

**The European Migration Complex**  
The evolution of Frontex as an EU agency

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**Abstract**

Since its establishment in 2004, the European Border and Coast Guard agency, Frontex, has evolved into a relatively autonomous agency. In 2021, the agency was accused of being involved in pushing back migrants at sea, and therefore violating their fundamental rights. This research focuses on the evolution of the agency by applying historical institutionalism and analysing three critical junctures, namely the 9/11 terrorist attacks in 2001, the migrant crisis in 2015 and the increased criticism on the agency from 2020 onwards. By demonstrating how unintended consequences occurred in Frontex' path dependent development, this research will explain how a constant linkage between migration and security, disagreement among the EU Member States and a lack of prioritising fundamental rights within the agency, eventually led to Frontex being able to divert from EU law. The unintended consequences of attempts to find solutions to crises and fix the problems within the agency, only led to Frontex' activities turning out to be highly problematic and ending up creating problems it was supposed to solve.

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**Abbreviations**

EU	-	European Union
FRA	-	European Union Agency for Fundamental Rights
FRM	-	Fundamental Rights Monitors
FRO	-	Fundamental Rights Officer
JHA	-	Justice and Home Affairs
LIBE	-	Civil Liberties, Justice and Home Affairs
NGO	-	Non-governmental organisation
OLAF	-	European Anti-Fraud Office
RABITs	-	Rapid Border Intervention Teams
SIR	-	Serious Incident Report

## Introduction

With the implementation of the Schengen protocol, and the removal of internal borders, the Member States of the European Union (EU) started to share responsibility for protecting the outside borders of the Union.<sup>1</sup> Therefore, in 2004, the EU set up the European border and coast guard agency named Frontex. The agency was intended to control the migrant streams coming to the EU and especially the Schengen area. In 2016 the organisation was restructured, after the increasing numbers of migrants skyrocketed in 2015. The small organisation that Frontex was in 2004 quickly developed into one of the biggest EU agencies with the largest budget.<sup>2</sup> However, in recent years Frontex has received more and more critique. In 2021 the European anti-fraud office, OLAF, published a report in which evidence was shown for Frontex' involvement in push-backs at the Greek-Turkish border.<sup>3</sup> The report came at a moment at which increasingly more research was done on fundamental rights violations by Frontex. The renewed attention given to the activities of Frontex raises the question how Frontex could get into the position to be accused of such violations. Even though the agency is now critiqued, its responsibilities have not been limited. In fact, the European Council is seeking to expand Frontex' activities outside of the Schengen and EU border.<sup>4</sup> This research will be focussed on the evolution of Frontex and will answer the research question: How did Frontex evolve into a relatively autonomous agency that could divert from EU law between 2004 and 2021? This will be done by looking at critical junctures in the history of Frontex and see how these moments and its consequences have influenced the evolution of Frontex. For each critical period this research will answer the subquestions: How a critical juncture influenced changes within the agency? What changes took place? And what unintended consequences occurred? By answering these questions, this research will show how Frontex has developed from a relatively small agency into an agency whose activities are highly problematic.

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<sup>1</sup> Wim van Meurs, Robin de Bruin, Liesbeth van de Grift, Carla Hoetink, Karin van Leeuwen & Carlos Reijnen, *The Unfinished History of European Integration* (Amsterdam 2013), page 276.

<sup>2</sup> Vittoria Meissner, 'The European Border and Coast Guard Agency Frontex beyond borders: The effect of the agency's external dimension', *TARN Working Paper Series 16/2017* (2017), page 7.

<sup>3</sup> European Anti-Fraud Office (OLAF), 'Final Report Investigation CASE No OC/2021/0451/A1' (30 April 2021) <https://fragdenstaat.de/dokumente/233972-olaf-final-report-on-frontex/> (last accessed 14 June 2023).

<sup>4</sup> Council of the European Union, 'Border management: Council authorises the opening of negotiations with four Western Balkans partners on Frontex cooperation' (18 November 2022) <https://europa.eu/!CyKdtf> (last accessed 5 May 2023).

## Theory

Most scholars that research the autonomy of Frontex focus on the relation and division of power between Frontex and the EU Member States. Broadly, this group of researchers can be split into intergovernmentalist and neo-institutionalist. Intergovernmentalist scholars, like Sarah Léonard, argue that control within Frontex is in the hands of the Member States. According to Léonard the autonomy of Frontex is significantly restricted by the Member States, since they are in charge of border control activities in their country. Frontex is merely there to coordinate those activities.<sup>5</sup> Neo-institutionalists, like Roberta Mungianu, oppose this by saying that at least some autonomy has shifted from the Member States to the EU itself. Mungianu explains that Frontex' border officers' power is established by EU law. While they might be supporting the border guards of the Member States, this means that the EU has an influence on the border control policy and therefore reached a level of supranationalism.<sup>6</sup> However, it is striking how quickly Frontex' responsibilities have increased since its restructuring in 2016. To explain this rapid change in responsibilities and autonomy it is not enough to only look at the debate between neo-institutionalism and intergovernmentalism. These theories provide too little context to how policy of an institution develops over time. Therefore, this debate does not adequately explain how Frontex got to the position to operate relatively autonomously. In order to explain this, focus has to be shifted to the evolution of Frontex.

In order to understand this development, this research will be built on the theory of historical institutionalism. Historical institutionalism is a theory that explains how factors like timing, succession and path dependency have an effect on institutions. That, in turn, shapes political change. One scholar that applied historical institutionalism is Paul Pierson, who applied the theory to the social policy of the EU. Pierson explains that different factors create gaps that consequently make it very hard to incorporate new findings in institutions. The factors that create these gaps are; the level of autonomy of institutional actors, time restrictions of decision makers, likely unintended consequences and changes in preferences over time.<sup>7</sup> Pierson explains that these factors send institutions down a specific path of development. This means that the

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<sup>5</sup> Sara Léonard, 'EU border security and migration into the European Union: FRONTEX and securitisation through practices', *European Security* 19 (2010) 2, 231-254, page 239.

<sup>6</sup> Roberta Mungianu, 'Frontex: Towards a Common Policy on External Border Control', *European Journal of Migration and Law* 15 (2013), 359-385, page 384/385.

<sup>7</sup> Paul Pierson, 'The Path to European Integration: A Historical Institutional Analysis', *Comparative Political Studies* 29 (1996) 2, 123-163, page 131/132.

development of institutions is dependent on decisions that have been made in the past, in other words, dependent on the path that has been taken. There are also factors that make it difficult to reverse policy within an institution and consequently maintain this path dependency. These factors are; resistance of institutional actors, obstacles within the organisation and high costs.<sup>8</sup> By applying historical institutionalism to the case of Frontex, this research can explain how certain situations and decisions have led Frontex down a specific path of which it became increasingly difficult to deviate. This path dependency of Frontex also led to specific consequences. Therefore, the factor that is of particular interest in the case of Frontex is the likelihood of unintended consequences. For example, the restructuring of Frontex in 2016 was a direct response to the migrant crisis of 2015. The rapid growth of responsibilities that came with the restructuring brought with it large long-term effects. Pierson explains that actions often have important consequences for sectors outside of those they initially intended. As the number of decisions that are made grows, more interaction takes place among actors and policies. Decisions and policies can therefore not be isolated anymore, and one decision has larger consequences.<sup>9</sup> Robert King Merton explains that consequences result from the conditions of actions, meaning, the interplay of the action and the objective situation.<sup>10</sup> Merton explains that situations can change and therefore consequences will change. Unintended consequences are therefore also often the result from the assumption that actions that have led to positive results in the past will continue to do so. Besides that, Merton points out that decisions are often made based on opinion and estimations and not on scientific knowledge. This is especially the case in situations that ask for immediate action. In those situations, there is often a lack of knowledge for certain aspects of the situation and will therefore result in unintended consequences.<sup>11</sup>

### Academic debate

The increased attention given to Frontex in the academic field means that a variety of topics regarding the organisation are being researched. Research differs from themes like Frontex' activities, the agency's characteristics, its operational effects, Frontex and human rights and

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<sup>8</sup> Ibid, 142.

<sup>9</sup> Ibid, 137.

<sup>10</sup> Robert K. Merton, 'The Unanticipated Consequences of Purposive Social Action', *American Sociological Review* 1 (1936) 6, 894-904, page 895.

<sup>11</sup> Ibid, 900/901.

Frontex and the EU bureaucracy.<sup>12</sup> In this research, the focus lies on how Frontex received its autonomy and how this has influenced the activities of the organisation by applying historical institutionalism. Applying historical institutionalism to the case of Frontex is not common in the academic field, but also not new. One of the main scholars who researches this topic is Vittoria Meissner. Meissner argues that Frontex' role has grown expansively over the years which made it possible for the agency to influence decision making of the European Commission. The research of Meissner is focussed on the external dimension of Frontex, with a case study on the cooperation of Frontex with non-EU countries in the Western Balkans. Meissner explains how three factors have influenced the growth of Frontex and how that growth has caused a growing influence of Frontex on other EU institutions. The first factor is exogenous shocks. These are an important element of historical institutionalist research. Within historical institutionalism specific exogenous factors can take the role of critical junctures when they send decision makers down a specific path and cause policy changes. Meissner takes the 9/11 terrorist attacks as one major critical juncture, which caused the EU to give more attention to security policy.<sup>13</sup> The second factor is the continuous delegation of authority to Frontex, also known as agency empowerment. Meissner shows how Frontex' tasks, budget and staff capabilities have grown expansively over time.<sup>14</sup> The last factor is Frontex' growing regional cooperation with third countries. Meissner's case study on the Western Balkans focuses on this factor.<sup>15</sup> Meissner's research is enlightening on how these three factors have developed and how they influence EU decision making. However, the focus of her research is predominantly on the influence of Frontex on decision outcomes in the EU. Meissner does not explain the internal development of Frontex into a relatively autonomous agency with continuously less direct participation of the Member States. Another scholar applying historical institutionalism to the case of Frontex is Helena Ekelund. Ekelund's research also draws on rational choice institutionalism and sociological institutionalism. In order to understand the establishment and design of agencies, it is critical to take into account all these forms of institutionalism. Ekelund argues that this is important in researching every type of agency, but especially agencies like Frontex. Frontex operates in a field

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<sup>12</sup> Jori Pascal Kalkman, 'Frontex: A literature review', *International Migration* 59 (2021) 1, 165-181.

<sup>13</sup> Meissner, 'The European Border and Coast Guard Agency Frontex beyond borders', 4/5.

<sup>14</sup> *Ibid*, 4.

<sup>15</sup> *Ibid*, 11.



that is tense, but also lacks hard science.<sup>16</sup> It is therefore important to look at all these aspects, because just like Merton, Ekelund argues that the functioning of an agency is dependent on the conditions under which they were established. This argument resonates with the historical institutionalist idea of critical junctures and path dependency. Ekelund concludes that Frontex was developed by lesson-drawing, cost-effectiveness and consistency with previous decisions.<sup>17</sup> The last factor can also be seen as path dependency. While Ekelund acknowledges the importance of researching Frontex with historical institutionalist theory, she also uses two other forms of institutionalism. Therefore, too little attention is given to the effect of path dependency, while this aspect is significant for the development of Frontex. Ekelund does mention path dependency but does not go into detail about how previous policy of Frontex influences its possibilities in the future. Finally, Satoko Horii is a scholar that quotes historical institutionalism in her research on Frontex and the evolution of cooperation on European border controls. Horii also puts much value on the focus of historical institutionalism on researching path dependency and critical junctures. Horii acknowledges that research should not just look at historical context, but at the effect an earlier event has on the possible outcome of later events. In her own research, Horii sees this path dependency as an important perspective to see the evolution of cooperation on European border controls as part of the wider framework of EU integration.<sup>18</sup> While Horii prefers applying sociological institutionalism in her research, her views on the efficacy of historical institutionalism are important to keep in mind. Especially the way she describes the concept of policy feedback, as a way of how policy can be the cause of political forces.<sup>19</sup> The work of these three authors, that apply or quote historical institutionalism, were published before the OLAF report on push-back involvement by Frontex came out. This new development in the history of Frontex gives new attention to an aspect of historical institutionalism that all these authors have not mentioned, namely, unintended consequences. This research will therefore contribute to the academic debate by focussing on these unintended consequences, including the criticism on Frontex. The research will also cover a longer period of time to analyse the development of Frontex based on three critical junctures.

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<sup>16</sup> Helena Ekelund, 'The Establishment of FRONTEX: A New Institutional Approach', *Journal of European Integration* 36 (2014) 2, 99-116, page 113.

<sup>17</sup> Ibid.

<sup>18</sup> Satoko Horii, *Frontex and the evolution of cooperation on European border controls* (Doctoral dissertation, University of Sussex 2015) page 23.

<sup>19</sup> Ibid.

## Methodology and sources

In the research central in this paper, historical institutionalism will be used as a methodology by analysing critical junctures. As mentioned before, critical junctures have the potential to have irreversible effects on the developmental trajectory of an institution. These critical junctures trigger the choices made by decision makers within the institution. Once the choices are turned into policy, an institution can be sent down a specific path of which it is increasingly difficult to deviate.<sup>20</sup> The undesirable effect of critical junctures is that of unintended consequences. Since critical junctures are often moments of crisis in which decisions have to be made quickly, the risk is that policy changes are often made without thinking of long-term consequences or without sufficient knowledge of the situation. Even if policy makers think of the long-term effects, these consequences are often minimised.<sup>21</sup> As Merton explains, the decisions that are made at moments which require immediate action, are often based on opinions and estimations. Most of the time critical junctures require immediate action and decision makers do not have knowledge on every aspect of the situation. This causes unintended consequences to occur.<sup>22</sup> The critical junctures that are central in this research are 9/11 and the establishment of Frontex in 2004, the migrant crisis and the restructuring of the agency in 2016, and lastly, the increasing criticism with as a pinnacle the OLAF report on Frontex in 2021. These critical junctures were significant for the development of Frontex and brought about the most change for the agency.

By applying historical institutionalism, this research will not only look at the official policy changes that caused the growth of Frontex, but more importantly the focus is on the critical junctures, tipping points that send decision makers down a specific path and cause the policy changes, and the unintended consequences of policy changes. While official policy changes are not the main sources that can explain these topics, they do shed a light on the growing responsibilities of Frontex, which is an element that has to be taken into account in this research. Sources that are related to the critical junctures are regulations of the EU, in particular Council Regulation (EC) 2007/2004<sup>23</sup> for the establishment of Frontex and Regulation (EU)

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<sup>20</sup> Pierson, 'The Path to European Integration', 146.

<sup>21</sup> Ibid, 136.

<sup>22</sup> Merton, 'The Unanticipated Consequences of Purposive Social Action', 900.

<sup>23</sup> Council of the European Union, 'Council Regulation (EC) No 2007/2004: Establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union' (26 October 2004) <https://www.refworld.org/docid/4847e8022.html> (last accessed 14 June 2023).

2016/1624<sup>24</sup> for the restructuring of the agency, and the actual OLAF report for the increasing criticism on Frontex.<sup>25</sup> However, to find answers to the question how a critical juncture influenced changes within Frontex, other primary sources will be needed. To understand how decision makers are influenced by a critical juncture, it is necessary to look at discussions leading up to, and motivations behind, altered policy. The mandate of Frontex can be altered with proposed amendments by the EU institutions (the Commission, the Council and the Parliament), therefore primary sources on this can be found in their repositories. These are the most important actors in the development of Frontex' mandate, which is why primary sources from these repositories are central in this research. All EU institutions held several meetings or published statements covering the topics central in this research. For instance, the European Justice and Home Affairs (JHA) Council, planned an extraordinary meeting nine days after the 9/11 terrorist attacks.<sup>26</sup> After the migrant crisis reached a peak in 2015, the European Commission published its European Agenda on Migration.<sup>27</sup> And after the OLAF report was published in 2021, the Parliament eventually froze the budget of Frontex.<sup>28</sup> Much discussion on the topic of push-backs and violations by the agency took place before that.<sup>29</sup> While the positions of the EU Member States are covered to a certain extent in this research, because they did influence the development of Frontex at certain times, this research is limited to the influence of the EU institutions and does not allow the space needed to cover the opinions of all Member States extensively. Therefore primary sources related to the positions of the Member States regarding border and migration policy are not extensively covered in this research. This can be a subject for further

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<sup>24</sup> European Parliament and the Council, 'Regulation (EU) 2016/1624 on the European Border and Coast Guard' (Strasbourg, 14 September 2016), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=celex:32016R1624> (last accessed 12 April 2023).

<sup>25</sup> European Anti-Fraud Office (OLAF), 'Final Report Investigation CASE No OC/2021/0451/A1' (30 April 2021) <https://fragdenstaat.de/dokumente/233972-olaf-final-report-on-frontex/> (last accessed 14 June 2023).

<sup>26</sup> European Commission, 'Extraordinary Council meeting - Justice, Home Affairs and Civil Protection' (Brussels, 20 September 2001), [https://ec.europa.eu/commission/presscorner/detail/en/PRES\\_01\\_327](https://ec.europa.eu/commission/presscorner/detail/en/PRES_01_327) (last accessed 23 May 2023).

<sup>27</sup> European Commission, 'Managing migration better in all aspects: A European Agenda on Migration' (Brussels, 13 May 2015), [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_15\\_4956](https://ec.europa.eu/commission/presscorner/detail/en/IP_15_4956) (last accessed 23 May 2023).

<sup>28</sup> European Parliament, 'EP asks for part of Frontex budget to be frozen until key improvements are made' (version 21 October 2021) <https://www.europarl.europa.eu/news/en/press-room/20211014IPR14931/ep-asks-for-part-of-frontex-budget-to-be-frozen-until-key-improvements-are-made> (last accessed 14 June 2023).

<sup>29</sup> European Parliament, 'Parliamentary question - E-000861/2022: OLAF report on Frontex' (2 March 2022), [https://www.europarl.europa.eu/doceo/document/E-9-2022-000861\\_EN.html](https://www.europarl.europa.eu/doceo/document/E-9-2022-000861_EN.html) (last accessed 18 January 2023);

European Parliament, 'Parliamentary question - P-003026/2021: European Court of Auditors' special report on the worrying situation at Frontex' (8 June 2021), [https://www.europarl.europa.eu/doceo/document/P-9-2021-003026\\_EN.html](https://www.europarl.europa.eu/doceo/document/P-9-2021-003026_EN.html) (last accessed 18 January 2023).

research. In order to gain insights into the unintended consequences of policy changes and Frontex' activities, this research will focus on reports on EU migrant regulations and Frontex' activities in general. These reports include publications of Amnesty International and Human Rights Watch.<sup>30</sup> Next to that, these reports will be compared to Frontex' own annual risk analysis.<sup>31</sup>

## Structure

The research will be presented in chronological order based around the critical junctures. The first chapter will focus on the establishment of Frontex in 2004. It will first look at the critical juncture that caused the establishment of the agency, namely, the 9/11 terrorist attacks and the increased attention given to border security by the Member States. Secondly this chapter will focus on the policy changes that occurred after the critical juncture. In this case, the founding document of Frontex. Lastly this chapter will look at the consequences for Frontex' activities of these policy changes, whether unintended or expected. The first chapter will cover a time period of 2001 to 2004. The other two chapters are structured similarly. The second chapter covers the migrant crisis and the restructuring of Frontex. The critical juncture in this chapter is the skyrocketing stream of migrants coming to the EU through the Mediterranean Sea in 2015. One of the consequences of this critical juncture was the policy change of the restructuring of Frontex in 2016. The consequences of these policy changes for Frontex' activities were extensive. Therefore, this chapter will take a close look at the changes in Frontex' activities. The time covered in this chapter is 2015 and 2016. The last chapter will focus on the increasing criticism and the OLAF report on Frontex as a pinnacle. First, the chapter will look at increasing reports on fundamental rights violations and push-backs that Frontex was involved in. This serves as the critical juncture in this chapter. After that, the chapter will look at the changes made regarding Frontex' mandate during this period of heightened criticism. Lastly, the chapter will examine how and if these changes have affected the agency and what issues with Frontex' mandate still

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<sup>30</sup> Amnesty International, 'Greece: Violence, lies, and pushbacks – Refugees and migrants still denied safety and asylum at Europe's borders' (23 June 2021), Index Number: EUR 25/4307/2021, <https://www.amnesty.org/en/documents/eur25/4307/2021/en/>;

Human Rights Watch, 'Frontex Failing to Protect People at EU Borders: Stronger Safeguards Vital as Border Agency Expands' (23 June 2021), <https://www.hrw.org/news/2021/06/23/frontex-failing-protect-people-eu-borders> (last accessed 2 May 2023).

<sup>31</sup> Frontex, 'Risk Analysis for 2018' (Warsaw, February 2018), [https://frontex.europa.eu/assets/Publications/Risk\\_Analysis/Risk\\_Analysis/Risk\\_Analysis\\_for\\_2018.pdf](https://frontex.europa.eu/assets/Publications/Risk_Analysis/Risk_Analysis/Risk_Analysis_for_2018.pdf) (last accessed 23 May 2023).

remain. This research will demonstrate how Frontex over time gained more autonomy and more responsibilities, and how this development was triggered by critical junctures. The research will conclude by demonstrating how this development eventually put Frontex in the position to be able to divert from EU law with highly problematic activities.

## 2004 - The establishment of Frontex

In 1999 the Schengen protocol was integrated into the EU legal framework with the Treaty of Amsterdam. Before this, each Member State was responsible for their own border. However, with the removal of the internal borders and the introduction of free movement of persons, the protection of the outside border of the Union became a shared responsibility of the Member States.<sup>32</sup> For since then, border management would affect all the Member States and therefore required shared decision making. Formal cooperation of the Member States on external border management took shape throughout the years and in 2004 eventually led to the establishment of the agency Frontex.<sup>33</sup> This chapter will focus on the first phase of the evolution of Frontex and the conditions under which the agency was established. It will look at the events leading up to the creation of the agency and its initial tasks. After that it will look at the consequences of, and the critique on, its establishment.

### How did 9/11 and the renewed attention to security policy within the EU cause the establishment of Frontex between 2001 and 2005?

The founding document of Frontex was signed in 2004 and is known as Council Regulation (EC) 2007/2004.<sup>34</sup> However, the establishment did not come out of nowhere. Before this final document was presented, many meetings, discussions and amendments took place to decide on its exact content and it was not until 2005 that it actually went into effect.<sup>35</sup> The first initiative for EU cooperation on border management goes back as far as early 2001, when Germany and Italy presented a proposal to the European Council for a European Border Police.<sup>36</sup> Between the first initiative in 2001 and the implementation of Frontex in 2005, large world events took place, but also the internal dynamics of the EU changed. As mentioned in the introduction, decisions are not made in a vacuum within institutions. Critical junctures, together with institutional changes

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<sup>32</sup> Van Meurs, De Bruin, Van de Grift, Hoetink, Van Leeuwen & Reijnen, *The Unfinished History of European Integration*, 276.

<sup>33</sup> Sarah Leonard, 'The creation of FRONTEX and the politics of institutionalisation in the EU external borders policy', *Journal of Contemporary European Research* 5 (2009) 3, 371-388, page 381.

<sup>34</sup> Council of the European Union, 'Council Regulation (EC) No 2007/2004: Establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union' (26 October 2004) <https://www.refworld.org/docid/4847e8022.html> (last accessed 14 June 2023).

<sup>35</sup> Leonard, 'The creation of FRONTEX and the politics of institutionalisation in the EU external borders policy', 372.

<sup>36</sup> *Ibid*, 376.

ultimately influence the outcome of discussions in an institution. This chapter will show that this also happened in the establishment of a joint border management and eventually shaped Frontex.

The critical juncture that largely influenced the discussions on border management within the EU is the 9/11 terrorist attacks. The terrorist attacks are arguably the main world event that took place between 2001 and 2005 and, together with the crisis situation after the attacks, was of major importance for Western states, who were shocked that an attack of this size could happen in the Western world. In these times of uncertainty, quickly after the attacks, security questions were linked with new ideas on migration control policies within the EU.<sup>37</sup> In addition, in the direct aftermath of 9/11 there was a strong feeling of urge to respond by the Member States. In this situation of crisis, security policies that previously would take years of debating were very quickly adapted within the Union.<sup>38</sup> Measures that seemed drastic and received opposition from Member States before 9/11, now became possible. In an extraordinary Council meeting on September the 20th, 2001, the JHA Council discussed the fight against terrorism in the direct aftermath of the 9/11 terrorist attacks. Nine days after the attacks, the Council already talked about strengthening the external borders of the Union.<sup>39</sup> In December 2001, with 9/11 still fresh in the minds of all policy makers, the European Council in Laeken decided on an integrated border management that would be responsible for counteracting terrorism, human trafficking and illegal immigration.<sup>40</sup> At the same time the European Commission proposed the establishment of a border agency.<sup>41</sup> As can be seen from these examples, 9/11 renewed the attention of the Member States to security matters and consequently tightened the control of external borders.<sup>42</sup> After 9/11 two more terrorist attacks took place that shocked the EU. The attacks in Madrid in 2004 and London in 2005 reinforced the feeling of needing to respond that came up after 9/11.<sup>43</sup> With these two attacks taking place on EU territory, the Union put security and counter-terrorism

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<sup>37</sup> Christina Boswell, 'Migration control in Europe after 9/11: Explaining the absence of securitization', *Journal of Common Market Studies* 45 (2007) 3, 589-610, page 596.

<sup>38</sup> Javier Argomaniz, 'Post-9/11 institutionalisation of European Union counter-terrorism: emergence, acceleration and inertia', *European Security* 18 (2009) 2, 151-172, page 154.

<sup>39</sup> European Commission, 'Extraordinary Council meeting - Justice, Home Affairs and Civil Protection' (Brussels, 20 September 2001), [https://ec.europa.eu/commission/presscorner/detail/en/PRES\\_01\\_327](https://ec.europa.eu/commission/presscorner/detail/en/PRES_01_327) (last accessed 23 May 2023).

<sup>40</sup> Council of the European Union, 'Presidency Conclusions: European Council meeting in Laeken' (14 and 15 December 2001), <https://www.consilium.europa.eu/media/20950/68827.pdf> (last accessed 3 March 2023).

<sup>41</sup> Meissner, 'The European Border and Coast Guard Agency Frontex beyond borders', 5.

<sup>42</sup> Vanda Amaro Dias and Maria Raquel Freire, 'Insecurities in EU border management: The unintended consequences of securitization processes in the Mediterranean', *methaodos.revista de ciencias sociales* 10 (2022) 2, 297-311, page 303.

<sup>43</sup> Argomaniz, 'Post-9/11 institutionalisation of European Union counter-terrorism', 163.

to the top of the agenda. It is within these moments of crisis after these critical moments that major steps were taken towards a common security policy and the establishment of Frontex.<sup>44</sup> 9/11 therefore serves as the critical juncture in the establishment of Frontex.

As seen in the before mentioned EU documents, critical junctures can trigger decision making within an institution and can have a big influence on policy creation, however, they do not stand on their own. Throughout the 1990s, the EU was confronted with an increase of illegal border crossings of migrants and therefore renewed their attention to finding a solution. Member States looked for new ways to increase their border control and to stop irregular migration into their territory.<sup>45</sup> At the same time external border control cooperation developed among the Schengen countries, until the protocol was integrated in the EU legal framework in 1999.<sup>46</sup> From the first initiative for joint border management until the formation of Frontex, major changes within the EU also occurred. In 2004 the biggest EU enlargement took place, by integrating ten more countries into the Union. This expansion raised questions in the existing Member States on uncontrolled migration, as it was believed that the new Member States would not be able to keep up the EU standard for border control. The formation of Frontex therefore took place at a time in which the EU was pressured to reassure that the future Member States had their affairs in order regarding border management. The EU had to show that it could protect its external borders.<sup>47</sup> Just like the 9/11 terrorist attacks, the problems with irregular migration and the EU enlargement also played an important role in the creation of EU joint border management.

The period between 2001 and 2005 proved to be important for the EU in prioritising security and adapting a wide range of measures to fight terrorism. The establishment of Frontex is related to the integrated border management system that the EU decided on in 2001. While a call for greater border security already existed before 9/11, the attacks served as a catalyst and became a sort of wakeup call for the Member States to put security and border control to the top

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<sup>44</sup> Ibid, 154.

<sup>45</sup> Dias and Freire, 'Insecurities in EU border management', 303;

Sarah Léonard and Christian Kaunert, 'The securitisation of migration in the European Union: Frontex and its evolving security practices', *Journal of Ethnic and Migration Studies*, 48 (2022) 6, 1417-1429, page 1421.

<sup>46</sup> Léonard, 'The creation of FRONTEX and the politics of institutionalisation in the EU external borders policy', 376;

Wies Maas and Thanh-Dam Truong, 'Europeanization and the Right to Seek Refugee Status: Reflections on Frontex', *Transnational Migration and Human Security: The Migration-Development-Security Nexus* 6 (2011), 67-79, page 68.

<sup>47</sup> Léonard, 'The creation of FRONTEX and the politics of institutionalisation in the EU external borders policy', 376.



of the agenda.<sup>48</sup> Just like after the terrorist attacks in Madrid and London, the moments of shock and crisis created an environment in which far reaching proposals were adapted rather easily. Therefore 9/11 serves as a critical juncture that made the EU prioritise security, which eventually led to the establishment of Frontex.

### What policy changes did this critical juncture bring about?

In the direct aftermath of 9/11, the threat of terrorism was mentioned in many documents of the EU. The JHA Council met nine days after the attacks and discussed the ‘necessary measures to maintain the highest level of security and any other measure needed to combat terrorism’.<sup>49</sup> Likewise, the conclusions of the European Council meeting of December 2001, refers to its ‘total solidarity with the American people and the international community in combating terrorism’.<sup>50</sup> In these documents, increased border control is also mentioned. Quickly after the terrorist attacks a linkage was made between terrorism and migration and therefore created an opportunity to securitize migration.<sup>51</sup> In a short period of time the fear of terrorism enabled legitimising policies in migration control that would otherwise be seen as illegitimate.<sup>52</sup> Many of these policies were built on the conclusions of the Tampere European Council meeting that took place in 1999. The EU fell back on policies already agreed upon in this meeting, since creating entirely new policies based on the new situation would make a quick response impossible. This means that the EU depended on the path set out at the Tampere European Council meeting.<sup>53</sup> This meeting included agreements made on management of migration flows and the Council encouraged Member States to cooperate on border control.<sup>54</sup> When the initial shock of 9/11 was over, the linkage between terrorism and migration became difficult to sustain, but it never fully disappeared. Controlling migration remained a priority for the EU.<sup>55</sup> The ongoing discussion and disagreement among Member States on how to approach border control cooperation, eventually led to the

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<sup>48</sup> Argomaniz, ‘Post-9/11 institutionalisation of European Union counter-terrorism’, 152.

<sup>49</sup> European Commission, ‘Extraordinary Council meeting - Justice, Home Affairs and Civil Protection’ (Brussels, 20 September 2001), [https://ec.europa.eu/commission/presscorner/detail/en/PRES\\_01\\_327](https://ec.europa.eu/commission/presscorner/detail/en/PRES_01_327) (last accessed 23 May 2023).

<sup>50</sup> Council of the European Union, ‘Presidency Conclusions: European Council meeting in Laeken’ (14 and 15 December 2001), <https://www.consilium.europa.eu/media/20950/68827.pdf> (last accessed 3 March 2023).

<sup>51</sup> Boswell, ‘Migration control in Europe after 9/11: Explaining the absence of securitization’, 589.

<sup>52</sup> Ibid, 591.

<sup>53</sup> Argomaniz, ‘Post-9/11 institutionalisation of European Union counter-terrorism’, 156.

<sup>54</sup> European Parliament, ‘Presidency Conclusions: Tampere European Council’ (15 and 16 October 1999), [https://www.europarl.europa.eu/summits/tam\\_en.htm#a](https://www.europarl.europa.eu/summits/tam_en.htm#a) (last accessed 10 March 2023).

<sup>55</sup> Boswell, ‘Migration control in Europe after 9/11: Explaining the absence of securitization’, 598.

Commission proposing a European agency for the Management of Operational Co-operation at the External Borders, what eventually became Frontex, in November 2003.<sup>56</sup> Due to several advantages of the establishment of an agency, the Council quickly agreed upon this proposal, and the official establishment of Frontex was published in October 2004.<sup>57</sup> The link between border control cooperation and terrorism remained, since the official Council regulation was published in the aftermath of the terrorist attacks in Madrid in March 2004 and directly after the Council's action plan on Combating Terrorism was published.<sup>58</sup>

During the entire time preparations were made for greater border control cooperation, many meetings among the Member States took place. Before the 9/11 terrorist attack, very few Member States were interested in discussing counter terrorism and protecting the shared border on a European level. Only France and Spain wanted to discuss counter terrorism policy within the EU.<sup>59</sup> However, this shifted after the terrorist attacks. Before 9/11 only six out of fifteen Member States had installed anti-terrorist laws.<sup>60</sup> Meanwhile, after the attacks, the Member States agreed upon an action plan on combating terrorism.<sup>61</sup> This agreement does not mean that the Member States agreed on border control cooperation. After Germany and Italy made the proposal for a European Border Police in early 2001, a feasibility study was done, supported by Belgium, France and Spain. However, this idea gained resistance from, especially, the United Kingdom.<sup>62</sup> As mentioned before, the ongoing disagreement between Member States on how to handle the external border, eventually led to the Commission proposing the establishment of Frontex. The proposal is often seen as a compromise between the Commission and the Member States in favour of greater border control (Germany and Italy) on one side, and the Member

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<sup>56</sup> European Commission, 'Proposal for a Council Regulation establishing a European Agency for the Management of Operational Co-operation at the External Borders' (Brussels, 20 November 2003), <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2003:0687:FIN:EN:PDF> (last accessed 10 March 2023).

<sup>57</sup> Leonard, 'The creation of FRONTEX and the politics of institutionalisation in the EU external borders policy', 381;

Council of the European Union, 'Council Regulation (EC) No 2007/2004: Establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union' (26 October 2004) <https://www.refworld.org/docid/4847e8022.html> (last accessed 14 June 2023).

<sup>58</sup> Council of the European Union, 'EU Plan of Action on Combating Terrorism', (Brussels, 15 June 2004) <https://data.consilium.europa.eu/doc/document/ST-10586-2004-INIT/en/pdf> (last accessed 10 March 2023).

<sup>59</sup> Argomaniz, 'Post-9/11 institutionalisation of European Union counter-terrorism', 153.

<sup>60</sup> Ibid, 155.

<sup>61</sup> Council of the European Union, 'Council Framework Decision of 13 June 2002 on combating terrorism' (Luxembourg, 13 June 2002), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32002F0475> (last accessed 12 March 2023).

<sup>62</sup> Leonard, 'The creation of FRONTEX and the politics of institutionalisation in the EU external borders policy', 376.

States who were against loosening their sovereign power (the UK and Scandinavian countries) on the other.<sup>63</sup> In any case, the establishment of Frontex created a significant moment, at which border control became a more supranational responsibility, while the topic was regarded as sensitive.<sup>64</sup>

The proposal for the establishment of Frontex gained support quickly. This is for a large part due to the proposal for an agency. The establishment of an agency for a topic as sensitive as border control was viewed more positively by the Member States than previous proposals regarding the topic.<sup>65</sup> There are certain aspects of an agency that are seen as an advantage by policymakers. For instance, agencies usually employ experts on the topic that they represent. Therefore, an agency is able to support policymakers with their expertise. Next to that, an agency can continue working on long-term goals, despite changes in government or institutional bodies that are more prone to public opinion. Another aspect is that agencies encourage cooperation and information sharing between Member States.<sup>66</sup> For the Member States one other big aspect made them less hesitant to agree with the proposal. Within the Management Board of Frontex all Member States would get a seat, next to two seats for the representatives of the Commission. This meant that all Member States would be involved in the protection of the external border.<sup>67</sup>

Council Regulation (EC) 2007/2004 not only formed the establishment of Frontex, but also described its main tasks. The second article of the regulation explains that the agency's tasks should be seen as additional to the border control services of Member States themselves. Frontex itself would be responsible for: (1) coordination of operational cooperation between Member States regarding external border control and surveillance; (2) assisting Member States on training national border guards; (3) carrying out risk analysis; (4) following-up on developments in research relevant for the control and surveillance of the external borders; (5) assisting Member States with operational and technical assistance at the external border when necessary; and (6)

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<sup>63</sup> Nina Perkowski, "There Are Voices in Every Direction": Organizational Decoupling in Frontex', *Journal of Common Market Studies* 57 (2019) 5, 1182-1199, page 1183.

<sup>64</sup> Vittoria Meissner, 'The European Border and Coast Guard Agency Frontex After the Migration Crisis: Towards a 'Superagency'?', in: Johannes Pollak and Peter Slominski (eds.) *The Role of EU Agencies in the Eurozone and Migration Crisis* (Palgrave Macmillan, Cham 2021), page 203.

<sup>65</sup> Chiara Loschi and Peter Slominski, 'Interagency Relations and the EU Migration Crisis: Strengthening of Law Enforcement Through Agencification?', in: Johannes Pollak and Peter Slominski (eds.) *The Role of EU Agencies in the Eurozone and Migration Crisis* (Palgrave Macmillan, Cham 2021), page 270.

<sup>66</sup> Leonard, 'The creation of FRONTEX and the politics of institutionalisation in the EU external borders policy', 374.

<sup>67</sup> Meissner, 'The European Border and Coast Guard Agency Frontex After the Migration Crisis', 207.

coordinating the cooperation between Member States on joint return operations.<sup>68</sup> While these tasks are important, they are also prone to criticism and therefore need a responsible body to carry them out. It is stressed throughout the entire regulation that Frontex is only there to assist Member States in the field of border control. The agency is not an independent body and is definitely not a policy maker.<sup>69</sup>

In the aftermath of 9/11, the EU institutions followed a path-dependent development and expanded on previously agreed policy in order to quickly respond to terrorist threats. One of the policy fields that became a priority in this period was border control. With the constant threat of terrorism in the background, the Member States continued to discuss how to better their external border control. In 2003, these discussions led to the proposal of an agency called Frontex. At this significant moment, a sensitive topic like border control became a supranational responsibility. The Member States were quick to agree, because the proposal included seats for all Member States in the Management Board of the agency, next to two seats for the Commission. Besides, the tasks of Frontex were formulated to be additional to the border control services of the Member States themselves.

### How have the critical juncture and the policy changes changed the activities of Frontex in terms of unintended consequences?

As mentioned in the introduction, situations that ask for an immediate response can have unintended consequences.<sup>70</sup> After 9/11, but also after the terrorist attacks in Madrid and London, the EU felt an urge to respond. During an extraordinary meeting of the European Parliament on the 12th of September 2001, its president Nicole Fontaine stressed that the 9/11 terrorist attacks were proof that a European common foreign and security policy was needed as quickly as possible.<sup>71</sup> However, during a debate of the Parliament on the external borders and Schengen on the 20th of September, the Danish politician Ole Krarup quoted a professor of criminal law that ‘the EU Commission and other institutions are merely using the attacks in the United States as an

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<sup>68</sup> Council of the European Union, ‘Council Regulation (EC) No 2007/2004: Establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union’ (26 October 2004) <https://www.refworld.org/docid/4847e8022.html> (last accessed 14 June 2023).

<sup>69</sup> Ibid.

<sup>70</sup> Merton, ‘The Unanticipated Consequences of Purposive Social Action’, 900.

<sup>71</sup> European Parliament, ‘Debates: 1. Acts of terrorism in the United States’, (Brussels, 12 September 2001), [https://www.europarl.europa.eu/doceo/document/CRE-5-2001-09-12-ITM-001\\_EN.html](https://www.europarl.europa.eu/doceo/document/CRE-5-2001-09-12-ITM-001_EN.html) (last accessed 13 March 2023).

opportunity to promote far-reaching harmonisation'.<sup>72</sup> In academic scholarship it is proven that crisis situations can not only lead to decisions with unintended consequences, but they can also be used by political actors to expand their power and authority.<sup>73</sup> When crisis narratives are used by political actors they create an opportunity for interventions and emergency measures. The flip side to that is that these emergency measures are often extended and eventually become permanent, as can be seen with Frontex' mandate in the next chapters.<sup>74</sup>

In order to come to fast responses and measures that can be implemented quickly, policy makers often fall back on pre-existing policy. When the Member States were struggling to find a way to cooperate on the topic, the Commission decided to propose an agency. This had been done before when agreement was hard to reach.<sup>75</sup> The way an agency like Frontex is managed has influence on the expected actions and consequences of an agency. In general it is assumed that agencies carry out what their creators want.<sup>76</sup> Frontex is controlled by a management board, in which all Member States have a seat next to two seats for the Commission.<sup>77</sup> In essence this means that Frontex is controlled by these parties, who decide what actions the agency carries out. It is also the main reason why the Member States were not opposed to the establishment of Frontex. There are several reasons for the Member States and the Commission to shift the execution of policy to an agency. Some argue that the establishment of Frontex can be understood as blame shifting by the Member States and the Commission. By making an agency carrying out border control, the Member States and the Commission avoid direct blame for human suffering at the external border of the EU. However, as a consequence of this, Frontex asks important questions about accountability. Frontex has to comply with the different demands of the Member States and the institutions of the EU. While the Member States and the Commission control its management board, the European Parliament controls the agency's

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<sup>72</sup> European Parliament, 'Debates: 3. External borders and Schengen', (Brussels, 20 November 2001), [https://www.europarl.europa.eu/doceo/document/CRE-5-2001-09-20-ITM-003\\_EN.html](https://www.europarl.europa.eu/doceo/document/CRE-5-2001-09-20-ITM-003_EN.html) (last accessed 13 March 2023).

<sup>73</sup> Nina Perkowski, Maurice Stierl and Andrew Burrige, 'The evolution of EUropean border governance through crisis: Frontex and the interplay of protracted and acute crisis narratives', *Environment and Planning D: Society and Space* 4 (2023) 1, 110-129, page 111.

<sup>74</sup> *Ibid*, 121.

<sup>75</sup> Leonard, 'The creation of FRONTEX and the politics of institutionalisation in the EU external borders policy', 375.

<sup>76</sup> Perkowski, "There Are Voices in Every Direction", 1184.

<sup>77</sup> Meissner, 'The European Border and Coast Guard Agency Frontex After the Migration Crisis', 207.

budget. The demands of these three actors are often conflicting, which leads to Frontex often being scrutinised by at least one actor.<sup>78</sup>

As mentioned, the European Parliament controls the budget of Frontex. However, the Parliament was largely absent during the formation of the agency. This was not due to their own choice. The Parliament was consulted on the draft proposal for the agency and proposed multiple amendments to ensure control over the agency by the Parliament itself and the Commission. The Parliament wanted to strengthen the community character of Frontex. The amendments covered topics like the composition of the management board, the access to documents and the rules to process personal data. However, all amendments were ignored or rejected by the Council.<sup>79</sup> Next to that, it was decided that from the first of January 2005, decisions made about the management of the external border of the EU had to be adapted through the co-decision procedure. This meant that if the Council could agree on the proposal of the Commission before that date, they could largely set aside the opinion of the Parliament. Thus, the Parliament was largely excluded from the discussion around the establishment of Frontex. As a consequence, topics that the Parliament usually greatly values, such as fundamental rights, accountability and transparency, were also largely absent from the discussion.<sup>80</sup> After the establishment, these topics also received little priority in the tasks of Frontex. However, the Parliament did have control over the budget of the agency. In that way it had some control over Frontex' activity and, as will be addressed in the next chapters, the Parliament also used this control.<sup>81</sup>

Due to several reasons, migration control and security were pushed to the top of the agenda of the EU in the early 2000s. The 9/11 terrorist attacks served as a catalyst for this prioritisation. Other contributing factors were Member States struggling with irregular migration before the attacks and the expansion of the Union alarming existing Member States on the ability to protect the external border. The 9/11 terrorist attacks as a critical juncture asked for an immediate response. Therefore, policymakers in the EU looked for ways to swiftly implement new policies regarding migration control and security. They quickly expanded on the conclusions of the Tampere European Council meeting and the discussion on increased cooperation on external

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<sup>78</sup> Perkowski, "There Are Voices in Every Direction", 1191.

<sup>79</sup> Leonard, 'The creation of FRONTEX and the politics of institutionalisation in the EU external borders policy', 382-385.

<sup>80</sup> Ibid, 380/381.

<sup>81</sup> Maas and Truong, 'Europeanization and the Right to Seek Refugee Status', 73.

border control was intensified. Eventually this discussion led to the establishment of the agency Frontex, since this solution was seen as advantageous for several reasons. However, the new policies set out by the EU also had consequences. Decisions made during crisis situations often lead to unintended consequences. The establishment of an agency led to a shift of focus to Frontex, but behind the scenes, the Member States and the Commission were still in control. The consequence of excluding the Parliament in discussions about border control proved more important. Leaving out the amendments that the Parliament proposed, led to important values such as fundamental rights, transparency and accountability to be underexposed in the final documents and the eventual actions of Frontex. The conditions under which Frontex was established, and especially the exclusion of the Parliament, has had a large impact on the early evolution of the agency. From the start, Frontex' evolution has been characterised by linking migration to security questions, contesting Member States for sovereignty and not prioritising fundamental rights. Ultimately, this led to long-term consequences as well. These consequences and the further development of Frontex will be discussed in the next chapters.

## 2016 - The migrant crisis and the restructuring of Frontex

After the establishment of Frontex, the agency carried out several missions. While there was criticism on the effectiveness of these missions, the agency was not severely challenged.<sup>82</sup> An amendment to the mandate of the agency in 2007 caused Frontex to be able to employ Rapid Border Intervention Teams (RABITs). These teams would provide short term support during critical moments.<sup>83</sup> In 2015, the migration flow to the EU skyrocketed and resulted in almost one million asylum seekers within the Union.<sup>84</sup> It quickly became clear that Frontex and the Member States were not capable of controlling this migration wave. The crossing of the Mediterranean Sea came with great risks and resulted in thousands of deaths.<sup>85</sup> In this moment of crisis, the EU responded by giving Frontex more responsibilities and more resources to carry out their tasks. This chapter will focus on the migration crisis as a critical juncture, the policy changes the crisis brought about and the consequences of these policy changes. This chapter covers the period in the evolution of Frontex where its responsibilities grew dramatically and it gained more autonomy compared to the initial establishment.

### How did the migrant crisis influence the restructuring of Frontex in 2016?

From 2011 onwards, the stream of migrants arriving at the EU border started rising significantly. The wave of uprisings in North Africa, also known as the ‘Arab Spring’, started to become increasingly violent and living standards declined. Especially the migration stream in the Central Mediterranean was put under pressure. Most of the more than 50,000 migrants had found Italy as their destination on this route by the end of this year.<sup>86</sup> However, the incline of migrants in 2011, did not prepare the EU for the number of migrants arriving in 2015. In this year, the number eventually rose to nearly one million migrants requesting asylum in an EU Member State.<sup>87</sup> By

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<sup>82</sup> Léonard and Kaunert, ‘The securitisation of migration in the European Union’, 1423.

<sup>83</sup> European Parliament and the Council of the European Union, ‘Regulation (EC) No 863/2007: establishing a mechanism for the creation of Rapid Border Intervention Teams’ (Strasbourg, 11 July 2007) <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32007R0863&from=EN> (last accessed 4 April 2023).

<sup>84</sup> Van Meurs, De Bruin, Van de Grift, Hoetink, Van Leeuwen & Reijnen, *The Unfinished History of European Integration*, 275.

<sup>85</sup> Léonard and Kaunert, ‘The securitisation of migration in the European Union’, 1424.

<sup>86</sup> Claudio Deiana, Vikram Maheshri and Giovanni Mastrobuoni, ‘Migration at Sea: Unintended Consequences of Search and Rescue Operations’, *Social Science Research Network* (November 2019), 6.

<sup>87</sup> Van Meurs, De Bruin, Van de Grift, Hoetink, Van Leeuwen & Reijnen, *The Unfinished History of European Integration*, 275.



far most migrants originated from Syria, who made up for more than 600,000 of the arrivals. Following after was Afghanistan with almost half that amount.<sup>88</sup> Many of these people fled persecution or general violence and were in need of international protection.<sup>89</sup> While only the number of arrivals were hard to imagine, the image of unsafe and overcrowded boats, and the drifting ashore of bodies of migrants that had died at sea, left a haunting impression. The numbers of deaths reached a pinnacle in April 2015, when more than a thousand migrants lost their lives in shipwrecks on the Mediterranean Sea.<sup>90</sup> This shocking rise of deaths in combination with the declining living standards for the thousands of migrants in the overcrowded camps in Greece and Italy, made the entire situation of humanitarian concern to the EU.<sup>91</sup> After a large shipwreck in April 2015, the Commission called the situation a migrant crisis.<sup>92</sup> A few days after the shipwreck, the Council held a special meeting, after which many measures were announced. These included assistance for the frontline countries and Frontex' operation Triton was expanded.<sup>93</sup> However, at the same time security measures were tightened by countries that were against unwanted migration.<sup>94</sup> This means that, just like with the establishment of Frontex, the Member States continued to link security and migration policy together.

Besides the fast rising number of migrants, a noteworthy shift of routes into Europe became clear. While migrants mostly entered Europe from Morocco into Spain, or through the Canary Islands before, the migration routes started to shift to the Eastern Mediterranean and the Western Balkan. Consequently, this led to the Greek and Italian shores being the main arrival points for migrants crossing the Mediterranean Sea.<sup>95</sup> Especially the route between Turkey and Greece saw a sharp rise with almost 900,000 crossings in 2015.<sup>96</sup> Because of the removal of internal borders with the Schengen protocol, migrants that had entered the EU were able to spread within the Union without much resistance. Therefore, the EU became increasingly overwhelmed with the

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<sup>88</sup> The European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, 'Frontex: General report 2015', (2016), 1-64, page 11.

<sup>89</sup> Michela Ceccorulli, 'Back to Schengen: the collective securitisation of the EU free-border area.' *West European Politics*, 42 (2019) 2, 302-322, page 307.

<sup>90</sup> Perkowski, Stierl and Burrige, 'The evolution of European border governance through crisis', 122.

<sup>91</sup> Van Meurs, De Bruin, Van de Grift, Hoetink, Van Leeuwen & Reijnen, *The Unfinished History of European Integration*, 275.

<sup>92</sup> Perkowski, Stierl and Burrige, 'The evolution of European border governance through crisis', 122.

<sup>93</sup> Deiana, Maheshri and Mastrobuoni, 'Migration at Sea', 8.

<sup>94</sup> Ceccorulli, 'Back to Schengen', 311/312.

<sup>95</sup> Léonard and Kaunert, 'The securitisation of migration in the European Union', 1424.

<sup>96</sup> Evangelia Tsourdi, 'Beyond the "Migration Crisis": The Evolving Role of EU Agencies in the Administrative Governance of the Asylum and External Border Control Policies', in: Johannes Pollak and Peter Slominski (eds.) *The Role of EU Agencies in the Eurozone and Migration Crisis* (Palgrave Macmillan, Cham 2021), page 232.

influx of migrants and struggled with the humanitarian disaster of thousands of migrants that died at sea and the thousands that lived in overcrowded camps.<sup>97</sup> However, the rise of migrants arriving at the EU border, did not lead to agreement among the Member States on how to deal with the crisis. Almost no Member State was eager to help the frontline countries by accepting their share of migrants. Germany was one of the few Member States welcoming migrants.<sup>98</sup> Discontent among the Member States rose further when it became clear that Greece was unable to manage its external border, despite increased support from Frontex, and prevent migrants from travelling further into the Schengen area. At the same time, far-right-wing political parties within the EU started to label the influx of migrants as a security threat. The ‘othering’ of migrants legitimised the securitisation of border control.<sup>99</sup> This eventually led to France, Germany, Austria, Slovenia, Hungary, Sweden and non-EU Norway to temporarily reimplement border controls within the Schengen area in December 2015.<sup>100</sup> This was seen as a big failure by the EU institutions. The Schengen protocol, including the free movement of persons, was generally understood as the biggest achievement of the EU and European integration.<sup>101</sup> However, in this context, it increasingly became a problem for the Member States. Despite the EU’s willingness to show that they could handle the crisis and were able to control their external border, reluctance and disagreement among the Member States proved challenging to come out of this crisis unscratched. Since the establishment of Frontex, the EU had an agency to turn to in case of a crisis at their external border. However, in 2015, because of the composition of the Management Board, the agency was still very dependent on the willingness of the Member States in order to execute their tasks.<sup>102</sup> A restructuring of Frontex was therefore necessary for the agency to carry out bigger missions and larger responsibilities, but mostly to bring back ‘order’ in the management of migration.<sup>103</sup> In 2016, Frontex was restructured into the European Border and Coast Guard Agency.<sup>104</sup> However, even in 2016, during a migration crisis, some Member States

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<sup>97</sup> Van Meurs, De Bruin, Van de Grift, Hoetink, Van Leeuwen & Reijnen, *The Unfinished History of European Integration*, 275.

<sup>98</sup> *Ibid.*

<sup>99</sup> Dias and Freire, ‘Insecurities in EU border management’, 308.

<sup>100</sup> Ceccorulli, ‘Back to Schengen’, 309.

<sup>101</sup> *Ibid.*, 302.

<sup>102</sup> Meissner, ‘The European Border and Coast Guard Agency Frontex After the Migration Crisis’, 207.

<sup>103</sup> Ceccorulli, ‘Back to Schengen’, 308.

<sup>104</sup> Perkowski, Stierl and Burrige, ‘The evolution of European border governance through crisis’, 119/120.

were reluctant to allow Frontex to carry out border controls by themselves, because of fear of sovereignty loss and an increase of migrants in their country.<sup>105</sup>

One of the main reasons for the EU to help find solutions to the migrant crisis, was to protect their image of an open Union that respects fundamental rights. With such a self-image that they also projected outwards, they had to prevent a humanitarian disaster at their external borders.<sup>106</sup> The critique on the establishment of Frontex is mostly that the Parliament was left out of the discussion, and therefore important values, such as fundamental rights, were not adhered to enough. In the years following its establishment several amendments and extra rules made sure that fundamental rights got more attention in Frontex' tasks. The RABIT regulation that was adopted in July 2007, included the specification that refugees should be protected during Frontex' operations.<sup>107</sup> Likewise, in 2011, Frontex adopted a fundamental rights strategy. However, this strategy was mostly adopted due to pressure from the Parliament and the Council.<sup>108</sup> In 2014, Frontex led a new operation called Triton that replaced the Italian led operation Mare Nostrum. Mare Nostrum had as a main objective to search and rescue migrants in distress at the Mediterranean Sea. However, Triton's main objective was of a less humanitarian nature, namely the surveillance of the external borders of the EU. After the shipwrecks in April 2015, the Triton operation entered a second phase that included a bigger operational territory and a budget that had tripled. Besides, Frontex started to dismantle boats of migrant smugglers, to prevent them from being used again.<sup>109</sup> Frontex' operations did not specifically call for the search and rescue of migrants at sea, but the Parliament and Council did stress that Frontex' operation had to comply with international and European law, which meant that migrants in difficulty had to be rescued.<sup>110</sup> Besides the efforts of the EU to prevent a humanitarian disaster at its external borders, they also faced another challenge. The solidarity between the Member States and the removal of the internal borders that Schengen had created, were starting to crumble down. From September 2015 onwards, the EU therefore focussed less on saving lives at sea, but instead focussed on preventing the downfall of Schengen, the crown achievement of EU integration.<sup>111</sup>

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<sup>105</sup> Meissner, 'The European Border and Coast Guard Agency Frontex After the Migration Crisis', 210.

<sup>106</sup> Van Meurs, De Bruin, Van de Grift, Hoetink, Van Leeuwen & Reijnen, *The Unfinished History of European Integration*, 275.

<sup>107</sup> Maas and Truong, 'Europeanization and the Right to Seek Refugee Status', 75.

<sup>108</sup> Perkowski, "There Are Voices in Every Direction", 1193.

<sup>109</sup> Deiana, Maheshri and Mastrobuoni, 'Migration at Sea', 8.

<sup>110</sup> Ibid.

<sup>111</sup> Ceccorulli, 'Back to Schengen', 307.

The migration crisis of 2015 was a major critical juncture for Frontex and for the EU as a whole. The crisis revealed that the EU's external border management was not strong enough and that the solidarity between the Member States was weaker than believed. A quick response was necessary in order to find a solution, which included several major decisions concerning Frontex. The migration crisis is the key reference used to justify the growth of Frontex in 2016 and forms a central topic in debates concerning migration and border security.<sup>112</sup> As a direct response to the migration crisis, Frontex was restructured into the European Border and Coast Guard agency after failed attempts in the years prior. The agency gained much more independence from the Member States and was therefore sent down a path towards a more supranational agency. There was little debate on the unintended consequences of this development at the time, since the involved actors were mostly concerned about protecting their borders and preserving the Schengen area.

#### What policy changes did the migrant crisis bring about?

As mentioned before, with the establishment of Frontex in 2004, the EU now had an agency to turn to in case of a crisis at the external borders of the EU. The other way around, Frontex would be able to show their value and could strengthen their influence in moments of crisis.<sup>113</sup> With the migrant crisis in 2015, both happened. Before 2015, several changes had been made regarding Frontex' mandate. Such as, the RABIT regulation that was adopted in July 2007.<sup>114</sup> At this time, it was already clear that Frontex' tasks were focussed on preventing crises. However, its tasks were not meant to assist on a long-term basis.<sup>115</sup> While the agency grew in the years prior to the migrant crisis, its growth expanded far more in 2015.<sup>116</sup> In May 2015, the European Commission presented its European Agenda on Migration as a direct response to the shipwrecks in April of

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<sup>112</sup> Julia Sachseder, Saskia Stachowitsch and Clemens Binder, 'Gender, race, and crisis-driven institutional growth: discourses of "migration crisis" and the expansion of Frontex', *Journal of Ethnic and Migration Studies* 48 (2022) 19, 4670-4693, page 4670.

<sup>113</sup> Meissner, 'The European Border and Coast Guard Agency Frontex beyond borders', 5.

<sup>114</sup> European Parliament and the Council of the European Union, 'Regulation (EC) No 863/2007: establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers' (Strasbourg, 11 July 2007) <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32007R0863&from=EN> (last accessed 4 April 2023).

<sup>115</sup> Ilkka Laitinen, 'Frontex - Facts and Myths' (11 June 2007), <https://frontex.europa.eu/media-centre/news/news-release/frontex-facts-and-myths-BYxkX5> (last accessed 12 April 2023).

<sup>116</sup> Meissner, 'The European Border and Coast Guard Agency Frontex After the Migration Crisis', 203; Perkowski, Stierl and Burrige, 'The evolution of European border governance through crisis', 119.

that year. The Agenda was a more elaborate response, building on the statement already made after a special meeting of the Council on the 23rd of April.<sup>117</sup> The Agenda quotes: ‘There is political consensus [...] following the recent tragedies in the Mediterranean to mobilise all efforts and tools at our disposal to take immediate action to prevent more people from dying at sea.’<sup>118</sup> Similarly to the situation after the 9/11 terrorist attacks, there was an urge to respond by the EU institutions. This meant that the EU looked at Frontex to be able to respond quickly. The Agenda on Migration referenced the strengthening of Frontex multiple times, including the tripling of the budget for the operations Triton and Poseidon, a bigger role in return operations and the strengthening of the capacity of Frontex.<sup>119</sup> Looking at the growth of the general budget of Frontex, it becomes clear that solutions to the crisis were sought by investing in the agency. Frontex’ budget went from 97.9 million euros in 2014, to 143.3 million euros in 2015, to 238.7 million euros in 2016.<sup>120</sup> The investment in Frontex was not limited to budget. With the proposal of the European Border and Coast Guard Agency in December 2015, Frontex would be restructured completely.<sup>121</sup> In the proposal, the shift of focus is visible from ‘prevent more people from dying at sea’ to protecting the Schengen area.<sup>122</sup> Besides, the proposal mentions terrorist threats as a reason for the restructuring.<sup>123</sup> The proposal was adopted on the 16th of September 2016 with Regulation (EU) 2016/1624.<sup>124</sup> The restructuring and drastic expansion of Frontex followed a path-dependent process, triggered by the migrant crisis. The EU institutions saw Frontex as the agency to turn to in this crisis. Consequently the agency grew dramatically in just three years, compared to the ten years before the migrant crisis.<sup>125</sup>

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<sup>117</sup> European Council, ‘Special meeting of the European Council, 23 April 2015 - statement’ (23 April 2015), <https://www.consilium.europa.eu/en/press/press-releases/2015/04/23/special-euco-statement/> (last accessed 23 May 2023).

<sup>118</sup> European Commission, ‘Managing migration better in all aspects: A European Agenda on Migration’ (Brussels, 13 May 2015), [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_15\\_4956](https://ec.europa.eu/commission/presscorner/detail/en/IP_15_4956) (last accessed 23 May 2023).

<sup>119</sup> Ibid.

<sup>120</sup> Perkowski, Stierl and Burrige, ‘The evolution of European border governance through crisis’, 119.

<sup>121</sup> European Commission, ‘Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC’ (Strasbourg, 15 December 2015), <https://data.consilium.europa.eu/doc/document/ST-15398-2015-INIT/en/pdf> (last accessed 12 April 2023).

<sup>122</sup> Ibid, 3.

<sup>123</sup> Ibid.

<sup>124</sup> European Parliament and the Council, ‘Regulation (EU) 2016/1624 on the European Border and Coast Guard’ (Strasbourg, 14 September 2016), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=celex:32016R1624> (last accessed 12 April 2023).

<sup>125</sup> Perkowski, Stierl and Burrige, ‘The evolution of European border governance through crisis’, 122; Meissner, ‘The European Border and Coast Guard Agency Frontex After the Migration Crisis’, 220.

Article 8 of the new regulation, sets out the tasks of the new Frontex. By looking at this list, the growth is already visible. As described in the first chapter, Frontex had six main tasks at its establishment. In 2016, the list consisted of 21 tasks. Most notably from this list, was that Frontex would set up its own rapid reaction pool of at least 1500 officers that they would be able to quickly deploy in the operations of the agency. Besides, Frontex would set up its own elaborate technical equipment pool.<sup>126</sup> For both of these pools, the agency was dependent on the Member States before. The restructuring therefore gave Frontex more independence and its functioning became more important. Frontex' growing independence from the Member States becomes most clear in their new ability to intervene in the territory of a Member State, without their approval. This could only happen in case of an emergency at the external borders of the EU and after a decision of the Council had been made.<sup>127</sup> However, the significant independence Frontex gained with this ability is undeniable.

The migrant crisis did not only lead to the restructuring of Frontex, but also to direct changes in the operations of the agency. As mentioned before, the budget for Frontex' operations Triton and Poseidon was tripled with immediate effect after the Agenda on Migration was presented.<sup>128</sup> The operations had as a main aim the surveillance of the external borders of the EU. Regarding migrants, they were supposed to save migrants at sea if they were in danger, in accordance to EU and international law, but at the same time reduce the amount of migrants arriving at the EU borders.<sup>129</sup> One of the ways to reach this goal was to strengthen Frontex' role in return operations, which is also described in Regulation (EU) 2016/1624.<sup>130</sup> Another immediate effect of the strengthening and growth of Frontex was its increased presence in migrant hotspots in especially Italy and Greece. The migrant crisis therefore led to more Frontex officers on the ground.<sup>131</sup> Within these hotspots, Frontex developed its cooperation with

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<sup>126</sup> European Parliament and the Council, 'Regulation (EU) 2016/1624 on the European Border and Coast Guard' (Strasbourg, 14 September 2016), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=celex:32016R1624> (last accessed 12 April 2023), page 14/15.

<sup>127</sup> Ibid, 4;

Meissner, 'The European Border and Coast Guard Agency Frontex After the Migration Crisis', 213/214.

<sup>128</sup> European Commission, 'Managing migration better in all aspects: A European Agenda on Migration' (Brussels, 13 May 2015), [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_15\\_4956](https://ec.europa.eu/commission/presscorner/detail/en/IP_15_4956) (last accessed 23 May 2023).

<sup>129</sup> Dias and Freire, 'Insecurities in EU border management', 307.

<sup>130</sup> European Parliament and the Council, 'Regulation (EU) 2016/1624 on the European Border and Coast Guard' (Strasbourg, 14 September 2016), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=celex:32016R1624> (last accessed 12 April 2023).

<sup>131</sup> Perkowski, Stierl and Burrige, 'The evolution of European border governance through crisis', 119.

especially Europol, but also with Eurojust in the fight against cross-border crimes, like smuggler networks.<sup>132</sup>

The migrant crisis of 2015 triggered a path-dependent development of Frontex. After its establishment in 2004, the agency saw their mandate expand, but really settled as the solution at hand in 2015. As a direct response to the tragedies of the migrant crisis, the EU published its Agenda on Migration, which included immediate and long term changes to Frontex' mandate. After its official restructuring in 2016, the tasks and responsibilities of Frontex had grown exceptionally. Where before the restructuring, Frontex was supposed to support the Member States, after it became clear that the management of the external border increasingly became a shared responsibility of the EU and the Member States.<sup>133</sup> However, the restructuring of Frontex also securitised migration within the EU, and developed a limited understanding of migrant arrivals.<sup>134</sup>

#### How have the migrant crisis and the policy changes changed the activities of Frontex in terms of unintended consequences?

Like the Agenda on Migration pointed out, the migration crisis asked for 'immediate action' from the EU.<sup>135</sup> Just like after the 9/11 terrorist attacks, there was an urge to come with a quick response, which comes with the risk of having unintended consequences.<sup>136</sup> When many migrants died at sea on their way to the EU border, there was an increased call for saving lives.<sup>137</sup> However, the dangerous routes migrants were taking at the time can also be seen as an unintended consequence of EU border management. By implementing visas and other requirements, it became harder for people to reach the EU legally. Which caused them to look at illegal and more dangerous routes.<sup>138</sup> The Commission explains in the Agenda on Migration that

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<sup>132</sup> European Parliament and the Council, 'Regulation (EU) 2016/1624 on the European Border and Coast Guard' (Strasbourg, 14 September 2016), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=celex:32016R1624> (last accessed 12 April 2023), page 14;

Léonard and Kaunert, 'The securitisation of migration in the European Union', 1426.

<sup>133</sup> Meissner, 'The European Border and Coast Guard Agency Frontex After the Migration Crisis', 215.

<sup>134</sup> Léonard and Kaunert, 'The securitisation of migration in the European Union', 1426;

Perkowski, Stierl and Burridge, 'The evolution of European border governance through crisis', 123.

<sup>135</sup> European Commission, 'Managing migration better in all aspects: A European Agenda on Migration' (Brussels, 13 May 2015), [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_15\\_4956](https://ec.europa.eu/commission/presscorner/detail/en/IP_15_4956) (last accessed 23 May 2023).

<sup>136</sup> Merton, 'The Unanticipated Consequences of Purposive Social Action', 900.

<sup>137</sup> Sachse, Stachowitsch and Binder, 'Gender, race, and crisis-driven institutional growth', 4685.

<sup>138</sup> Maas and Truong, 'Europeanization and the Right to Seek Refugee Status', 70.

the presented actions were necessary to ‘prevent more people from dying at sea’.<sup>139</sup> However, search and rescue missions also have unintended effects. While these missions saved lives directly, they were also seen as a final encouragement for migrants to attempt the dangerous crossing of the Mediterranean Sea. Consequently, this led to more deaths at sea.<sup>140</sup> Besides, the search and rescue missions were seen as beneficiary to human smugglers, who turned to even more unsafe boats to transport migrants on, because the migrants would be rescued anyways.<sup>141</sup> Also measures taken to keep migrants from arriving at the EU shores had a negative external effect, such as deteriorating living standards at the coast of Libya, where migrants gathered, but were prevented from crossing.<sup>142</sup> Considering all this, it can be concluded that Frontex’ mandate had severe unintended consequences.

One of the biggest unintended consequences of the migrant crisis was the reinstatement of internal borders within the Schengen area. This triggered a new crisis within the EU. The Schengen agreement was seen as one of the biggest achievements of the EU and in 2015, this agreement was in danger of falling apart.<sup>143</sup> Besides the saving lives goal, the Agenda on Migration was also set to secure the EU borders.<sup>144</sup> Over time, this second goal and the protection of the Schengen agreement became more important. This also scaled down the attention to the external crisis and the humanitarian conditions of the migrants at the EU border.<sup>145</sup> The protection of fundamental rights was not the priority in handling the migrant crisis. Meanwhile the situation at the external border worsened. Many more migrants arrived, the number of deaths rose, all while the Member States disagreed on how to handle the crisis. This had negative consequences for the image of the EU as a security provider, both within the Union and externally.<sup>146</sup>

Finally the restructuring of Frontex and the establishment of the European Border and Coast Guard agency can be seen as an unintended consequence for the Member States. In 2004,

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<sup>139</sup> European Commission, ‘Managing migration better in all aspects: A European Agenda on Migration’ (Brussels, 13 May 2015), [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_15\\_4956](https://ec.europa.eu/commission/presscorner/detail/en/IP_15_4956) (last accessed 23 May 2023).

<sup>140</sup> Deiana, Maheshri and Mastrobuoni, ‘Migration at Sea’, 3.

<sup>141</sup> Ibid, 26.

<sup>142</sup> Dias and Freire, ‘Insecurities in EU border management’, 307.

<sup>143</sup> Ceccorulli, ‘Back to Schengen’, 302.

<sup>144</sup> European Commission, ‘Managing migration better in all aspects: A European Agenda on Migration’ (Brussels, 13 May 2015), [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_15\\_4956](https://ec.europa.eu/commission/presscorner/detail/en/IP_15_4956) (last accessed 23 May 2023).

<sup>145</sup> Ceccorulli, ‘Back to Schengen’, 316.

<sup>146</sup> Ibid, 310;

Dias and Freire, ‘Insecurities in EU border management’, 308.



with the establishment of Frontex, it was not foreseen that the agency would grow as much as it did in 2016. Especially the growing independence from Member States was seen as a consequence that was not intended in 2004. With its growing independence, Frontex also gained more prominence and influence. The strategy of Frontex became more influential for the handling of migration related questions by Member States on a national level.<sup>147</sup> Especially after the restructuring in 2016, the agency would be able to intervene in a Member State without their approval in case of an emergency.

After its establishment in 2004, the migrant crisis in 2015 proved to be the trigger for the drastic growth of Frontex. As an existing agency, the EU was quick to turn to Frontex to find a solution to the migrant crisis. In 2016, Frontex was restructured into the European Border and Coast Guard agency, and gained much more independence from the Member States. The development of Frontex was sent down a path towards a more supranational agency. However, a more supranational agency also came with unintended consequences. Most noticeably being more deaths at sea, as more migrants attempted to cross the Mediterranean Sea because of search and rescue missions. The migrant crisis was of immense importance for the evolution of Frontex. During the short period of time covered in this chapter, Frontex grew exceptionally into a relatively autonomous agency. The growth of Frontex is characterised by the same elements as its early evolution. Namely, linking migration to security, contesting Member States for sovereignty and issues with prioritising fundamental rights. These elements proved to be prone to criticism and created serious issues in the further development of Frontex. While short term unintended consequences of Frontex' restructuring were already discussed in this chapter. The next will look more deeply into the criticism on, and unintended consequences of, Frontex' mandate, including the allegations of fundamental rights violations.

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<sup>147</sup> Tsourdi, 'Beyond the "Migration Crisis"', 256.

## **2021 - Increasing criticism and the OLAF report on Frontex**

The growth of Frontex between 2004 and 2016, into a relatively autonomous agency, has been remarkable. The agency especially grew since 2015 and eventually became the biggest EU agency in terms of budget and staff.<sup>148</sup> There has been a general consensus in the EU and among Member States that an efficient border management system is necessary. Besides the national border guards, Frontex plays a big part in this system, but there have been reasonable doubts if the agency is able to handle its increasing responsibilities. From its start, Frontex has been the subject of criticism, either about the effectiveness of its missions, the negative external consequences of the agency's operations or the inability of the involved actors to agree on sufficient fundamental rights standards.<sup>149</sup> However, the criticism on the agency reached its peak in 2020, when multiple non-governmental organisations (NGO) reported on accusations of Frontex of being involved in push-backs of migrants at the EU border. This, in turn, triggered internal investigations within the EU. This chapter will focus on the scope of the criticism that Frontex received and the violations it was accused of in 2021 by the EU Anti Fraud Office (OLAF). Further, this chapter will look at the changes Frontex made during this period, what the unintended consequences of Frontex' activities were and what issues with its practices still remain. This chapter covers the period of time in Frontex' evolution in which the agency grew to extraordinary size with unprecedented autonomy. This growth and this phase in its evolution, gave Frontex responsibilities that, if not executed with care, could cause violations of EU law. In this same period it became increasingly clear that Frontex was not able to handle these responsibilities.

### What criticism did Frontex receive and what violations were reported in 2021?

As has been stated in the previous chapters, Frontex has been no stranger to criticism ever since its establishment. Until 2020, Frontex was often criticised by international NGOs like Amnesty International and Human Rights Watch, for unintended consequences of previous developments. They saw Frontex as the institutionalisation of the securitisation of the migration and asylum

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<sup>148</sup> Meissner, 'The European Border and Coast Guard Agency Frontex beyond borders', 7.

<sup>149</sup> Léonard and Kaunert, 'The securitisation of migration in the European Union', 1423;

Dias and Freire, 'Insecurities in EU border management', 307;

Maas and Truong, 'Europeanization and the Right to Seek Refugee Status', 67.

policy within the EU.<sup>150</sup> Next to that they critiqued the violence and discrimination used by Frontex at the EU border, which is often justified by the agency because they claim to be working in a ‘crisis situation’.<sup>151</sup> The border management of Frontex, especially the lowering of the amount of migrants arriving at EU shores, was also seen as beneficial for smugglers and making the journey more dangerous for migrants.<sup>152</sup> Furthermore, Frontex was accused of lacking transparency and accountability and not complying with its own rules regarding these topics.<sup>153</sup> The critique on the lack of transparency and accountability can also be clearly linked to the exclusion of the Parliament in the establishment of Frontex, since these topics are usually highly valued by the Parliament. All this criticism was already known in 2020, but saw new daylight when multiple reports came out by international NGOs, accusing Frontex of violating migrants’ fundamental rights.<sup>154</sup> This topic too lacked attention in the establishment of Frontex, due to the exclusion of the Parliament. Frontex was accused of using violence, illegal push-backs and denying migrants access to asylum in countries like Croatia, Cyprus, Greece and Hungary.<sup>155</sup> Besides, Frontex allegedly did not monitor these violations and did not hold the actors involved accountable.<sup>156</sup>

The most serious allegations towards Frontex were those of illegal push-backs at the EU external borders.<sup>157</sup> The term push-backs is used when third country migrants are caught when

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<sup>150</sup> Loschi and Slominski, ‘Interagency Relations and the EU Migration Crisis’, 271.

<sup>151</sup> Sachseder, Stachowitsch and Binder, ‘Gender, race, and crisis-driven institutional growth’, 4672.

<sup>152</sup> Ibid, 4686.

<sup>153</sup> Micaela Del Monte and Katrien Luyten, ‘Briefing: European Parliament scrutiny of Frontex’, *European Parliamentary Research Service* (2022), page 2;

Marco Stefan and Roberto Cortinovis, ‘Setting The Right Priorities: Is the New Pact on Migration and Asylum Addressing The Issue of Pushbacks at EU External Borders?’, in: Sergio Carrera and Andrew Geddes (eds.) *The EU Pact on Migration and Asylum in light of the United Nations Global Compact on Refugees* (European University Institute, 2021), page 188;

Amnesty International, ‘Greece: Violence, lies, and pushbacks – Refugees and migrants still denied safety and asylum at Europe’s borders’ (23 June 2021), Index Number: EUR 25/4307/2021, <https://www.amnesty.org/en/documents/eur25/4307/2021/en/>, page 42.

<sup>154</sup> Human Rights Watch, ‘Frontex Failing to Protect People at EU Borders: Stronger Safeguards Vital as Border Agency Expands’ (23 June 2021), <https://www.hrw.org/news/2021/06/23/frontex-failing-protect-people-eu-borders> (last accessed 2 May 2023).

<sup>155</sup> Ibid;

Sachseder, Stachowitsch and Binder, ‘Gender, race, and crisis-driven institutional growth’, 4686.

<sup>156</sup> Lena Karamanidou and Bernd Kasperek, ‘Fundamental Rights, Accountability and Transparency in European Governance of Migration: The Case of the European Border and Coast Guard Agency Frontex’, *Global Migration: Consequences and Responses – Working Paper Series, RESPOND* (July 2020), page 6.

<sup>157</sup> Human Rights Watch, ‘Frontex Failing to Protect People at EU Borders: Stronger Safeguards Vital as Border Agency Expands’ (23 June 2021), <https://www.hrw.org/news/2021/06/23/frontex-failing-protect-people-eu-borders> (last accessed 2 May 2023);

they cross a country's border, either on land or at sea, and are returned to the land of another jurisdiction without consideration of their circumstances.<sup>158</sup> This practice does not only prevent those migrants the access to asylum, but also becomes illegal when it breaks the principle of non-refoulement.<sup>159</sup> Non-refoulement is a fundamental right, that prevents the return of people to territories where they risk persecution, torture or other ill treatment.<sup>160</sup> The reports of NGOs showed worrying concerns regarding push-backs. These allegations towards Frontex led to a series of questions in the Parliament in October 2020. Most were questioning to what extent the Commission was aware of the violations, how the Commission was going to respond and some called for an independent investigation.<sup>161</sup> However, the reporting on violations continued. For instance, Human Rights Watch reported in June 2021 that a Danish patrol boat, as part of a Frontex operation, was told to tow a dinghy full of migrants out of Greek waters.<sup>162</sup> Eventually, the allegations led to investigations into Frontex by the Parliament, the European Ombudsman and the European Anti-Fraud Office (OLAF).<sup>163</sup> The two most important allegations that the OLAF investigation looked at, were the possible witnessing of illegal push-backs by a Frontex-deployed asset and the exclusion of Frontex' Fundamental Rights Officer (FRO) from the reporting line.<sup>164</sup> OLAF concluded that these allegations were proven. The report refers to

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Amnesty International, 'Greece: Violence, lies, and pushbacks – Refugees and migrants still denied safety and asylum at Europe's borders' (23 June 2021), Index Number: EUR 25/4307/2021, <https://www.amnesty.org/en/documents/eur25/4307/2021/en/>.

<sup>158</sup> Del Monte and Luyten, 'Briefing: European Parliament scrutiny of Frontex', 2.

<sup>159</sup> European Anti-Fraud Office (OLAF), 'Final Report Investigation CASE No OC/2021/0451/A1' (30 April 2021) <https://fragdenstaat.de/dokumente/233972-olaf-final-report-on-frontex/> (last accessed 14 June 2023), page 15.

<sup>160</sup> Ibid, 15.

<sup>161</sup> European Parliament, 'Parliamentary question - E-005865/2020: Frontex involvement in migrant pushbacks' (28 October 2020), [https://www.europarl.europa.eu/doceo/document/E-9-2020-005865\\_EN.html](https://www.europarl.europa.eu/doceo/document/E-9-2020-005865_EN.html) (last accessed 26 May 2023);

European Parliament, 'Parliamentary question - E-005836/2020: Allegations of Frontex's complicity in violating the principle of non-refoulement' (27 October 2020), [https://www.europarl.europa.eu/doceo/document/E-9-2020-005836\\_EN.html](https://www.europarl.europa.eu/doceo/document/E-9-2020-005836_EN.html) (last accessed 26 May 2023);

European Parliament, 'Parliamentary question - E-005772/2020: Illegal refoulement operations by Frontex in the Aegean' (23 October 2020), [https://www.europarl.europa.eu/doceo/document/E-9-2020-005772\\_EN.html](https://www.europarl.europa.eu/doceo/document/E-9-2020-005772_EN.html) (last accessed 26 May 2023);

European Parliament, 'Parliamentary question - E-005769/2020: The role of Frontex in illegal Greek pushbacks', (23 October 2020), [https://www.europarl.europa.eu/doceo/document/E-9-2020-005769\\_EN.html](https://www.europarl.europa.eu/doceo/document/E-9-2020-005769_EN.html) (last accessed 26 May 2023).

<sup>162</sup> Human Rights Watch, 'Frontex Failing to Protect People at EU Borders: Stronger Safeguards Vital as Border Agency Expands' (23 June 2021), <https://www.hrw.org/news/2021/06/23/frontex-failing-protect-people-eu-borders> (last accessed 2 May 2023).

<sup>163</sup> Ibid.

<sup>164</sup> European Anti-Fraud Office (OLAF), 'Final Report Investigation CASE No OC/2021/0451/A1' (30 April 2021) <https://fragdenstaat.de/dokumente/233972-olaf-final-report-on-frontex/> (last accessed 14 June 2023), page 9.

specific people in the agency, but their names remain anonymous. However, OLAF concludes that they

Committed serious misconduct and other irregularities. In doing so they hindered the capacity of FRONTEX to fully comply with its responsibilities, namely monitoring compliance with fundamental rights in its activities at the external borders, and ensuring respect for, protection and promotion of, fundamental rights, as enshrined in particular in the Charter of Fundamental Rights of the EU.<sup>165</sup>

The OLAF report proved that Frontex deliberately removed their aerial surveillance from a region in Greece, to avoid witnessing push-backs. As a result, the agency would not have to deal with the incident internally.<sup>166</sup> Next to that, the report refers to multiple incidents in which a Serious Incident Report (SIR) was categorised in a specific way, to exclude the FRO from investigating the incident.<sup>167</sup> It is argued that Frontex' reasoning behind this was to shield the Greek national coast guard. It is not proven that Frontex' staff was involved in illegal push-backs directly, but in some Member States these practices seem systematic and part of the standard national policy.<sup>168</sup>

Throughout the evolution of Frontex, the Member States often disagreed on the amount of independence that Frontex should have. Despite having seen the crisis situation in 2015, most Member States in 2016 and 2018 still voted against more independence for Frontex. Fearing sovereignty losses, the Member States were reluctant to give Frontex even more autonomy.<sup>169</sup> This means that the Member States continue to have a large influence on the practices of Frontex. Frontex' operations are meant to assist the national border management and are employed on request of the host Member State.<sup>170</sup> However, the officers employed in Frontex' operations, are influenced by the values and organisational structure of their country of origin.<sup>171</sup> Next to that, Member States are tempted to continue executing push-backs, because this will lead

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<sup>165</sup> Ibid, 3.

<sup>166</sup> Ibid, 31.

<sup>167</sup> Ibid, 17-33.

<sup>168</sup> Michal Vít and Gábor Kemény, 'Contradictions in Frontex Operations: the Push-back', *Magyar Rendészet* (2020) 4, 85-92, page 88.

<sup>169</sup> Raphael Bossong, 'The Expansion of Frontex: Symbolic Measures and Long-term Changes in EU Border Management', *Stiftung Wissenschaft und Politik* (2019) 47, page 2.

<sup>170</sup> Ibid, 7.

<sup>171</sup> Vít and Kemény, 'Contradictions in Frontex Operations', 90.

to less arriving migrants. Therefore, they will be reluctant to request assistance from Frontex, since this assistance comes with stricter rules and asks for greater transparency.<sup>172</sup> These two trends have great consequences for the respect for fundamental rights within border management. The lack of agreement between the Member States, but also between the Member States and other EU institutions, is seen as one of the main reasons for failing to establish an efficient border management system.<sup>173</sup> Frontex has to satisfy two camps that have goals that almost seem incompatible. Namely, the Member States on the one hand, who call for a decrease of irregular migration and want Frontex to provide security, and the EU institutions, most prominently the Parliament, on the other hand, who call for Frontex to respect the EU rule of law.<sup>174</sup> However, instead of solving the disagreements, the evolution of Frontex shows that the agency reverts to the same measures to try and fix the external border management system.<sup>175</sup> This mostly comes down to more money and more staff. Nevertheless, these measures have not led to an effective way of handling irregular migration.<sup>176</sup> This way of trying to fix the system is especially criticised when it is compared to the evolution of EU agencies dedicated to fundamental rights. While Frontex' budget has grown to 333 million euros in 2019, the EU's Fundamental Rights Agency's (FRA) budget only grew from 20.7 million euros in 2011 to 22.8 million euros in 2019.<sup>177</sup> The attitude of the Member States and the investment in different agencies, in combination with the violations discussed before, shows that fundamental rights are inferior to controlling the external borders within the border management of Frontex.<sup>178</sup>

While Frontex received criticism since its establishment, the criticism reached a peak in 2020. International NGOs accused Frontex of serious fundamental rights violations like push-backs and breaking non-refoulement. The increase in reports on violations led to investigations by multiple EU institutions. OLAF concluded that Frontex was guilty of deliberately removing aerial surveillance from a region in Greece, to avoid witnessing push-backs. Next to these allegations, Frontex is accused of failing to establish an efficient border management system. This is mostly due to Frontex having to satisfy two camps, the

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<sup>172</sup> Bossong, 'The Expansion of Frontex', 6.

<sup>173</sup> Vít and Kemény, 'Contradictions in Frontex Operations', 87.

<sup>174</sup> Ibid, 90;

Bossong, 'The Expansion of Frontex', 4.

<sup>175</sup> Loschi and Slominski, 'Interagency Relations and the EU Migration Crisis', 280.

<sup>176</sup> Bossong, 'The Expansion of Frontex', 8.

<sup>177</sup> Loschi and Slominski, 'Interagency Relations and the EU Migration Crisis', 281.

<sup>178</sup> Karamanidou and Kasperek, 'Fundamental Rights, Accountability and Transparency in European Governance of Migration', 84.

Member States that want a decrease of migration and the Parliament that calls for greater adherence to fundamental rights. This tension leads to fundamental rights being inferior to controlling the external borders within the border management of Frontex.

### What changes did Frontex make during this period of heightened criticism?

The increased criticism on Frontex led to some involuntary changes for the agency. The allegations of fundamental rights violations were problematic and were hurting the image of the EU as a security provider. In order to show that the allegations were taken seriously, Frontex was pressured, mostly by the Parliament and Council, to improve in this field. Just like in 2011, when Frontex was pressured by the Parliament and Council to implement a fundamental rights strategy.<sup>179</sup> In 2019, a new regulation proposed by the Commission already ensured that Frontex, and mostly its adherence to fundamental rights, would be supervised more.<sup>180</sup> In 2020, the FRA also started to play a bigger role in Frontex' functioning. For instance, the FRA started to attend Frontex' management board meeting that covered fundamental rights topics.<sup>181</sup> The FRA and Frontex already had formal agreements to cooperate with each other, but those were vague and non-binding.<sup>182</sup> In 2020 the FRA's involvement was more permanent. In January 2021, the Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), set up the Frontex Scrutiny Working Group. In July 2021, the working group concluded that Frontex failed to prevent or reduce the risk of serious violations, called on Frontex to speed up the recruitment process of the Fundamental Rights Monitors (FRM) and concluded that the Parliament had not been sufficiently informed on the allegations. As a result of the continuing criticism, the director of Frontex, Fabrice Leggeri, eventually resigned in April 2022. In July 2022, Aija Kalnāja was assigned as ad interim director. She informed the LIBE committee in November 2021 that Frontex had almost implemented half of the recommendations of the Frontex Scrutiny Working Group. In May 2022, this number had risen to 23 of the 43 recommendations.<sup>183</sup> Other measures that the agency took in response to criticism were, adapting a new fundamental rights strategy in February 2021 and appointing a new FRO in June 2021.<sup>184</sup>

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<sup>179</sup> Perkowski, "There Are Voices in Every Direction", 1193.

<sup>180</sup> Bossong, 'The Expansion of Frontex', 3.

<sup>181</sup> Del Monte and Luyten, 'Briefing: European Parliament scrutiny of Frontex', 5.

<sup>182</sup> Loschi and Slominski, 'Interagency Relations and the EU Migration Crisis', 287.

<sup>183</sup> Del Monte and Luyten, 'Briefing: European Parliament scrutiny of Frontex', 10.

<sup>184</sup> Ibid, 6.

Next to the changes that Frontex implemented due to rising criticism, they also made changes in this period that were more in line with the path dependent development they have been following since its establishment. In 2019, the Frontex mandate saw another reform. The goal of this reform was to prevent another migrant crisis that would spread out over the continent and was intended to satisfy the demands of the Member States.<sup>185</sup> In order to be able to respond quickly to future crises, the reform introduced a standing corps that would eventually grow to 10,000 operational staff in 2027.<sup>186</sup> While most of these 10,000 would still be operational staff for short-term deployments, the growth of the agency's statutory staff and long-term deployment staff also grew significantly.<sup>187</sup> This expansion means that Frontex is showing that it is not only the solution at hand during crisis situations, but also plans to leave its mark on the long-term and to become a fixed part in EU border management.<sup>188</sup> Similarly, the budget of Frontex is set to keep rising. Due to Member States wanting Frontex to play a bigger role in (expensive) return operations, the agency's budget had already grown from 333 million euros in 2019 to more than 700 million euros in 2022.<sup>189</sup> Between 2021 and 2027, the total budget of Frontex is set to increase to around 9.4 billion euros.<sup>190</sup> This means that, in terms of staff and budget, Frontex follows a very path-dependent development of expansion. Another path-dependent element of Frontex' development is the link between border management and security policy of the EU. Frontex does not only present the increase of arriving migrants as a crisis, but also links these numbers to, for example, higher terrorism threats.<sup>191</sup> These links not only justify the growth of Frontex, but also justify the investment in new border technology, like surveillance systems,

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<sup>185</sup> Meissner, 'The European Border and Coast Guard Agency Frontex After the Migration Crisis', 219.

<sup>186</sup> European Parliament and the Council, 'Regulation (EU) 2019/1896 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624' (Brussels, 13 November 2019), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019R1896> (last accessed 5 May 2023), page 2; Loschi and Slominski, 'Interagency Relations and the EU Migration Crisis', 285; Sachseder, Stachowitsch and Binder, 'Gender, race, and crisis-driven institutional growth', 4673.

<sup>187</sup> European Parliament and the Council, 'Regulation (EU) 2019/1896 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624' (Brussels, 13 November 2019), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019R1896> (last accessed 5 May 2023), page 101.

<sup>188</sup> Sachseder, Stachowitsch and Binder, 'Gender, race, and crisis-driven institutional growth', 4674; Tsourdi, 'Beyond the "Migration Crisis"', 236.

<sup>189</sup> Frontex, 'Budget 2022 VOB', (Warsaw, 1 January 2022), [https://frontex.europa.eu/assets/Key\\_Documents/Budget/Frontex\\_VOB\\_2022.pdf](https://frontex.europa.eu/assets/Key_Documents/Budget/Frontex_VOB_2022.pdf) (last accessed 5 May 2023).

<sup>190</sup> Bossong, 'The Expansion of Frontex', 2.

<sup>191</sup> Sachseder, Stachowitsch and Binder, 'Gender, race, and crisis-driven institutional growth', 4679; Frontex, 'Risk Analysis for 2018' (Warsaw, February 2018), [https://frontex.europa.eu/assets/Publications/Risk\\_Analysis/Risk\\_Analysis/Risk\\_Analysis\\_for\\_2018.pdf](https://frontex.europa.eu/assets/Publications/Risk_Analysis/Risk_Analysis/Risk_Analysis_for_2018.pdf) (last accessed 23 May 2023), pagina 39.



drones and IT systems handling biometric data.<sup>192</sup> This new technology leads to the EU external border being increasingly more securitised, causing some to describe the EU as ‘(cyber) Fortress Europe’.<sup>193</sup> The focus on technological innovations, shows that securitisations remains an important part of the EU’s border management.

Other changes that Frontex made during this period of heightened criticism include moving return operations to the top priority of the agency and an increased focus on cooperation with third countries. Both these changes are sensitive to criticism regarding fundamental rights, but were supposed to bring results that the Member States wanted to see. Namely a decrease of arriving migrants. Frontex has been involved in return operations ever since 2006. However, only with the new regulation in 2019, return operations became one of the most important tasks of the agency.<sup>194</sup> With the new regulation, Frontex became able to conduct return operations independently, but also was to assist Member States in this regard.<sup>195</sup> The Commission’s New Pact on Migration and Asylum of 2020, stressed the priority of return operations by Frontex even more.<sup>196</sup> However, return operations are sensitive to fundamental rights violations, since migrants are often returned involuntarily. Therefore, the operations include risks regarding refoulement, violence and sharing of sensitive information.<sup>197</sup> Hence why the new regulation of 2019 included better possibilities to hold Frontex accountable for violations during return operations.<sup>198</sup> At the same time cooperation with third countries became increasingly important to Frontex. One of the plans was to deploy Frontex staff on joint operations to third countries in order to prevent migrants from arriving at EU borders.<sup>199</sup> In the EU’s neighbouring countries, Frontex is often already active as an advisor or a provider of technical support.<sup>200</sup> However, this plan would authorise Frontex to conduct operations outside of EU territory. In 2022, this kind of cooperation

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<sup>192</sup> Sachseder, Stachowitsch and Binder, ‘Gender, race, and crisis-driven institutional growth’, 4682; Léonard and Kaunert, ‘The securitisation of migration in the European Union’, 1420.

<sup>193</sup> Dias and Freire, ‘Insecurities in EU border management’, 304.

<sup>194</sup> Mariana Gkliati, ‘Frontex Return Operations and their Human Rights Implications’, in: Ibrahim Soysüren and Mihaela Nedelcu (eds.) *Deportation of Foreigners: EU instruments, Nation-State practices and social actors’ involvement* (Bern, 10 January 2020), page 18.

<sup>195</sup> European Parliament and the Council, ‘Regulation (EU) 2019/1896 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624’ (Brussels, 13 November 2019), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019R1896> (last accessed 5 May 2023), page 50.

<sup>196</sup> European Commission, ‘New Pact on Migration and Asylum’ (Brussels, 23 September 2020), [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_1706](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1706) (last accessed 23 May 2023).

<sup>197</sup> Gkliati, ‘Frontex Return Operations and their Human Rights Implications’, 10.

<sup>198</sup> *Ibid.*, 17.

<sup>199</sup> Meissner, ‘The European Border and Coast Guard Agency Frontex After the Migration Crisis’, 217.

<sup>200</sup> Bossong, ‘The Expansion of Frontex’, 7.

was still seen as a reasonable opportunity, and negotiations were opened with Western Balkan countries about Frontex cooperation.<sup>201</sup> Another plan went a step further and suggested Frontex to conduct return operations from non-EU countries to countries of origin.<sup>202</sup> However, this plan was quickly stranded due to opposition by the Parliament.<sup>203</sup> The biggest critique of the Parliament was that safeguarding of fundamental rights was almost impossible in these kinds of operations.<sup>204</sup> This last example clearly shows the underlying tension that was present throughout Frontex' mandate and shows how the two camps that Frontex tried to satisfy, had different ideas on what Frontex' main task should be.

In the period of heightened criticism, Frontex implemented a series of changes. Due to the criticism they were forced to implement changes mostly by the Parliament and Council, in order to prioritise fundamental rights better. However, in this period, the agency also saw changes more in line with the previously set out path. Namely, an increase in staff and budget, further securitising the EU border and moving return operations and third country cooperation to the top of the agenda. While these changes were contradictory, they were to satisfy all actors involved in Frontex. The changes as a response to the criticism to satisfy the Parliament and the path dependent changes to satisfy the Member States.

Have the activities of Frontex changed in terms of unintended consequences and what issues with Frontex' mandate still remain?

The obligation of Frontex to follow international and EU law in combination with the requirement of Frontex staff to respect fundamental rights, led to an overall understanding that the presence of Frontex improves fundamental right standards and makes for better monitoring, since the operations take place within an EU environment.<sup>205</sup> However, in reality this all-time presence of EU law has an opposite effect. Frontline Member States, like Poland and Lithuania, are pushing for harder measures to decrease the number of migrants entering the EU. Lithuania

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<sup>201</sup> Council of the European Union, 'Border management: Council authorises the opening of negotiations with four Western Balkans partners on Frontex cooperation' (18 November 2022) <https://europa.eu/CyKdtf> (last accessed 5 May 2023).

<sup>202</sup> Bossong, 'The Expansion of Frontex', 4.

<sup>203</sup> Gkliati, 'Frontex Return Operations and their Human Rights Implications', 6.

<sup>204</sup> Bossong, 'The Expansion of Frontex', 4.

<sup>205</sup> Karamanidou and Kasperek, 'Fundamental Rights, Accountability and Transparency in European Governance of Migration', 69;

Stefan and Cortinovis, 'Setting The Right Priorities', 187.

asks for assistance from Frontex regarding this, Poland does not.<sup>206</sup> However, these Member States also go a step further, by taking measures that are illegal in EU law, such as making push-backs legal on a national level.<sup>207</sup> Frontex can only act in these border areas, if they are invited by the host country.<sup>208</sup> Since Frontex' operations come with more monitoring and stricter rules regarding EU law and fundamental rights, Member States become more reluctant to invite such operations.<sup>209</sup> This means that it can be said that the biggest unintended consequence of the evolution of Frontex is that Member States are hesitant to ask for Frontex' assistance and fundamental rights violations are still occurring.

The problems with Frontex and the accusations of fundamental rights violations have had some direct consequences. As described in the previous chapters, the Parliament is in control of approving or rejecting Frontex' budget. Considering the Parliament holds fundamental rights and transparency in high regards, they were very displeased with the accusations regarding Frontex. As a consequence, the Parliament decided to use its budgetary power. In April 2021, the Parliament postponed the discharge of Frontex' financial year of 2019, and temporarily froze the agency's accounts. The discharge was eventually granted in October 2021. However, in May 2022, the Parliament again decided to postpone the discharge of Frontex' financial year of 2020.<sup>210</sup> Some of the demands of the Parliament to grant discharge were the speed up of the recruitment of FRO's and FRM's, equalising the gender imbalance within the agency and better reporting on serious incidents at the external border.<sup>211</sup>

Not only the criticism and allegations had consequences for Frontex. Other trends in Frontex' development have also caused unintended consequences. An analysis of the narrative that Frontex portrays outwards, shows that the agency recites a crisis narrative. The image is that mass migration is taking place at the EU borders and that this causes insecurity to the Union.<sup>212</sup> This image of a prolonged crisis justifies the presence of Frontex, but also contributes to an

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<sup>206</sup> Magdalena Perkowska and Aurelijus Gutauskas, 'Were the Lithuanian and Polish Responses to the Refugee Influx Legal or Illegal?', *Bialystok Legal Studies* 28 (2023) 1, 125.

Bossong, 'The Expansion of Frontex', 4.

<sup>207</sup> Perkowska and Gutauskas, 'Were the Lithuanian and Polish Responses to the Refugee Influx Legal or Illegal?', 133;

Vít and Kemény, 'Contradictions in Frontex Operations', 85.

<sup>208</sup> Bossong, 'The Expansion of Frontex', 1.

<sup>209</sup> *Ibid*, 6.

<sup>210</sup> Del Monte and Luyten, 'Briefing: European Parliament scrutiny of Frontex', 8/9.

<sup>211</sup> *Ibid*, 8.

<sup>212</sup> Perkowski, Stierl and Burrige, 'The evolution of EUropean border governance through crisis', 114.

image of a dangerous ‘other’. Migrants are portrayed as a threat, and while stopping migrants from arriving at EU borders should bring security to the EU, it only causes insecurity to migrants.<sup>213</sup> It also encourages increasing security measures regarding migration and asylum policy within the EU. Over the years, big investments have been made in upgrading the technological defence mechanisms of the EU external border.<sup>214</sup> The soaring securitisation of migration within the EU has resulted in its borders becoming one big technological security wall.<sup>215</sup> In the 1990s and early 2000s, after increasing policies were created to prevent migrants from entering Europe, the concept ‘fortress Europe’ was invented.<sup>216</sup> With this technological wall, the EU might have achieved the creation of this fortress. However, this wall does not stop migrants from attempting to enter the EU. Because, ‘erecting walls may stop the flow, but will not solve it.’<sup>217</sup> There are several issues with the technological border of the EU. One being that the ongoing securitisation of migration clashes with dealing with the root causes of migration.<sup>218</sup> Another being that the technological developments at the EU border are relatively new and should be examined more, in order to prevent more fundamental rights allegations in border management.

The development of Frontex into the agency that it is today, is ultimately an unintended consequence of the agency it started out as. The negotiations that took place before 2004, did not envision Frontex to become the key player in EU security and migration policy it is today.<sup>219</sup> Over time, Frontex has started to look more and more like the European Border Police that Germany and Italy initially proposed in 2001.<sup>220</sup> However, the agency’s rapid expansion has made it the solution at hand for the EU in crisis situations.<sup>221</sup> The agency got so big that, while an EU agency cannot create policy themselves, its strategy can influence the national policy of Member States.<sup>222</sup> However, reality is that issues with Frontex’ mandate have always been there

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<sup>213</sup> Dias and Freire, ‘Insecurities in EU border management’, 308.

<sup>214</sup> Léonard and Kaunert, ‘The securitisation of migration in the European Union’, 1420.

<sup>215</sup> Perkowski, Stierl and Burrige, ‘The evolution of EUropean border governance through crisis’, 112.

<sup>216</sup> Dias and Freire, ‘Insecurities in EU border management’, 303.

<sup>217</sup> Ibid, 308.

<sup>218</sup> Ibid.

<sup>219</sup> Meissner, ‘The European Border and Coast Guard Agency Frontex After the Migration Crisis’, 213;

Perkowski, Stierl and Burrige, ‘The evolution of EUropean border governance through crisis’, 123.

<sup>220</sup> Leonard, ‘The creation of FRONTEX and the politics of institutionalisation in the EU external borders policy’, 376.

<sup>221</sup> Meissner, ‘The European Border and Coast Guard Agency Frontex After the Migration Crisis’, 222;

Sachseder, Stachowitsch and Binder, ‘Gender, race, and crisis-driven institutional growth’, 4674.

<sup>222</sup> Tsourdi, ‘Beyond the “Migration Crisis”’, 246.

and there are still issues remaining. Return operations are still taking place, despite their sensitivity to fundamental rights violations.<sup>223</sup> Border management policies of certain Member States are not in line with EU law.<sup>224</sup> Frontex' operations are still not monitored by an independent body.<sup>225</sup> Migrants keep finding alternative routes and smugglers become more professional.<sup>226</sup> And Frontex is set to keep expanding, even to non-EU territory.<sup>227</sup> All this, while the number of migrants arriving at EU borders, is not lowering. A fair question to ask is if Frontex is even capable of handling the growing responsibilities they have been given in the past years. Or, if Frontex mainly serves as a blame taker of the EU institutions and the Member States regarding human suffering.<sup>228</sup> In order to really establish an efficient border management system, the Member States and the EU institutions would need to find common ground. Frontex' role would be to understand the role of migration in the countries of origin, and focus on establishing professional standards of border control with new technology, and with high regards for transparency and accountability.<sup>229</sup>

The mounting criticism that Frontex received in 2020, is a reflection of the growing autonomy of the agency and its growing responsibilities. However, the criticism also shows that Frontex does not always have control over its own operations. While Frontex did become more independent throughout its evolution, its mandate still often clashes with expectations of the Member States and the EU institutions. On the one hand, Frontex implemented changes to better the standards regarding fundamental rights in the agency, to satisfy the Parliament. While on the other hand, the agency also continues a path-dependent development that is more in line with the expectations of the Member States. Throughout its evolution, the agency's mandate was often amended in responses to critical junctures and therefore without sufficient knowledge of the

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<sup>223</sup> Gkliati, 'Frontex Return Operations and their Human Rights Implications', 10.

<sup>224</sup> Perkowska and Gutauskas, 'Were the Lithuanian and Polish Responses to the Refugee Influx Legal or Illegal?', 127.

<sup>225</sup> Gkliati, 'Frontex Return Operations and their Human Rights Implications', 14.

<sup>226</sup> Bossong, 'The Expansion of Frontex', 2;

Sachseder, Stachowitsch and Binder, 'Gender, race, and crisis-driven institutional growth', 4686.

<sup>227</sup> Council of the European Union, 'Border management: Council authorises the opening of negotiations with four Western Balkans partners on Frontex cooperation' (18 November 2022) <https://europa.eu/CyKdftf> (last accessed 5 May 2023).

<sup>228</sup> Perkowski, Stierl and Burrige, 'The evolution of EUropean border governance through crisis', 112.

<sup>229</sup> Ana Uzelac, 'Policy Brief - Returns at what cost: The challenges of placing readmissions at the heart of EU migration policies', *Clingendael Netherlands Institute for International Relations* (June 2019), page 9; Bossong, 'The Expansion of Frontex', 8.

long-term consequences. This has resulted in Frontex on paper being an agency that should satisfy both camps, while in reality it satisfies neither. Frontex became a reactive actor in European migration, unable to sufficiently manage its growing responsibilities and creating problems it is supposed to solve.

## Conclusion

Ever since its establishment the growth and evolution of Frontex has been remarkable. Triggered by critical junctures, the mandate of Frontex found unprecedented autonomy in a relatively short period of time. In 2004 a mandate was established for Frontex, as a response to higher prioritisation of security within the EU. As seen in the research of Ekelund and Merton, the functioning of an agency is dependent on the conditions under which they were set up. Therefore, the link between security and migration in discussions regarding Frontex has been present throughout the entire evolution of the agency. From 9/11 serving as a catalyst and pushing migration and security to the top of the agenda of the EU, to the threat of the Schengen protocol crumbling down, to eventually creating highly securitised external borders causing some to describe the EU as '(cyber) Fortress Europe'.

Another constant factor in Frontex' evolution is the tension between Frontex' mandate, the Member States and the EU institutions. From the start, all actors could not agree on how to establish an efficient border control system. This in itself led to the proposal of establishing an agency. However, with the continued development of Frontex into a more supranational agency, the Member States were constantly contested for sovereignty. The Member States therefore were reluctant throughout Frontex' entire evolution to give the agency more independence. Even when confronted with humanitarian disasters at the EU external borders, Member States did not want to lose their own sovereignty. This eventually led to Frontex having to try and satisfy two camps. The Member States on one hand, that push for more securitisation measures and want to control their own borders, and the EU institutions on the other, that want Frontex to operate in accordance with EU and international law.

The most important constant factor in Frontex' evolution is the issues with prioritising fundamental rights within the agency. Ekelund and Merton's argument of an agency's functioning being dependent on the conditions under which it is set up, also works well here. By excluding the Parliament in the establishment of Frontex, an ignorant mistake was made with extraordinary consequences. While Frontex' mandate has been adjusted many times throughout its evolution, it was not able to solve the lack of prioritisation of fundamental rights. On paper, fundamental rights became increasingly important for Frontex. However, in reality, the ever-growing amount of responsibilities, the constant association with securitisation and the urge to satisfy the Member States led to Frontex not being able to sufficiently adhere to EU and

international law. The accusations against Frontex in 2020 and the OLAF report of 2021 were therefore consequences of these factors in the evolution of Frontex.

Frontex' evolution, analysed by applying historical institutionalism, shows that with the growth of Frontex, issues within the agency could not be isolated anymore. While an issue might have had small consequences in Frontex' early evolution, after its growth one issue would have very large consequences. With the growth of Frontex, the environment in which Frontex operated also changed. This not only led to larger consequences, but also different consequences. While policy makers often assume that solutions that worked in the past will continue to do so, this mostly leads to unintended consequences. In Frontex' case, the continued reverting to expanding Frontex' mandate did not lead to positive results, but instead led to smaller consequences becoming large consequences and eventually led to Frontex diverting from EU law. The unintended consequences of attempts to find solutions to crises and fix the problems within Frontex, only led to the agency's activities turning out to be highly problematic and ending up creating problems it was supposed to solve.

This research aimed to explain how Frontex evolved into a relatively autonomous agency that could divert from EU law. While it attempted to do so with the use of primary sources of the EU institutions and Frontex itself, in combination with secondary literature, it was not able to cover all leads related to this topic. The contradictions in the Frontex mandate are a highly controversial topic and continue to inspire new and interesting research in many different fields. For instance, this research mentioned the positions of certain Member States, but not to a great extent. At the same time, primary sources related to the positions of the Member States were not central in this research, due to the limit of scope. Further research on the positions of the Member States can give greater insights into which Member States are supporting the expansion of Frontex, which are not and how these Member States can find common ground. A different approach that would be interesting in the academic debate regarding Frontex, would be to investigate the influence of Frontex' evolution externally, for instance on migration streams. Another controversial topic that was not investigated enough in this research is the effectiveness of third country cooperation, especially since the EU is planning on expanding this cooperation. Next to additional research into Frontex in the field of international relations, the topic can also inspire new research in other disciplines like law, economics and sociology. The contradictions between EU and national law, the effectiveness of the investments in Frontex and the effect of



human behaviour on Frontex' operations are all topics that can expand the academic debate regarding Frontex as an EU agency.

While this research focussed on the development of Frontex from a historical institutionalist perspective, it did uncover problems still remaining within Frontex' mandate and EU migration policy. Migrants are still dying at sea and fundamental rights violations are still occurring at the EU borders. At the same time there has been a general consensus in the EU and among Member States that an efficient border management system is necessary. The year 2023 is seeing a sharp rise in migrant arrivals which reinforces this feeling even more. On the 8th of June 2023 the Council reached an agreement on new EU asylum and migration laws, after lengthy discussions.<sup>230</sup> These new laws could change the procedures for migrants arriving at the EU border dramatically. The laws still have to pass through the Parliament, where they will most likely be criticised for various reasons. It remains to be seen how these new laws will affect the role of Frontex, but with the agency's evolution in mind, it is certainly interesting to follow this development.

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<sup>230</sup> Council of the European Union, 'Migration policy: Council reaches agreement on key asylum and migration laws' (8 June 2023), <https://europa.eu/!hMfchM> (last accessed 15 June 2023).

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