Whose *Mare*?

Rule of law challenges in the field of European border surveillance in the Mediterranean

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Abstract

This paper examines key developments in the field of European border surveillance in the Mediterranean. By asking, 'Whose Mare?', we focus on rule of law challenges stemming from these developments in a post-Lisbon EU. The developments examined are the Italian Navy-led Mare Nostrum operation, the debates over European 'exit strategies' for this operation and the ensuing launch of the Frontex Triton joint operation (JO). The recently adopted Regulation on Frontex sea border surveillance operations is also presented as a key development to understand the rule of law challenges. Moreover, the adoption of the European Union Maritime Security Strategy (MSS) and the development of several maritime surveillance systems in the EU highlight that a wide range of actors seeks authority over this field.

Although the home affairs-driven and Schengen-based cooperation in this field was initially developed in informal 'clubs', it has gradually been institutionalised and formalised in rules, competences and mandates. This cooperation is now subject to more – although still incomplete – rule of law frameworks and the involvement of the Union legislation and the Court of Justice. Moreover, it is built on a civilian law enforcement basis, thereby excluding other policy-making communities from the field of mobility surveillance. This paper argues that the adoption of the MSS signals a renewed attempt by the defence, foreign and maritime affairs policy-making communities to seek authority over this field. We understand this as a result of the 'politics of de-pillarisation' in a post-Lisbon EU.

This paper presents several emerging rule of law challenges as authority over this field is often sought outside EU rule of law frameworks. As a result, the possibilities for public, parliamentary and judicial scrutiny are limited, thereby hampering the taking of responsibility for persons seeking international protection. This risks taking this field back to the days of the 'laboratory' and 'experimental governance' approaches to policy-making. The recommendations therefore highlight the need for more accountability, suggesting, inter alia, that the European Court of Auditors assesses the 'dual use' funding behind the MSS and that the Fundamental Rights Officer in Frontex scrutinises the Triton JO as a critical test case for the application of the Regulation on Frontex sea border surveillance operations.

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Introduction

The field of European border surveillance in the Mediterranean has experienced a recent multiplication of legal, policy and operational developments. We have witnessed the launch of the Italian Navy *Mare Nostrum*[1] operation after headline-grabbing cases of deaths at sea in the Mediterranean as well as the search for EU 'exit strategies' for the operation, finally resulting in the Frontex (EU Border Agency) *Triton* joint operation (JO). In the background of these developments, the negotiation process and adoption of a new Regulation 656/2014 covering Frontex sea border surveillance operations has constituted a major step for establishing common EU rules on maritime surveillance of human mobility, and most centrally on search and rescue (SAR) at sea and the disembarkation of persons. At the EU policy formulation level, the adoption of the EU Maritime Security Strategy and its Action Plan under the auspices of the Italian presidency during the second half of 2014 has brought to light a growing number of EU and national actors entering the field of maritime border surveillance. This is also reflected in the proliferation of different surveillance systems and technologies now operational or under development, such as the European border surveillance system EUROSUR, the maritime surveillance project MARSUR and the development of a Common Intelligence Sharing Environment (CISE). These developments add to the complexity of the field of European surveillance in the Mediterranean and provoke questions about 'who' does 'what' 'where' on what basis and under which rule of law framework.

By asking, 'Whose *Mare*?', this paper aims at gaining a better understanding of the ways in which these legal, policy and operational developments can be understood in a post-Lisbon Treaty EU arena. It does so by examining how the actors and security professionals behind these developments are attempting to gain authority and legitimacy over the field of European border surveillance in the Mediterranean, and how they do so inside and outside the post-Lisbon Treaty rule of law frameworks. While previous research has already examined the merging between civilian/border and military authorities in border surveillance and the management of migration in the EU,[2] as well as the tensions between interior and foreign affair professionals

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[1] "*Mare Nostrum*" is Latin for "Our Sea". The Romans already called the Mediterranean Sea by this name. It became more controversial, however, after it was also used by the fascist Mussolini government to push for a sphere of Italian influence in the Mediterranean Sea.

[2] See for instance D. Bigo (2014), "The (in)securitisation practices of the three universes of EU border control: military/navy – border guards/police – database analysts', *Security Dialogue*, Vol. 45, No. 3, pp. 210, 220.

in the Europeanization of migration policy,[3] this paper argues that the institutional configurations which have emerged since the entry into force of the Lisbon Treaty in 2009 have changed this field in at least two ways: First, by making more transparent some of these old struggles between these security actors; and second, by bringing more into the spotlight foreign affairs and military professionals at domestic and EU levels as a result of the setting up of the European External Action Service (EEAS), the consolidation of the European Defence Agency (EDA) and experimental or 'flexible' negotiation venues inside the Council such as the ad hoc, informal and cross-sector Council working group called the Friends of the Presidency (FoP) Group. These actors are using the scrapping of the First, Second and Third Pillar divide resulting from the Treaty of Lisbon[4] – *the politics of de-pillarisation* – as a tool to gain legitimacy and authority in the setting of priorities, financial resources and surveillance technologies deployed in the field of maritime surveillance of human mobility.

While several have already engaged in positioning themselves in these struggles, by calling for the further involvement of military capabilities in the Mediterranean,[5] in this paper we instead argue that these authority struggles actually pose a series of profound rule of law and ethical challenges which should be openly debated and taken into consideration in any future EU policy debates regarding border and migration management in the Mediterranean. We understand 'rule of law challenges' here as attempts to evade EU rule of law and supranational accountability frameworks, thereby enabling 1) the shifting of responsibilities for the individuals targeted by these developments, who are often persons seeking international protection or at distress at sea, and 2) the lack of democratic accountability of the involved decision-shaping and decision-making processes. The focus of the analysis is thus on the *authority struggles and rule of law challenges* and their interrelationships in this policy field.

Section 1 of the paper starts by outlining key policy, legal and operational developments in the field of European border surveillance in the Mediterranean. Throughout the discussions of these developments, we bring to the forefront the different yet interrelated struggles by actors to seek authority over this field and the rule of law challenges that mark or drive these activities. To provide a better understanding of the broader tendencies characterising this field, section 2 presents the cross-cutting elements of the developments discussed in Section 1, thereby identifying authority struggles between actors and alliances from different policy-making communities as well as challenges over whether their activities fall inside or outside EU rule of law frameworks. We furthermore present our understanding of why these actors and approaches could come to the forefront in a post-Lisbon EU and highlight their attempts at evading EU rule of law frameworks. These two key elements – *authority struggles and rule of law challenges* – are presented in the conclusion (section 3) as interlinked drivers behind the developments in the field of European surveillance in the Mediterranean, resulting in increasing *divergences between the rule of law and authority* in EU maritime border surveillance-related policies. This challenges central rule of law principles and regulations governing the responsibility for 'who' does 'what' 'where' in EU border, asylum and migration policies. The recommendations laid down in Section 4 address some of the rule of law deficits marking this field.

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[3] V. Guiraudon (2000), "European integration and migration policy: vertical policy making as venue shopping", *Journal of Common Market Studies*, Vol. 38, No. 2, pp. 251-271; S. Carrera, L. den Hertog and J. Parkin (2012), "What prospects for EU-Southern Mediterranean relations?", MEDPRO Technical Report, No. 15, August.

[4] The Lisbon Treaty abolished the 'three pillar' structure that had been introduced by the Maastricht Treaty and that consisted, after the Treaty of Amsterdam, of the 'first' Community pillar (the former Treaty establishing the European Community), the 'second' pillar for Common Foreign and Security Policy (CFSP – former Title V of the Treaty on the EU) and the 'third' pillar for Police and Judicial Cooperation in Criminal Matters (PJCC – former title VI of the Treaty on the EU). However, CFSP is still covered by its distinct set of rules stipulated in Title V of the current Treaty on the EU, whereas other policy fields are now covered by the Treaty on the Functioning of the EU.

[5] Cf., R. Parkes (2014), "Integrating EU defence and migration policies in the Mediterranean", FRIDE Working Papers, No. 125, November; H. Brady (2014), "*Mare Europaeum?* Tackling Mediterranean migration", European Union Institute for Security Studies Brief, No. 25, September; M. Drent, K. Homan, D. Zandee (2013), "Civil-military capacities for European Security", Clingendael Report, December.

1. Recent developments: a field of authority struggles and rule of law challenges

The field of European surveillance in the Mediterranean is experiencing a proliferation of initiatives and strategies. This section presents an overview of these various developments and their interrelationships. From October 2013 till October 2014, the Italian Navy-led *Mare Nostrum* operation was fully operational (section 1.1) and European 'exit strategies' for it fiercely discussed at Italian and EU levels, eventually leading to the launching of the Frontex *Triton* JO in November 2014 (section 1.2). The negotiation dynamics and final adoption in May 2014 of the new Regulation on Frontex sea border surveillance operations, including SAR and disembarkation, should be understood as a crucial driver and outcome of the processes that shape this field (section 1.3). The adoption of the MSS in June 2014, driven by the defence, foreign affairs and maritime affairs policy-making communities, can also be seen as being in dialogue with these developments (section 1.4). Finally, the authority struggles over the surveillance of maritime mobility present themselves visibly when analysing the multiplication of EU-driven and -financed surveillance systems as initiated by different communities of policy-makers (section 1.5).

1.1 The Mare Nostrum operation

The *Mare Nostrum* operation was launched on 18 October 2013 by the Italian Navy, following headline-grabbing cases of deaths at sea just off the Italian island of Lampedusa, in which more than 300 individuals lost their lives.[6] This was not a completely new operation, but rather a serious upgrade of the ongoing naval operation "Constant Vigilance".[7] Initially, the idea was to establish a Frontex JO as a response to these tragedies. The former EU Home Affairs Commissioner Malmström suggested this by calling for "an extensive Frontex search and rescue operation that will cover the Mediterranean from Cyprus to Spain",[8] announcing that the member states should consider making available additional support for Frontex to carry out this operation.[9] However, the Italian government went ahead with the *Mare Nostrum* mission. It became clear from interviews that Frontex and the Commission were largely unaware of the launch of *Mare Nostrum*, in what they consider a clear unilateral member state action.[10]

There are diverging estimates of the overall operating costs of the *Mare Nostrum* operation, but according to some media sources they amount to about €9 million per month.[11] Italy requested EU funding from the External Borders Fund (EBF) in November 2013, after which the Commission granted €1.8 million to Italy from the emergency support envelope under the EBF. This was supposed to cover one month of operating costs of the surveillance activities in the operation.[12] After this financial support, the Commission did not grant further funding for the *Mare Nostrum* operation but did offer financial support to Italy for other purposes.[13]

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[6] BBC (2013), "Mediterranean 'a cemetery' – Maltese PM Muscat", 12 October. Recently, in August 2014, around 300 further deaths were reported in separate incidents off the Libyan coast, bringing the total death toll estimated by the UNHCR for 2014 to 2,000 individuals; see: Euronews (2014), "Drownings rise among migrants trying to reach Europe by sea", 27 August.

[7] See: Italian Defence Ministry (2013), "Mare Nostrum Operation" (www.marina.difesa.it/EN/operations/Pagine/MareNostrum.aspx).

[8] European Commission (2013), Commissioner Malmström's intervention on Lampedusa during the Home Affairs Council press conference, MEMO, Luxembourg, 8 October.

[9] Times of Malta (2013), "Malmström proposes Med-wide search and rescue mission for migrant boats", 8 October.

[10] Interview at the Commission, DG Home Affairs.

[11] Times of Malta (2013), "Malmström: Frontex cannot substitute Italy's Mare Nostrum operation", 9 July. The *Mare Nostrum* Operation cost Italy □114 million in total, and around □9 million a month. See: Agence Europe (2014), "JHA: Triton introduced and Mare Nostrum withdrawn", Brussels, 31 October.

[12] Interview at the Commission, DG Home Affairs.

[13] See for an overview of some of this funding amounting to □50 million: European Commission (2014), Staff working document – Implementation of the Commission on the work of the Task Force Mediterranean, Part 2/2, SWD(2014) 173 final, Brussels, 22 May, p. 40.

The operational area stretched far beyond Italian territorial waters and contiguous zones, overlapping with the Maltese and Libyan SAR zones,[14] and a large number of assets participated in the operation, such as naval vessels, airplanes, drones and helicopters.[15] The main actor driving the operation was the Italian Navy under the ministry of defence, with more than 900 personnel dedicated to the operation.[16] Naval vessels indeed took a leading role in the interception activities of the operation. Echoing similar statements from Italy, Frontex former Interim Executive Director Gil Arias explained that a *Mare Nostrum* type of operation was only possible with military ships, due to their capacity to carry a large number of people.[17] Interestingly, the operation also involved Slovenia, which offered a navy patrol boat with about 40 members for a period of some weeks.[18]

The Italian Navy reported that by the end of October 2014 150,810 persons[19] had been 'rescued' by *Mare Nostrum*.[20] This means that the Mediterranean migration flows towards Europe in 2014 surpass those following the Arab Spring in 2011, when 141,000 persons were detected in the Mediterranean.[21] Mr Arias has reported that on the Central Mediterranean route, persons are departing mainly from Libya (86%),[22] with Eritreans and Syrians in the lead (respectively, 23% and 17%) – the latter representing the largest increase for one nationality in comparison with 2013.[23] According to Mr Arias, most of the incidents at sea (people rescued or intercepted) have occurred within the operational area of *Mare Nostrum*, near the Libyan coast, and not in the operational area covered by the ongoing Frontex joint operations (JOs) *Hermes* and *Aeneas* (see further section 1.2). He concluded that "the number of trips and of persons has drastically increased with the launching of *Mare Nostrum*. I am afraid of saying it is a pull factor, but the smugglers have abused the proximity of this operation near to the Libyan coast to put more people in the sea with the assumption that they would be rescued very soon. This made it cheaper for them, they put less fuel, less food and less water on the boats which at the same time increases the risks of the migrants".[24]

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[14] Amnesty International (2014), "Lives Adrift: Refugees and Migrants in Peril in the Central Mediterranean", London.

[15] Ibid., footnote 54: according to the same Amnesty International report, "The Italian Navy assets available to OMN include: one amphibious ship LPD, which has the overall command of the operation, and has on board medical facilities and (mezzi da sbarco e gommoni a chiglia rigida); two Maestrale frigates, each with a AB-212 helicopter on board; two patrol vessels Costellazioni/Comandanti and Minerva type, which can have on board a AB-212 helicopter; two EH-101 (MPH) heavy helicopters, on board the amphibious ship, or stationed in Lampedusa/Pantelleria/Catania as required; one P180 aircraft, with ForwardLookingInfraRed – FLIR technology, at Pratica di Mare; one LRMP Breguet Atlantic in Sigonella; the radar network of the navy which can receive commercial vessels signals (through AutomaticIdentification System – AIS technology)."

[16] Italian Defence Ministry (2013), op. cit.

[17] Hearing before the European Parliament's LIBE Committee on 4 September 2014.

[18] Italian Defence Ministry (2014), "Il Ministro della Difesa Mario Mauro incontra il Primo Ministro Sloveno – la Slovenia partecipa all'emergenza immigrazione con una nave in Mare Nostrum", *Comunicato stampa*, Nr. 18, 17 January (www.marina.difesa.it/documentazione/comunicati/Pagine/2014_018.aspx).

[19] We prefer to use the word "persons" over, e.g. "migrants", as this is a term referring to them in their most basic capacity as human beings, avoiding discussions upfront over whether they are "migrants" or "refugees".

[20] The Guardian (2014), "Italy: end of ongoing sea rescue mission 'puts thousands at risk", Brussels, 31 October.

[21] Frontex Interim Executive Director Gil Arias during a presentation to the Parliament's LIBE Committee on 4 September 2014. This number of arrivals in the context of *Mare Nostrum* should however be put in context as they constitute only a minor share of all entries into the Schengen Area each year (over 16 million short stay Schengen visas issued in 2013, see statistics published on website of Commission DG Home (http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/visa-policy/docs/synthese_2013_with_filters_en.xls) and of those applying for asylum, e.g. 435,000 in 2013, see Eurostat figures: http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-QA-14-003/EN/KS-QA-14-003-EN.PDF.

[22] According to Frontex data: 9% from Egypt, 4% unknown, 0.9% Turkey, 0.4% Tunisia and 0.1% other. See: Presentation by Frontex Interim Executive Director Gil Arias during a presentation to the Parliament's LIBE Committee on 4 September 2014.

[23] Ibid.

[24] Ibid.

The operation's objective has always been presented as two-sided, namely serving humanitarian and security purposes:[25] the activities in the operation have included surveillance, search and rescue (SAR), "control procedures on the migrants rescued", the arrest of facilitators and the disembarkation in Italian ports.[26] This has resulted in a certain blurring of 'what' precisely *Mare Nostrum* is doing. At the same time, however, the official discourse has been that the main objective is SAR, and that this can best be implemented by the Navy for its capabilities, i.e. fulfilling 'humanitarian' purposes with 'military' means. This also clearly sets the *Mare Nostrum* operation apart from the EU initiatives in this area, as both SAR and military involvement are exactly the sensitive EU competence lines running through this field, as further explained below. Moreover, the ambiguous context in which the operation came into existence, unilaterally launched by the Italian Navy without informing EU level actors and while the idea of a Frontex operation was still floating around, indicates the authority struggles behind choosing from contrasting responses to the deaths at sea. This is not just an EU versus member state contrast, but should also be understood in the Italian context where the Navy and other civilian/interior ministry actors are engaged in authority struggles.[27]

Regarding rule of law challenges, the fact that this was an explicitly SAR-focused and military-driven member state operation entails that it is not covered by the EU rule of law frameworks in the area, such as the new Frontex sea border surveillance Regulation discussed in section 1.3 below and the EU Charter of Fundamental Rights. Moreover, there have been various reports indicating that the Italian authorities did not engage in the necessary procedures to render the EU Dublin Regulation effective, such as fingerprinting,[28] thereby allowing persons to travel northwards and apply for asylum in another EU member state. This point should not be mistaken for an argument in favour of these EU rules and although this may be well motivated by the lack of adequate reception facilities in Italy, as confirmed by judgments from the European Court of Human Rights (ECtHR) and a German court.[29] It does however signal that also in the follow-up of the *Mare Nostrum* operation the application of EU rule of law frameworks was questionable and that there was a shifting of responsibility for the individuals seeking international protection or in distress at sea. All this underlines that the choice for establishing the *Mare Nostrum* operation – constituting a *specific type* of response to the deaths at sea – can be understood in the context of authority struggles between national and EU levels which raise a number of rule of law challenges, as highlighted in this paragraph and further elaborated upon in section 2 below.

1.2 'Who wants *Mare Nostrum*?' and Frontex *Triton* JO

The whereabouts and actual future of the *Mare Nostrum* operation was the object of much discussion at national and EU levels during 2014. In Italian politics, the Northern League called for the suspension of the operation and the Deputy Senate Speaker, Mr Gasparri from the *Forza Italia* party, labelled it as an undesirable "taxi service".[30] This resonates with a wider argument heard amongst some policy-makers, namely that *Mare Nostrum* has become a 'pull factor' for immigration into Europe.[31]

The role of the EU Border Agency Frontex (European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union) was key in the debates about the future of the *Mare Nostrum* operation. It was founded in 2004 as a former First Pillar Agency and its legal mandate

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[25] ANSAmed (2013), "Immigration: Italy launches Mare Nostrum, 400 more saved", Rome, 15 October.

[26] Italian Defence Ministry (2013), op. cit.

[27] As confirmed in several interviews.

[28] P. Fargues and S. Bonfanti (2014), "When the best option is a leaky boat: why migrants risk their lives crossing the Mediterranean and what Europe is doing about it", Migration Policy Centre Policy Brief, No. 5, European University Institute, Florence, October, p. 13.

[29] Cf. ECtHR (2014), Grand Chamber Judgment, Application No 29217/12, *Tarakhel v. Switzerland*, 4 November;

Frankfurt Administrative Court (2012), Az. 1 L 1994/12.F.A., 11 June.

[30] G. Dinmore and G. Segreti (2014), "Italy's right calls for end to navy's rescue of African migrants", *Financial Times*, 22 April.

[31] The UK indicated that it would not further support SAR activities in the Mediterranean as it constitutes a 'pull factor', see: The Guardian (2014), "UK axes support for Mediterranean migrant rescue operation", 27 October.

was significantly expanded in 2011.[32] The agency's Commission 'parent DG' is the DG Home Affairs.[33] Frontex can be seen as a typical EU Home Affairs Agency[34] that is emergency- and intelligence-driven and responsible for supporting and coordinating operational cooperation between the Schengen national services of the participating member states and Schengen Associated Countries.[35] The agency builds upon the Schengen *acquis* and one of its key roles is to implement the Schengen Borders Code at the external borders.[36]

Alongside granting the agency a number of new competencies,[37] the amended 2011 Frontex Regulation reinforced its rule of law framework in a number of ways. It raised the importance of the operational plan to be adopted with the host member state before a JO and of the oversight to be exercised by the agency over its implementation, including the competence for the Frontex executive director to suspend an operation where human rights breaches occur.[38] Moreover, the amended Regulation now includes a far greater number of references to human rights and refugee law obligations – such as the principle of *non-refoulement* – and gives the agency the task of further developing a Fundamental Rights Strategy and Codes of Conduct.[39] The obligation was also stipulated to include key European and international maritime, human rights and refugee law in the training of border guards and other personnel prior to their participation in operational activities.[40] More human rights monitoring obligations and structures have been set up, although their efficiency has been subject to debates and concerns, not least by the European Ombudsman who opened two own-initiative investigations into the agency and its safeguarding of human rights obligations.[41]

Moreover, the agency's cooperation with third countries was circumscribed under the 2011 amendments, as the new Regulation stipulates that it "shall comply with norms and standards at least equivalent to those set by Union legislation also when cooperation with third countries takes place on the territory of those countries".[42] *In concreto*, these various provisions make it – in our view – impossible for the agency to once again carry out some of its 'innovative' JOs in cooperation with third states, such as the HERA JOs that counted on the active involvement of Mauritanian and Senegalese officials in intercepting and returning persons.[43] These

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[32] Council (2004), Regulation (EC) 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 (Frontex Regulation), OJ L349/1, 25 November; Parliament and Council (2011), Regulation (EU) 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 EU (Amended Frontex Regulation), OJ L 304/1, 22 November.

[33] Under the Juncker Commission, these DGs may be reshuffled. The new Home Affairs Commissioner Dimitris Avramopoulos will now have the portfolio of "Migration and Home Affairs".

[34] S. Carrera, L. den Hertog and J. Parkin (2013), "The peculiar nature of EU Home Affairs agencies in migration control: beyond accountability versus autonomy?", *European Journal of Migration and Law*, Volume 15, Issue 4, pp. 337-358.

[35] On the origins of Frontex see also S. Leonard (2009), "The creation of FRONTEX and the politics of institutionalisation in the EU External Border Policy", *Journal of Contemporary European Research*, Volume 5, Issue 3, pp. 371-388. As to how Frontex cannot be seen as an institutionalisation of the post-9/11 securitisation of migration in EU, see A.W. Neal (2009), "Securitization and risk at the EU Border: the origins of Frontex", *Journal of Common Market Studies*, Vol. 47, No. 2, pp. 333-356.

[36] The Court ruling on the UK's participation in Frontex also confirmed this: CJEU (2007), Case C-77/05, *UK v. Council*, ECR [2007] I-11459.

[37] Most important, the agency was given the competence to process personal data, see: Art. 11c, Parliament and Council (2011), op. cit.

[38] Ibid., Arts. 3(1a) and 3a.

[39] Ibid., Art. 26a.

[40] Ibid., Art. 5(a).

[41] European Ombudsman (2013), Draft recommendation of the European Ombudsman in his own-initiative inquiry OI/5/2012/BEH-MHC concerning Frontex, Strasbourg, 9 April; European Ombudsman (2014), Fundamental rights and forced returns of migrants: Ombudsman opens investigation, Press Release, No. 20, 22 October.

[42] Art. 14, Parliament and Council (2011), op. cit.

[43] See for more detail: S. Carrera (2007), "The EU border management strategy – Frontex and the challenges of irregular immigration in the Canary Islands", CEPS Working Document, No. 261, Brussels, March.

amendments can therefore be seen as new rule of law frameworks constraining some of the agency's operational leeway.

In terms of its operational presence in the Mediterranean, the JO European Patrol Network (EPN) *Hermes* was launched in 2011 as a response to the mobility flows following the Arab Spring and after a formal request by Italy.[44] Since then, the *Hermes* JO has been extended several times and has continued its activity into 2014.[45] Italy hosts this Frontex JO with its geographical operational area south of Sicily and among the Pelagic Islands.[46] Moreover, the agency operated the JO EPN *Aeneas* since 2011 for several months a year in a geographical area covering the coast of Apulia and Calabria, focusing more on the Ionian Sea and also hosted by Italy. Taken together, a total of 22 member states are taking part in the *Hermes* and *Aeneas* JOs. The number of persons intercepted was reduced significantly during the course of 2014 (see table below), which according to interviews has been mainly due to the action of the *Mare Nostrum* operation as it intervenes more to the south, thereby intercepting persons before they reach the Frontex JO areas. The authority of Frontex in the area had thus decreased significantly as it stood in the shadows of the *Mare Nostrum* operation. In a Commission (DG Home) Communication on the Task Force Mediterranean, and against the implicit background of Italy's *Mare Nostrum* operation, it attempted to make clear that the role of Frontex should still be central, stating that it should be ensured "that reinforced border surveillance operations of Member States are fully coordinated with Frontex joint operations".[47]

Table 1. EPN Hermes 2013 and 2014

Operation name		Total Persons intercepted	Total persons rescued	Facilitators arrested
EPN 2013	*Hermes*	64,647	57,677	204
EPN 2014	*Hermes*	28,953	26,877	76

Source: Frontex Liaison Office in Brussels, August 2014.

Since the start of the Italian presidency in July 2014, Italy has attempted to find European financial and operational support for an 'exit strategy' from *Mare Nostrum*.[48] This coincided with a time when member states, such as France and Italy, lobbied for increased resources for Frontex, pushing the idea of a 'Frontex Plus' operation.[49] Former Home Affairs Commissioner Malmström, however, tempered the expectations by stating in early July, "Frontex is a small agency and cannot take over Mare Nostrum tomorrow".[50] Nonetheless, in an official press release published on 28 August 2014, she stated:

> "We have decided that the two ongoing Frontex operations Hermes and Aeneas will be merged and extended into a new upgraded operation. The aim is to put in place an enlarged 'Frontex plus' to complement what Italy has been doing."[51]

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[44] Frontex (2011), "Hermes 2011 starts tomorrow in Lampedusa", Warsaw (http://frontex.europa.eu/news/hermes-2011-starts-tomorrow-in-lampedusa-X4XZcr).

[45] See pledged assets to *Hermes* in: Frontex (2014), Programme of Work 2014, Warsaw, p. 134.

[46] Frontex (2014), General Report 2013, Warsaw, pp. 59 and 64.

[47] European Commission (2014), op. cit., p. 35.

[48] ANSA (2014), "Alfano seeks Mare Nostrum exit strategy – Interior minister to discuss Mare Nostrum rebus with Malmström", 26 August. See also: ANSA (2014), "Frontex must take place of Mare Nostrum says Gozi – Alfano to meet Malmström Wednesday", 25 August.

[49] EurActiv (2014), "Italy pushes 'Frontex Plus' to tackle migration crisis", 7 July. See also: EurActiv (2014), "France campaigns for EU border guards", 26 June.

[50] Times of Malta (2014), "Malmström: Frontex cannot substitute Italy's Mare Nostrum operation", 9 July.

[51] European Commission (2014), Statement by Commissioner Malmström after the meeting with Italian Interior Minister Alfano, Brussels, 27 August (http://europa.eu/rapid/press-release_STATEMENT-14-259_en.htm?locale=en).

However, a number of conflicting views were expressed during the press conference as to what exactly this EU-led coordinated effort was going to entail and what its relationship would be to the *Mare Nostrum* operation. The Italian minister of the interior made clear that the new Frontex operation would not be "taking over" *Mare Nostrum*. However, in the same press conference Commissioner Malmström stated:

> "The 'Frontex Plus' operation will substitute, take over Mare Nostrum, even if it will not be to the same extent. 'Mare Nostrum' has been very ambitious and we don't know if we can find the means to do exactly what Italy has done…and it has to be within the Frontex mandate."[52]

Several media sources echoed the Commissioner's statement and announced Frontex was taking over or replacing *Mare Nostrum*.[53] Later, however, Commissioner Malmström clarified the Commission's position before the LIBE Committee of the European Parliament and stated that the new Frontex operation would actually *not* take over *Mare Nostrum*.[54] Several Members of the European Parliament (MEPs) asked about the lack of clarity on Frontex Plus: How is it exactly going to work and who takes responsibility for SAR now carried out in *Mare Nostrum*?[55] Commissioner Malmström stated that the future and continuation of *Mare Nostrum* is a question for the Italian government and that:

> "Frontex does not have the capacity to do Mare Nostrum, not the amount of people, mandate, money or the resources. Mare Nostrum is a very expensive operation and Frontex cannot do this and the Commission has been very clear – we cannot replace Mare Nostrum…The mandate of Frontex is a border guard agency. Now there will be still people coming in the Mediterranean and there will be more people coming and this is something we don't have the solution for."

Former Frontex Interim Executive Director Gil Arias also commented before the LIBE Committee, on 4 September 2014, and responded to MEPs' reactions alluding to the 'division of responsibilities' between *Triton* and *Mare Nostrum*, concerning the issue of 'border guarding' and SAR. Some MEPs indicated that they had been mistaken by the declarations that Frontex Plus would be a substitute for *Mare Nostrum*. Mr Arias stated:

> "'Frontex Plus' is totally misleading for the public…The difference between Mare Nostrum and Triton is the nature of the two operations, while Mare Nostrum is a SAR operation, Triton will be with the main focus on border controls and management, yet frequently the operations coordinated by Frontex end in SAR operations."

By the end of August 2014, Frontex drafted a "concept document" on the future of the JOs EPN *Hermes* and *Aeneas* in the Central Mediterranean, which proposed: "JO EPN *Hermes* 2014 upgraded to new JO EPN *Triton* considering that IT [Italian] national operation *Mare Nostrum* is terminated",[56] with JO EPN *Triton* also incorporating JO *Aeneas*. This option was only deemed effective *if Mare Nostrum were to be discontinued*: as the document made clear, "there is an estimation for low operational effectiveness of JO *Hermes* 2014 as long as *Mare Nostrum* is running (because the latter is covering and intercepting the migratory routes beforehand)".[57] As shown above, the operational area of *Mare Nostrum* is further south, close to Libyan

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[52] See: European Commission (2014), Visit of Angelino Alfano, Italian Minister for the Interior and President in office of the Council of the EU, to Cecilia Malmström: extracts from the joint press conference, 27 August (http://ec.europa.eu/avservices/video/player.cfm?ref=I092071&sitelang=en).

[53] EUobserver (2014), "EU mission to help Italy save boat migrants", 28 August (http://euobserver.com/news/125377); Euronews 2014, "EU 'Frontex Plus' agency to replace Italy migrant sea rescue", 27 August (www.euronews.com/2014/08/27/eu-frontex-plus-agency-to-replace-italy-migrant-sea-rescue).

[54] N. Nielsen (2014), "EU migrant mission will not replace Mare Nostrum", *EUObserver*, 3 September (http://euobserver.com/justice/125456).

[55] For example, questions by MEP Keller.

[56] Frontex (2014), "Concept of reinforced joint operation tackling the migratory flows towards Italy: JO EPN Triton – to better control irregular migration and contribute to SAR in the Mediterranean Sea", Operations Division – Joint Operations Unit, Warsaw, 28 August, p. 10.

[57] Ibid., p. 9.

shores.[58] The clear contrast between the two approaches and the implicit condition that *Mare Nostrum* should be discontinued further highlights the authority struggles of the competing operations.

The Frontex concept document also further underlined the sensitive nature of Frontex getting involved in SAR activities. Its title stated that the new *Triton* operation would "better control irregular migration and *contribute to* SAR in the Mediterranean Sea" and highlighted "early detection as contribution to *national* MS SAR obligations" (emphases added).[59] It also stressed that the "Frontex proposed deployment should not be seen as limitation for the Host MS to plan and deploy their means to respond to irregular migratory flows in the Central Mediterranean as well as to ensure efficient SAR capacity under national responsibility…"[60]

One further hurdle that complicated the launching of the *Triton* JO was the 'squabbling' between Italy and Malta over the disembarkation of persons, which is a long-standing matter of conflict pertaining to Maltese participation in Frontex JOs. The initial 2010 Council Decision on SAR and disembarkation in Frontex sea border surveillance operations[61] resulted in the unilateral withdrawal of Malta from Frontex JOs, due to its opposition to the disembarkation guidelines.[62] This step by Malta, and the lengthy and troubled process of negotiations and the adoption of these Frontex SAR and disembarkation guidelines/rules (see section 1.3), can be understood as a rule of law struggle that influences who can seek what degree of authority over this field. It was later reported that in the context of *Triton*, Malta would be involved "in very exceptional cases, if security factors require it".[63]

Eventually, the *Triton* JO was launched on 1 November 2014 with a monthly operational cost of €2.9 million and its operational area being much more limited than that of *Mare Nostrum*, not stretching beyond the 30 nautical miles from Italy's coast lines.[64] Following diverging statements about the future of *Mare Nostrum*, indicating differences of opinion of the Italian Navy and dDefence minister with the prime minister and interior minister,[65] the operation formally ceased by the end of October 2014, although a two-month transition period would reportedly apply and the future of the longstanding Italian naval operation "Constant Vigilance" would apparently not be affected.[66]

How can we understand these shifting positions on Frontex taking over *Mare Nostrum*? The major obstacles are said to be the limits of the EU's and Frontex's mandates and capabilities. As the excerpts from the LIBE hearing above show, it is argued that Frontex does not have the mandate to carry out a *Mare Nostrum* type of operation. Although it is acknowledged that situations of distress will arise, the agency says it cannot focus on SAR under the rule of law framework applicable to it. Along those lines, the Commission stated that "although Frontex is neither a search and rescue body nor does it take up the functions of a Rescue Coordination Centre, it assists Member States to fulfil their obligations under international maritime law to render assistance to

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[58] This is also confirmed by a map of operational areas included in a recent Amnesty International publication, see: Amnesty International (2014), op. cit., p. 44.

[59] Frontex (2014), op. cit., pp. 1 and 12.

[60] Ibid., p. 11.

[61] 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, 4 May.

[62] Malta Independent (2010), "Malta to no longer host Frontex missions, PN, PL MEPs trade blows after EP vote", 26 March.

[63] Agence Europe (2014), "JHA: Triton introduced and Mare Nostrum withdrawn", Brussels, 31 October.

[64] N. Nielsen (2014), "Frontex mission to extend just beyond Italian waters", *EUobserver*, Brussels, 7 October. The area of 30 nautical miles entails that it will not be limited to the territorial waters of Italy or Malta, as the territorial waters stretch 12 miles beyond the coast line under the provisions of UNCLOS (United Nations Convention of the Law of the Sea), see Art. 3.

[65] The Guardian (2014), "Italian navy says it will continue refugee rescue mission despite plan to scrap it", 28 October.

[66] The Guardian (2014), "Italy: end of ongoing sea rescue mission 'puts thousands at risk'", 31 October. The JHA Council conclusions of 10 October 2014 spoke of a "prompt phasing out" of "the emergency measures taken by Italy", see: Council (2014), Conclusions on "taking action to better manage migratory flows", JHA Council meeting, Luxembourg, 10 October, pt. II.

persons in distress."[67] Moreover, although the new Regulation 656/2014 carries the title "rules for the *surveillance* of the external sea borders"[68] (emphasis added), it deals with SAR as well (see section 1.3). This once more highlights the ambiguity in the mission's objectives and the sensitivities around the competence of SAR, where 'surveillance' is the accepted term used to refer to a *de facto* much wider array of possible activities. These dynamics highlight that authority struggles and rule of law challenges interlink: the degree and form of authority that can be obtained and publicly claimed is also presented as constrained by the applicable rule of law frameworks.

This series of events is exemplary of how rule of law frameworks, namely legal competencies, mandates and rules, can steer the course of debates in EU cooperation regarding border control and surveillance policies in the Mediterranean. It typifies the home affairs-driven responses where primarily *civilian* authorities cooperate on border *surveillance*, and where SAR and military involvement remain sensitive issues. It highlights the importance accorded in the EU home affairs field of professionals to 'who' does 'what' 'where', thereby also excluding other actors – chiefly the military – in the process. Rule of law frameworks can thereby also be used as a forceful argument to refrain from taking action and evade responsibility.

As the *Mare Nostrum* Operation became increasingly perceived as a 'pull factor' in national and EU policy-making circles, it seemed that the continuation of such a SAR-heavy operation became 'unwanted'. The argument that a European response is unable to provide such an operation due to limited mandates and competences could also be understood as an attempt – by Italy and the Commission and Frontex – to hide a more political choice of *not wanting* to continue *Mare Nostrum* in any case. As highlighted above, the official argument advanced was that a limited Frontex JO was "the only possible response" under the EU rule of law frameworks in place, although its "effectiveness" was in turn said to require the discontinuation of *Mare Nostrum*. One could understand this as a way to employ rule of law arguments to win authority struggles. The reluctance to launch a JO with an SAR focus and beyond the territorial waters of EU member states could be understood as a way to evade the new Regulation 656/2014 covering those Frontex maritime operations. This Regulation now more clearly circumscribes central issues such as 'what' constitutes a place of safety and establishing procedures for SAR and disembarkation, thereby also raising the prospects for liability where incidents might occur at sea.

1.3 The Regulation on Frontex sea border surveillance operations

In the background of the developments described above, there was a long and troubled process of negotiating and challenging the rules applicable to Frontex sea border surveillance operations. Frontex JOs are now covered by Regulation 656/2014 adopted in May 2014, which outlines common rules on the interception of ships at sea, including on the high seas, and on SAR and disembarkation.[69] These rules replace a 2010 Council Decision[70] that contained *guidelines* on SAR and disembarkation but that was annulled by the CJEU in 2012 after being challenged by the European Parliament (see more in detail below).[71] The new Regulation contains a legal framework that regulates and hence circumscribes the way in which border surveillance, SAR and disembarkation are to be carried out in the context of Frontex operations. Moreover, it includes an annual reporting mechanism to the Parliament that should include "any incidents which may have taken place".[72]

Merging with another rule of law struggle by Italy, the new Regulation also aims to codify the landmark *Hirsi v. Italy* judgment by the European Court of Human Rights (ECtHR).[73] In that case, the ECtHR found Italian

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[67] Commission (2014), "Frontex Joint Operation 'Triton' – Concerted efforts to manage migration in the Central Mediterranean", MEMO, Brussels, 7 October.

[68] 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 Frontex at the external borders of the Member States of the EU (Regulation on Frontex sea border surveillance operations), OJ L 189/93, 27 June.

[69] Ibid.

[70] Council (2010), op. cit.

[71] CJEU (2012), Case C-355/10, *Parliament v Council*.

[72] Art. 13(2), Parliament and Council (2014), Regulation on Frontex sea border surveillance operations, op. cit.

[73] Ibid., Art. 4.

push-backs to Libya in violation of Articles 3 (*non-refoulement)* and 13 (effective remedy) of the Convention and of Article 4 of Protocol No. 4 to it (prohibition of collective expulsion).[74] This new Regulation includes some red lines and, judging from the fierce member state and inter-institutional struggles, constrains the operational leeway in Frontex maritime operations. However, it should be stressed that rule of law challenges remain, such as, *inter alia*, relating to the insufficient availability of interpreters and legal advisers at sea.[75]

Another problematic issue concerns the role of third-state Rescue Coordination Centres (RCCs) in identifying a place of safety in SAR situations under Article 10(c) of the Regulation. Although other provisions in the Regulation aim to anticipate the possible non-functioning of these third-state RCCs and the rule of law challenges stemming from operations taking place on the territorial sea of third countries,[76] the baseline remains that the responsible RCC – including those of a third state – can designate a place of safety. It is important here to echo the observations of Rapporteur Tineke Strik, who investigated the case of the so-called 'left-to-die-boat' for the Council of Europe Parliamentary Assembly.[77] She highlighted the importance for states to start coordinating SAR activities *immediately*, as every second counts, irrespective of the SAR area from which the distress is sent, until it can be transferred safely to the responsible SAR authority.[78] Article 10(c) of the Regulations should thus not be interpreted by member states to denounce responsibility for distress situations from other SAR areas, such as from the mostly dysfunctional Libyan SAR area.

Moreover, as the rules for interception only cover the member states' territorial seas and the high seas,[79] the responsibility for situations where Frontex operations would *de facto* deter boats from the territorial seas of third states remains uncodified. One can recall here the Frontex HERA JO off the West African coast, where boats were prevented from leaving through cooperation with third-state authorities.[80] In our opinion, since Article 14(1) of the 2011 amended Frontex Regulation and Recital 5 of the Regulation on Frontex sea border surveillance operations now clearly stipulate the respect for Union law even if cooperation takes place in third-state territorial waters,[81] these kinds of practices will now trigger the responsibility of Frontex for possible incidents and human rights violations. This is in line with the argument advanced in this paper that Frontex has gradually become embedded in a rule of law framework (see below section 2.1 and 3).

Rule of law challenges also emerged in the negotiation process of the recent Regulation 656/2014. Six member states with Mediterranean sea borders (Greece, Spain, France, Italy, Cyprus and Malta) argued that the

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[74] ECtHR (2012), Grand Chamber Judgment, Application No 27765/09, *Hirsi Jamaa and others v. Italy*, 23.02.2012.

[75] The Meijers Committee pointed out that the Commission proposal does not codify the *Hirsi v. Italy* judgment by the ECtHR as regards the requirement that effective remedies should be in place, including interpreters, advisers and a suspensive effect of the remedy, see: Meijers Committee (2013), "Note on the Proposal for a Regulation establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by Frontex", 25 May, pp. 2-3. After the Parliament and Council negotiations, the adopted Regulation now formulates that interpreters and legal advisers may be based on shore, but that these matters can be detailed in the operational plan (see Article 4(3), Parliament and Council (2014), Regulation on Frontex sea border surveillance operations, op. cit.). See also: Amnesty International, International Commission of Jurists and the European Council on Refugees and Exiles (2013), "Joint Briefing on the European Commission Proposal for a Regulation of the European Parliament and of the Council establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by Frontex", 6 September.

[76] Art. 9(2.i), Parliament and Council (2014), Regulation on Frontex sea border surveillance operations, op. cit., foresees a situation where "the Rescue Coordination Centre of a third country responsible for the search and rescue region does not respond to the information transmitted". In such a situation, another Rescue Coordination Centre should take over.

[77] T. Strik (2012), "Lives lost in the Mediterranean Sea: Who is responsible?", Report for the Parliamentary
Assembly, Committee on Migration, Refugees and Displaced Persons, Council of Europe, 29 March.

[78] T. Strik (2014), "The 'left-to-die boat': actions and reactions", Report for the Parliamentary
Assembly, Committee on Migration, Refugees and Displaced Persons, Council of Europe, 9 June, pp. 9-10.

[79] See Arts. 6 and 7, Parliament and Council (2014), Regulation on Frontex sea border surveillance operations, op. cit.

[80] See for more detail: Carrera (2007), op. cit.

[81] Recital 5 of the Regulation states that "when cooperation with third countries takes place on the territory or the territorial sea of those countries, the Member States and the Agency should comply with norms and standards at least equivalent to those set by Union law". This echoes a similar provision in Art. 14, Parliament and Council (2011), Amended Frontex Regulation, op. cit.

"regulation of search and rescue and disembarkation in an EU legislative instrument is unacceptable" and "constitutes a red line".[82] They opposed Articles 9 and 10 of the Regulation pertaining to the specifics of SAR and disembarkation. These member states clearly indicated that this remains a member state exclusive competence that is regulated by international law.[83] It is interesting to note that while these six member states were trying to resist EU level rule of law frameworks pertaining to SAR and disembarkation, Italy was engaging in its national and – so it claimed – SAR-focused *Mare Nostrum* Operation. These member states argued that these matters should be exclusively laid down in the operational plans for Frontex JOs, now that this is considered a legally binding document and regulated in Article 3a(j) of the 2011 amended Frontex Regulation. They argued that there should not be a specific list of definitions and obligations in the Regulation.[84]

The crucial turning point in the easing of member states' concerns about the Regulation, was the reassurance that Articles 9 and 10 would unequivocally *only* apply to Frontex operations by explicitly indicating that they pertain to the operational plan of each Frontex JO. This was done by introducing a 'chapeau' provision to these Articles, respectively in Articles 9(2) and 10(1)) stipulating that "the operational plan shall contain…at least" the listed provisions there. Although this limited scope of the SAR and disembarkation rules could already be logically deduced from the overall scope of the proposed Regulation, namely referring to surveillance "in the context of operational cooperation coordinated" by Frontex, this reassured the opposing member states that the formulated requirements relate exclusively to Frontex operations. Although member states had to eventually accept that the Regulation contains the codification of SAR and disembarkation obligations at EU level, they made sure that it does not create obligations and responsibilities for their national operations, such as Italy's *Mare Nostrum.*

The opposition of the member states to an EU rule of law framework covering SAR can also be understood against the background of the long-standing discussions over the extent to which the concept of 'border surveillance' also subsumes SAR obligations. Although SAR is indeed not a formally accepted EU competence and the official activity covered by the Regulation is 'border surveillance',[85] it certainly enters the area of SAR and provides rules applicable to SAR and disembarkation. This is also clear from Recital 1 of the Regulation which states:

> "*border surveillance is not limited to the detection of attempts at unauthorised border crossings* but equally extends to steps such as intercepting vessels suspected of trying to gain entry to the Union without submitting to border checks, as well as *arrangements intended to address situations such as search and rescue that may arise during a border surveillance operation at sea* and arrangements intended to bring such an operation to a successful conclusion" (emphasis added).[86]

In the above-mentioned CJEU case (C-355/10) on the initial 2010 Council Decision, the Court examined the meaning and scope of 'border surveillance' and the extent to which this EU concept covered issues related to SAR and disembarkation. The Court did this to ascertain whether the contested Decision introduced new essential elements in the SBC and should therefore be subject to the Ordinary Legislative Procedure and not to delegated acts. One of the arguments put forward by the European Parliament was that the Decision introduced new essential elements in the concept of 'border surveillance' envisaged in the SBC. The Parliament argued that rules relating to activities such as SAR and disembarkation do not fall within the concept of surveillance.[87] The Council contended that the guidelines were not contrary to the policy aims of

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[82] Council (2013), Doc. 14612/13, Brussels, 10 October, p. 1.

[83] Ibid. See for a highly critical assessment of this position taken by these six member states: S. Peers, "EU rules on maritime rescue: Member States quibble while migrants drown", Statewatch Analysis, 22 October.

[84] Council (2013), op. cit., p. 3.

[85] Art. 2(2), Parliament and Council (2014), Regulation on Frontex sea border surveillance operations, op. cit.

[86] A similar statement is made in Recital 14, which reads, "During a border surveillance operation at sea, a situation may occur where it will be necessary to render assistance to persons found in distress".

[87] CJEU (2012), op. cit., para. 50.

border surveillance and that they were primarily intended to facilitate the running of the operations.[88] In the Council's view:

> "Admittedly, helping ships in distress is not a surveillance measure in the narrow sense. However, if such a situation were to occur during a surveillance operation coordinated by the Agency, it would be indispensable to coordinate in advance how the search and rescue was conducted by various participating Member States. In those circumstances, the Council takes the view that the contested decision does not introduce new elements into the SBC."[89]

Similarly, the Commission contended that the Decision did not introduce 'new elements' into the SBC because:

> "In order to assess whether 'search and rescue' falls within the concept of surveillance, it is important to take into consideration the factual circumstances in which attempted illegal entries arise. In many instances, the surveillance operation will prompt the search and rescue situation, and it is not possible to draw a sharp distinction between those operations."[90]

The CJEU answer to this struggle over delimitating border surveillance was that "it entails political choices falling within the responsibilities of the European Union legislature, in that it requires the conflicting interests at issue to be weighed up on the basis of a number of assessments." Depending on these political choices, the powers of the border guards may vary significantly.[91] Also, the CJEU clarified that the kind of powers conferred to border guards and covered by the contested Decision meant that "the fundamental rights of the persons concerned may be interfered with to such an extent that the involvement of the European Union legislature is required."[92] Political choices were considered to be essential behind the dispute, according to the Court, and they could only be settled through the involvement of the EU legislature. The Court then concluded that the contested Decision contained essential elements of external maritime border surveillance and should therefore by adopted by a legislative act.[93]

This case before the Court is central in understanding how rule of law challenges and authority struggles are intertwined in this field. Certainly, there was *prima facie* a legal dispute over institutional prerogatives. Yet the essential dispute related to who has the authority to shape the content and scope of the rule of law frameworks covering this field. The member states pushed for the adoption of a *narrow set of guidelines* on SAR and disembarkation exclusively in the scope of Frontex JOs. The CJEU judgment eventually resulted in the full involvement of the Union legislature for adopting a new Regulation. Member states could accept these rules under the sole condition that this new EU rule of law framework would not cover their national activities in this field, and hence not create additional obligations, responsibilities and liabilities. The case of Italy is most telling in this regard, as it was the staunchest opponent of binding EU rules on SAR and disembarkation whereas at the same time implementing a significant national operation claiming to do exactly that and which strongly decreased the authority of the Frontex operations also ongoing in the Central Mediterranean. It shows that member states attempted to seek authority in this field outside the scope of EU rule of law frameworks.

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[88] Ibid., para. 53.

[89] Ibid., para. 54.

[90] Ibid., para. 56. The CJEU held in paragraph 84: "In those circumstances, the contested decision must be annulled in its entirety because it contains essential elements of the surveillance of the sea external borders of the Member States which go beyond the scope of the additional measures within the meaning of Article 12(5) of the SBC, and only the European Union legislature was entitled to adopt such a decision."

[91] Ibid., para. 76: The CJEU held: "Depending on the political choices on the basis of which those rules are adopted, the powers of the border guards may vary significantly, and the exercise of those powers require authorisation, be an obligation or be prohibited, for example, in relation to applying enforcement measures, using force or conducting the persons apprehended to a specific location. In addition, where those powers concern the taking of measures against ships, their exercise is liable, depending on the scope of the powers, to interfere with the sovereign rights of third countries according to the flag flown by the ships concerned. Thus, the adoption of such rules constitutes a major development in the SBC system."

[92] Ibid., para. 77.

[93] Ibid., para. 79.

1.4 The EU Maritime Security Strategy: Whose strategy?

Another far-reaching policy development in this domain has been the emergence of the EU Maritime Security Strategy (MSS), which pertains to maritime surveillance in a number of ways. The MSS was adopted by the Council in June 2014 but is the result of a longer process at play in which the defence, foreign affairs and maritime affairs policy communities played a major role. This process was shaped by, *inter alia*, the Integrated Maritime Policy (IMP) adopted in 2007,[94] several (Foreign Affairs and General Affairs) Council and European Council Conclusions[95] and a Commission (DG Maritime Affairs) Communication on integrated maritime surveillance,[96] as well as by a 'Wise Pen' report on maritime surveillance for the EDA.[97] Prepared by the Political and Security Committee (PSC) within the Common Security and Defence Policy (CSDP) structures, the Council Conclusions of April 2010 called upon the High Representative, "together with the Commission and the Member States", to prepare "options for the possible elaboration of a Security Strategy for the global maritime domain".[98] The talks over the MSS were subsequently taken forward in the Council's FoP Group.

The MSS as now adopted clearly deals with migration flows as one of the relevant "risks and threats", where it lists "trafficking of human beings and smuggling of migrants, organised criminal networks facilitating illegal migration".[99] Moreover, the MSS aims to "help secure the Union's maritime external borders".[100] The increased "maritime awareness, surveillance and information sharing" is one of its central pillars to deal with these risks and threats, with "the objective to ensure that maritime surveillance information collected by one maritime civilian or military authority…can be shared and subject to multiuse".[101] In terms of its approach, the MSS indeed follows a dominant "cross-sectoral" approach that promotes "multipurpose", "dual-use" and "civil-military" forms of activities.[102] This also entails the further integration of civilian and military actors and assets, and should more specifically be understood as more cooperation between the navies and coast guards. As the former EU Commissioner for Maritime Affairs and Fisheries recently stated in a speech on the MSS:

> "And when I refer to 'national' capabilities, I mean both military and civilian. This is an essential point. All these capabilities, civilian and military, form an integral part of the overall security set-up and I see no reason for rivalry or antagonism. I hope we can agree on this premise."[103]

Although the implementation of the MSS is to be awaited, it promotes a discourse in which migratory flows are perceived as a source of risk that needs a partially military response. However, here again we can see the competence struggles dominating the field: the MSS explicitly indicates that it "does not affect the respective competences of the Union and its Member States" and that "new structures, legislation, additional administrative burden" should be avoided.[104] That is also why the MSS and its Action Plan are formally non-

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[94] Commission (2007), Communication – An integrated maritime policy for the European Union, COM(2007) 575 final, Brussels, 10 October, adopted later that year by the European Council.

[95] As listed in Pt. I of the MSS: the Council Conclusions of 26 April 2010 (Council (2010), Conclusions on the Maritime Security Strategy, 3,009th Foreign Affairs Council meeting, Luxembourg) and of 23 May 2011 (Council (2011), Conclusions on integration of maritime surveillance – towards the integration of maritime surveillance: a common information sharing environment for the EU maritime domain, 3,092nd General Affairs Council meeting, Brussels) and the European Council (2013), Conclusions, Brussels, 20 December.

[96] Commission (2009), Communication – Towards the integration of maritime surveillance: a common information sharing environment for the EU maritime domain, COM (2009) 538 final, Brussels, 15 October.

[97] F. Del Pozo, A. Dymock, L. Feldt, P. Hebrard and F. Sanfelice di Monteforte, "Maritime surveillance in support of CSDP", The Wise Pen Team final report to EDA Steering Board, 26 April.

[98] Council (2010), Conclusions on the Maritime Security Strategy, op. cit.

[99] Art. V(c), Council (2014), European Union Maritime Security Strategy (MSS), Doc. 11205/14, Brussels, 24 June.

[100] Ibid., Art. III(2).

[101] Ibid., Art. VI(2).

[102] Ibid., Arts. VI(3), VI(5.b).

[103] Commission (2014), Speech at the ESRT conference on "the implementation of the European Maritime Security Strategy", 14 May.

[104] Art. III(b), Council (2014), MSS, op. cit.

binding documents. The adoption of these documents can be seen as a strategy to drive the EU debate over incorporating the navies more in border surveillance, including surveillance of mobility.

The MSS Action Plan has been negotiated in the Council's FoP Group and was adopted on 16 December 2014 by the General Affairs Council.[105] The Italian government sees the adoption of this Action Plan as one of the priorities for its presidency and seems to have steered the discussions towards more attention for surveillance, also including SAR.[106] The "implementation and review" of the Action Plan will also be coordinated by the FoP.[107]

To understand better the authority struggles and rule of law challenges at play here, it is crucial to take a look at the institutional dynamics behind the MSS and its Action Plan. The FoP, the body chosen for negotiations, can be understood as an ad hoc, informal and cross-sector Council working group of member states and EU representatives that does not fall under any of the sector-specific Council configurations, such as those relating to JHA or Foreign Affairs. Rather, it prepares the adoption and then forwards the files to Coreper, in turn feeding it through to the General Affairs Council. The FoP is closely, though not exclusively, linked to the specific set of actors related to the maritime domain, as it was reportedly first used for the adoption of the Integrated Maritime Policy in 2007. It has also been used to prepare the adoption of a legislative act: the Maritime Spatial Planning Directive.[108]

We gathered from interviews that DG Mare usually does the talking for the Commission, although the Commission delegation also varies to include representatives from DGs Move (Mobility and Transport), Enterprise (and Industry), ECHO (Humanitarian Aid and Civil Protection) and Home Affairs.[109] Moreover, for the technical details of setting up the CISE network, DGs Connect (Communications Networks, Content and Technology) and Digit (Informatics) are also in contact with DG Mare, the last leading the file more on the political level. Furthermore, the EDA is represented in the FoP directly, whereas other agencies are represented through their parent DGs. Most of the member states are represented, but not always all of them as some show more interest than others in maritime affairs. The member state delegations are mostly of a defence (navy) and foreign affairs nature. With Greece and then Italy holding the Council presidencies in 2014, the MSS and its Action Plan received serious political priority, also including – against the backdrop of the migration flows in the Mediterranean – the issues of border surveillance, control and SAR. The FoP functions along these lines: the presidency sets the agenda, with support from the Directorate General Policy of the Council Secretariat.[110] It should however be stressed that we also experienced during our research that the information regarding the proceedings of FoP and the specific ministries and EU actors involved in specific meetings is far from transparent. This concerns a key rule of law challenge, namely that there appears to be a transparency and accountability deficit as to what the FoP is actually doing and with which 'friends'.

Although the MSS itself is not directly backed up with funding, because of its dominant cross-sectoral approach its Action Plan foresees attracting funding from an array of sources, such as Horizon 2020 and EDA research funding as well as from external relations funds and European Structural and Investments Funds.[111] If these sources could indeed be mobilised, this would present a funding potential clearly surpassing the mere home affairs-driven funding. Exploring the linkages between funding for civilian and military EU activities was also recently recommended to the Council's Political and Security Committee.[112] One of the central

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[105] Council (2014), European Union Maritime Security Strategy (MSS) – Action Plan, Doc. 17002/14, Brussels, 16 December.

[106] Interview at the Commission, DG Maritime Affairs. The Action Plan does indeed include references to SAR in relation to the capabilities of third countries, see: Council (2014), MSS Action Plan, op. cit., p. 6.

[107] Ibid., p. 21.

[108] Parliament and Council (2014), Directive 2014/89/EU of 23 July 2014 establishing a framework for maritime spatial planning, OJ L 257/135, 28 August. Information provided during an interview at the Commission, DG Maritime Affairs.

[109] Interview at the Commission, DG Maritime Affairs.

[110] Interview at the Commission, DG Maritime Affairs.

[111] Council (2014), EUMSS Action Plan, op. cit., pp. 12, 17-19.

[112] Council (2014), PMG Recommendations on the Note from the High Representative on options for improvement of the financing of civilian and military missions and operations, Doc. 12269/14, Brussels, 28 July.

strategies in that regard is to use 'dual funding for dual use projects',[113] meaning, e.g. Horizon 2020 funds, which can only fund research for civilian applications,[114] will be used in combination with other military-related funds to finance projects that can have uses both in the civilian and military domains, i.e. dual use. However, we question this strategy and understand it as an attempt to evade and conflate the rule of law frameworks governing the EU funds.

If the MSS would indeed be able to bring together in the implementation phase all the actors involved, including the military, then this would potentially mean a serious reversal of a thus far home affairs-driven approach to the maritime surveillance of mobility. This means that there are alternative or parallel fields of actors proposing competing approaches in this area: on the one hand, the home affairs and Schengen cooperation between primarily civilian actors (border guards) and increasingly based on legal mandates, competences and rules; and, on the other hand, the defence, foreign and maritime affairs professionals trying to surpass those rule of law frameworks by encouraging 'cross-sectoral' and 'civil-military' cooperation, presenting experimental ways of working outside rule of law frameworks. Although the MSS Action Plan speaks of "the respect for rules and principles", "rules-based governance" and "rule of law", this seems to be equated mostly with "criminal justice and maritime law enforcement", thus presenting a narrow understanding of the rule of law.[115] This shows that the seeking of authority outside EU rule of law frameworks is not only a struggle mounted by member states in initiatives such as the *Mare Nostrum* operation, but also by EU-level actors pursuing initiatives outside the increasingly formalised and institutionalised home affairs and Schengen cooperation on border controls and surveillance and the Lisbon Treaty rule of law frameworks.

1.5   The surveillance race towards the 'system of the systems': EUROSUR, MARSUR and CISE

The most visible and concrete example of struggles for authority and actor competition in the field of European surveillance of maritime mobility is over which surveillance *system* will manage to become the true and definitive 'system of the systems'. EU policy-making communities are working on their own and parallel surveillance systems, thus clearly opening the space for competition. There seems to be an exponential growth of EU (pilot and research) projects and systems focusing on maritime surveillance and information exchange technologies.[116] The European Council stressed in its 2011 Conclusions on the integration of maritime surveillance:

> "The importance of coordination, at EU and national level, in order to promote coherence and compatibility and to maintain overview and transparency in the many potentially interrelated initiatives and developments at Union level".

For reasons of limited space, this section limits itself to brief discussions of the main systems and the struggles between them, namely the European Border Surveillance System (EUROSUR), the Maritime Surveillance System (MARSUR) and the Common Information Sharing Environment (CISE). Although not the focus of

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[113] As confirmed during interviews.

[114] Art. 19(2), Parliament and Council (2013), Regulation (EU) 1291/2013 of 11 December 2013 establishing Horizon 2020 – the Framework Programme for Research and Innovation (2014-2020) and repealing Decision No. 1982/2006/EC, OJ L 347/104, 20 December.

[115] Council (2014), EUMSS Action Plan, op. cit., pp. 2, 3 and 5.

[116] An overview of a plethora of different systems and pilot/research projects with names such as "BleuMassMed" and "FLUX" is given throughout the recent Commission communication on CISE, see: Commission (2014), Better situational awareness by enhance cooperation across maritime surveillance authorities: next steps within the Common Information Sharing Environment for the EU maritime domain, COM(2014) 451 final. In addition to the many initiatives mentioned there, the "Seahorse network" could also mentioned, in which Libya is also foreseen to participate, as well as the "Close Eye" project, see: Commission (2014), Implementation of the Commission on the work of the Task Force Mediterranean, op. cit., pp. 9, 23, 39.

this paper, it should be noted at the outset that the involvement of private security companies constitutes a crucial driver behind the development of these systems.[117]

In the crucial month of October 2013, with the Lampedusa tragedy fresh in memory, the Parliament and Council adopted the EUROSUR Regulation after a lengthy process of negotiation.[118] The Regulation entered into force in December 2013 for the 19 member states with external borders to the east and the south, with the remaining member states joining in December 2014. EUROSUR is a European border surveillance network, consistently presented as the 'system of the systems',[119] that aims to draw together information from an array of sources, thereby providing a "near-real time" situational picture of the EU external land and sea borders and of "pre-frontier" areas. This should raise "situational awareness" and "reaction capability".[120]

The information is fed into the system via a network of hubs and nodes. Frontex leads the implementation of EUROSUR and is itself also a node, bringing together information into a "European situational picture" and "common pre-frontier intelligence picture".[121] The most important interlocutors for the agency in feeding information into the system are the National Coordination Centres (NCCs) established by the member states. Moreover, information from several EU agencies (e.g. Europol, the EU Satellite Centre, the European Maritime Safety Agency and the European Asylum Support Office), the EEAS, international organisations and third countries is supposed to be entered into EUROSUR. So far, the NCCs are represented by different entities depending on the member state involved, including border guards, (border) police, national guards, the prime minister's office, the interior ministry, the armed forces and the coast guard.[122] The NCCs also cooperate with the respective Maritime Rescue Coordination Centres (MRCCs), with some member states also co-locating the NCC and the MRCC. Although SAR is formally excluded from the Regulation, this suggests indeed that there could be follow-up of EUROSUR information by the competent SAR authorities. Although former Frontex Interim Executive Director Gil Arias downplayed the potential of EUROSUR for SAR purposes,[123] a recent report indicated at least one such SAR follow-up.[124]

EUROSUR is "multipurpose",[125] aiming at "detecting, preventing and combating illegal immigration and cross-border crime and contributing to ensuring the protection and saving lives of migrants".[126] The purpose of saving migrant lives has been a prominent argument in the adoption of the Regulation, and human rights provisions – in particular relating to *non-refoulement*, human dignity and data protection – are also entered into the Regulation.[127]

In line with its 'system of the systems' ambitions, EUROSUR is presented by the main actors behind it – Commission DG Home and Frontex – as *the* preferred way of surveillance and exchange. This is a way to gain more authority, also over the non-home affairs actors engaging in maritime surveillance. For example, the

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[117] See for an excellent analysis: M. Lemberg-Pedersen (2011), "Private security companies and the European borderscapes", in T. Gammeltoft-Hansen and N. Nyberg Sørensen (eds), *The Migration Industry: The Commercialization of International Migration*, Oxford: Routledge, pp. 152-172.

[118] Parliament and Council (2013), Regulation (EU) 1052/2013 of 22 October 2013 establishing the European Border Surveillance System (EUROSUR Regulation), OJ L 295/11, 6 November.

[119] See, e.g. Commission (2008), Examining the creation of a European Border Surveillance System (EUROSUR), MEMO/08/86, Brussels, 13 February.

[120] Arts. 1 and 3(d), Parliament and Council (2013), EUROSUR Regulation, op. cit.

[121] Ibid., Art. 6(a-c).

[122] Written information provided by the Commission DG Home.

[123] N. Nielsen (2014), "EU border surveillance system not helping to save lives", *EUobserver*, 14 May (http://euobserver.com/justice/124136).

[124] Commission (2014), Report – Sixth bi-annual report on the functioning of the Schengen Area, 1 May – 31 October 2014, COM(2014) 711 final, Brussels, 27 November.

[125] Commission, Infographic – EUROSUR

(http://ec.europa.eu/dgs/home-affairs/e-library/docs/infographics/eurosur/eurosur_en.pdf).

[126] Art. 1, Parliament and Council (2013), EUROSUR Regulation, op. cit., the legal basis for the Regulation is Article 77(2.d) TFEU.

[127] Art. 2(4), Parliament and Council (2013), EUROSUR Regulation, op. cit.

Commission (DG Home) recently attempted to do so in the Mediterranean context by stating that "national [border surveillance] efforts – *regardless of the authority undertaking them* – should be shared through the EUROSUR network" (emphasis added).[128] This encourages non-home affairs actors, especially those of a military nature, to also channel their information through the home affairs EUROSUR, as an attempt to gain more information authority. Regarding this military input, the Commission went on to say that this "should be encouraged within the overall legal framework of Frontex and EUROSUR Regulations which would apply to participating military assets".[129] Moreover, the Commission stated that "the possible involvement of countries of departure in maritime surveillance operations should be discussed, within the Frontex and EUROSUR legal framework".[130]

Around the same time that EUROSUR became operational under Frontex leadership, the EDA announced that the MARSUR system reached "operational status".[131] This is arguably the most important project for the EDA, as it was its first project after its establishment in 2005.[132] The objectives of this navy-built network are "to avoid duplication of effort and the use of available technologies, data and information; to enhance cooperation in a simple, efficient and low-cost solution for civil-military cooperation; and to support safety and security".[133] In essence, this is a naval information exchange system. The combined data would bring about a "Recognised Maritime Picture". The participation of member states is "voluntary", with currently 17 member states and Norway participating and open to "third party input such as data from friendly regional states or military partners".[134] The emphasis of the system is on 'networking' on a voluntary basis between naval 'friends' on the basis of built trust, also coined the 'Facebook' approach to information sharing in the maritime surveillance field.[135] The system has a clear military nature and is thus set up without involvement of the Union legislature and outside Union rule of law frameworks. MARSUR was also presented as a 'system of the systems' in its own right and is since the end of October 2014 – after the EDA-led preparatory phase – in its 'live phase' and has been handed over to the EU Military Staff within the CSDP structures in the EEAS.[136]

Finally, the MSS refers several times to CISE as central to the way forward for the surveillance of the European maritime domain. CISE aims to:

> "create a political, organisational and legal environment to enable information sharing across the seven relevant sectors/user communities (transport, environmental protection, fisheries control, border control, general law enforcement, customs and defence) based on existing and future surveillance systems/networks".[137]

The Commission DG Maritime Affairs leads the file in close cooperation with the core actors involved in the MSS. It argues that the CISE would be of particular relevance for the surveillance of maritime mobility flows. In its latest July 2014 Communication, the Commission highlights that the availability of more "relevant information" is crucial:

> "This could potentially lead to the reduction of such threats and risks by 30% on average. Pertinent examples would be information sharing between civilian and military authorities on the influx of migrants to the Schengen Area through the Mediterranean sea…"[138]

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[128] Commission (2013), Communication on the work of the Task Force Mediterranean, COM(2013) 869 final, Brussels, 4 December, p. 16.

[129] Ibid., p. 17.

[130] Ibid., p. 9.

[131] EDA (2014), "European maritime surveillance network reaches operational status", Paris, 27 October.

[132] MARSUR website, "History" (http://marsur.info/page2.php).

[133] EDA (2012), "Together for a stronger Europe", Brussels.

[134] EDA (2013), "MARSUR networking", 13 August (www.eda.europa.eu/our-work/projects-search/marsur-networking).

[135] As indicated during our interviews.

[136] MARSUR website, op. cit.

[137] See DG MARE website (http://ec.europa.eu/dgs/maritimeaffairs_fisheries/consultations/cise/index_en.htm).

[138] Commission (2014), COM(2014) 451 final, op. cit., p. 3.

So, whereas EUROSUR and MARSUR attempt to establish themselves as 'systems of the systems', they are limited to their respective civilian home affairs and military spheres. In contrast to this sector-specific system attempting to gain authority over other sectors, however, CISE is the result of cross-sectoral thinking, thereby aiming to be *the true overarching system* on maritime surveillance at EU level. Although the MSS Action Plan does endorse the sharing of information through EUROSUR and MARSUR, it presents CISE as the true "meta-project" in the field of "maritime awareness, surveillance and information sharing".[139] In other words: EUROSUR and MARSUR will be *one of the* surveillance systems feeding information into CISE when it becomes operational by 2020. This sharing between military and civilian actors is at the very heart of CISE, identified as "one of the most important needs", particularly as regards military input "since military authorities are one of the main holders of maritime surveillance data".[140] Although CISE would not create a new source of information as such but is all about "interoperability" of existing systems,[141] the mere struggles over the format in which the information would have to be fed into the system constitutes a matter of defining and controlling the flow of information in this area, including the different "impact levels" of incidents, as is for example already prevalent in the EUROSUR system.[142] This constitutes a clear authority struggle over the ownership of information exchange and surveillance technologies in this area, with CISE implicitly but most forcefully claiming to be the true and definitive 'system of the systems' in the European field of maritime surveillance. It must be stressed that MARSUR and CISE should however not be contrasted too much, as the actors involved in their development overlap to a high degree. CISE could hence be seen as the next step of the MARSUR network.

However, these authority struggles between surveillance systems and their underlying policy communities also bring about rule of law and ethical challenges. The recent Commission Communication on CISE admits that "Member State authorities carry out many different operational surveillance tasks, many of them to fulfil existing obligations under EU law" which "require specific competences".[143] However, in the MSS and CISE logics, this is exactly what is to be overcome as "maritime risks and threats do not respect national or administrative borders".[144] Therefore, the Commission "will continue to review existing sectorial legislation at EU level *in order to remove possible remaining legal barriers* to cross-sectoral information sharing while ensuring compliance with relevant data protection requirements" (emphasis added).[145] At the same time, the Commission "does not see a need" to start any cross-sectoral legislative process for the development of CISE but rather invites EP and Council to give "political guidance and confirm their willingness to support the proposal".[146] Again, this brings to the forefront most forcefully the point made above: that actors are seeking authority in this field outside EU rule of law frameworks and supranational legal and scrutiny procedures. Or even more: that they are striving to do away with some of the boundaries these rule of law frameworks entail and with the legislative processes that formally accompany them.

2. At a critical junction: Actors inside and outside EU rule of law

The previous sections have painted the picture of a dynamic field of European surveillance of maritime mobility, characterised by authority struggles and rule of law challenges. This section identifies some of the cross-cutting processes at play here. This will focus on the policy communities seeking authority over this field and on the patterns of doing so inside or outside the EU rule of law frameworks. These struggles essentially present us with increasingly diverging processes, both in terms of the policy communities of professionals and rule of law frameworks involved. As Bigo has highlighted in his study on the "universes of EU border control: military/navy – border guards/police – database analysts", these communities each have their own

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[139] Council (2014), MSS Action Plan, op. cit., pp. 7-8.

[140] Commission (2014), COM(2014) 451 final, op. cit., p. 5.

[141] Ibid., p. 3.

[142] Council and Parliament (2013), EUROSUR Regulation, op. cit., Chapter II.

[143] Commission (2014), COM(2014) 451 final, op. cit., p. 2.

[144] Ibid.

[145] Ibid., p. 7.

[146] Ibid., p. 8.

'dispositions' but share a common interest in "global preventive surveillance".[147] This section aims also at providing a better understanding of what has allowed the struggles to come to the forefront so forcefully in recent times.

2.1   Home affairs and Schengen cooperation: towards formalisation and institutionalisation

The analysis provided in section 1 has first showed that there is a process driven by a home affairs and Schengen-based policy-making and operational community of professionals. The Schengen system has indeed been one developed and implemented by a very specific set of actors with a predominantly home affairs or interior ministry nature. Bigo has demonstrated how since the early 1990s the establishment of Schengen and EU free movement was underpinned by a strong discursive component driven by police and security experts, who argued that that the abolition of border controls would constitute a major security deficit calling for a whole series of "compensatory security measures".[148] However, the initial foundations of the Schengen area were in fact mainly driven by economic pressures; the result of an initiative to overcome practical obstacles to cross-border trade. The 1985 Schengen Agreement was negotiated largely by ministers of transport and foreign affairs, and was primarily concerned with establishing the free circulation of goods, hardly touching upon aspects of police and security.[149] Guiraudon has argued that since then foreign affairs ministries were ousted by justice and home affairs ministries, in particular those of the "interior" in the emergence of intergovernmental cooperation on migration control as a new policy venue presenting a flexible, informal, non-binding and secretive nature of 'clubs', which in her opinion has largely justified the security-oriented content.[150]

The resulting picture has been one where interior ministries and corresponding actors have dominated transgovernmental processes of European mobility surveillance. This has meant directly or indirectly sidelining foreign affairs actors as well as military, customs, transport and industries professionals and experts. The predominance of these specific home affairs communities has materialised in one of the guiding principles inspiring the entire Schengen machinery, and which has been highlighted in the Schengen Border Catalogue as a 'best practice': that the national border authorities should be of a civilian (non-military) nature.[151] The catalogue, which aims at bringing some clarity to the Schengen *acquis*, was updated in 2008,[152] and states that "the competent national authority is a specialized Border Guard or Border Police force (not a military one)".[153]

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[147] Bigo (2014), op. cit.

[148] D. Bigo (1996), *Police en Réseaux: l'Expérience Européenne*, Paris: Presse de Sciences Po.

[149] Parkin emphasises, "However, an envoy of the German Ministry of Interior had, during negotiations on the Schengen Agreement, inserted a reference to the effect that reduction of border controls would constitute a 'security risk' of such magnitude that compensatory measures would be needed in the long run to offset this security deficit", J. Parkin (2011), "The difficult road to the Schengen Information System II: The legacy of laboratories and the costs for fundamental rights and the rule of law", CEPS Liberty and Security Series, Brussels, April, p. 3.

[150] In her view: "Yet migration control experts took advantage of new organizational setting not previously available to them. The 'wining and dining culture' of the 1970s Trevi Group alerted law and order ministries to the potential of European-wide scope of policy making. Once a model had been set for security 'clubs' that discussed drugs or terrorism, it was easy to add new types of working groups responsible for other cross-border issues or to widen the subject matter of a pre-existing one… Migration control officials meeting their counterparts in the early 1980s established links between migration, asylum and crime-related issues, and emphasized technical issues that required their expertise". V. Guiraudon (2000), "European Integration and Migration Policy: Vertical Policy Making as Venue Shopping", *Journal of Common Market Studies*, Vol. 38, No. 2, pp. 251-271 at p. 260. See also T. Bunyan (1997), "Key Texts on Justice and Home Affairs in the European Union (Volume 1) From Trevi to Maastricht (1976-1993)", London: Statewatch.

[151] Council (2002), EU Schengen Catalogue: External Border Control, Removal and Readmission, General Secretariat DG H, February.

[152] Council (2008), Updated Schengen Catalogue on External Borders control, Return and Readmission, 3rd Draft, 15250/2/08, Brussels, 2 December.

[153] Moreover, it also recommends a "Centralised and clearly structured responsible public authority with a direct chain of command between Border Guard units at national, regional and local level, ensuring a common approach to border control, a unified planning system and an extensive and fast data flows at all levels of organization", ibid.,p.18.

In relation to the Frontex *Triton* JO, it was also stressed that this should be "under full civilian control".[154] There are a few exceptions, however, as the national authorities in Malta and France show military-related components, and Frontex is participating in the CSDP EUBAM Libya.[155]

In the home affairs-driven and Schengen-based field, authority struggles have taken place around the principles of subsidiarity, solidarity and the actual "division of competences" between the EU and the member states, pertaining to the limits of European intervention. Member states are still said to hold sovereignty over their borders,[156] while at the same time some of these same borders are also *common* external borders of all the participating Schengen states. These struggles have determined the current division of competences and the legal definitions of what the EU can do (border controls/surveillance/SAR).

Although this cooperation initially developed through informal cooperation, the area has become increasingly institutionalised and formalised over subsequent Treaty changes, including the Lisbon Treaty. These processes have led to the involvement of the Union legislature, CJEU jurisdiction and the applicability of EU rule of law frameworks, such as the Charter and a set of harmonised rules and procedures for the crossing of the external borders of the EU as laid down in the Schengen Borders Code.[157] Moreover, through the amending of its founding Regulation in 2011 and the adoption of the Regulation on Frontex sea border surveillance operations in 2014, Frontex has also become embedded in a stronger rule of law framework. Of course, it is clear that this process has also been accompanied by severe rule of law struggles between the EU and its member states. The above described moves by member states in the process of negotiating guidelines and then binding rules for SAR and disembarkation for Frontex operations (section 1.3) constitute attempts to resist and evade EU rule of law frameworks in this field. Nonetheless, and noting the many shortcomings are still found, they constitute drivers and constraints for the shape EU interventions can take in this field.

2.2 Defence, foreign affairs and maritime affairs cooperation: What about EU rule of law?

The processes in this field are, however, at a crossroads, with other policy-making communities at EU and member state level also seeking authority. We see new ways of cooperation emerging outside the gradually formalised and institutionalised home affairs and Schengen-based cooperation and the broader EU rule of law frameworks in place.

The departure from the home affairs-driven responses can be seen in the launching of the *Mare Nostrum* Operation. In responding to the migratory flows in the Mediterranean and the deaths at sea, the EU home affairs 'solution' of a Frontex JO did not initially offer a viable option, at least not in the eyes of the Italian government that initiated its unilateral and navy-led *Mare Nostrum* mission, outside EU rule of law frameworks. While implementing its own alleged SAR-focused operation, Italy's position in the negotiations over the Frontex sea border surveillance Regulation, also concerning SAR rules, further highlights its resistance to such EU rule of law constraints. At the level of EU strategic policy formulation, the MSS is a

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[154] Council (2014), Note from the Presidency to the Delegations, Taking action to better manage migratory flows, Doc. 13747/14, Brussels, 6 October, p. 6.

[155] This is the case of the French *Gendarmerie Maritime* (Ministry of Defence) (www.defense.gouv.fr/marine/organisation/les-forces/gendarmerie-maritime/la-gendarmerie-maritime) and the Armed Forces in Malta, which is under the responsibility of the Minister for Home Affairs and National Security. See www.afm.gov.mt/NewsDetails?l=1&nid=2439&cid=82; Commission (2014), Implementation of the Commission on the work of the Task Force Mediterranean, op. cit., p. 14.

[156] Art. 77.4 of the Treaty on the Functioning of the European Union, which reads, "This Article shall not affect the competence of the Member States concerning the geographical demarcation of their borders, in accordance with international law". See also recital 4, Parliament and Council (2004), Frontex Regulation, op. cit., which reads, "The responsibility for the control and surveillance of external borders lies with the Member States."

[157] Parliament and Council (2006), Regulation (EC) 562/2006 of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code – SBC), OJ L105/1, 13 April. See also: E. Guild (2006), "Danger – Border under construction: Assessing the first five years of Border Policy in an Area of Freedom, Security and Justice", in J.W. de Zwaan and F.A.N.J. Goudappel (eds), *Freedom, Security and Justice in the European Union, Implementation of the Hague Programme*, The Hague: T.M.C. Asser Press, pp. 45-72.

clear example of the competing paradigm as well. This strategy – instead of invoking mandates, competences and legal rules to determine 'who' can do 'what' 'where' – builds exactly on the opposite: 'dual-use' and 'civil-military' approaches are preferred. These approaches do not foster the clear delineation of policy competences and mandates but rather attempt to blur and conflate them in order to establish a 'cross-sectoral' approach, often also outside the formal involvement of the Union legislature.

As we showed in section 1.4, the MSS and its Action Plan are certainly not home affairs-driven responses but were rather shaped in the FoP Group by an alliance of defence, foreign and maritime affairs actors such as the EDA, the EEAS and the Commission's DG MARE. As discussed above, these were exactly those sidelined in the home affairs-driven Schengen cooperation. The emergence of this new alliance of professionals can therefore also be understood as a way for them to gain back authority in this field. So, although it is clear that the initially sidelined policy communities had a 'motive' to seek new authority, the question remains why this alliance of new actors could emerge at this point.

In a way, the cross-sectoral approach of the MSS was foreseeable under the Lisbon Treaty with its emphasis on synergies between former Treaty-based pillars and legal competences. The Treaty framework under which European security cooperation develops has changed since the end of 2009. The entry into force of the Lisbon Treaty remodelled the lines of division between sovereignty-sensitive policy areas and actors in each of them. The ownership of policy domains has been liberalised and actors that used to be imprisoned under 'pillar configurations' have more leeway to engage in new policy venues. This does not only concern the disappearance of the former 'second and third pillars', but also the establishment of the EEAS in 2010. The role of the EEAS, as a *sui generis* service between the Council and the Commission aiming to bring coherence to the EU foreign policy and defence actors and competences encourages this spirit of cross-sectoral EU cooperation. The Lisbon Treaty and its focus on 'de-pillarisation' has fostered a certain mindset which could unravel what we call the 'politics of de-pillarisation'. Of course, there are still legal boundaries in place in the post-Lisbon era, for example, as regards the Common Foreign and Security Policy (CFSP), but the different mindset – and especially the emergence of the EEAS – has allowed for new cross-sectoral alliances and strategies to emerge.

Pawlak – in his study on the external dimension of AFSJ – has argued that 'cross-pillarisation' cannot just foster the coordination of actors and approaches but can also create a situation where a policy field is held hostage by the many institutional 'turf battles' and 'internal cross-pillar politics'.[158] As boundaries increasingly fade away, the space authority struggles amongst a greater number of actors also widens. A similar argument can be applied to our study, namely that the Lisbon Treaty has given larger legitimacy to actors and alliances to enter the sphere of maritime border surveillance. This could be understood as a process of post-Lisbon Treaty 'politics of de-pillarisation' of liberalised new alliances and actors which were marginalised since the origins of Schengen in the 1990s and which now count on new policy venues to steer their interests and agendas.

Overall, this analysis reveals a field of European surveillance of maritime mobility with ample opportunities for authority-seeking strategies between various actors and that is at the same time increasingly marked by the rule of law as one of its determining drivers. The reinforced EU rule of law in this field drives not only the development that *action is covered by it*, but also that *attempts at evading it* are made. The development of the MSS, MARSUR and CISE have been driven in the FoP Group by the EDA, Commission DG Mare and the EEAS in ways which escape any supranational accountability framework provided by the Treaties. They also

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[158] This was examined in relation to cross-pillarisation by Pawlak (2009), who examined cross-pillarisation through the prism of inter- and intra-institutional politics. Pawlak concluded that "the process towards adoption of the Strategy for the External Dimension of JHA serves as the setting for the presentation of intra- and inter-institutional politics resulting both from the struggle of power and from ideological differences within and between the EU institutions (Commission, Council, European Parliament)" (p. 27). He continues, "In a perfect world, the internal cross-pillarization would contribute to the external one in order to build a positive image of the European Union and enhance the effectiveness of European policies. However, in reality, external cross-pillarization may become a hostage of internal cross-pillar politics…The conflict within and between institutions can stem from their striving for influence within policy areas (turf wars), ideological differences over policy approaches and solutions and distribution of scarce resources" (p. 30). P. Pawlak (2009), "The external dimension of the Area of Freedom, Security and Justice: Hijacker or Hostage of Cross-Pillarization?", *Journal of European Integration*, Vol. 31, No. 1, pp. 25-44.

evade a democratic debate and scrutiny about the ethical and fundamental rights challenges inherent to the militarization of border surveillance and management of human mobility in the Mediterranean. Also in the negotiations over the Regulation on Frontex sea border operations, it was clear that member states attempted to evade EU rule of law frameworks concerning SAR and disembarkation. These developments highlight that several actors attempt to work outside EU rules that could allocate responsibility for persons on the move, of which many are seeking international protection or at distress at sea.

3. Conclusions: Whose *Mare*?

'Whose *Mare*?' This was the question posed in the introduction of this paper to better understand the latest legal, policy and operational developments in maritime border surveillance in the Mediterranean. This paper has examined the rule of law challenges inherent to the authority struggles between national and EU security professionals behind these developments. Section 1 discussed the Italian *Mare Nostrum* Operation and the debates on its future, including the central role of Frontex therein. This highlighted disputes over the type of response to deaths at sea in the Mediterranean and rule of law arguments over limited mandates, competences and legal rules. Central to understanding these dynamics was the process through which new binding rules on Frontex maritime border surveillance operations became negotiated and adopted by EU member states. This process showed clear authority struggles over who was to define the status and scope of such EU level involvement in sensitive issues such as SAR and disembarkation. Moreover, it became evident that there was significant member state opposition to EU rule of law frameworks in this area. The negotiation behind Regulation 656/2014 thus presented itself as the focal point in which authority struggles and rule of law challenges interplayed.

The rule of law frameworks could be understood as drivers or parameters of who gains authority under which conditions. Our analysis showed two modes in which rule of law frameworks function as drivers. First, as identified in the debates on taking over *Mare Nostrum*, rule of law frameworks were used discursively to evade taking responsibility for the future of the mission and people seeking international protection in the EU crossing the Mediterranean Sea. Second, authority has been sought by other security professionals often exactly *outside* these EU rule of law frameworks, by trying to limit their scope of applicability. This move has also been evident in the development of the MSS and CISE, in the careful avoidance of questions of applicable EU rule of law frameworks such as mandates, competences, legislative procedures and rules determining 'who' can do 'what' 'where'. The authority struggles emerged most visibly and concretely when looking at the competing EU surveillance systems aiming to be the true and definitive 'system of the systems' as regards the ownership of maritime border surveillance in the Mediterranean.

Section 2 identified the cross-cutting elements running through these developments, highlighting the actors and alliances involved and their relationships with EU rule of law frameworks. It thereby first identified the home affairs and Schengen-based cooperation on border controls and surveillance that has become increasingly formalised and institutionalised in recent decades. Crucially also, the Schengen system has been dominantly implemented by professionals with a predominantly law enforcement, policing and civilian nature. Throughout different Treaty reforms, including certainly the Treaty of Lisbon, and linked to the growing involvement of the Union legislature and CJEU jurisdiction, the Schengen cooperation has gradually endowed itself with a series of legal standards. Although these are still subject to considerable gaps and deficits, in particular in what concerns their implementation and monitoring and the accessibility to effective remedies by concerned individuals,[159] several developments – amongst which also the adoption of the rules for Frontex sea border surveillance operations – have gradually brought this toolkit closer to rule of law standards. The Schengen system also depends on a fundamental distinction between activities in the rubric of 'border surveillance', which fall within the remits of the EU competence, and those labelled as SAR and hence presenting more 'humanitarian' purposes, which remain formally under the sovereignty of national competent authorities of EU member states.

This paper subsequently highlighted other alliances of actors and approaches entering the scene in a post-Lisbon Treaty institutional arena. This approach is marked by its attention to 'cross-sectoral' and 'civil-

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[159] See, e.g. Carrera, Den Hertog, Guild and Parkin (2011), op. cit.; European Ombudsman (2013), op. cit.

military' cooperation, often outside EU rule of law frameworks. The Italian national and Navy-led *Mare Nostrum* operation can be seen as an instance of this. On the more strategic level, the emergence of the MSS shows that indeed these new approaches are now surfacing on the EU level, with alliances of actors from primarily the foreign affairs, defence and maritime affairs policy communities. These alliances consist of the actors that were initially sidelined by the home affairs communities in the 1990s. Translating the approach of 'clubs' in these early days of home affairs cooperation as highlighted above in section 2.1 to the 21st century, this new approach is based on groups of 'friends' that engage in 'networking' on voluntary and non-binding bases, also coined as the 'Facebook' approach to 21st century informal European cooperation.[160] This brings us back to some of the 'experimentalist governance' strategies and 'laboratory' ways of cooperation that we have identified before and that so often come at the expense of the rule of law.[161] These new actors thus have a clear drive to seek new authority in this field, and seem to do so outside EU rule of law frameworks by preferring non-binding and informal ways of working. The de-pillarisation by the Lisbon Treaty created a new cross-pillar drive for 'synergies', thereby promoting these 'cross-sectoral' initiatives. The establishment of the EEAS as a service between the Commission and the Council, with a clear mandate to foster coherence between several policy fields, also facilitated that process.

While some have welcomed the increasing involvement of these actors in maritime surveillance, especially focusing on the opportunities of more military involvement in the Mediterranean,[162] we see sufficient reason to be critical. Although this might be a sign of a more heterogeneous setting of European cooperation, there are a number of challenges which share the common concern that several of these actors and initiatives operate outside EU rule of law frameworks. Also, as highlighted above, the decision-making procedures in the FoP Group show rule of law deficits as regards their lack of accountability. The basic concern is that this hampers action being based on an appropriate legal basis, regulated by a set of clear rules, transparent and open to monitoring, thereby enabling legal certainty, effective democratic accountability and judicial review to safeguard human rights protection of persons on the move – all of which are central EU rule of law principles.[163] In essence, this concerns the question of who is responsible for the persons finding themselves targeted by these control and surveillance developments, who are too often those seeking international protection. As demonstrated by Frontex statistics, the top nationalities of the persons intercepted by the *Mare Nostrum* operation were nationals from Eritrea and Syria, which are also the nationalities for which the recognition rates for refugee status or subsidiary protection are the highest across the EU.[164]

The actors and their non-binding and informal ways of cooperation outside these rule of law frameworks lead to a blurring of the interventions and responsibility and hence liability for possible violations of human rights. This creates legal uncertainties as regards 'what' precisely is being done (border control and surveillance *or* rescue and search at sea?) by 'whom' in which capacity. As more actors enter the field, the picture of who bears what responsibility for the individuals targeted becomes increasingly fuzzy. Moreover, the growing involvement of the military actors – and in particular of the navies – questions their relationship to the Schengen legal framework and other established EU rules. It took the home affairs and Schengen-based cooperation many years of rule of law challenges and authority struggles before it came to adopt more rule of

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[160] As highlighted in our interviews.

[161] J. Pollack and P. Slominski (2009), "Experimentalist but not Accountable Governance? The Role of Frontex in Managing the EU's External Borders", *West European Politics*, Vol. 32, No. 5; Carrera, Den Hertog and Parkin (2013), op. cit.; Parkin (2011), op. cit. See also: T. Balzacq, D. Bigo, S. Carrera and E. Guild (2006), "Chapter 7 - The Treaty of Prüm and EC Treaty: two competing models for EU internal security", in T. Balzacq and S. Carrera (eds), *Security versus Freedom? A challenge for Europe's future*, Aldershot: Ashgate, pp. 115-136 at p. 132-133, thereby also referring to D. Bigo (2005), "Frontiers control in Europe: who is in control?", in D. Bigo and E. Guild (eds), *Controlling Frontiers: Free Movement into and within Europe*, Aldershot: Ashgate, pp. 66-67.

[162] Cf., Parkes (2014), op. cit., Brady (2014), op. cit. and Drent et al. (2013), op. cit.

[163] See L. Pech (2009), "The rule of law as a constitutional principle of the European Union", Jean Monnet Working Paper, 04/09, NYU School of Law.

[164] Data as presented by former Frontex Interim Executive Director Gil Arias before the LIBE Committee on 4 September 2014. The recognition rates statistics are the latest 2014 third quarter numbers available, see: Eurostat (2014), Asylum quarterly report – Q3 2014, December (http://ec.europa.eu/eurostat/statistics-explained/index.php/ Asylum_quarterly_report).

law frameworks. Accepting these 'new' actors and approaches risks going back to an era of non-binding, informal and 'experimental governance'[165] in the field of border surveillance. The new and loose format of actors involved in the FoP Group and the 'soft law' or policy nature of a document such as the MSS also risk sidelining Union legislature and democratic accountability in this policy-making process. It also evades a necessary open and democratic debate about the far-reaching ethical repercussions of the militarization of border surveillance and SAR in the Mediterranean.

This paper showed that a wide range of actors are engaging in rule of law challenges and authority struggles in this field. However forceful their arguments from an operational point of view, these actors cannot escape the EU rule of law and fundamental rights matrix of supranational legal, democratic and judicial accountability which should make no reference to 'pillars'. Moreover, these issues entail inherent 'political choices' having an impact on fundamental rights which cannot escape rule of law and require the involvement of the legislature and democratic accountability – as the Court has previously concluded.[166]

Recommendations

i.   **More scrutiny by the European Parliament of ongoing operations and decision-making.** In the future discussions on the border control, surveillance and SAR operations in the Mediterranean, the involvement of and scrutiny by the European Parliament is crucial. This reinforced parliamentary scrutiny should focus first of all on the ongoing practices in the Frontex *Triton* JO, thereby paying special attention to its added value from a budgetary and rule of law perspective. Second, the Parliament could closely follow the implementation of the MSS and the decision-making processes that drive it forward. More precisely, the strong role of the FoP Group deserves scrutiny as more transparency concerning its composition and discussions is needed. This revolves around the question of *who is and who is not* a friend of the presidency, and the underlying motives.

ii. **Monitoring of rule of law compliance by the European Ombudsman and the Frontex Consultative Forum and Fundamental Rights Officer.** Also, the implications of the MSS 'cross-sectoral' approach for the EU rule of law frameworks should be assessed, focussing, e.g. on the growing involvement of military actors and the implications for the rights of persons on the move. As regards this latter point, the European Ombudsman could play a vital role and could, as in the past,[167] continue to scrutinise human rights compliance in Frontex JOs. Moreover, the Ombudsman could investigate the lack of transparency and accountability of the ways of working in the FoP Group. The *Triton* JO could be seen as a test case for the implementation of the new Regulation on Frontex sea border operations. The Frontex bodies set up in 2011 aiming to enhance its human rights compliance – the Consultative Forum and the Fundamental Rights Officer – have a special responsibility when it comes to the monitoring of the *Triton* JO under these new rules and under the general rule of law framework now in place.

iii. **A new post to coordinate monitoring: the EU Border Monitor.** Going beyond the monitoring of Frontex activities, different monitoring activities – including of member state border activities under, e.g. national or MSS-led implementation, could be coordinated by a new post to be created: that of the EU Border Monitor, as recommended earlier.[168] It should have the competence "to ensure that EU border controls, wherever they take place, are consistent with EU law and the Charter of Fundamental Rights."[169]

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[165] Pollack and Slominski (2009), op. cit.

[166] Ibid.

[167] Supra ftnt. 43.

[168] E. Guild, K. Groenendijk and S. Carrera (2008), "Ten Recommendations on Freedom, Security and Justice for the European Parliament Election", CEPS Policy Brief, No. 173, CEPS.

[169] Ibid., p. 1.

iv. **A Court of Auditors assessment of the added value and mixing of funding sources.** From the budgetary angle, the Court of Auditors could assess the added value of the funding deployed for the Frontex *Triton* JO and the implications of the possible mixing of diverse funding instruments for the implementation of the 'cross-sectoral' MSS and 'dual use' funding strategies.

v. **Drawing up a surveillance-related rule of law strategy by the Commissioner responsible for horizontal rule of law (Timmermans).** At the highest political level in the Commission, the new Commissioner responsible for, *inter alia*, horizontal rule of law and the Charter of Fundamental Rights (Dutch Commissioner Timmermans) could lead the drawing up of an inter-agency rule of law strategy, preferably connecting to the Commission's Roadmap for a Common Approach to EU Agencies.[170] As he was given the responsibility for "coordinating the Commission's work related to the rule of law",[171] he would also be well placed to monitor rule of law compliance in border surveillance and control under the implementation of the MSS that involves several Commission DGs and the EEAS.

vi. **No return to 'experimentalist governance' and 'laboratory' approaches to policy-making.** These different monitoring structures should be established and reinforced to make sure that EU approaches to border control and surveillance do not retreat to the 'experimentalist governance'[172] that we found in previous research on EU Home Affairs Agencies[173] and the 'laboratory' development of the Schengen acquis.[174] We could learn from the above-described Europeanization processes that resulted in more formalised rule of law frameworks being established. Therefore, we should be careful that the new 'cross-sectoral' approach under the MSS would not start to operate outside that framework.

vii. **The scope of the Regulation on Frontex sea border surveillance operations should be extended.** The limited scope of the Regulation currently does not cover member state sea border surveillance activities, despite the fact that these constitute the majority of European sea border surveillance activities. These activities pertain not merely to member state borders, but also have a clear EU dimension as external borders of the Schengen area. Therefore, the scope of the Regulation should be extended to all sea border surveillance activities by member states, including those falling outside Frontex operational cooperation. Moreover, the Regulation should explicitly apply to the interceptions of vessels in third-state territorial waters where interceptions are a direct or indirect result of cooperation of Frontex or member states with the third state. Last, the possible role of a third-state SAR authority in designating a place of safety under Article 10(c) of the Regulation should be explicitly premised on the functioning of that authority on a human rights compliant basis.

viii. **More attention to shipmasters' and fishermen's obligations to render assistance and de-criminalising that assistance.** Only the true and unhindered engagement of private shipmasters and fishermen in search and rescue offers a structural response to deaths at sea.[175] In line with a recent report by the EU's Fundamental Rights Agency (FRA) that the EU's Facilitation Directive should be

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[170] Commission (2012), Commission adopts roadmap for reform of agencies, Brussels, 19 December, (http://europa.eu/rapid/press-release_IP-12-1396_en.htm).

[171] Commission (2014), Mission letter from Jean-Claude Juncker to Frans Timmermans, Brussels, 10 September, p. 5 (http://ec.europa.eu/about/juncker-commission/docs/timmermans_en.pdf).

[172] Pollack and Slominski (2009), op. cit.

[173] Carrera, Den Hertog and Parkin (2013), op. cit.

[174] Parkin (2011), op. cit.; T. Balzacq et al. (2006), op. cit.

[175] Basaran argues that "enhancing rescue efforts will remain insufficient as long as search and rescue of irregular migrants is not decriminalised and desecuritised", pointing to the density of seafaring in the Central Mediterranean and the duty to render assistance by commercial ships "without fear of punishment", see: T. Basaran (2014), "Saving lives at sea: security, law and adverse effects", *European Journal of Migration and Law*, Vol. 16, 2014, pp. 365-387 at p. 386.

reformulated and that its implementation should "explicitly exclude punishment for humanitarian assistance at entry (rescue at sea…)",[176] the report by Rapporteur Tineke Strik of the Council of Europe[177] and our earlier recommendations,[178] the Commission should launch a Communication which outlines a roadmap towards the full de-criminalisation of the rendering of assistance by private shipmasters and fishermen, including proposing the necessary amendments of EU legislation in the area (such as the Facilitation Directive) and using its full power to effectuate a change in national legislation where necessary. The Task Force Mediterranean also identified the need to "evaluate the current acquis on facilitating unauthorised entry" and that there should be issued "a call to shipmasters to remind them of their obligations and of the fact that they will not face negative consequences to assist migrants". From the report of the Commission, however, it was clear that this was one of the few areas where no implementing initiatives were taken. It is recommended that this issue receives more attention in the work of the Task Force. Also in line with earlier recommendations by the Council of Europe's Parliamentary Assembly, a financial compensation mechanism should be explored for those rendering assistance, as the economic losses can be prohibitive and discourage the rendering of assistance.[179] This is especially the case where long waiting periods arise from member states' unwillingness to allow disembarkation.[180] To that effect, the proposed extended Regulation on sea border surveillance could include a provision stipulating that when member states cause unjustified delays in admitting ships for disembarkation, an obligation arises for member states to compensate the financially affected shipmasters and fishermen.

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[176] Fundamental Rights Agency (2014), Criminalisation of migrants in an irregular situation and of persons engaging with them, Vienna, March, p. 16.

[177] Strik (2012), op. cit.; Strik (2014), op. cit.

[178] S. Carrera and E. Guild (2013), "EU borders and their controls – preventing unwanted movement of people in Europe", CEPS Essay, No. 14, November; L. den Hertog (2012), "Two boats in the Mediterranean and their unfortunate encounters with Europe's policies towards people on the move", CEPS Paper in Liberty and Security in Europe, No. 48, July 2012.

[179] See: Strik (2012), op. cit., pt. 13.4.1. For adopted resolution, see: Parliamentary Assembly of the Council of Europe (2012), "Lives lost in the Mediterranean Sea: who is responsible?", Resolution 1872/2012, 24 April.

[180] For examples of this, see: Strik 2014, op. cit., p. 11.

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