main section of this article, are consistent with the concept of institutional isomorphism. First, they empower the Agency, in particular its statutory staff, with some capacities which have been traditionally reserved for the national border guards of the Member States. Second, they make their execution subject to decisions and actions taken by the relevant authorities of the host state. Third, facing specific and extremely difficult challenges at the EU's external borders, they authorise Frontex to react quickly to elevated-risk conditions and to be prepared to contain or eliminate direct threats to the host state's security. Thus, Frontex's activities have become a *de facto* component of the operations undertaken by the competent authorities of the

³⁷ The migration crisis in Europe has brought evidence of many examples of such steps, undertaken, amongst others, by immigration services and border guards in Greece, Italy, Hungary, Croatia, and Austria.

³⁸ This matter goes beyond the scope of the present article. From a doctrinal point of view, it is taken up in the context of international humanitarian law and European law. It is worth underlining the comprehensive insight contained in: M. Fink, *Frontex and Human Rights. Responsibility in 'Multi-Actor Situations' under the ECHR and EU Public Liability Law*, Oxford 2018. Cf. M. Fink, *The Action for Damages as a Fundamental Rights Remedy: Holding Frontex Liable*, German Law Journal 2020, vol. 21, pp. 532–548; I. Majcher, *Human Rights Violations During EU Border Surveillance and Return Operations: Frontex's Shared Responsibility or Complicity?*, Silesian Journal of Legal Studies 2015, vol. 7, pp. 45–78.

³⁹ Cf. Fundamental Rights and Legal Operational Aspects...

⁴⁰ N. Nielsen, *Frontex guards in Greece could be armed by summer*, EU Observer, 17 March 2021, https://euobserver.com/migration/151253?utm_source=euobs&utm_medium=email [access: 17.03.2021].

host country, leading to an isomorphic merger of the activities of EU agencies and national border guards.

The pending investigations and enquiries into alleged violations of fundamental rights during Frontex-led joint operations will probably result in the formulation of proposals *de lege ferenda*. However, they will likely not give grounds for challenging the provisions of EU law relating to the use of force by the European Border and Coast Guard Agency.

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