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THE EVOLUTION OF THE PRINCIPLE OF SHARED RESPONSIBILITY IN THE AREA OF EUROPEAN INTEGRATED BORDER MANAGEMENT

ABSTRACT

The article includes a legal analysis of the principle of shared responsibility, which is the current basis for implementing European Integrated Border Management (EUIBM). In particular, the article analyzes the main instruments strengthening the institutional position of the European Union in border management, that is, the Frontex standing service and its powers to apply coercive measures and the obligation of Member States to cooperate with the agency. There are three stages in the evolution of the principle of shared responsibility. The first stage begins with the reform of the EUIBM system resulting from the then migration pressure, initiated by the European Commission's communication of December 2015 and the European Border and Coast Guard (ESGiP) Regulation of 2016, replacing the original Frontex Regulation. The reform allowed for the adoption of the first binding definition of European integrated border management and introduced the principle of shared responsibility. The second stage is marked by the ESGiP reform of 2019, which significantly expanded Frontex's competences by establishing the agency's force corps. The third stage, carried out during the period of intensifying geopolitical changes in Europe and the world, begins with the adoption in 2023 of the first multi-annual program implementing and aimed at the effective implementation of EUIBM, the so-called "strategic policy." The article puts forward the thesis that geopolitical conditions favoring the tendency to tighten operational cooperation have enabled the Union to build an EUIBM

based on the principle of shared responsibility and a significant evolution of the principle itself. It seems that EUIBM in its current formula has exhausted the treaty possibilities and further expansion of the system should be preceded by a treaty reform.

Keywords: European integrated border management, EUIBM, Frontex, European Border and Coast Guard, principle of shared responsibility

INTRODUCTION

The Treaty of Lisbon brought the Area of Freedom, Security and Justice (AFSJ) under a single legal regime, including it in the catalogue of shared competences. Article 77 TFEU¹ provides that the Union shall develop a policy for the gradual establishment of an integrated external border management system (currently EU's Integrated Border Management – EUIBM) and that the Union legislators shall take all necessary measures to this end. Within the framework of the so-called EU border policy, primary law explicitly grants the competence to shape a uniform regime for crossing the internal and external borders of the EU Member States and the conditions for the free movement of persons. The limits of the exercise of the Union's competences are generally set out in the principles of subsidiarity,² proportionality³ and respect for national identity.⁴ The EU's actions are also limited by the derogation clauses of the AFSJ, that is, public order and the protection of internal security.⁵

These derogation clauses constitute a *lex specialis* and are intended to limit the application of the principle of respect for national identity. Significantly, primary law does not contain a definition of the EUIBM and does not indicate the elements that would constitute it. Contrary to the proposals addressed at the working group, the Convention drafting the content of the Constitution for Europe, and subsequently Member States at the Lisbon Intergovernmental Conference, refrained from shaping the organisational structures of the EUIBM in primary law.⁶ This is an important element that distinguishes the border policy from other areas of cooperation between

¹ *Treaty on the Functioning of the European Union*, consolidated version 2016, OJ 2016, C 202, article 77(1)(c) and 77(2)(d), [hereinafter referred to as the TFEU].

² *Treaty on European Union*, consolidated version 2016, OJ 2016, C 202, article 5(3), [hereinafter referred to as TEU].

³ TEU, article 5(4).

⁴ *Ibid.*, article 4(2).

⁵ See TFEU, article 72.

⁶ More: A. Parol, "Zintegrowane zarządzanie granicami 2.0. Wpływ zasady dzielonej odpowiedzialności na pozycję krajowych i unijnych organów wykonawczych," *Prawo i Polityka*, no. 7 (2016), pp. 86-87.

AFSJ. In the area of police cooperation, the TFEU clearly and unambiguously defines the legal position of Europol as a coordinator of the activities of the competent authorities of Member States.⁷ In particular, the TFEU provides that *[t]he application of coercive measures shall be the exclusive responsibility of the competent national authorities*.⁸ In the area of judicial cooperation in criminal matters, it lists Eurojust⁹ and the European Public Prosecutor's Office¹⁰ and precisely identifies the catalogue of their tasks. On the one hand, the inclusion of the provisions on Europol and Eurojust in primary law was a form of reordering their position in the unified legal regime. On the other hand, it introduced rigid limits on the agency's mandates. There is no doubt, therefore, that the departure from the Treaty-based clarification of the competences of the EU border agency (Frontex) – in favour of the competence to adopt 'any measure' – allows for a very flexible definition of the limits of entrustment. The article highlights the thesis that the geopolitical conditions favourable to the trends of closer operational cooperation have enabled the EU to build the EUIBM, based on the principle of shared responsibility and a significant evolution of the principle itself, which in its current form may lead to a significant limitation of Member States' competences in the area of internal security.

Three stages have been identified in the evolution of the principle of shared responsibility. The first phase starts with a Communication from the European Commission in December 2015. The Communication was also accompanied by a proposal for a regulation on the European Border and Coast Guard (EBCG),¹¹ adopted in an extremely fast procedure in September 2016. The reform allowed for the creation of the first binding definition of European integrated border management and introduced the principle of shared (joint) responsibility. The second stage is marked by the 2019 EBCG reform, which significantly expanded Frontex's competences by establishing the agency's force corps. The third phase, implemented at a time of intensifying geopolitical changes in Europe and the world, starts with the adoption in 2023 of the first multiannual programme aiming at the effective implementation of the EUIBM, the so-called 'strategic policy.'

The article uses methods typical for the discipline of legal sciences, in particular the historical-descriptive and formal-dogmatic methods. The study presents the conclusions *de lege lata* and *de lege ferenda*.

⁷ TFEU, article 88.

⁸ *Ibid.*, article 88(3).

⁹ *Ibid.*, article 85.

¹⁰ *Ibid.*, article 86.

¹¹ *Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard*, OJ 2016, L 251, [hereinafter referred to as the EBCG Regulation 2016].

ESTABLISHMENT OF THE EUROPEAN AGENCY FOR THE MANAGEMENT OF OPERATIONAL COOPERATION AT THE EXTERNAL BORDERS OF THE MEMBER STATES OF THE EUROPEAN UNION

The development of the EUIBM began with the establishment of its key component, the Frontex Agency.¹² The original full name of the agency, that is, the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, symbolically indicated the limit of the tasks it was delegated with. The regulation establishing Frontex was adopted in 2004, exercising the then Community competence in the area of visas, asylum, immigration and other policies related to the free movement of persons.¹³ The original fundamental principle of IBM was a model in which¹⁴ Member States' authorities had full responsibility for the implementation tasks at the external borders. This did not imply exclusivity of national services in this area, but clearly shaped the relationship between the authorities. National actors had a dominant position and Frontex had a subsidiary position as coordinator of national activities.¹⁵ The Frontex Regulation¹⁶ stated that *the responsibility for the control and surveillance of external borders lies with the Member States*. As the EU's executive body, Frontex was supposed to *facilitate and render more effective the application of existing and future Community measures relating to the management of external borders... and make them more effective*.¹⁷

Frontex's subsidiary position did not result from the limits of the entrustment of competences to the Union, but from the lack of political consent of Member States to use the full possibilities of the Treaty. There was a persistent resistance by Member States to transfer power and autonomy to EU force agencies, including Frontex. The intergovernmentalism that has traditionally characterised European cooperation in the area of justice and home affairs has been a decisive factor in the actual degree of

¹² More: P. Antoń, "Wpływ traktatu lizbońskiego na zintegrowane zarządzanie granicami zewnętrznymi Unii Europejskiej," *Politeja*, vol. 15, no. 3(54) (2018), p. 337 et seq.

¹³ *Treaty Establishing the European Community*, consolidated version 2006, OJ 2006, C 321, article 62(2)(a) and article 66. More: A. Nitszke, *System agencji Unii Europejskiej*, Kraków 2017, p. 84 et seq.

¹⁴ See: A. Gruszczak, "Zadania wywiadowcze agencji FRONTEX: prawo – procedury – efekty," in A. Kuś, A.M. Kosińska, A. Szachon-Pszenny (eds.), *Agencja FRONTEX w Strefie Schengen. 10 lat doświadczeń*, Lublin 2015, p. 17.

¹⁵ More: A. Parol, "Status prawno-ustrojowy FRONTEX-u w systemie instytucjonalnym Unii Europejskiej," in A. Kuś, A.M. Kosińska, A. Szachon-Pszenny (eds.), *Agencja FRONTEX w Strefie Schengen...*, p. 45 et seq.

¹⁶ *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 2004, L 349, p. 1, as amended, article 1(2), [hereinafter referred to as the Frontex Regulation].

¹⁷ *Ibid.*

delegation.¹⁸ Member States have often allowed Frontex to carry out tasks beyond its formal mandate, 'testing' which of its competences would prove useful and acceptable. Already in the first years of the Agency's operation, in the literature¹⁹ it was pointed out that the lack of transparency and clarity characterising the Agency's tasks allowed for the inclusion of informal practices in the catalogue of Frontex's tasks, which over time were considered to be part of its regular activities. A cardinal example of this is the conduct of operations at sea, which was only secondarily incorporated into the Agency's mandate.²⁰ This prompted multiple revisions of the Frontex Regulation and its reforms in 2007, 2011, 2013 and 2014.

In parallel with the 2014 reform of Frontex's mandate, the European Commission has taken steps to expand the EUIBM. Among other things, the European Commission commissioned a feasibility study,²¹ the result of a year of survey and other work by a team of experts hired by Unisys, a private consulting firm based in Belgium. The original aim of the study was to prepare three alternative solutions for the development of the EUIBM. In the end, however, three models were presented combined into a single vision of a phased development of the EUIBM. The first phase, based on a support scenario model, envisaged maintaining the subsidiary position of the EU executive bodies. In the second stage, to be achieved by 2025, the so-called participation scenario model, the position of the EU bodies was to be strengthened. In this hybrid model, the centres responsible for decision-making and operational management were to be found at both Member State and EU level. In principle, border management (control and security) remained the responsibility of Member States and national officials. On the other hand, in crisis situations, executive and decision-making competences were to be shifted more towards the EU level. This stage also envisaged the establishment of the so-called European Border Corps. The draft envisaged that the corps would consist of officers from individual Member States, seconded by their home units to the corps for a specified period of time (a maximum of three years). The selection of candidates would be made by the Executive Director of Frontex and these officers would also report to him. Under the shared powers model, Frontex would have full operational powers and its officers would have powers to use coercive measures. The third phase – the delegation and accountability scenario – would be implemented between 2030 and 2035. In this

¹⁸ See: S. Carrera, L. den Hertog, J. Parkin, "The Peculiar Nature of EU Home Affairs Agencies in Migration Control Beyond Accountability *versus* Autonomy," *European Journal of Migration Law*, vol. 15, no. 4 (2013), p. 343.

¹⁹ J. Pollack, P. Sloniski, "Experimentalist But Not Accountable Governance? The Role of Frontex in Managing the EU's External Borders," *West European Politics*, vol. 32, no. 5 (2009), p. 904.

²⁰ L. Marin, "Policing the EU's External Borders: A Challenge for the Rule of Law and Fundamental Rights in the Area of Freedom, Security and Justice? An Analysis of Frontex Joint Operations at the Southern Maritime Border," *Journal of Contemporary European Research*, vol. 7, no. 4 (2011), p. 482.

²¹ M. van de Poel et al., *Study on the Feasibility of the Creation of a European System of Border Guards to Control the External Borders of the Union ESBG. Final Report*, Version 3.00, 16 June 2014, at <https://www.statewatch.org/media/documents/news/2014/nov/eu-com-dg-hm-border-guards-study.pdf>, 10 November 2023, [hereinafter referred to as the feasibility study].

format, a defined and closed catalogue of tasks was to be carried out by a specially created EU body. It also provided for the full centralisation of executive powers at the EU level. This meant that the EU bodies would be competent both to adopt the acts and to exercise their implementing powers (operational and auxiliary). However, the implementation of the model of exclusive rights presupposes a prior reform of primary law. The preparation of the study met with the interest of commentators and observers of integration processes.²²

EUROPEAN INTEGRATED BORDER MANAGEMENT AND THE ESTABLISHMENT OF THE PRINCIPLE OF SHARED RESPONSIBILITY

In the European Commission's communication of December 2015,²³ the European Commission indicated that the migratory pressures of the time made it necessary to deepen cooperation in the AFSJ and to establish the European Border and Coast Guard (EBCG). The geopolitical situation presented an excellent opportunity to launch the realisation of the shared responsibility model envisaged in the feasibility study. Alongside the Communication, the Commission presented a legislative proposal²⁴ for an EBCG Regulation, which was adopted after a legislative procedure lasting only nine months. The Council voted unanimously on the legislative proposal. The instability of the situation at the external borders has effectively discouraged national parliaments from using the Early Warning Mechanism, although parliaments have raised concerns about a possible breach of the principle of subsidiarity.²⁵ The narrative of the European media clearly pointed to the correlation between Frontex's limited competences and the destabilisation of the migration situation at the borders.²⁶ It is reasonable to argue that without the political mobilisation triggered by migratory pressure,²⁷ the 2016 reform would not have been possible.

²² N. Nielsen, *Supra-National Border Guard System on EU Radar*, 19 November 2014, at <https://euobserver.com/rule-of-law/126568>, 15 January 2024.

²³ *Communication from the Commission to the European Parliament and the Council, European Border and Coast Guard and the Effective Management of the EU's External Borders*, COM(2015) 0673 final.

²⁴ *Proposal for a Regulation of the European Parliament and of 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) 0671 final.

²⁵ The official position on the project was presented by 10 chambers of national parliaments representing 7 member states. See *European Border and Coast Guard*, 2015/0310(COD), at [https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2015/0310\(COD\)](https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2015/0310(COD)), 15 January 2024.

²⁶ N. Mathiason, V. Parsons, T. Jeory, *Frontex Resource Limitations Put Agency in Straitjacket*, 15 September 2015, at <https://euobserver.com/investigations/130281>, 15 January 2024.

²⁷ More on the migration situation: J.J. Węc, "Reforma polityki imigracyjnej, kontroli granic zewnętrznych oraz polityki azylowej Unii Europejskiej w dobie kryzysu migracyjnego (2015-2016)," *Przegląd Zachodni*, no. 2 (2017), p. 7 et seq.

The first stage in the evolution of the principle of shared responsibility was marked by the adoption in 2016 of the EBCG Regulation,²⁸ which established the first legal definition of the EUIBM and thus set the limits of the Union's implementing powers.²⁹ The current definition contains 12 'thematic' elements that build the mechanism in question and three overarching elements, which are: (1) fundamental rights, (2) research and innovation and (3) education and training. Among the 'thematic' elements, border controls are listed first and should be considered as an axiom of the concept.³⁰ Further, the regulation differentiates between legal and illegal or irregular modes of crossing the external borders. With regard to legal migration, the regulation merely states that IBM includes measures to facilitate legal border crossings. A much wider range of elements is mentioned in the area of illegal crossing. In this area, IBM covers measures related to the prevention and detection of cross-border crime, such as migrant smuggling, trafficking in human beings and terrorism, as well as measures related to the onward routing of persons who are in need of, or intend to apply for, international protection. The Regulation explicitly mentions the elements that make up operational activities. In the first place, these are risk analyses and analyses of threats that may affect the functioning or security of the external borders. This is followed by technical and operational measures within the Schengen area related to border control and aimed at tackling illegal immigration and combating cross-border crime more effectively. In particular, it recognises the use of state-of-the-art technology, including large-scale information systems, as part of operational activities. It explicitly mentions search and rescue operations for persons in distress at sea and the return of third-country nationals. In addition to operational activities, the regulation includes among the elements of the EUIBM a quality control mechanism, including a Schengen evaluation mechanism, possible national mechanisms and solidarity mechanisms, in particular EU funding instruments. The cooperation of entities with executive powers, mentioned explicitly, is also an element of the EUIBM. The regulation distinguishes three levels of cooperation, the first two being internal, the third implementing the external dimension of the Area of Freedom, Security and Justice. The internal dimension concerns cooperation between Member States supported and coordinated by Frontex and so-called inter-agency cooperation. In particular, this cooperation includes the exchange of information. The external dimension of EUIBM, on the other hand, covers cooperation with third countries focusing on neighbouring countries and those third countries identified as countries of origin or transit with regard to illegal immigration as a result of risk anal-

²⁸ EBCG regulation 2016, article 4.

²⁹ The scope of the EUIBM was slightly modified in 2019. See *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 2019, L 295, article 3, [hereinafter referred to as the EBCG Regulation 2019].

³⁰ More: J. Wagner, "The European Union's Model of Integrated Border Management: Preventing Transnational Threats, Cross-Border Crime and Irregular Migration in the Context of the EU's Security Policies and Strategies," in Ch. Leuprecht, T. Hataley, E. Brunet-Jailly (eds.), *Patterns in Border Security. Regional Comparisons*, London 2022, p. 77 et seq.

ysis. The current scope of the EUIBM system reflects the dual objective of effectively managing migration and ensuring a high level of security.³¹

The 2016 EBCG Regulation also introduced a catalogue of autonomous rules for the EUIBM to ensure its effectiveness and efficiency. The catalogue of principles includes: the principle of shared (joint) responsibility; the principle of cooperation in good faith and the obligation to exchange information. According to the first principle cited, Member State authorities and Frontex are jointly responsible for implementing the EUIBM. As the EC points out,³² the principle of shared responsibility is a cornerstone of the architecture of the European Border and Coast Guard and expresses the operational dimension of the shared competences the EU has in the AFSJ. Shared responsibility is complemented by the primary obligation of all European Border and Coast Guard entities (Frontex and national authorities) to cooperate in good faith, and the overarching obligation to share information within the European Border and Coast Guard community.

According to Article 7 of the Regulation, *[t]he European Border and Coast Guard shall implement European integrated border management as a shared responsibility of the Agency and of the national authorities responsible for border management, including coast guards to the extent that they carry out maritime border surveillance operations and any other border control tasks.* Earlier in the Preamble,³³ the EU legislator states that *European integrated border management should be implemented as a shared responsibility between the Agency and national authorities responsible for border management, including coast guards.* Next, it states that *Member States retain the primary responsibility for the management of their external borders in their interest and in the interest of all Member States and are responsible for issuing return decisions.*³⁴ Further, in the operative part,³⁵ it provides that *[t]he Member States shall continue to be primarily responsible for the management of their sections of the external borders.*

The principle of shared responsibility has led to a significant reduction in the model of executive federalism³⁶ in favour of multi-level governance or integrated management. The first is that national authorities implement EU law at national level and EU bodies at EU level. The second model shifts from traditional direct administration at EU level and indirect administration at national level to integrated administration,³⁷

³¹ See J. Rijpma, *The Proposal for a European Border and Coast Guard: Evolution or Revolution in External Border Management?*, Brussels 2016, p. 14.

³² *Strategy Document Defining a Multiannual Strategic Policy for European Integrated Border Management in Accordance with Art. 8(1) 4 of Regulation (EU) 2019/1896*, COM(2022) 303 final, p. 10.

³³ EBCG Regulation 2019, recital 12.

³⁴ *Ibid.*

³⁵ *Ibid.*, article 7(1).

³⁶ Zob. M. Chamon, "The Influence of 'Regulatory Agencies' on Pluralism in European Administrative Law," *Review of European Administrative Law*, vol. 5, no. 2 (2012), p. 65.

³⁷ J. Saurer, "The Accountability of Supranational Administration: The Case of European Union Agencies," *American University International Law Review*, vol. 24, no. 3 (2009), p. 432 et seq.; see H.C.H. Hofmann, A. Türk, "Conclusions – Europe's Integrated Administration," in H.C.H. Hofmann, A. Türk (eds.), *EU Administrative Governance*, Cheltenham 2006, p. 588.

that is, one that creates a network of interconnections and relationships between national and EU authorities.

The adopted change introduced a new style of thinking about the way the law is exercised in the area of integrated border management. It shaped Frontex's position as an equal partner. It gradually familiarised border officials and policy makers with the prospect of a supranational service responsible for border control and surveillance.

OBLIGATION FOR MEMBER STATES TO COOPERATE WITH FRONTEX

From the perspective of the strengthening of the formal legal position, the clearest signal of the change in Frontex's position with regard to national authorities was the introduction in Article 19 of Regulation 2016/1624 of the possibility to exert significant pressure on a Member State to involve Frontex in active operational activities at the border. The procedure can only be triggered if there is a situation at the external borders requiring urgent action. In a virtually unchanged form, the indicated procedure now applies under Article 42 of the 2019 EBCG Regulation.

Under the provisions of the 2019 ECBG Regulation, a decision may ultimately be taken against a Member State that refuses to cooperate with Frontex or the cooperation provided is deemed to be insufficient to reintroduce internal border controls with that state. It might happen in a situation where external border control becomes ineffective to the extent that it poses a risk to the functioning of the Schengen area. Practically, the EU Council and the EC can therefore exclude such a state from the Schengen area.

This is a two-stage procedure involving the two Union institutions, that is, the Council and the European Commission. In the first stage, the Council, on the basis of a proposal from the Commission, may immediately adopt a decision by means of an implementing act laying down measures to be implemented by Frontex to alleviate the risks and requiring the Member State concerned to cooperate with the Agency in implementing those measures. The Commission shall consult Frontex before submitting a proposal. Due to the fact that the EBCG Regulation does not contain provisions for unanimity, qualified majority voting appears to apply for the adoption of the implementing decision. The Council, in an implementing decision, may oblige a Member State to cooperate with Frontex, including: (a) the organisation and coordination of rapid border interventions and the deployment of a permanent service, including teams from the Rapid Reaction Reserve; (b) the deployment of a permanent service within the framework of the Migration Management Support Teams, in particular in hotspot areas; (c) the coordination of operations of one or more Member States and third countries at the external borders, including joint operations with third countries; (d) the deployment of technical equipment; (e) the organisation of return interventions. Failure to implement the Council Decision and cooperate with Frontex enables the Commission to initiate the second phase of the procedure, resulting in the reintroduction of internal border controls.

Importantly, the implementing decision is adopted by the Council of the European Union. Originally, in its legislative proposal, the European Commission proposed that it would be the European Commission to take this decision. The proposal has not been accepted by the Council and, ultimately, it is the Council that has the power to take action in this area. On the occasion of the 2019 reform, the Commission again proposed that it should be the one to adopt the implementing decision. Again, the change did not meet with the approval of the EU Council. In practice, this means that the possible initiation of the procedure under Article 42 of the 2019 EBCG Regulation will be intergovernmental.

So far, despite the tense situation at the external borders, the Member States of the EU Council have not taken advantage of the opportunity to initiate this procedure. Instead, in 2023 and early 2024, they actively used the possibility under the Schengen Borders Code³⁸ for a single country to temporarily reintroduce border control. At present, that is, in January 2024, controls are being carried out by the Czech Republic, Poland, Slovenia, Italy, Germany, Austria, Slovakia, Denmark, Norway, Germany, Sweden and France.³⁹ Keeping things in proportion, the procedure under Article 42 of the 2019 EBCG Regulation appears to be as 'atomic' as the procedure under Article 7 TEU. It can be assumed that the ministers assembled in the Council of the EU will be reluctant to use it. Nevertheless, the fact remains that secondary legislation introduces instruments that can significantly limit the competences of national border authorities. The possible use of the procedure will have a significant impact on the way in which the internal security of Member States is ensured by the competent national authorities.

STANDING CORPS OF THE EUROPEAN BORDER AND COAST GUARD

The second stage in the evolution of the principle of shared responsibility is marked by the adoption of the new European Border and Coast Guard Regulation in 2019. The introduction of a permanent service of the European Border and Coast Guard has proven to be crucial for the strengthening of Frontex's position. Launched in 2021, the standing corps is the first uniformed service in the EU. By 2027, the corps is expected to have 10,000 members. The service is tasked with supporting current and future operational activities in the areas of external border control, return, combating cross-border crime and asylum. Officers forming part of the permanent service have executive powers where appropriate. This is to ensure that Member States on the ground are effectively supported in their efforts to protect external borders, fight cross-border crime

³⁸ *Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the Rules Governing the Movement of Persons Across Borders (Schengen Borders Code)*, OJ 2016, L 077, as amended, articles 25-29.

³⁹ European Commission, *Temporary Reintroduction of Border Control*, at https://home-affairs.ec.europa.eu/policies/schengen-borders-and-visa/schengen-area/temporary-reintroduction-border-control_en, 15 January 2024.

and significantly increase the effectiveness and sustainability of the return of irregular migrants. The permanent service consists of four categories of operational staff, namely: statutory staff, staff seconded to Frontex by Member States for long periods, staff provided by Member States for short-term deployments and staff in the Rapid Reaction Reserve for rapid border interventions. The operational staff includes border guards, return escorts, return specialists and other relevant staff. Permanent staff should be deployed as part of teams. The actual number of operational personnel deployed from the standing service will depend on operational needs. Operational staff deployed as team members should have all the necessary powers to carry out border controls and to carry out tasks requiring executive powers, including the use of force, in accordance with applicable national and Union law. If statutory staff exercise executive powers, Frontex is liable for any damage caused. A member of the statutory staff shall be liable to disciplinary action before the Executive Director of Frontex. During a joint operation, a pilot project, the deployment of a migration management support team, a rapid border intervention, a return operation or a return intervention, members of the teams on the territory of the host Member State, including statutory staff, shall be treated in the same way as officials of the host Member State with regard to any possible criminal act committed against or by them.⁴⁰

The armed conflict in Ukraine and the related instrumentalisation of migratory movements at the eastern external border of the Schengen Member States makes the smooth functioning of border services even more important for ensuring the internal security of the Schengen area. The establishment of a permanent service at Frontex streamlines and increases the efficiency of the agency's operations. It causes Frontex officers to move from being passive observers of the activities of national officers to actively participating in operational activities, including those requiring the use of coercive measures. As the EC points out in the new Pact on Migration and Asylum, a permanent service remains an essential element in ensuring the necessary capacity to intervene quickly and sufficiently.⁴¹

ESTABLISHING A MULTI-ANNUAL STRATEGIC POLICY FOR EUROPEAN INTEGRATED BORDER MANAGEMENT

The third phase in the evolution of the principle of shared responsibility is marked by the promulgation of a 'strategic policy' in a European Commission Communication⁴² in March 2023. The 2019 EBCG Regulation introduced an important operational

⁴⁰ EBCG Regulation 2019, article 85.

⁴¹ *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum*, COM(2020) 609 final, p. 15.

⁴² *Communication from the Commission to the European Parliament and the Council Establishing a Multiannual Strategic Policy for European Integrated Border Management*, COM(2023) 146 final, [hereinafter referred to as the EUIBM Strategic Policy Communication].

planning novelty by granting the European Commission the power to define multi-annual EUIBM strategies. The structure of the five-year multiannual strategic policy cycle for European Integrated Border Management comprises four main stages: (1) the setting of the political direction by the Union institutions; (2) the technical and operational strategy on European Integrated Border Management developed by the Frontex Management Board; (3) the national strategies on European Integrated Border Management developed by Member States; (4) the evaluation carried out by the Commission for the renewal of the cycle. For the first time, the EC exercised its power in 2022 by launching a consultation procedure. Earlier, in the new Pact on Migration and Asylum, it announced that it would present a policy paper on the multiannual strategic policy cycle and implementation in the first half of 2021.⁴³

As the EC points out, the aim of the strategy is to provide a common policy framework and guidelines for the implementation of effective integrated border management⁴⁴ for the period 2023-2027. The strategy takes into account both megatrends, such as global inequality on a wider scale, climate change, demographic growth and potential future pandemics, and short-term geopolitical and operational conditions. As the EC notes, *[t]he Russian war of aggression against Ukraine has reconfirmed the reality of a hostile geopolitical context at Europe's Eastern borders*. The 'strategic policy' also takes into account the new phenomenon of instrumentalisation of migration for political purposes implemented by state entities and the already well-known activities of organised criminal networks.⁴⁵

In its position paper, the European Commission reaffirms and supplements the EUIBM principles stemming directly from the content of the 2019 EBCG Regulation.⁴⁶ It first points out the joint responsibility of national authorities and Frontex, also confirming that the main responsibility lies with national authorities. At the same time, the European Commission states that *[w]hile Member States retain the primary responsibility for the management of their external borders in their interest and in the interest of all Member States and are responsible for issuing return decisions, the Agency should support the application of Union measures relating to the management of the external borders and return by reinforcing, assessing and coordinating the actions of the Member States which implement those measures*. Further, European Commission goes on to list among the principles of the EUIBM: a four-tier access control model,⁴⁷ comprehensive near real-time situational awareness; continuous readiness to respond to emerging threats; a well-established system of coordination, communication and integrated planning; an inter-agency approach; and a common culture and high level of professionalism among the Border Guards.

In particular, the European Commission's 'strategic policy' implies the obligation to prepare EU (by Frontex) and national operational strategies for EUIBM. The overall

⁴³ *Ibid.*, p. 14.

⁴⁴ EBCG Regulation 2019, article 8(4).

⁴⁵ EUIBM Strategic Policy Communication, p. 4.

⁴⁶ *Ibid.*

⁴⁷ EBCG Regulation 2019, recital 12.

(EU) strategy covers actions at EU and national levels, including actions aiming at harmonisation of practices, standardisation of technical means and interoperability in the operational dimension. The overall strategy is accompanied by an action plan outlining key measures, timelines, milestones, resources needed and monitoring arrangements.

Member States' EUIBM strategies will be built on a national centralised governance structure, coordinating all relevant authorities involved in border management and return, and taking into account the impact of other EU policies implemented at the external borders of Member States by relevant national authorities, including customs and sanitary control authorities. Member States' strategies set out arrangements for border management and participation in relevant EU mechanisms coordinated by Frontex and other relevant EU actors. The document also specifies the current and planned allocation of human and financial resources and the main milestones for the development of the necessary infrastructure, and establishes a review and monitoring mechanism.

As indicated by the European Commission in its 2018 legislative proposal, the multiannual cycle *should set out an integrated, unified and continuous process for providing strategic guidelines to all the relevant actors at Union level and at national level in the area of border management and return so that those actors are able to implement European integrated border management in a coherent manner.*⁴⁸ In addition to the current benefits in terms of more efficient and effective management of migration flows, the effects of cooperation under the 'strategic policy' may be a prelude to the third stage in the development of border cooperation, the exclusive powers model referred to earlier. It might be particularly relevant in light of the fact that the recently concluded Conference on the Future of Europe, in its recommendations, called on the EU institutions to extend Frontex's competences, including full access to activities carried out at the external borders.⁴⁹

CONCLUSIONS

Since 2015, the European Commission seems to have been gradually implementing the plan to build a European border guard, proposed in the 2014 feasibility study. The original Frontex Regulation implemented a support scenario model, and in 2016 it entered the implementation phase of the participation scenario model. The third stage, the delegation and accountability scenario, remains unrealised, although the conclusions of the Conference on the Future are very consistent with it.

The evolution of EUIBM is inevitably linked to the identification and expansion of the principle of shared responsibility, which defines the interplay between national competent authorities and Frontex. The EUIBM in its current format appears to have

⁴⁸ *Ibid.*, recital 16.

⁴⁹ Conference on the Future of Europe, Panel IV, Recommendation no. 8, p. 5, at <https://wayback.archive-it.org>, 10 November 2023.

exhausted the treaty possibilities of limiting the competences of national authorities and further expansion of Frontex's mandate should be preceded by treaty reform. The current European Border and Coast Guard system forming a network consisting of Frontex and national authorities remains within the limits of the powers conferred. The establishment of an autonomous corps at Frontex and the entrusting of its officers with the right to use coercive measures, despite legitimate doubts, did not initiate much systemic discussion. The transfer and use of strategic planning competences was also accepted without protest from Member States. It is not excluded that the Union's institutions will want to take up the challenge of the Conference on the Future of Europe to deepen European integration and pursue the implementation of the exclusive powers model. However, it should be unequivocally emphasised that this will require a prior reform of primary law.

The reform of the EUIBM and the redefinition of the interaction between national authorities and Frontex is facilitated by the unstable geopolitical situation. Of particular relevance is the ever-present external migratory pressure, which has had a significant impact on the functioning of the EU since the first decade of the 21st century. The migratory movements of 2015 were particularly important, as they gave the EC the impetus to initiate reform and introduce the principle of shared responsibility. Already at that time, the 2016 ECBG Regulation introduced the hitherto unused possibility of a procedure obliging a Member State to cooperate with Frontex (now Article 42 of the 2019 ECBG Regulation). The possible use of this procedure will lead to a significant reduction in the influence of national authorities on the internal security of a Member State. The ongoing destabilisation of the migration situation has also allowed Frontex to strengthen its competences in 2019 with the establishment of a permanent corps. The war in Ukraine and the instrumentalisation of migration by the Russian Federation was a key reason for the development and adoption of the first EUIBM policy strategy. The persistence of existing security threats or their escalation will create fertile ground for further deepening of the integration in the EUIBM, but it seems that the current treaty framework is not flexible enough to give it a legal basis.

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