

# A European Border and Coast Guard: What's in a name?

**Sergio Carrera and Leonhard den Hertog**

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## Abstract

This paper assesses the Commission's proposal presented in December 2015 to set up a European Border and Coast Guard (EBCG), based on the responses made by the EU border agency Frontex to the 'refugee crisis' that began in 2015 and continues unabated. It explores the extent to which this proposed new body will be capable of remedying the EU's shortcomings in meeting established border and asylum standards and related institutional needs on the ground and concludes that it is unlikely to do so. The paper argues that the EBCG proposal does not establish a true European Border and Coast Guard. Instead it would revamp Frontex into a Frontex + Agency. The EBCG would expand the current logic of national border guards to be committed to the Frontex Agency 'pools' and therefore does not solve the 'dependency' of Frontex on member states. More importantly, the EBCG would do too little to ensure that member states comply with EU border and asylum standards, which has constituted the central deficiency throughout 2015 and earlier. We find that it will also fall short of establishing a professional culture in border control cooperation to be shared across the Union. Revamping and relabelling Frontex will create expectations that will be difficult to fulfil if compliance with EU border, reception, and asylum standards remains weak on the ground. The paper calls on the EU to give higher priority to policies dealing with the structural compliance with EU border and asylum standards by all member states, moving beyond the EU Dublin system and including an enlarged role for the European Asylum Support Office (EASO).



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**Sergio Carrera is Senior Research Fellow and Head of the Justice and Home Affairs research unit at CEPS and Associate Professor and Senior Researcher at the University of Maastricht. Leonhard den Hertog is TRANSMIC postdoctoral researcher at the Justice and Home Affairs research unit at CEPS. The authors would like to express their gratitude to Frontex for the provision of information and statistics on the performance of Joint Operations Triton and Poseidon.**

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# Table of Contents

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Executive Summary.....	1
Introduction .....	2
1. The EBCG Proposal .....	3
2. Frontex: State of play and lessons learned.....	4
2.1 Frontex Operations and Hotspots: The Mediterranean in Focus .....	5
2.1.1 Triton Joint Operation .....	5
2.1.2 Poseidon Joint Operation .....	7
2.1.3 The Hotspots in Italy and Greece .....	8
2.2 And what about asylum? .....	11
3. The EBCG: What are the challenges? .....	11
3.1 Autonomy and the constant state of emergency .....	12
3.2 Structural capacity and institutional standards .....	13
3.3 Processing asylum applications and upholding human rights .....	13
4. Conclusions.....	16
References .....	17

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## Executive Summary

The European Commission has proposed to set up a European Border and Coast Guard (EBCG) as one of the key responses to the 2015 'refugee crisis'. The initiative calls for allocating more competences, staff and equipment to the EU's current border agency Frontex and further reinforcing its capabilities by bringing together resources from Frontex and EU member states' border and coast guard authorities.

This paper critically assesses the proposal against the background of the Frontex responses at the external borders in 2015, namely the 'Triton' and 'Poseidon' Joint Operations and the 'Hotspots' systems in Italy and Greece. It is ultimately argued that the EBCG would neither lead to a truly European border and coast guard, nor would it address the key deficiency of 2015: the inadequate reception conditions and asylum system inside the EU.

## Key Findings

- **First**, the proposal builds on the current Frontex Regulation, aiming to revamp the agency into a Frontex+ and assign it more competences to address the perceived shortcomings in its current work: insufficient (human and equipment) capacities and a lack of cooperation by some member states. This includes proposals for a 'right to intervene' and more mandatory member state contributions to the agency's 'pools'. The proposal, however, stops short of establishing an agency staffed with its own 'European' border guards who would be responsible for the uniform and full application of EU law (e.g. the Schengen Borders Code), thereby reinforcing rather than overturning the logic of reliance on member state border guards seconded for the Agency's work.
- **Second**, the 2015 refugee crisis revealed the structural deficiencies in the compliance with EU border and asylum standards across member states. Without addressing these domestic 'capacity deficits' in a structural and systematic manner, the EBCG proposal would implant a reinforced Agency in a working environment on the ground that is unable to perform adequately and to connect to the Agency's work. The 2015 responses have shown that the Agency can coordinate Joint Operations and help set up 'Hotspots', but without up-to-standard national reception and asylum systems in place, those intercepted and registered cannot be directed anywhere. Relocation is also challenging under those circumstances.
- **Third**, the EBCG aims to position Frontex at centre stage to coordinate information exchange and operational cooperation between member states' border authorities and those with 'coast guard functions'. This could give the agency a reinforced point of entry into surveillance cooperation within networks of non-Schengen-based coast guards, which may include military and (para-) military, maritime safety and transport actors, depending on the member state. This development raises questions over how to safeguard the compliance of these actors and networks with key EU rule of law standards during EBCG-coordinated activities and who will be responsible in the event that there are incidents involving fundamental rights violations.
- **Fourth**, the EBCG initiative indicates a misguided EU policy priority focused on external border controls, return and cooperation with third countries as the 'solution' to the refugee crisis. The EU agenda therefore fails to focus on the key intra-EU weaknesses on the ground related to the reception and processes of asylum-seekers and how they could be more properly addressed through enhanced EU institutional solidarity.

Any effort to reinforce the Frontex mandate should be accompanied by a serious discussion on how to boost the role and competences of the European Asylum Support Office (EASO) in safeguarding access to reception and asylum across the Union and moving beyond the current EU Dublin system.

## Introduction

The European Commission proposed a “European Border and Coast Guard” (EBCG) in December 2015.<sup>1</sup> It has constituted one of the most visible policy responses to the ‘2015 refugee crisis’. This paper critically addresses the question of whether the EBCG contains the necessary elements to establish a true European border guard equipped to remedy the present shortcomings of the EU external borders agency (Frontex) and to ensure that EU rule of law and international protection obligations are maintained across the Union.

The EBCG proposal is premised on the assumption that beefing up Frontex with more competences would help in adequately responding to the ‘refugee crisis’. The main deficiency identified by the Commission appears to be the unwillingness of some member states to contribute to Frontex operations with border guards and technical equipment, or to effectively and politically allow for Frontex interventions on their territory.

The most controversial elements of the EBCG initiative stipulate more powers for Frontex’s own-initiative joint operations. These include a ‘right to intervene’ in cases where particular pressures and deficiencies are identified by the agency at EU external borders, irrespective of the consent by the state concerned. There are also clearer obligations for member states to contribute equipment and personnel to the new agency.

The European Council Conclusions of December 2015<sup>2</sup> called on the Council to reach agreement on the proposal before June 2016. The ambition, confirmed by the European Council Conclusions of February 18<sup>th</sup> on Migration<sup>3</sup>, is for the new EBCG agency to become operational in the course of this summer. By September

This paper examines the main elements contained in the EBCG proposal. It contrasts the latter to current Frontex operations, such as the activities in the ‘Hotspots’ in Italy and Greece, in an attempt to assess whether the Commission’s proposal addresses the main challenges encountered by the agency and by asylum seekers seeking access to reception and asylum in the Union.

We argue that the EBCG does not constitute a truly ‘European’ border and coast guard. If adopted under the current provisions, it would establish an emergency-driven Frontex+ agency, leaving aside central questions such as ways to systematically address and cover structural capacity challenges in *all* EU member states in complying with rule of law standards prescribed in the EU Schengen Borders Code. It would not establish an agency endowed with its own ‘European’ (non-nationally attached) border guards and tools. Moreover, the EBCG would take too narrow a focus to emergency situations, instead of ensuring EU standards across the common external borders in all member states. A Frontex+ agency may have more competences, personnel and technical tools, but if the conditions and willingness to cooperate on the ground are not adequately ensured, there is little that the agency can actually ‘do’. The EBCG proposal will fall short of establishing a common European professional culture in border control cooperation among border authorities across the Union.

The predominant focus given to ‘reinforcing external borders’ and ‘return’ diverts attention from the need to address the most pressing challenges on the ground. These relate to the institutional deficiencies in ensuring the healthy asylum and reception systems in member states across the Union. Little attention has been paid to reinforcing institutional solidarity on asylum and the powers of EASO, boosting institutional capacities to deliver EU asylum standards at the member states’ level and move away from the ‘unworkable’ and much criticised Dublin system of sharing responsibility for assessing asylum-seekers’ applications in the EU.

Unless the member states adhere to EU standards in their border and asylum systems and take measures aimed at deepening the mutual trust that underpins the principle of mutual recognition as part of the EU border and asylum laws, and fostering a common professional culture of cooperation, the EBCG proposal will only raise false expectations. This will inevitably hit back against the very legitimacy of EU border and asylum policies.

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<sup>1</sup> European Commission (2015a), Proposal for a Regulation of the Parliament and the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC, COM(2015) 671 final, Strasbourg, 15.12.2015.

<sup>2</sup> European Council (2015), Meeting 17 and 18 December 2015, Conclusions, EUCO 28/15, Brussels, 18.12.2015.

<sup>3</sup> European Council (2016), Meeting 18 February 2016, Conclusions, Press Release 72/16, Brussels, 19.02.2016. It is stated that “(h) all the elements agreed last December should be implemented rapidly, including the decisions on relocation and measures to ensure returns and readmissions. As far as the ‘European Border and Coast Guard’ proposal is concerned, work should be accelerated with a view to reaching a political agreement under the Netherlands Presidency and to make the new system operational as soon as possible”.

## 1. The EBCG Proposal

The core of the Commission's proposal is to relabel Frontex as the 'EBCG Agency'. According to the Commission 'factsheet' on the EBCG:<sup>4</sup>

The limitations of the current EU border agency, Frontex, have hindered its ability to effectively address and remedy the situation created by the refugee crisis: it is not able to purchase its own resources, it does not have its own operational staff and relies on Member State contributions, it is unable to carry out its own return or border management operations without the prior request of a Member State and it does not have an explicit mandate to conduct search and rescue operations. The new Agency will be strengthened and reinforced to address all these issues.

Together with the EBCG Agency, the EBCG would be composed of national border and coast guard (naval) authorities, which would position Frontex centrally to coordinate a range of information exchange and operational activities under a 'functional approach' to coast guards. Depending on the EU member state, this may include military and/or para-military actors to the extent that they perform maritime border surveillance or 'border control' functions.<sup>5</sup>

The struggles between civilian law enforcement and military actors in the maritime domain, and in the Mediterranean more particularly, are long-standing. This is the case at both the EU and the national levels, with non-Schengen cooperation-based networks, sometimes of a military nature, challenging Frontex in its core activities of border surveillance.<sup>6</sup> As the membership of the European Coast Guard Functions Forum (ECGFF) shows, the member states' authorities carrying out coast guard functions vary considerably, including national (para-) military institutions, especially in the Mediterranean member states.<sup>7</sup> The proposed inclusion of coast guards in the new EBCG Agency could thus be read as a point of entry for Frontex into the network of European military actors.

Even though some coast guard authorities had already participated in Frontex joint operations, the current proposals foresee more integration of military and civilian actors in the maritime domain under the coordination of Frontex. In the past, the agency had already managed to obtain information exchange arrangements with other EU agencies – such as with the European Fisheries Control Agency (EFCA) that is now to be closely associated with the EBCG, as is foreseen for the European Maritime Safety Agency (EMSA) – and from the EU satellite earth monitoring system 'Copernicus'.<sup>8</sup>

The EBCG proposals foresee "a working arrangement" between these EU agencies and the EBCG Agency, as well as for the European Commission to adopt "a practical handbook on European cooperation on coast guard functions".<sup>9</sup> The further integration between different national actors in the areas of transport, fisheries, military and civilian law enforcement within the EBCG represents an important attempt to reposition Frontex as the dominant coordinating actor in the field.<sup>10</sup> Even though the proposals are intended to engender more cooperation and information exchange between these actors, it remains to be seen whether the distrust and tensions between them can be overcome in practice.

<sup>4</sup> See European Commission, Factsheet on EBCG ([http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/securing-eu-borders/fact-sheets/docs/a\\_european\\_border\\_and\\_coast\\_guard\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/securing-eu-borders/fact-sheets/docs/a_european_border_and_coast_guard_en.pdf)).

<sup>5</sup> See for example, European Commission (2015b), Communication, A European Border and Coast Guard and the effective management of Europe's external borders, COM(2015) 673 final, Strasbourg, 15.12.2015, p. 7, where "300 civilian and military authorities in the Member States" are mentioned as "responsible for carrying out coastguard functions". See also Arts 9 and 52, European Commission (2015a). Moreover, the European Coast Guard Functions Forum (ECGFF), supported by Frontex since its foundation in 2009, includes a whole range of activities under 'coast guard functions', ranging from 'vessel traffic management' to SAR (see [www.ecgff.eu/mission-tasks](http://www.ecgff.eu/mission-tasks)).

<sup>6</sup> See Carrera & den Hertog (2015). The establishment of the EU military operation EUNAVFOR MED in the Mediterranean and the recently proposed deployment of NATO assets in the Aegean Sea are other cases in point.

<sup>7</sup> See [www.ecgff.eu/members](http://www.ecgff.eu/members).

<sup>8</sup> See Frontex (2016a), "European Fisheries Control Agency (EFCA) and Frontex agree on closer cooperation", 14.01.2016 and Frontex (2015a), "Frontex to implement border surveillance services as part of Copernicus", 17.12.2015.

<sup>9</sup> See Art. 52(2-3), European Commission (2015a).

<sup>10</sup> The EMSA representatives have a mostly transport (commercial shipping) and infrastructure institutional affiliation, [www.emsa.europa.eu/who-are-we/admin-board/list-of-representatives.html](http://www.emsa.europa.eu/who-are-we/admin-board/list-of-representatives.html).

Furthermore, the EBCG is not envisaged as a single entity. Rather, the proposal replicates the current Frontex Regulation,<sup>11</sup> adding to and enlarging some of its competences. What are the main innovations brought by the EBCG initiative?

The agency would carry out “vulnerability assessments” of the “technical equipment, systems, capabilities, resources and contingency plans of the Member States regarding border control”. Following the vulnerability assessment or in situations “requiring urgent action”, the Executive Director would propose corrective measures.<sup>12</sup>

This constitutes the so-called ‘right to intervene’ which would entail sending European border and coast guard authorities from other member states to a common EU external border without the need to obtain the formal consent of the member state concerned. If the corrective measures are not followed by the concerned member state, the European Commission could adopt an Implementing Act containing Agency measures to be taken by the concerned member state.<sup>13</sup> An operational plan, however, would still need to be agreed between the agency and the host member state.<sup>14</sup>

The agency would also administer a “Complaints Mechanism” supervised by its Fundamental Rights Officer to “monitor and ensure the respect for fundamental rights in all its activities”.<sup>15</sup>

The EBCG would have a “rapid reserve pool” of EBCG teams, consisting of a “standing corps” of a minimum of 1,500 national border guards to which member states “shall make available” 2-3% of their national border and coast guard officers. They should be deployable within three working days.<sup>16</sup> Pools are also foreseen for “forced return monitors”, “forced return escorts” and “return specialist”,<sup>17</sup> and for technical equipment.<sup>18</sup> The agency would have the competence to place liaison officers in member states who would “take instructions only from the Agency”.<sup>19</sup> Frontex would also acquire explicit competence for border operations on the territory of third countries.<sup>20</sup>

The EBCG Agency would also reinforce, and even convert Frontex into an ‘EU returns agency’. A new Returns Office would be set up to coordinate (technically and operationally) the return activities of irregular immigrants by the member states. The agency could propose return operations at its own initiative, and would be able to coordinate ‘mixed return operations’ with returnees from one third country to another.<sup>21</sup>

## 2. Frontex: State of play and lessons learned

Would these new components address the challenges presented by the EU refugee crisis? What have been the main ‘results’ and lessons learned from the activities of Frontex when it comes to operational support and coordination to concerned member states, and their roles in the Hot Spots during 2015?

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<sup>11</sup> Parliament and Council (2011), Regulation (EU) No 1168/2011 of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, *OJ L* 304/1, 22.11.2011.

<sup>12</sup> Art. 12, European Commission (2015a). The Explanatory Memorandum of the proposal states: “The vulnerability assessment focuses on prevention so as to avoid reaching a crisis situation. It is an assessment of the operational capabilities of Member States at the external borders and for this purpose it looks into the technical equipment, capacities, resources and contingency plans. That assessment is carried out by the Agency, the Supervisory Board advises the Executive Director, who in turn decides on the necessary measures”, p. 4.

<sup>13</sup> Art. 18, *ibid.*

<sup>14</sup> *Ibid.*, Arts 15 and 16.

<sup>15</sup> *Ibid.*, Art. 72.

<sup>16</sup> *Ibid.*, Art. 19.

<sup>17</sup> *Ibid.*, Arts 28-30.

<sup>18</sup> *Ibid.*, Art. 38. This is already partly stipulated in the current Frontex Regulation; see Art. 7, Parliament and Council (2011).

<sup>19</sup> *Ibid.*, Art. 11.

<sup>20</sup> *Ibid.*, Art. 53.

<sup>21</sup> *Ibid.*, Arts 26-32.

The situation at the EU's external borders in the Mediterranean was marked by a shift of mobility towards the so-called 'Eastern Mediterranean route', as can be seen from Table 1 below. According to the International Organisation for Migration (IOM), the sea-borne death toll on the Mediterranean in 2014 was 3,279 and 3,770 in 2015.<sup>22</sup>

Before presenting various numbers in the remainder of this paper, we want to introduce a note of caution. These numbers, supplied by Frontex and the Commission, should be interpreted with care. They often work with categories that are imprecise as to the legal and personal statuses of individuals, such as referring to 'would-be migrants' whereas they are largely refugees and to 'people smugglers' whereas these are actually individuals *suspected* of smuggling without being convicted or may include civil society actors or volunteers providing humanitarian assistance.

Moreover, Frontex statistics cannot be assumed to give the complete picture of 'irregular migration'. They only capture those movements that are more visible and detected. Lastly, there is arguably a certain degree of double-counting involved in the Frontex statistics. This is especially so where it concerns irregular border crossings. The amount of border crossings can thus not be equated with the amount of individuals entering the Schengen Area.<sup>23</sup>

*Table 1. Frontex numbers on detected irregular border crossings in the Mediterranean*

Route	Detected irregular border crossings	
	2014	2015
Eastern Mediterranean route	50,830	885,386
Central Mediterranean route	170,760	153,946
Western Mediterranean route	7,840	7,160

*Data source:* Frontex (<http://frontex.europa.eu/trends-and-routes/migratory-routes-map/>).

## 2.1 Frontex Operations and Hotspots: The Mediterranean in Focus

One of the most important competences of Frontex is to coordinate member states' border control and surveillance activities through so-called Joint Operations (JOs).<sup>24</sup> Two of these JOs have been of especial relevance in the context of the refugee crisis: Triton and Poseidon. Frontex's role in the development of the Hotspots model has also been key in this context and calls for closer scrutiny when assessing the value added of the EBCG proposal.

### 2.1.1 Triton Joint Operation

The Triton JO was launched in October 2014 on the Central Mediterranean Route, merging the previous Hermes and Aeneas JOs.<sup>25</sup> This launch itself was the result of struggles between Italy and the EU over a follow-up to the Italian naval 'Mare Nostrum' operation, which ran for one year starting in October 2013.<sup>26</sup>

Although the operational area and main activities of Triton were initially limited in scope, they were enlarged in May 2015 after a shipwreck in which several hundreds of migrants lost their lives.<sup>27</sup> Most importantly, the beefed-up Frontex Triton JO was no longer formally limited to border surveillance and control activities, but also was to contribute to search and rescue (SAR) at sea. This was a surprising development, as Frontex had

<sup>22</sup> See IOM (2015 and 2016).

<sup>23</sup> Frontex itself has acknowledged the possibility of double counting, see: <http://frontex.europa.eu/news/number-of-migrants-arriving-in-greece-down-40-in-january-x3gZWu>. On the use of statistics, see also a forthcoming paper by Ann Singleton, "Migration and Asylum Data for Policy in the European Union: The problem with numbers", CEPS Paper in Liberty and Security in Europe, March 2016.

<sup>24</sup> See Arts 3 and 3a, Parliament and Council (2011).

<sup>25</sup> See European Commission (2014) and European Commission, Triton Factsheet ([http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/background-information/docs/frontex\\_triton\\_factsheet\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/background-information/docs/frontex_triton_factsheet_en.pdf)).

<sup>26</sup> See Ministero della Difesa, "Mare Nostrum Operation" ([www.marina.difesa.it/EN/operations/Pagine/MareNostrum.aspx](http://www.marina.difesa.it/EN/operations/Pagine/MareNostrum.aspx)).

<sup>27</sup> Frontex (2015b), "Frontex expands its joint operation Triton", Press Release, 26 May.

since long proclaimed itself as having no competence for SAR, even though Regulation 656/2014 already stipulated rules for the Agency's SAR activities (see section 3.3 below).<sup>28</sup> The operational area was enlarged southwards, at some points adjacent to Libyan territorial waters.

What have been the main results of Triton? As can be seen from Table 2 below, according to Frontex a total of 153,988 persons entering irregularly in the EU have been intercepted and/or rescued over the course of 2015. This represents a decrease of 9% compared to 2014. This overall number accounts for essentially all detected irregular border crossings on the Central Mediterranean route. This would suggest that the Frontex JO Triton is thus not accompanied by further large-scale unilateral operations. This also raises the question as to whether these numbers actually represent *the Frontex-coordinated activities of JO Triton only*, or whether they also include numbers of individuals rescued or intercepted by the EU's military 'EUNAVFOR Med' operation (see below) and by various NGO-led SAR initiatives.

As can be seen from the Table 2 below, the top-five nationalities of the migrants on this route are Eritrean, Nigerian, Somali, Sudanese, Gambian and Syrian, some of which enjoy a high rate of international protection in the EU member states, and are identified by the UNHCR as among the top ten source countries of refugees.<sup>29</sup> These include: Syria, Afghanistan, Somalia, South Sudan, Sudan, the Democratic Republic of the Congo, Central Africa Rep., Myanmar, Eritrea and Iraq.<sup>30</sup> Lastly, virtually all the disembarkations in the Central Mediterranean take place in Italian ports, with disembarkations in Malta dropping to near-zero. According to press reports, this could be due to an Italian-Maltese arrangement.<sup>31</sup>

*Table 2. Statistics on the JO Triton in 2015*

1,055 incidents related to irregular migration have occurred
153,987 irregular migrants have been apprehended.
4 incidents on prevention of departure, with an estimated 441 would-be migrants at sea
455 people smugglers have been arrested.
4 incidents related to smuggling of goods with 30 smugglers arrested.
6 incidents related to third-country actions, with an estimated 210 would-be migrants apprehended.
298 fatalities have been reported, showing a 74% increase when compared to 2014 <sup>32</sup>
The main areas of departure were: Libya (136,714 migrants), Egypt (10,980 migrants), Turkey (2,210 migrants), Greece (967 migrants), Tunisia (565 migrants) and Algeria (309 migrants).
Main nationalities: Eritrean (37 741), Nigerian (31 630), Somali (12 630), Sudanese (8 779), Gambian (8 152), Syrian (7 289), Senegalese (5 909), and Malian (5 841).

*Data source:* Obtained from Frontex through a request for information.<sup>33</sup>

The relationship and division of responsibilities between Triton and the EU's Common Security and Defence Policy operation called EUNAVFOR MED Sophia, which operates just south of JO Triton's operational area, are not entirely clear. The official goal of EUNAVFOR MED Sophia operation is to 'counter' the business model of smugglers for which it has been allocated €11.82 million for the first 12 months of operation.<sup>34</sup>

<sup>28</sup> For more details, see Carrera & den Hertog (2015).

<sup>29</sup> See also UNHCR, "UNHCR Survey finds Afghan and Syrian refugees arriving to Greece are fleeing conflict and violence", Geneva, 23.02.2016.

<sup>30</sup> See UNHCR, "Mid-year trends 2015", 18.12.2015.

<sup>31</sup> See H. Grech (2015), "Italian MEP asks Brussels about 'secret Malta-Italy migrants for oil deal'", *The Malta Independent*, 18 October.

<sup>32</sup> According to Frontex, These fatalities correspond only to the dead bodies recovered by Italian authorities and not to the higher number of migrants that have been reported as missing. Moreover, according to information provided by the IOM during 2015, the number of estimated fatalities in the Mediterranean Sea reached 3,770 cases, which is an increase of approximately 15% compared to the previous year (3,279) (see <http://missingmigrants.iom.int/mediterranean>).

<sup>33</sup> Presenting these numbers here does not mean that the authors were able to verify them or endorse the statistical categories employed. See our explanation on the use of statistics at the beginning of section 2.

<sup>34</sup> EEAS, "European Union Naval Force – Mediterranean Operation Sophia Factsheet", 12.02.2016.

According to a leaked document, the operation employs 166 staff members, 113 of whom come from Italy and 53 from other member states.<sup>35</sup> It is reported that as of end of January 2016, the operation had engaged in the rescue of 8,336 migrants. Moreover, 67 wooden and rubber vessels transporting migrants have been destroyed, and 46 individuals are “detained by Italian authorities and investigated for smuggling and trafficking crimes”.<sup>36</sup>

### 2.1.2 Poseidon Joint Operation

The Poseidon JO is active on the Eastern Mediterranean route, with irregular border-crossing detections on this route totalling 859 165 in 2015 according to Frontex data. As can be seen from Table 3 below, Frontex statistics suggest that all the irregular border crossings on this route have been detected in the context of the JO Poseidon. It is however unclear whether this also involves the numbers of individuals intercepted or rescued by national authorities and whether the SAR activities of NGOs are also included in this data. At face value, it does seem in any case improbable that all detections on this route were made solely by the Frontex-coordinated JO Poseidon.

According to the European Commission, the Frontex “interventions and the deployment of Frontex Rapid Border Intervention Teams (RABITs) in the Aegean helped to detect over one million irregular immigrants and apprehend over 900 suspected smugglers”.<sup>37</sup> That notwithstanding, it is not entirely clear how this information should be understood in relation to the Table 3 below and which time frame it covers precisely. Frontex indicated in mid-December 2015 that “only one in five” migrants on this route was “intercepted upon reaching the shore”.<sup>38</sup> This underlines once more that statistics issued by various actors throughout 2015 are part and parcel of the struggles over ‘who’ is to appear ‘in control’ of the situation. The used term of ‘apprehension’ seems sufficiently ambiguous to cover various undefined categories of rescue, interception and registration of individuals by various actors.

Table 3. Statistics on JO Poseidon in 2015

<b>6,993 incidents related to irregular migration occurred.</b>
<b>859,165 irregular migrants were apprehended.</b>
<b>611 incidents on prevention of departure, with an estimated 31,470 would-be migrants at sea</b>
<b>466 people smugglers have been arrested.</b>
<b>232 fatalities have been reported.</b>
<b>7,974 persons have been saved by Frontex-deployed assets (55% of the total rescued).</b>
<b>Main landing points: Lesbos (499,931), Chios (120,208), Samos (75,106), Kos (60,322), Leros (41,234), Agathonisi (31,527), Kalymnos (8,765), Rhodes (7,766), Symi (5,409) and Megisti (4,571).</b>
<b>Main nationalities: Syrian (476,651), Afghani (202,709), Iraqi (91,355), Iranian (23,781), Pakistani (23,529), Palestinian (7,704), Moroccan (7,621), Somali (4,442), Bangladeshi (3,907) and Lebanese (2,463).</b>
<b>647 persons arrived from Egypt, and all the rest from Turkey.</b>

<sup>35</sup> In particular, Belgium, Bulgaria, Cyprus, Czech Republic, Estonia, Finland, France, Germany, Greece, Hungary, Latvia, Lithuania, Malta, The Netherlands, Poland, Slovenia, Spain, Sweden and the United Kingdom. See Council, “EUNAVFOR MED Op SOPHIA – Six Monthly Report 22 June – 22 December 2015”, Doc. EEAS(2016) 126, Brussels, 28.01.2016.

<sup>36</sup> Ibid.

<sup>37</sup> European Commission (2016a), “Communication on the State of Play of Implementation of the Priority Actions under the European Agenda on Migration”, COM(2016) 85 final, Brussels, 10.02.2016, p. 4. On RABITs, see Parliament and Council, Regulation (EC) No 863/2007 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* 199/30, 31.7.2007. See also Carrera & Guild (2010).

<sup>38</sup> Frontex (2015c), “Frontex accepts Greece’s request for rapid border intervention teams”, 10 December.

*Date source:* Obtained from Frontex through a request for information.<sup>39</sup>

On 28 December 2015, the agency launched the Poseidon Rapid Intervention,<sup>40</sup> following a formal request from Greece, which entailed “replacing” and “up-scaling” the JO Poseidon. It places more emphasis on ‘security checks’ aimed at accelerating registration and fingerprinting. Within this ‘Rapid Intervention, the number of “officers and interpreters on the ground” is foreseen to amount to 376, plus several vessels with their crew.<sup>41</sup>

The Poseidon Rapid Intervention largely coincides with the Hotspots on the Greek islands. The Poseidon Sea JO has been going on yearly since 2007, mostly combined with a Poseidon operation on land, together totalling a budget of over €100 million since then.<sup>42</sup>

The external evaluation of the Poseidon land operation concluded that the equipment levels were “generally adequate for the implementation of the Operational Plans”, with similar findings on the human resources for this operation.<sup>43</sup>

### 2.1.3 *The Hotspots in Italy and Greece*

The Hotspots system in Greece and Italy have been presented as a major element in the 2015 EU response to the refugee crisis. They have been framed hand in hand with the temporary relocation system of 160,000 asylum-seekers.<sup>44</sup> The main idea of the Hotspots is to dispatch personnel from EU agencies like Frontex, EASO, Europol and Eurojust to Italy and Greece to support national authorities in the screening, identification and fingerprinting of people arriving in specific locations.<sup>45</sup>

The ultimate goal of the Hotspots is to ensure “full 100% coverage of identification and registration of all entries by the March European Council”.<sup>46</sup> The registration element is crucial, with the Commission even positing the ‘no registration, no rights’ principle.<sup>47</sup> This is consistent with logic of the old Dublin system, which coerces asylum-seekers to register (or to be fingerprinted) in the first EU member state of entry as a pre-condition for entitlement to international protection.

The European Commission contends that “central to the hotspots approach is that it helps to identify who is and who is not in need of international protection through a process of identification and filtering of applications”.<sup>48</sup> This process would in turn lead individuals into the asylum, relocation or return system of Greece and Italy. According to the Commission, “[t]he proportion of migrants whose fingerprints are included in the Eurodac database has risen in Greece from 8% in September 2015 to 78% in January 2016, and in Italy from 36% to 87% over the same period”.<sup>49</sup>

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<sup>39</sup> Featuring these numbers here does not mean that the authors were able to verify these numbers or endorse the statistical categories employed. See our explanation on the use of statistics at the beginning of section 2.

<sup>40</sup> Frontex (2015d), “Frontex and Greece agree on operational plan for Poseidon Rapid Intervention”, 17 December; Frontex (2015a).

<sup>41</sup> Ibid.

<sup>42</sup> Calculated on the basis of Frontex “Archive of Operations” (<http://frontex.europa.eu/operations/archive-of-operations/>).

<sup>43</sup> Ramboll Management Consulting and EurAsylum (2015), “External evaluation of the Agency under Art. 33 of the Frontex Regulation – Final Report”, 28 July, pp. 44-45.

<sup>44</sup> Council (2015), “Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece”, *OJ L* 248, 24.9.2015, pp. 80–94. See Carrera et al. (2015).

<sup>45</sup> European Commission, Factsheet, “The hotspot approach to managing exceptional migratory flows” ([http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/background-information/docs/2\\_hotspots\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/background-information/docs/2_hotspots_en.pdf)).

<sup>46</sup> Commission 2016a, p. 9.

<sup>47</sup> Ibid., p. 12.

<sup>48</sup> Ibid., pp. 9-10.

<sup>49</sup> Ibid.

The link between registration and actual relocation is less straightforward. As far as relocation is concerned, there is thus far a very limited number of individuals effectively relocated.<sup>50</sup> From the original target of 160,000 asylum-seekers to be 'relocated' from Greece and Italy, only 218 persons have been relocated from Greece during the last six months, and 279 from Italy as of February 2016. The beneficiaries are mainly of Syrian and Eritrean nationalities. Finland and France are so far the two Member States having received a larger number of asylum seekers (140 and 135, respectively).<sup>51</sup>

The European Commission has expressed concerns about the state of play and has called upon EU member states to comply with their commitments. In a recent Communication, it highlighted that

... the most important factor remains the political will of Member States to make relocation work. Whilst the numbers of identified eligible candidates has been growing, Member States have so far formalised only a little over 2,000 offers of places and only twelve Member States have received relocated people. As of 8 February, only 218 people have been relocated from Greece, and 279 from Italy. Five Member States have not yet made any places available for relocation.<sup>52</sup>

So far Austria, Croatia, Slovakia, Slovenia and Hungary have not made any places available for relocation. In addition to the situation in Sweden,<sup>53</sup> the Commission has also recently adopted a Proposal for a Council Decision suspending the relocation of 30% of applicants allocated to Austria.<sup>54</sup>

In Italy, six hotspots have been foreseen: Lampedusa, Pozzallo, Porto Empedocle, Trapani, Augusta and Taranto. As can be seen in Table 4, 25 Frontex officers were present in a total of four hotspots in Italy. This actually represents a decrease from earlier numbers reported.<sup>55</sup>

Some of the challenges encountered in making these hotspots operational seemed to amount to limited disembarkations at or close to them. The Italian Maritime Rescue Coordination Centre (MRCC) would reportedly direct boats to ports of safety not in their vicinity. The Commission indicated that there are "administrative problems with port authorities" and that "further coordination concerning the disembarkation of migrants rescued at sea" is required.

This calls into question their integration into the Italian system, as well as the optimality of the chosen hotspot locations in view of the Italian disembarkation ports. It also shows that the presence of Frontex officers in hotspots is not effective where nearby national systems are not adequate or where Frontex operations are badly integrated into those systems.

In Greece, five hotspots were envisaged: Lesbos, Leros, Kos, Chios and Samos. As can be seen from Table 5, 454 Frontex officers were present at all five of these hotspots, but their presence has not ensured that they are operational: only three hotspots were formally operational by mid-February, and only one "can be considered fully operational".<sup>56</sup> According to the Commission, there were deficiencies as regards the connection between hotspots and the rest of the migration system. Moreover, as hotspots are primarily registration centres, the

<sup>50</sup> A total of 218 people from Greece, and a total of 279 from Italy (Ibid., p. 11).

<sup>51</sup> European Commission (2016b), "Annex to the Communication from the Commission to the European Parliament and the Council on the State of Play of Implementation of the Priority Actions under the European Agenda on Migration Relocation - State of Play Table", COM(2016) 85, 10.2.2016.

<sup>52</sup> European Commission (2016b, p. 11).

<sup>53</sup> European Commission (2015c), "Proposal for a Council Decision establishing provisional measures in the area of international protection for the benefit of Sweden in accordance with Article 9 of Council Decision (EU) 2015/1523 and Article 9 of Council Decision (EU) 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece", COM(2015) 677 final, Strasbourg, 15.12.2015.

<sup>54</sup> European Commission (2016c), "Proposal for a Council Implementing Decision on the temporary suspension of the relocation of 30% of applicants allocated to Austria under Council Decision (EU) 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece", 2016/0045 (NLE), COM(2016) 80 final, Brussels, 10.2.2016.

<sup>55</sup> Compared to the numbers reported on 4 February 2016, the presence of Frontex in the Italian hotspots halved from the number of 49 officers. Updates on these numbers are available almost daily at: [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/press-material/docs/state\\_of\\_play\\_hotspots\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/press-material/docs/state_of_play_hotspots_en.pdf)

<sup>56</sup> European Commission (2016a, p. 9).

Commission needs the Greek authorities to increase reception capacities if those registered are to be redirected to any further national system.<sup>57</sup>

Table 4. Hotspots in Italy: State of play

HOTSPOTS IN ITALY						
	LAMPEDUSA	POZZALLO	PORTE EMPEDOCLE	AUGUSTA	TARANTO	TRAPANI
Total Reception Capacity	500	300	300	300	300	400
EU Presence	Frontex: 9 Officers (Debriefing, screening and fingerprinting teams, Frontex supporting officers)	Frontex: 5 Officers (Debriefing and screening teams)	0	0	Frontex: 2 Officers (Debriefing and screening teams)	Frontex: 9 Officers (Debriefing and screening teams)
	EASO: 2 Member State Experts	EASO: 3 Member State Experts	0	0	0	EASO: 3 Member State Experts

Source: European Commission ([http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/press-material/docs/state\\_of\\_play\\_-\\_hotspots\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/press-material/docs/state_of_play_-_hotspots_en.pdf)) as per 16.02.2016.

Table 5. Hotspots in Greece: State of Play

HOTSPOTS IN GREECE					
	LESVOS	CHIOS	SAMOS	LEROS	KOS
Total Reception Capacity	2709	2250	650	330	290
EU Presence	Frontex: 235 Officers (Debriefing, screening, fingerprinters and registration teams. Border Surveillance Officers, Advance Level Document Officer, Team Leaders, Frontex Supporting Officers)	Frontex: 66 Officers (Debriefing, screening and Advance Level document expert teams. Border Surveillance Officer)	Frontex: 57 Officers (Screening and debriefing teams. Border Surveillance Officer and Advance Level Document Officer)	Frontex: 41 Officers (Screening and debriefing teams. Border Surveillance Officer and Advance Level Document Officer)	Frontex: 55 Officers (Screening and debriefing teams. Border Surveillance Officer and Advance Level Document Officer)
	EASO: 7 Member State experts, 1 member of EASO staff	0	EASO: 5 Member State experts	0	0

Source: European Commission ([http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/press-material/docs/state\\_of\\_play\\_-\\_hotspots\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/press-material/docs/state_of_play_-_hotspots_en.pdf)) as per 16.02.2016).

<sup>57</sup> Ibid., pp. 8-9.

## 2.2 And what about asylum?

The Achilles heel of the Hotspots system is that it fully relies on sound reception and asylum capacities of the member states concerned. The 2015 Commission Communication on Managing the Refugee Crisis expressly stated:

For the approach to be successful, the host Member State has to provide well-functioning reception facilities in which the expert teams deployed by the EU Agencies can operate. This includes first reception and pre-removal centres. The existence of sufficient reception facilities is also a necessary precondition for relocation, and the EU provides substantial financial support to Member States to build this infrastructure.<sup>58</sup>

The deficiencies in the Greek asylum system have been known for a long time, as confirmed in landmark judgements by the European Court of Human Rights and the Court of Justice of the European Union in Luxembourg in 2011, leading to a halt in ‘Dublin transfers’ to Greece.<sup>59</sup> The European Commission recently adopted a Recommendation on 10 February 2016, aiming to “bring Greece back into the Dublin system”.<sup>60</sup>

This is indeed not an easy fix. Moreover, proper reception conditions and access to asylum procedures cannot be taken for granted in other EU states either. As the UNHCR and other international human rights actors have amply shown,<sup>61</sup> other member states are not up to the required EU standards. In September 2015, the European Commission launched 40 infringement proceedings against EU member states for incorrect transposition and implementation of common European asylum standards.<sup>62</sup>

As the Commission has recently recognised, “the Commission's work on implementation and infringements reflects the fact that one of the weaknesses of the EU's migration management system, and of the Common European Asylum System in particular, has been the failure to transpose fully and inconsistent implementation”.<sup>63</sup> A key challenge remains practical implementation and the extent to which the structural conditions are present for EU asylum standards to be effectively delivered.

As Tables 4 and 5 above showed, the presence of EASO at the hotspots has been underwhelming. Only eight member state experts have been sent to all of Italy, and only 12 member state experts and one EASO staff member to Greece. Moreover, the member states’ response rate to EASO’s call for experts has also been quite low so far, with 201 experts pledged of the 374 requested. The EASO call for experts itself already counts for less than half the number of the 775 border guards requested by Frontex.<sup>64</sup>

## 3. The EBCG: What are the challenges?

In light of the above developments, what challenges must the EBCG proposal confront? Challenges can be expected to arise in three areas in particular: i) autonomy and the constant state of emergency ii) structural capacity and institutional standards and iii) asylum processing and human rights.

<sup>58</sup> European Commission (2015d, p. 3).

<sup>59</sup> ECtHR, Judgment, *M.S.S. v. Belgium and Greece*, Application no. 30696/09, 21.01.2011; CJEU Grand Chamber, Judgment, Joined Cases C-411/10 and C-493/10, *N.S. v Secretary of State for the Home Department and M.E. and others v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*, 21.12.2011.

<sup>60</sup> European Commission (2016d).

<sup>61</sup> See Carrera & Guild (2015).

<sup>62</sup> European Commission (2015e), “More responsibility in managing the refugee crisis: European Commission adopts 40 infringement decisions to make European Asylum System work”, Press Release, Brussels, 23.09.2015. For an updated state of play on infringements, see Commission (2016e), “Annex 8 to the Communication on the state of play of implementation of the priority actions under the European Agenda on Migration, Implementation of EU law – state of play”, COM(2016) 85 final, Brussels, 10.02.2016.

<sup>63</sup> European Commission (2016a, p. 22).

<sup>64</sup> See European Commission (2016f), Member States’ Support to Emergency Relocation Mechanism, 16.02.2016 ([http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/press-material/docs/state\\_of\\_play\\_-\\_relocation\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/press-material/docs/state_of_play_-_relocation_en.pdf)) (data as per 16.02.2016). See also EASO, “EASO calls for over 370 experts to participate in its operation in Italy and Greece” (<https://easo.europa.eu/latest-news/easo-calls-for-over-370-experts-to-participate-in-its-operations-in-italy-and-greece/>).

### 3.1 Autonomy and the constant state of emergency

While the Commission's proposal calls the initiative a European Border and Coast Guard, it is difficult to accept that it would actually constitute a proper European border and coast guard authority if adopted in its current form.

This is not the first time that Frontex has lamented the lack of officers and equipment dedicated by the member states to its operations and activities. In every 'migration crisis' that has erupted in the EU since the setting up of the agency in 2004, the 'solution' has too often been to increase its budget, without giving the agency a corresponding increase in its autonomy and operational means and competences to 'absorb' this funding.

Of the 775 border guards originally requested by Frontex in the course of 2015, the agency received 447, with those often not constituting long-term or full-time postings either.<sup>65</sup> These numbers are simply illusory. The new EBCG initiative would aim at overcoming similar constraints in the future and remedy current shortages with member states' contributions. However, in both human and technical support, the Frontex+ agency would still depend on member states' national authorities and instruments. The EBCG does not envisage Frontex having its own European border guards. The border guards sent to member states would still be 'national border guards' from the 'pools' under the coordination of the Agency.

The way in which the so-called right to intervene has been designed for a new agency would be emergency or 'crisis-driven'. It appears as if its creators had mainly (if not solely) Greece and Italy, and the Mediterranean, in mind. The new system would therefore not establish a permanent and stable deployment of European border guard teams along all EU external common borders, irrespective of the level of 'vulnerability', kind (land, sea, air, etc.) and location across the Schengen territory.

Concerns have been raised regarding the compatibility of the EBCG proposal, and the 'right to intervene', with the current legal competences of the EU enshrined in the treaties as well as the negative political repercussions of replacing national with 'foreign' border guards from other EU member states. Peers has argued that "the EU does not have the powers to send Frontex or its reserve forces to other Member States without their consent, or to require Member States to deploy those reserve forces without their consent either".<sup>66</sup>

The non-compliance of the proposal with EU law is difficult to argue, however. Article 77.1.d of the Treaty on the Functioning of the European Union (TFEU) does grant the power to the EU to adopt "any measure" necessary for gradual establishment of an integrated border management system for external borders.<sup>67</sup> One could add to that the need to ensure the actual capacity of EU member states to effectively deliver their obligations in performing and implementing EU border control at established standards. The principle of sincere cooperation would be at the heart of the equation here and ultimately justify the value added of the Commission's proposal on 'the right to intervene'.<sup>68</sup>

On the other hand, the competence of the Frontex+ agency to carry out an operation "without the prior *request* of a Member State" should not be overstated. The member state and the agency would still need to agree on an operational plan and national officers and assistance would be still needed to be able to implement any form of operational cooperation, including on questions related to return. To this we may add the fact that the current proposal includes a 'right to intervene', but it does not foresee any 'enforcement mechanism' other than the public 'naming and shaming' of the member state concerned.

As regards the "vulnerability assessment" that could justify the intervention, a risk analysis of member states' "capacity to face upcoming challenges", much like the foreseen vulnerability assessment, is already stipulated

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<sup>65</sup> See European Commission (2016g). See also Frontex (2015d).

<sup>66</sup> See Peers (2015).

<sup>67</sup> This legislative proposal is based on Arts 77(2)(b and d) and 79(2)(c) of the Treaty on the Functioning of the European Union (TFEU). The Explanatory Memorandum of the Proposal for a Regulation states: "The objective of this draft Regulation is to provide for a more integrated management of the EU's external borders, inter alia by providing the European Border and Coast Guard Agency with more competences in the fields of external border management and return than Frontex currently has." See European Commission (2015a, p. 3).

<sup>68</sup> Article 77.1.d TFEU could then be read in conjunction with Article 4.3 Treaty on the European Union (TEU), which enshrines the principle of sincere and loyal cooperation between member states and the Union.

in the current Frontex Regulation.<sup>69</sup> The 2015 evaluation of the agency acknowledged this existing competence but cited internal (lack of prioritisation) and external (political sensitivity) reasons why this had not yet been implemented.<sup>70</sup> Similarly, the currently existing Schengen evaluation mechanism<sup>71</sup> already foresees the competence of Frontex to deliver ‘risk analysis’ to support the implementation of the evaluation.<sup>72</sup> Since the mutual recognition of both negative asylum decisions and Schengen entries among the member states is a crucial feature of the EU Schengen and asylum law, the agency’s vulnerability assessment could go beyond evaluating member states’ equipment and capacities to face emergency situations, namely to address more systematically the compliance of *all* member states with EU border, asylum and fundamental rights law standards on the ground.

To conclude, these proposals do not represent the great leap forward as regards the autonomy of Frontex and moreover risk increasing the emergency-driven, and thereby reactive nature of the agency’s work.

### 3.2 Structural capacity and institutional standards

Events during 2015 have highlighted that shortages of manpower are not the only challenge, however, and perhaps even not the main one. If common European and international standards are not respected throughout national border, asylum and return systems, there is little to gain from putting more Frontex officers on the ground, especially if their deployment goes against the will of national authorities with whom cooperation is crucial for obtaining any result.

Even with hundreds of additional border guards, the new EBCG Agency would not be able function if the border, migration and asylum (administrative and judicial) systems of a member state are sub-standard. A certain level of cooperation with the member state concerned is a paramount precondition for any agency intervention.

The poor state of transposition and practical implementation of EU asylum standards by member states is just the tip of the iceberg of a more systemic deficit. The lack of adherence by member states, and not only Greece and Italy, to European and international law intended to bringing their national systems up-to-standard, will make it very difficult for the EBCG Agency to implement its new powers effectively, and even risks financing and coordinating defunct systems.

The underlying challenge relates to mutual trust as to whether the foundations are there to comply with EU Schengen and asylum law. This is particularly true with respect to the principle of mutual recognition of national decisions covering first entry into the Schengen territory and negative decisions of asylum applications in the scope of the Dublin system.

In short, more staff, tools and financial resources mean little if the conditions on the ground are not there. The EBCG proposal does not properly address or provide any sound answer to these dilemmas.

### 3.3 Processing asylum applications and upholding human rights

One of the weakest links in the EU responses to the refugee crisis has been that of ensuring the human right to seek asylum in the Union and assuming legal responsibility towards refugees. The increasingly dominant focus has been on strengthening external border controls and returns. Yet, who is to be controlled and returned? And

<sup>69</sup> Art. 4, para. 3, Parliament and Council (2011).

<sup>70</sup> See Ramboll Management Consulting & EurAsylum (2015) and Frontex (2015f, p. 35).

<sup>71</sup> Council (2013), “Regulation (EU) No 1053/2013 of 7 October 2013 establishing an evaluation and monitoring mechanism to verify the application of the Schengen acquis and repealing the Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen”, *OJ L 295/27*, 6.11.2013, see Art. 7 of the Regulation.

<sup>72</sup> It would be important to better define and link the activation of the right to intervene foreseen in the EBCG proposal with the Schengen evaluation procedure envisaged in Article 16 of Regulation No 1053/2013. The EBCG proposal states: “...the establishment of a vulnerability assessment, complements the Schengen evaluation mechanism established by Regulation (EU) No 1053/2013...In cases where it results from a Schengen evaluation that there are serious deficiencies at the external border, the Commission may recommend initiating the deployment of European Border and Coast Guard Teams or presenting strategic plans to the Agency for its opinion. The present proposal is also without prejudice to the measures which may be adopted under Article 19a and 26 of the Schengen Borders Code.” See European Commission (2015a, p. 4).

how are these activities to be made compatible with human rights obligations of EU member states and the Union's institutions and agencies?

Section 2.2 of this paper showed the low level of EU member states' participation in the activities of the EU asylum agency, EASO. The role of EASO in hotspots could in fact be central in increasing the capacity in the first reception of asylum-seekers, but the fact that EASO has sent only 20 member state asylum experts to Italy and Greece gives us an idea of the scale of the challenge.

The current state of play sends a message that granting asylum, ensuring proper reception of asylum seekers or fighting national practices of intolerance<sup>73</sup> may not be at the top of the policy priorities. This has been confirmed by the recent European Council Conclusions on Migration of 18 February 2016, which start by proclaiming: "In response to the migration crisis facing the EU, the objective must be to rapidly stem the flows, protect our external borders, reduce illegal migration and safeguard the integrity of the Schengen area."<sup>74</sup>

We have previously called for developing a common European asylum service that would assist all member states in the assessment of asylum applications, building their domestic capacity in reception and deciding on the redistribution of asylum applications on the basis of new criteria.<sup>75</sup> The above-mentioned February 2016 European Council Conclusions on Migration state (in point 7.g):

[T]he humanitarian situation of migrants along the Western Balkans route calls for urgent action using all available EU and national means to alleviate it. To this end, the European Council considers it necessary to now put in place the capacity for the EU to provide humanitarian assistance internally, in cooperation with organisations such as the UNHCR, to support countries facing large numbers of refugees and migrants, building on the experience of the EU Humanitarian Aid and Civil Protection department.

While limited in scope, this is a welcome and interesting proposal. European Commission data, however, suggest that there have been continuous shortfalls in member states' contributions to the Civil Protection Mechanism.<sup>76</sup>

When navigating through the Mediterranean, another key challenge will continue to be deciding *who* is responsible for search and rescue of people at distress at sea, and *which* rules apply to whom. It is to be recalled that the adoption of Regulation 656/2014 on Frontex sea border operations and SAR was preceded by deep struggles over the question of competence with member states concerned over EU involvement in SAR and with the European Parliament challenging a prior Council Decision<sup>77</sup> on the issue before the CJEU. In its judgment, the Luxembourg Court confirmed that these rules did constitute "a major development" in the Schengen Borders Code system and adopting such rules would thus require the full involvement of the Union legislature as they entail "political choices" and questions over fundamental rights.<sup>78</sup> During the ensuing legislative process on Regulation 656/2014, the member states eventually accepted the EU's involvement in SAR, as far as it would remain limited to Frontex operations.<sup>79</sup> Moreover, in practice the Frontex JOs have already extensively engaged in SAR activities, such as in the Triton JO described above.

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<sup>73</sup> See e.g. UNHCR, "Hungary urged to refrain from policies and practices that promote intolerance and hatred", Geneva, 21.12.2015.

<sup>74</sup> European Council (2016).

<sup>75</sup> Carrera et al. (2015, p. 21). A recent report prepared by MEPs Metsola and Kyenge also stressed the possibility for EASO to become a 'fully fledged' European asylum agency (see European Parliament, 2016, pt. 58).

<sup>76</sup> European Commission (2016g), Annex 9 to the Communication from the Commission to the European Parliament and the Council on the State of Play of Implementation of the Priority Actions under the European Agenda on Migration Accepted Member States' Support to Civil Protection Mechanism for Serbia, Slovenia, Croatia and Greece, COM(2016) 85 final, Brussels, 10.02.2016.

<sup>77</sup> Council (2010), Decision 2010/252/EU of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of operational cooperation coordinated by Frontex at the external borders of the Member States of the EU, *OJ L* 111/20, 04.05.2010.

<sup>78</sup> CJEU (2012), Judgment, Case C-355/10, *Parliament v Council*.

<sup>79</sup> For a more in-depth treatment of this question, see Carrera & den Hertog (2015, pp. 10-13).

Nevertheless, Regulation 656/2014 regarding the rules on Frontex sea border surveillance operations already implied a Frontex competence for SAR and clearly stipulates binding rules for the Agency's SAR activities.<sup>80</sup> This Regulation would unequivocally apply to the new EBCG. Yet, a key challenge for any new EBCG would be how to ensure compliance with this Regulation by national military and para-military authorities working under its coordination after the enlarged involvement of various coast guard actors in the agency's activities. The transformation of Frontex into an EBCG should bring back to the table the extension of the material scope of Regulation 656/2014 to all EU member state authorities, including coast guards and naval forces.

Of particular relevance here will also be the exact way in which the modalities of cooperation between the EBCG agency and the European Fisheries Control Agency and the European Maritime Safety Agency will be delineated in the working agreement envisaged in Article 52 of the EBCG proposal.<sup>81</sup>

As highlighted in section 1 of this paper, a welcome yet limited new feature of the EBCG is the establishment of a common complaint mechanism in those situations where an individual's fundamental rights might be violated during the agency's activities. The European Ombudsman had already expressed concern in 2013 about the lack of an internal complaints mechanism in Frontex's arrangements.<sup>82</sup> The Ombudsman recommended that Frontex should set up such a mechanism to deal directly with complaints alleging breaches of fundamental rights during Frontex operations, but this was not accepted by the agency at that time.<sup>83</sup>

We have already expressed concern over whether this complaint mechanism would be independent from the EBCG Agency,<sup>84</sup> and whether consideration has been properly given to the decision-making on who is in need of international protection and who is not. Moreover, the effective remedies available to complainants in the event of unfavourable or negative decisions should be clarified. Independent investigations ensuring effective access to justice should be a central element. A key challenge will be to properly ensure the compliance of the activities of any future EBCG actor with the EU Charter of Fundamental Rights.

Similar human rights challenges may emerge relating to the 'new' external mandate of the EBCG agency. This aspect is not altogether so new; under the current Frontex Regulation, the agency already has the competence to place liaison officers in third countries. The current Frontex Regulation also implies a competence for Frontex to operate on third-country territory, as Article 14 allows for working arrangements with third countries "related to the management of operational cooperation", stipulating that such cooperation should respect Union law "also when cooperation takes place on the territory of those countries".

In any case, the absence of an explicit competence has not prevented Frontex from carrying out operational activities in third countries in the past, such as in the HERA JOs in the territorial waters of Senegal and Mauritania. Questions have been raised about the legality of these operations, not least from a human rights and refugee law perspective.<sup>85</sup>

A more revolutionary proposal concerns the enlargement of the Frontex competence for carrying out return operations from third countries – provided they are a Party to the European Convention on Human Rights (ECHR) – to other third countries.<sup>86</sup> These proposals raise profound questions concerning their compliance with EU law on this issue, such as the Returns Directive, as well as broader considerations relating to whether the expulsion orders of non-EU member states can and should be recognised by EU member states and the

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<sup>80</sup> Parliament and Council (2014), Regulation (EU) No 656/2014 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, *OJL* 189, 27.6.2014, pp. 93-107.

<sup>81</sup> Art. 52, Commission (2015a).

<sup>82</sup> According to the European Ombudsman (2013), "the lack of such a mechanism meant that Frontex would be less aware of concerns or complaints about the manner in which it operated; and, on the other hand, people with complaints did not have the opportunity to have their complaints dealt with directly by Frontex".

<sup>83</sup> See Frontex (2015g), Response to the European Ombudsman's Decision closing her own-initiative inquiry OI/9/2015/MHZ and the conclusions, Warsaw, 19.10.2015.

<sup>84</sup> See Guild et al. (2015).

<sup>85</sup> See den Hertog (2013).

<sup>86</sup> Art. 27(4), European Commission (2015a).

new EBCG Agency. The now introduced requirement of ECHR membership would give the agency the competence to carry out JROs from countries such as Turkey, Russia and several Western Balkan countries.

#### 4. Conclusions

This paper has argued that the EBCG proposal would not lead to a truly European border guard. It would strengthen the current competences of the Frontex agency, but it would still not remedy the shortcomings of Frontex. The analysis also shows that several elements presented as ‘new’, are in fact not altogether new. They would neither guarantee the setting up of a permanent system of ‘European’ border guards ensuring a consistent implementation and the soundness of the domestic capacities in all EU member states in light of border (rule of law) standards across the Union.

Furthermore, the EBCG puts too much emphasis on reinforcing external border controls in the Schengen territory and the return of irregular immigrants, at the expense of EU actions to address the asylum, humanitarian and human rights challenges residing at the core of the refugee crisis. The envisaged re-design of Frontex, in the absence of similar initiatives to boost EASO and the EU’s institutional solidarity to support national asylum systems, will not address the reception and humanitarian challenges experienced by asylum-seekers in the EU. Until these are tackled head-on, the EU will not be able to offer any durable solutions to intercepted and registered migrants, regardless of how many JOs and hotspots it launches.

Frontex can be given more funding, human and technical resources for ‘emergency’ or ‘crisis’-led situations. Yet, the envisaged EBCG will still largely depend on EU member states’ border personnel and tools, as well as their capacity to cooperate. As we have learned during 2015, EU agencies like Frontex or EASO can be deployed to domestic arenas, but if the national border and asylum systems are not healthy and lack the capacity to comply EU standards, little can be done on the ground.

The key lacunae in the EBCG proposal is therefore a lack of definition on *what* an EBCG should be actually doing and *how* it should be doing it. The current discussions and proposal focus excessively on *who* will have competences to intervene and who will need to commit staff and equipment. Without the necessary respect for European and international standards by the composite parts of the EBCG in place, setting up a Frontex+ agency cannot be expected to address structural deficiencies. It will raise expectations that cannot be met.

The current proposals are also too marked by ‘emergency’ and ‘crisis’ politics. The foreseen agency’s “vulnerability assessment” is aimed at assessing “technical equipment, systems, capabilities, resources and contingency plans” in view of whether they can face “upcoming challenges, including present and future threats and pressures”.<sup>87</sup> This reflects the logic of emergency-driven and therefore reactive responses. It leaves largely unaddressed the assessment of all member states’ structural compliance with their obligations under EU asylum law, such as the Schengen Borders Code and the EU Charter of Fundamental Rights.

As a first step, the relationship between the Schengen evaluation mechanism and the agency’s “vulnerability assessment” should be better defined in the proposal. As few member states are currently ‘named and shamed’ for not doing ‘their part’ in responding to the refugee crisis, the “right to intervene” seems clearly addressed at them. This could be seen as unequal treatment. It should not be forgotten however that EU and international law and standards should be upheld by every member states – not only by Greece or Italy at their sea borders – at all the Schengen external borders, including airports.

For any EBCG proposal to be successful, more efforts are needed to more closely link the EBCG to compliance with EU rule-of-law standards in a permanent and regular fashion across all member states and EU actors. Nationalism needs to give way to a European professional culture among border authorities across the Union in border-control cooperation that is closely tied to rule of law and fundamental human rights, which constitute the *common ground* of European integration. This must go hand-in-hand with new initiatives aimed at abandoning the EU Dublin system and reinforcing the institutional capacities to deliver a Common European Asylum System. The role of the EASO should be reformed alongside any EBCG, possibly evolving into a European asylum service, with the goal of ensuring reception conditions, access to asylum procedures and the provision of humanitarian assistance at all common EU external borders.

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<sup>87</sup> Art. 12(1-2), European Commission (2015a).

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