

# MULTILEVEL GOVERNANCE OF MARITIME BORDER SURVEILLANCE IN THE EU AND ACCOUNTABILITY: THE COAST GUARD IN SWEDEN

ÅSA GUSTAFSSON\*

*The article strives to examine the accountability of the Swedish Coast Guard in the field of maritime border surveillance. Border management, including border surveillance, lies close to states' core interests, such as sovereignty and security, and are inherently sensitive to human rights violations. This has affected the developments of the regulatory framework at the EU level in different ways. The question is posed how EU law, and the instruments that are directly applicable in the member states, impact on the accountability of the Swedish Coast Guard in the field of maritime border surveillance. The member state in focus is Sweden and in that sense it deals with maritime border surveillance in the Baltic Sea region, and not the Mediterranean Sea region, which has often been the debated issue due to the migration pressure in that region. However, it is of interest to examine also an actor in a Nordic EU member state, taking into account inter alia the vast fragmentation regarding authorities with responsibilities in border management in the EU. Also the multilevel system of rules as well as of actors – Frontex and the member states' authorities – makes it relevant to make such an investigation. Whether multi-level regulation promotes or undermines accountability is to some extent dependent on which concept of accountability one holds. When applying a concept of individual accountability, the existence of a range of accountability avenues regarding the Coast Guard's activities transpires as quite satisfactory. However, if more actors would be involved in the Coast Guard's maritime border surveillance activities based on the existing multilevel system of actors and rules, this would negatively impact the possibilities to hold the different actors accountable, for instance since different 'accountability rules' apply to different actors.*

## 1 INTRODUCTION

Border surveillance is a debated and controversial topic within the EU. The EU has around 7 400 km of external land borders and 57 800 km of external maritime borders and coastlines. The debate and developments concerning border surveillance of the external maritime borders have been Mediterranean driven, and there have been a proliferation of initiatives and strategies to cope with the situation.<sup>1</sup> However, it would also be of interest to shed some light on how maritime border surveillance is applied in a Nordic EU member state, Sweden, which this text purports to do, albeit in a limited way.

---

\* Faculty of Social Sciences, Business and Economics, Åbo Akademi University.

<sup>1</sup> eg Sergio Carrera, Leonhard den Hertog, 'Whose Mare? Rule of Law Challenges in the Field of European Border Surveillance in the Mediterranean' (2015) 79 *Liberty and Security*, Centre of European Policy Studies, 3. Carrera and den Hertog analysed the field of European border surveillance in the Mediterranean with the aim of gaining a better understanding of the ways in which the legal, policy and operational developments in this domain can be understood in a post-Lisbon Treaty EU arena.

In migration policy most policy issues are governed by shared competences that leave the national level different degrees of freedom.<sup>2</sup> As Heidbreder states, there is no single multilevel mode of interaction in the EU in the field of migration policy.<sup>3</sup> The incremental evolution of central regulation regarding legal and irregular migration, including border control, entails a multitude of interaction modes.<sup>4</sup> To grasp the nature of multilevel policymaking in migration policy, it is central to distinguish which particular rules apply. The variance is not by broad policy fields but is mostly bound to policy issues.<sup>5</sup> Thus, the supranational rules have to be analysed issue by issue – which is one of the reasons for this contribution. In the EU, implementation is largely left to the member states.<sup>6</sup> In EU law, the concept of border management encompasses actions and/or decisions undertaken in the context of both border control and border surveillance.<sup>7</sup> The supranational EU rules on border surveillance consists of regulations that are binding legislative acts that must be applied in their entirety across the EU. Multilevel governance, through EU actors and national actors, of border surveillance is complex. In border management Frontex has significant coordination and operational tasks, but the formal control over border forces stays in the hands of the member states.<sup>8</sup> For an overall assessment of the research situation it seems appropriate to cite Heupel and Reinold:

‘Governance beyond the nation-state is replete with challenges, complexities, and contradictions, and even though both International Relations (IR) and International Law (IL) scholarship have sought to develop conceptual tools in order to grasp this complex reality, there still remain a considerable number of blind spots on each discipline’s research agenda’.<sup>9</sup>

Concerning surveillance as such, it has become an increasingly important security measure in various sectors of society in the EU context, and is understood as an efficient tool to combat different kinds of threats to Europe’s internal and external security.<sup>10</sup> From a political or social science point of view, surveillance can be understood as ‘the process of watching,

---

<sup>2</sup> Treaty of the Functioning of the European Union (TFEU), art 4(2) states: ‘Shared competence between the Union and the Member States applies in the following principal areas: [...] (j) area of freedom, security and justice’. Eva G. Heidbreder, ‘Multilevel Elements of EU Migration Policy’ (2014) 2 King Project-Political Science Unit, In-depth Study, 8.

<sup>3</sup> *ibid.*, 8.

<sup>4</sup> *ibid.*

<sup>5</sup> *ibid.*, 3.

<sup>6</sup> Andreas Føllesdal, ‘Epilogue: Toward More Legitimate Multilevel Regulation’ in Andreas Føllesdal, Ramses A. Wessel, Jan Wouters (eds), *Multilevel regulation and the EU: The interplay between global, European, and national normative processes* (Martinus Nijhoff Publishers 2008) 392.

<sup>7</sup> Jörg Monar, ‘The External Shield of the Area of Freedom, Security and Justice: Progress and Deficits of the Integrated Management of External EU Borders’ in J. de Zwaan and F. A. N. J. Goudappel (eds), *Freedom, Security and Justice in the European Union: Implementation of The Hague Programme* (T.M.C. Asser Press 2006)

<sup>8</sup> Regulation (EU) 2019/1896 of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) 1052/2013 and (EU) 2016/1624 (2019 Frontex Regulation) [2019] OJ L 295/1, recital 12, art 7; Heidbreder (n 2) 7.

<sup>9</sup> Theresa Reinold, Monika Heupel, ‘Introduction: The Rule of Law in an Era of Multi-level Governance and Global Legal Pluralism’ in Theresa Reinold, Monika Heupel (eds), *The Rule of Law in Global Governance* (Palgrave Macmillan 2016) 1.

<sup>10</sup> Maria Jumbert Gabrielsen, ‘Controlling the Mediterranean Space through Surveillance: The Politics and Discourse of Surveillance as an All-Encompassing Solution to EU Maritime Border Management Issues’ (2012) 3 *Espace Populations Sociétés* 35.

monitoring, recording, and processing the behaviour of people, objects and events in order to govern activity'.<sup>11</sup> That definition underlines that surveillance is not strictly confined to watching and observing, but also records and processes what is being observed; thus, in a narrow sense, surveillance can be understood as the process of keeping something under close observation.<sup>12</sup> But, surveillance could also be understood as a three-part process: watching, collecting information, and finally, reacting to an observed abnormal situation.<sup>13</sup> On the issue of competing interests in EU migration policy, Peers has stated that:

‘The EU’s involvement in this field of law must not only address these diverse aspects of migration in a coherent way, but also has to manage two distinct but related conflicts: the balance between EU competence in this field and national sovereignty, and the tension between immigration control and the protection of human rights’.<sup>14</sup>

The division of authority is seemingly the outcome of competing interests in these two dimensions.<sup>15</sup> Border management and border surveillance lie close to states’ core interests, such as sovereignty<sup>16</sup> and security,<sup>17</sup> which seemingly has affected the developments of the regulatory framework at EU level.<sup>18</sup> A longstanding conceptual discussion regarding border surveillance of maritime borders concerns the extent to which such border surveillance also subsumes search and rescue operations (SAR).<sup>19</sup>

How border management rules and practice relate to the upholding of human rights has been, and continues to be, extensively debated and explored by many scholars.<sup>20</sup> EU legislation in the field of human rights and border management has evolved, but it mainly sets out general rules.<sup>21</sup>

This contribution relates to aspects concerning both the abovementioned conflicts or dimensions – the ‘sovereignty dimension’ and the ‘human rights dimension’ – since they have been, and still are, essential for the development of the multilevel rules. In the context of accountability the human rights aspects are crucial, since border management activities are

---

<sup>11</sup> Valerie Jenness, Davin Smith, Judith Stephan-Norris, ‘Taking a Look at Surveillance Studies’ (2007) 36 *Contemporary Sociology: A Journal of Reviews* 2 vii.

<sup>12</sup> Jumbert Gabrielsen (n 10) 38.

<sup>13</sup> *ibid.*

<sup>14</sup> Steve Peers, ‘Immigration and Asylum’ in Catherine Bernard and Steve Peers (eds), *European Union Law* (OUP 2014) 777, cited by Heidbreder (n 2) 6.

<sup>15</sup> *ibid.*

<sup>16</sup> The traditional understanding of sovereignty is closely linked to the norm of non-intervention, as discussed by Daase in Christopher Daase, ‘Security, Intervention, and the Responsibility to Protect: Transforming the State by Reinterpreting Sovereignty’ in Stephan Leibfried, Evelyne Huber, Matthew Lange, Jonah D. Levy, Frank Nullmeier, John D. Stephens (eds) *The Oxford Handbook of Transformations of the State* (OUP 2015) 310

<sup>17</sup> The term ‘national security’ often denotes security relating to the protection of the territory of a state, see for instance Marie Jacobsson ‘Maritime Security: an Individual or Collective Responsibility?’ in Jarna Maria Petman and Johannes Klabbers (eds), *Nordic Cosmopolitanism: Essays in International Law for Martti Koskenniemi* (Martinus Nijhoff 2003) 391.

<sup>18</sup> Åsa Gustafsson, ‘The Baltic Sea Region Border Control Cooperation (BSRBCC) and border management in the Baltic Sea region: A case study’ (2018) 98 *Marine Policy* 309.

<sup>19</sup> eg Carrera, den Hertog (n 1) 12.

<sup>20</sup> Sergio Carrera, Marco Stefan, *Complaint Mechanisms in Border Management and Expulsion Operations in Europe: Effective Remedies for Victims of Human Rights Violations?* (2018) Centre for European Policy Studies.

<sup>21</sup> Peers (n 14) 783 - cited by Heidbreder (n 2) 7.

inherently sensitive to human rights violations.<sup>22</sup> However, human rights aspects will not be investigated substantially, since the focus of this text is of a procedural character: the existence of accountability mechanisms, as further clarified below.

Obviously, the Baltic Sea is in a completely different situation than the Mediterranean Sea when it comes to ‘maritime migration pressure’, which can hardly be said to exist at all in the Baltic Sea. Eight of the nine countries bordering the Baltic Sea – Finland, Russia, Estonia, Latvia, Lithuania, Poland, Germany, Denmark, Sweden – are EU members, only Russia is not, which implies that the ‘maritime migration’ situation in the Baltic Sea seems unlikely to change in any drastic way. It can also be noted that the large ‘joint operations’ that have attracted much attention in the Mediterranean, have (so far) not been used in the Baltic Sea – and would also not seem likely to occur, for the reasons just mentioned.

Nevertheless, the choice to investigate a Nordic member state, bordering the Baltic Sea, is motivated by the fact that the Nordic member states have not been explored that much so far regarding these issues, since focus has been on the Mediterranean region. More importantly, there has been an increasing plurality of actors involved in EU border management including surveillance, which blurs who is doing what and who is (or should be) responsible for what. The multi-actor and fragmented landscape<sup>23</sup> are reasons for investigating also authorities in Nordic members states. In 2017 it was assessed that more than 50 national authorities were involved in the border control functions that are included in the Schengen Borders Code,<sup>24</sup> and that more than 300 national authorities were engaging in coast guard functions in the EU.<sup>25</sup> Not all EU member states concerned have a specialised ‘coast guard’ authority. Coast guard functions in the EU have been performed by civil, paramilitary and military actors.<sup>26</sup>

An attempt to answer the research question posed below will shed light on the fragmentation caused by the complex multi-actor landscape related to border control and maritime surveillance in the EU. Such an examination becomes all the more important in a context where EU agencies such as the European Border and Coast Guard have become involved in the implementation of EU bordering policies.<sup>27</sup> One example is that in the EU member state Greece, Frontex is involved in almost every aspect of border management,

---

<sup>22</sup> Mariana Gkliati, ‘A Nexus Approach to the Responsibility of the European Border and Coast Guard: From Individual to Systemic Accountability’ (2018) SSRN Electronic Journal <<https://ssrn.com/abstract=3118551>> accessed 15 April 2020 9, 10.

<sup>23</sup> Sergio Carrera, Steven Blockmans, Jean-Pierre Cassarino, Daniel Gros, Elspeth Guild, *The European Border and Coast Guard: Addressing Migration and Asylum Challenges in the Mediterranean?* (2017) Centre for European Policy Studies 26.

<sup>24</sup> Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the Rules Governing the Movement of Persons across Borders (Schengen Borders Code) [2016] OJ L 77/1.

<sup>25</sup> Carrera, Blockmans, Cassarino, Gros, Guild (n 23) 29.

<sup>26</sup> *ibid* 30. According to the overview of countries compiled by Carrera and Stefan in 2018, in six countries (Turkey, Serbia, Italy, Greece, Bulgaria and Austria) out of in total eleven examined Council of Europe countries, border surveillance was performed by both civil and military authorities (the other countries examined were Hungary, Romania, Poland, Spain and Slovakia). A total of 26 authorities were performing border control and border surveillance in the 11 countries investigated - Sergio Carrera, Marco Stefan, *Complaint Mechanisms in Border Management and Expulsion Operations in Europe: Effective Remedies for Victims of Human Rights Violations?* (2018) Centre for European Policy Studies 46-47.

<sup>27</sup> Carrera, Stefan, *Complaint Mechanisms in Border Management and Expulsion Operations in Europe: Effective Remedies for Victims of Human Rights Violations?* (n 20) 14.

offering operational help to the national authorities.<sup>28</sup> If multiple actors are involved in border management, it makes the identification of the responsible actor even harder.

The main actor in Sweden responsible for the application of the EU rules on maritime border surveillance, is the Coast Guard. Against the background laid out above, the following research question is posed: How does EU law, and the instruments that are directly applicable in the member states, impact on the accountability of the Swedish Coast Guard in the field of maritime border surveillance in Sweden?

The question guiding the research is the extent to which accountability mechanisms exist. No attempt is made to assess the effectiveness of the mechanisms in question, since that would not be possible within the framework of this text. Furthermore, the investigation is not exhaustive or empirical, in the sense that it examines real life cases where accountability is at stake. Rather, the regulatory framework is explored for the purpose of identifying existing accountability possibilities.

The concept examined in the text is labelled ‘maritime border surveillance’. This contribution is written from a legal perspective, but for instance the political scientific term multilevel governance, and reasonings concerning it, is used in the text, since that adds to the understanding of the context.

I will proceed as follows. First, the concepts multilevel regulation and accountability will be described for the purpose of this text. In the main part the relevant EU rules, in particular the rules on ‘maritime border surveillance’ within the EU/Schengen, are explored, and the developments that are assessed as relevant for the current status of the rules are described. Second, the national actor the Swedish Coast Guard and the context and rules relevant for its implementation of the rules, and its accountability, are explored. Finally, some tentative concluding comments are made.

## 2 THE CONCEPTS MULTILEVEL GOVERNANCE AND ACCOUNTABILITY

The research question involves issues regarding the division of competencies in the EU in the field of maritime border surveillance, as well as concerning an application of the concept accountability. No in-depth analysis is possible within the limits of this contribution of the concepts multilevel governance and accountability, but it is necessary to outline how these notions are viewed for the purpose of framing the research question, and for explaining which theoretical points of departure that are used for this specific investigation, while recognising that there are other ways to conceive of these issues.

---

<sup>28</sup> Aikaterini Drakopoulou, Alexandros Konstantinou, Dimitri Koros, ‘Border management at the external Schengen Borders: Border controls, return operations, and obstacles to effective remedies in Greece’ in Sergio Carrera, Marco Stefan (eds), *Fundamental Rights Challenges in Border Controls and Expulsion of Irregular Immigrants in the European Union Complaint Mechanisms and Access to Justice* (Routledge 2020) 177.

## 2.1 MULTILEVEL GOVERNANCE

This text is written from a legal perspective, but in this part it seems useful to adopt an interdisciplinary approach and apply the political scientific concept multi-level governance. The concept is assessed as of value when framing the research question.

The concept of multi-level governance initially emerged from European integration research, and has often been elaborated on in the field of political science in connection with analyses of the EU system.<sup>29</sup> However, there is no one definition of multilevel governance that enjoys consensus across academic disciplines, as stated *inter alia* by Chowdhury and Wessel,<sup>30</sup> citing Bache and Flinders.<sup>31</sup>

From a political science perspective pioneers Hooghe and Marks, as well as Piattoni, have elaborated on multi-level governance.<sup>32</sup> Hooghe and Marks start at a general level, stating that multi-level governance indicates the dispersion of authoritative decision-making across multiple players at different territorial levels within the EU,<sup>33</sup> and distinguish between two types of governance, where the first resembled federal arrangements, and the second implies governance based on special-purpose agencies.<sup>34</sup> Piattoni has suggested that there are three dimensions of multi-level governance.<sup>35</sup> First, ‘centre v. periphery’, second, ‘domestic v. international’, and, third, ‘state v. society’. ‘Centre v. periphery’ implies movements away from the unitary state towards decentralized systems of governance. ‘Domestic v. international’ indicates movements away from the national state towards increasingly structured modes of international cooperation and regulation, including the EU.<sup>36</sup> The third dimension ‘state v. society’ concerns the increasing involvement of non-governmental organisations and civil society in authoritative decision-making. Here it is appropriate to cite Heidebreder, who assert that in the area of migration policy, the mix of (Hooghe’s and Marks’) type one and type two multilevel governance is particularly obvious because different policy concerns are tackled with different approaches.<sup>37</sup>

Chowdhury and Wessel have asserted that the differences between the concept multilevel regulation and multilevel governance primarily lie in the distinction between what is known as governance and regulation in academic literature.<sup>38</sup> They develop multi-level regulation as a frame of reference to capture developments that are vertically linked across

---

<sup>29</sup> Liesbet Hooghe, Gary Marks, *Multi-level Governance and European Integration* (Rowman & Littlefield 2001). Reinold, Heupel (n 9) 5. Simona Piattoni has strived to systematise approaches to multi-level governance through a three-dimensional based study, theoretical, empirical and normative, and argues in favour of a theory of multi-level governance in *The Theory of Multi-level governance: Conceptual, Empirical, and Normative Challenges* (OUP 2010). Lucinda Miller has analysed multi-level governance in her study on contract law in an EU context in *The Emergence of EU Contract Law: Exploring Europeanization* (OUP 2011) 155. See also Carlo Panara, ‘Multi-Level Governance as a Constitutional Principle in the Legal System of the European Union’ (2016) 16(4) *Croatian and Comparative Public Administration* 705.

<sup>30</sup> Nupur Chowdhury, Ramses A. Wessel, ‘Conceptualising Multilevel Regulation in the EU: A Legal Translation of Multilevel Governance?’ (2012) 18(3) *European Law Journal* 335.

<sup>31</sup> Ian Bache, Matthew Flinders, *Multi-level governance* (OUP 2004).

<sup>32</sup> Liesbet Hooghe, Gary Marks ‘Types of multi-level governance’ in Henrik Enderlein, Sonja Wälti, Michael Zürn (eds), *Handbook on multi-level governance* (Edward Elgar 2010); Piattoni (n 29).

<sup>33</sup> Hooghe and Marks, *Multi-level Governance and European Integration* (n 29) XI.

<sup>34</sup> Hooghe and Marks, ‘Types of multi-level governance’ (n 32) 17-22.

<sup>35</sup> Piattoni (n 29) 26-31. Cited by Panara (n 29) 708.

<sup>36</sup> *ibid.*

<sup>37</sup> Heidebreder (n 2) 3.

<sup>38</sup> Chowdhury, Wessel (n 30) 345.

administrative or territorial levels within specific regulatory space, where the regulatory actions comprise rule making, rule enforcement and rule authorization.<sup>39</sup>

Panara takes a step on the legal path and analyses multi-level governance from a legal perspective to identify its legal basis within the EU, identifying for instance the subsidiarity principle as of significant importance.<sup>40</sup>

Having touched on certain scholars' views of multilevel governance and multilevel regulation, it is relevant to come back to Heupel's and Reinold's analysis which involves global legal pluralism.<sup>41</sup> They point to the lack of interdisciplinary work that tries to bring together the concepts of multi-level governance and global legal pluralism (but mention Isksel and Thies),<sup>42</sup> and underline that political scientists and international lawyers 'have a shared interest in understanding the causal dynamics of governance beyond the nation-state and in appraising its normative implications for democracy, accountability, and the rule of law'.<sup>43</sup> A common approach for political scientists and international lawyers is that both multi-level governance theories and the literature on legal pluralism 'dismiss the notion of a hierarchical ordering of global governance along the lines of the ideal of the centralized nation-state'.<sup>44</sup>

The above overview of certain contributions related to multilevel governance shows that there are a multitude of approaches. For the purposes of this text I will use an assumption of a general character as the point of departure in the investigation, namely that multi-level governance indicates the dispersion of authoritative decision-making across multiple players at different territorial levels within the EU.

## 2.2 ACCOUNTABILITY AND HUMAN RIGHTS

Accountability is undoubtedly a broad term, called *inter alia* an 'ever-expanding concept',<sup>45</sup> that can incorporate a number of understandings.<sup>46</sup> It has been given various meanings in different contexts and raises several questions. Nollkaemper, Wouters and Hachez point to three questions; 'who is accountable', 'to who must one be accountable', and 'for what is one held accountable'?<sup>47</sup> Different forms of accountability can be identified, such as democratic and legal accountability.<sup>48</sup>

---

<sup>39</sup> Chowdhury, Wessel (n 30) 345.

<sup>40</sup> Panara (n 29).

<sup>41</sup> In a legal context such approaches as (i) constitutionalism, (ii) global administrative law, (iii) fragmentation of international law, have been developed to deal with the complexity – however, they will not be further explored here. For an overview see for instance Ramses A. Wessel, Jan Wouters, 'The phenomenon of multilevel regulation: Interactions between global, EU and national regulatory spheres' in Andreas Føllesdal, Ramses A. Wessel, Jan Wouters (eds), *Multilevel regulation and the EU: The interplay between global, European, and national normative processes* (Martinus Nijhoff Publishers 2008), 32.

<sup>42</sup> Turkuler Isiksel, Anne Thies, 'Changing subjects: Rights, remedies and responsibilities of individuals under global legal pluralism' (2013) 2 *Global Constitutionalism* 2.

<sup>43</sup> Reinold, Heupel (n 9) 4.

<sup>44</sup> *ibid.*

<sup>45</sup> Andreas von Arnould, Sinthiou Buszewski, 'Modes of Legal Accountability: The Srebrenica Example' (2013) 88 *Die Friedens-Warte* ¾ 15.

<sup>46</sup> André Nollkaemper, Deidre Curtin, 'Conceptualizing Accountability in International and European Law' (2007) 36 *Netherlands Yearbook of International Law*.

<sup>47</sup> André Nollkaemper, Jan Wouters, Nicolas Hachez, *Accountability and the Rule of Law at International Level* (2008) Policy brief 5-6.

<sup>48</sup> Gkliati (n 22).

Such concepts as transparency, liability, controllability, responsibility and responsiveness have been used in connection with accountability.<sup>49</sup> It is of interest that Krisch explores pluralism's implications for democracy and the rule of law, and highlights pluralism's normative virtues, asserting that the interaction of different normative orders and authorities could be viewed as an accountability mechanism.<sup>50</sup>

Accountability could be termed 'individual' and are in those cases perhaps mostly seen as legal.<sup>51</sup> Courts are assessed as the natural accountability mechanism. At the international level one downside is that international courts are often not accessible to individuals.<sup>52</sup>

It can be noted that the concept of complaint mechanism could encompass the accountability instruments and bodies which are internal to the authorities.<sup>53</sup> The Organization for Security Cooperation in Europe (OSCE) has identified 'five levels' of supervision, of which the first is 'internal affairs', in its 2008 Guidebook on Democratic Policing.<sup>54</sup> This text will not explore the wide field of legal aspects on human rights violations and remedies in any detail, but some observations deemed relevant and necessary for this text will be made:

European Convention on Human Rights (ECHR)<sup>55</sup> states parties have human rights obligations, both substantial and regarding procedures, in border management situations where authorities have 'effective' control, including extra-territorial jurisdiction.<sup>56</sup> In a judgment by the European Court of Human Rights (ECtHR) the legal environment surrounding Frontex, based on the earlier Frontex mandate, has been dealt with, in *Hirsi Jamaa et al. v Italy*.<sup>57</sup> The judgment interprets the obligations under the ECHR of Italy. One of the merits of the judgment is to clarify ECHR obligations binding an EU member state in the framework of operations allegedly aimed at combating illegal immigration and conducted alongside EU-coordinated border surveillance operations. The Court found that Italy had assumed *de jure* and *de facto* control over the immigrants. The Court confirmed its 'Hirsi doctrine' of *de jure* and *de facto* control in respect of extraterritorial jurisdiction in *N.D. and N.T. v. Spain*.<sup>58</sup>

The ECHR safeguards are also guaranteed by the Charter of Fundamental Rights of the European Union (EU Charter).<sup>59</sup> The EU Charter has the same legal value as the EU Treaties. Article 52(3) of the EU Charter states that, without prejudice to a more extensive protection, the scope of the rights for which it provides shall be the same as the one laid

---

<sup>49</sup> Maaiké Damen, *Accountability in a multilevel setting: Cohesion Policy*, Paper presented at Regional Studies Association European Conference (2013) 5.

<sup>50</sup> Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (OUP 2010) 272.

<sup>51</sup> Gkliati (n 22).

<sup>52</sup> Nollkaemper, Wouters, Hachez (n 46) 6.

<sup>53</sup> Carrera, Stefan, *Complaint Mechanisms in Border Management and Expulsion Operations in Europe: Effective Remedies for Victims of Human Rights Violations?* (n 20) 2.

<sup>54</sup> *ibid* 20; OSCE, *Guidebook on Democratic Policing*, (2008) by the Senior Police Adviser to the OSCE Secretary General.

<sup>55</sup> The Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), 4 November 1950.

<sup>56</sup> *N.D. and N.T. v. Spain*, App no 8675/15 and 8697/15 (ECtHR 2 October 2017). Carrera, Stefan, *Complaint Mechanisms in Border Management and Expulsion Operations in Europe: Effective Remedies for Victims of Human Rights Violations?* (n 20) 7.

<sup>57</sup> *Hirsi Jamaa and Others v Italy* App no 27765/09 (ECtHR, 23 February 2012).

<sup>58</sup> *N.D. and N.T. v. Spain* (n 56), para 54.

<sup>59</sup> Charter of Fundamental Rights of the European Union (EU Charter) [2012] OJ C 326/391.



down by the ECHR. Furthermore, the EU Charter provides for even greater possibilities to control the action of agents of the EU and its member states when they act within the scope of EU law. It describes the rights and principles that apply to the authorities of EU member states when they implement EU law regulating border checks and border surveillance. In all cases where the administrative and law enforcement action of EU member states and EU agencies falls under the scope of Schengen rules and other relevant EU legal and policy instruments, the fundamental rights safeguards provided by the EU Charter apply, irrespective of the fact that such action is conducted outside the EU's geographical borders.<sup>60</sup>

Substantive human rights obligations entail the adoption and implementation of rules of conduct directed at ensuring that the States' authorities fully respect relevant standards regarding human rights protection in the performance of border management.<sup>61</sup> However, previously this did not transpire explicitly in the relevant EU legislation, but the last few years' sea operations in the Mediterranean to tackle the refugee crisis and the criticized handling by the EU of these operations, resulted in amendments and new EU legislation related to human rights: For instance, an amendment to the Frontex Regulation in 2011 required the agency to explicitly act in compliance with the EU Charter.<sup>62</sup> In the 2016 Frontex Regulations there were explicit references to fundamental rights,<sup>63</sup> and in the 2019 Frontex Regulation further such references were included.<sup>64</sup> For instance, in preambular para. 24 it is stated; 'In a spirit of shared responsibility, the role of the Agency should be to monitor regularly the management of the external borders, including the respect for fundamental rights in the border management and return activities of the Agency'.

Concerning remedies, the EU right to an *effective* judicial remedy (emphasis added) is not restricted to allegations of 'fundamental rights' violations. It also extends to any rights conferred to individuals by the law of the Union. Article 47 EU Charter covers 'all rights' and administrative guarantees enshrined in EU secondary legislation, which include those covered in the Schengen Borders Code.<sup>65</sup> The Schengen Borders Code requires that there is effective judicial protection against abusive actions or inactions of authorities in charge of border management in the area of border controls and surveillance. It is appropriate to refer

---

<sup>60</sup> *N.D. and N.T. v. Spain* (n 56), para 54. Carrera, Stefan, *Complaint Mechanisms in Border Management and Expulsion Operations in Europe: Effective Remedies for Victims of Human Rights Violations?* (n 20) 7.

<sup>61</sup> Sergio Carrera, Marco Stefan, 'Human rights complaints at international borders or during expulsion procedures International, European, and EU standards', in Sergio Carrera, Marco Stefan (eds), *Fundamental Rights Challenges in Border Controls and Expulsion of Irregular Immigrants in the European Union Complaint Mechanisms and Access to Justice* (London Routledge 2020) 261.

<sup>62</sup> Regulation (EU) 1168/2011 of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2011] OJ L 304/1.

<sup>63</sup> Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC (2016 Frontex Regulation) [2016] OJ L251/1.

<sup>64</sup> 2019 Frontex Regulation.

<sup>65</sup> Art. 47 'Right to an effective remedy and to a fair trial': 'Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented'. Carrera, Stefan, 'Introduction Justicing Europe's frontiers: effective access to remedies and justice in bordering and expulsion policies' (n 27) 13.

briefly also to the ECtHR jurisprudence on *effective* remedies (emphasis added). Article 13 of the ECHR provides the right to an effective remedy and in principle concerns complaints of substantive violations of Convention provisions.<sup>66</sup> The provision has been interpreted by the ECtHR as a guarantee for everyone that claims that his or her rights under the ECHR has been violated.<sup>67</sup> The ECtHR jurisprudence concerning different aspects of an effective remedy is plentiful. Here I will only very briefly refer to the Court's view that the 'authority' referred to in art. 13 does not need, in all cases, to be a judicial institution in the strict sense.<sup>68</sup>

Sergio Carrera and Marco Stefan have examined the extent to which the various authorities and actors currently performing border management (and expulsion-related tasks) in the EU are subject to accountability mechanisms capable of delivering effective remedies and justice for abuses suffered by migrants and asylum seekers.<sup>69</sup> They *inter alia* reach the conclusion that ensuring access to effective remedies for abuses occurring in the field of border management (and returns) remains complicated in practice.<sup>70</sup> For the purpose of this text, it can be noted that they point out that a 'complaint' can be differentiated from, and does not always correspond to, a right to appeal of administrative decisions.<sup>71</sup>

Having examined some aspects of accountability, as summarised above, I have chosen to apply the following concept of accountability mechanisms accessible for individuals, both 'complaints' and 'appeals' for the purpose of this text, since that seems suitable for the kind of overarching exploration made here; first, the existence of possible internal instruments, and, second, of external avenues, both legal avenues – possible court proceeding, as well as ombudspersons, national human rights institutions, or other similar national accountability bodies.

### 3 THE EU RULES

In this section an overview of the developments of the EU rules on border surveillance is made. The purpose is to shed light on how the division of competencies regarding border surveillance has developed, and to highlight, first, the tensions that have existed, and still exist, between EU competence and national sovereignty, and, second, the initial absence of explicit human rights requirements. For a brief overview of the human rights framework deemed as of relevance for the topic in this contribution, see sec. 2.2.

First, I explore relevant aspects of the Schengen cooperation, second, of the EU rules on border surveillance, and, third, of the European Agency for the Management of Operational Cooperation at the External Borders, Frontex.

---

<sup>66</sup> Art. 13: 'Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity'. European Court of Human Rights, *Guide to Article 13 of the European Convention on Human Rights Right to an effective remedy*, First edition 31 October 2019, 6.

<sup>67</sup> *Klass et al. v the Federal Republic of Germany*, App no 5029/71 (ECtHR 6 September 1978).

<sup>68</sup> eg *Golder v the United Kingdom*, App no. 4451/70 (21 February 1975) para 33; *Klass et al. v Germany* (n 67) para 67.

<sup>69</sup> Carrera, Stefan, *Complaint Mechanisms in Border Management and Expulsion Operations in Europe: Effective Remedies for Victims of Human Rights Violations?* (n 20); Carrera, Stefan, 'Introduction Justicing Europe's frontiers: effective access to remedies and justice in bordering and expulsion policies' (n 27).

<sup>70</sup> Carrera, Stefan, 'Human rights complaints at international borders or during expulsion procedures International, European, and EU standards' (n 61) 267.

<sup>71</sup> Carrera, Stefan, 'Introduction Justicing Europe's frontiers: effective access to remedies and justice in bordering and expulsion policies' (n 27) 2.

### 3.1 THE SCHENGEN COOPERATION

The supranational EU border surveillance concept has its origin in the Schengen cooperation. The Schengen system entails that there is a common external border for which, in the absence of internal border controls, the member states are responsible together in order to ensure security within the area. The Schengen system has been developed and implemented by predominantly home affairs or interior ministries, as often referred to,<sup>72</sup> but the initial foundations of the Schengen area were in fact mainly driven by economic pressures: The 1985 Schengen Agreement was negotiated largely by ministers of transport and foreign affairs, and was primarily concerned with establishing the free circulation of goods, hardly touching upon aspects of police and security.<sup>73</sup> These were the EU objectives at the time – the creation of a common market was the central one, and the measures that the Schengen cooperation entailed were necessarily connected to these objectives.

Border control and the Schengen cooperation were developed in the context of the communitarisation of a range of issues termed Justice and Home Affairs matters – immigration, border control, asylum (also judicial cooperation, police cooperation and criminal law can be mentioned). Since a focus of this text is the division of competences, it is necessary to describe why the EU got involved in this field and why the member states felt it necessary to confer these competences. Border control was as a ‘flanking’ measure to the creation of internal market and an Area of Freedom, Security and Justice (as coined in the 1997 Amsterdam Treaty).

The emergence of the creation of an AFSJ, as an objective of EU law, created the need for much closer cooperation on external border controls. If the EU only has the competences necessary to achieve the objectives set out in the treaty, then as these objectives change, the competences have to evolve by setting more ambitious objectives. Creating an AFSJ and not only an internal market, the member states (implicitly as well as explicitly) agreed that the EU was to have greater competences in the fields necessary to achieve those objectives.

Initially the Schengen cooperation was based on the 1985 Schengen Agreement<sup>74</sup> and the 1990 Schengen Convention.<sup>75</sup> The Schengen Agreement was originally signed between Belgium, France, Germany, Luxembourg, and the Netherlands, outside the EU’s legal framework. Free movement of people was a core part of the original Treaty of Rome, but there was disagreement among member states how that should be realised.

---

<sup>72</sup> Carrera, den Hertog (n 1) 20. Andreas Maurer and Roderick Parkes, *Democracy and European Justice and - by seHome Affairs: Policies under the Shadow of September 11* (2005) Stiftung Wissenschaft und Politik, Working Paper 2005, 11. Didier Bigo, *Police en Réseaux: l'Expérience Européenne* (Press de Science Po. 1996).

<sup>73</sup> Carrera, den Hertog (n 1) 20.

<sup>74</sup> United Nations Treaty Collection, Agreement Between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at their Common Borders, 14 June 1985. The official text is only available in Dutch, French and German.

<sup>75</sup> United Nations Treaty Collection, Convention Implementing the Schengen Agreement of 14 June 1985 Between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at their Common Borders (with Final Act, Procès-verbal and Joint Declaration), 19 June 1990. The official text is only available in Dutch, French and German.

The Schengen Area was formed partly due to the lack of consensus amongst EU member states over whether or not the EU had the jurisdiction to abolish border controls, and partly because those states that wanted to implement the idea did not wish to wait for others.<sup>76</sup> The Schengen area gradually expanded to include more EU member states. However, the Ireland and the UK opted out of joining the Schengen Area, and Romania, Bulgaria, Croatia, and Cyprus are EU members who plan to become Schengen countries but are not at present. Furthermore, four non-EU states form part of the Schengen Area: Iceland, Liechtenstein, Norway and Switzerland. The different standings of states regarding the Schengen cooperation, resulting in its geographical scope, originate from the tensions between supra-national control and state sovereignty over borders.

It has been argued that the foreign affairs ministries were ousted by justice and home affairs ministries at the time of the formation of the Schengen cooperation.<sup>77</sup> In the home affairs-driven Schengen field, there have been struggles not least around the division of competences and sovereignty issues.

Looking at the developments from a treaty perspective the following can be mentioned: In connection with the 1999 entry into force of the Amsterdam Treaty, the Schengen cooperation was incorporated into the EU, according to the so-called Schengen Protocol that is attached to the Amsterdam Treaty. This entailed that the Schengen cooperation thereafter was implemented within the EU legal framework. Being part of the area without internal border controls means that the Schengen states do not – principally – carry out border checks at their internal borders (ie borders between two Schengen states) and carry out harmonised controls, based on clearly defined criteria, at their external borders (ie borders between a Schengen state and a non-Schengen state).<sup>78</sup>

The Maastricht Treaty, which came into force in 1993, created the three pillars structure of the EU. Issues related to the management of borders were governed by inter-governmental decision-making and located in the ‘third pillar’. However, following the entry into force in 1999 of the Amsterdam Treaty, and the end of a transition period in 2004, border management effectively became a shared competence between the EU and its member states.<sup>79</sup> Some issues concerning border management were now part of the supranational decision-making. The first Schengen Borders Code Regulation was adopted in 2006.<sup>80</sup> The definition of border surveillance in the latest (full) revision in 2016 of the Schengen Borders Code<sup>81</sup> is still the same as in the 2006 Code. The structure of the Schengen Borders Code was due in large part to the fact that rules already adopted in various legal instruments such as, in particular, the Schengen Convention and the Common Manual on checks at the external borders, were incorporated in it. The Schengen Convention did not include an explicit definition of border surveillance, but in art. 6.3 and 6.4 there were

---

<sup>76</sup> Paul Craig, Gráinne de Burca, *EU Law: Text, Cases and Materials* (OUP 2003) 751.

<sup>77</sup> Virginie Guiraudon, ‘European and Integration Policy: Vertical Policy Making as Venue Shopping’ (2000) 38(2) *Journal of Common Market Studies* 260, cited by Carrera, den Hertog (n 1) 20.

<sup>78</sup> Daniel Thym, ‘Legal framework for entry and border controls’, in Kay Hailbronner, Daniel Thym (eds), *EU immigration and asylum law – a commentary* (C.H. Beck/Hart/Nomos 2016) 31.

<sup>79</sup> eg Sarah Wolff, *EU Integrated Border Management Beyond Lisbon: Contrasting Policies and Practice* (Clingendael European Studies Programme 2009) 25.

<sup>80</sup> Regulation (EC) 562/2006 of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) OJ L 105/1.

<sup>81</sup> Schengen Borders Code.

formulations on border surveillance being carried out between the border crossing points, stating *inter alia* that it should be carried out with the aim that persons should not be able to avoid the control at border crossing points.

The Lisbon Treaty entered into force in 2009. The Lisbon Treaty abolished the ‘third pillar’ (policing and criminal law) and moved its provisions into the same Title that concerned immigration, asylum and civil law. Perhaps some of the most significant changes that the Treaty of Lisbon entailed, affected ‘Area of Freedom, Security and Justice (AFSJ)’ law, concerning issues of relevance both for a holistic view on border management, and for national sovereignty.

A new explicit competence on ‘an integrated management system for the external border’ was introduced at treaty level with the Lisbon Treaty. Until the entry into force of the Lisbon Treaty, the notion of integrated border management was more a political concept than a legally binding one even if it was already present as an objective in the 2001 Laeken Declaration.<sup>82</sup> In the 2016 Frontex Regulation<sup>83</sup> the concept ‘integrated border management’ was for the first time filled with a more precise content, including border control, which encompasses border surveillance. However, the definition of border surveillance is still placed in the Schengen Borders Code.

Finally, one last example regarding what can be interpreted as a sovereignty expression by member states can be worth mentioning: According to art. 4.2 Treaty on European Union (TEU) the EU is obliged to respect the member states’ ‘essential state functions’ which include ‘maintaining law and order and safeguarding national security’. Art. 72 Treaty on the Functioning of the European Union (TFEU) states that the Treaty provisions on the area of freedom, security and justice (not only those on immigration and asylum) ‘shall not affect the exercise of the responsibilities incumbent upon member states with regard to the maintenance of law and order and the safeguarding of internal security’. There have been different interpretations of this article.<sup>84</sup> The article could be seen as a reminder that detailed rules in corresponding EU legislation should ‘leave breathing space for member states when it comes to the maintenance of law and order and the safeguarding of internal security’.<sup>85</sup>

### 3.2 THE EU CONCEPT BORDER SURVEILLANCE

In EU law, the concept of border management encompasses actions and/or decisions undertaken in the context of both border control and border surveillance.<sup>86</sup> The concepts border control, border checks and border surveillance are used in the Schengen context and applied by the 26 Schengen states, including Sweden. Sweden participates fully in the Schengen cooperation since 25 March 2001. Core legal instruments of relevance for these

---

<sup>82</sup> Presidency Conclusions European Council meeting in Laeken 14 and 15 december 2001, DOC/01/18

<sup>83</sup> 2016 Frontex Regulation.

<sup>84</sup> Thym discusses art. 72 and states: ‘Some commentators have argued that the caveat in today’s Article 72 TFEU should be construed [...] as a justification for non-compliance with EU legislation whenever the maintenance of law and order was at stake’, but he argues against that interpretation (n 78) 44-45.

<sup>85</sup> Thym (n 78) 45.

<sup>86</sup> Monar (n 7), cited by Carrera, Stefan, ‘Human rights complaints at international borders or during expulsion procedures International, European, and EU standards’ (n 61) 283.

concepts are the Schengen Borders Code,<sup>87</sup> and the 2019 Frontex Regulation.<sup>88</sup> These regulations are directly applicable in the EU member states.

The rules on the communication network EUROSUR, earlier in a stand-alone EUROSUR Regulation,<sup>89</sup> have now been included in the 2019 Frontex Regulation (sec. 3). The backbone of EUROSUR is a network of National Coordination Centres (NCCs). It is of interest to note that it has been made clear that ‘EUROSUR information’ can be used for Search and Rescue (SAR) purposes.<sup>90</sup>

Art. 1 in the Schengen Borders Code describes the overarching aim of the Code, which is border control of persons. Art 2.10 in the Schengen Borders Code states that:

‘border control means the activity carried out at a border, in accordance with and for the purposes of this Regulation, in response exclusively to an intention to cross or the act of crossing that border, regardless of any other consideration, consisting of border checks and border surveillance.’

Art. 2.12 states that border surveillance means the ‘surveillance of borders between border crossing points and the surveillance of border crossing points outside the fixed opening hours, in order to prevent persons from circumventing border checks’.

Art. 13 in the Code provides more details on border surveillance and states that the main purpose of border surveillance ‘shall be to prevent unauthorised border crossings, to counter cross-border criminality and to take measures against persons who have crossed the border illegally’. Furthermore, ‘surveillance shall be carried out in such a way as to prevent and discourage persons from circumventing the checks at border crossing points’ by border guards using mobile or stationary units. The article explains that border guards shall act ‘by patrolling or stationing themselves at places known or perceived to be sensitive, the aim of such surveillance being to apprehend individuals crossing the border illegally. Surveillance may also be carried out by technical means, including electronic means.’

In the latest ‘Practical Handbook for Border Guards’ there are some practical advice on sea borders (p. 92ff) and border surveillance (p. 103ff).<sup>91</sup>

Court proceedings before the European Court of Justice (CJEU) has had an influence on the development of the concept border surveillance. The following is a brief summary of the events that against the background of the refugee crisis and developments in the

---

<sup>87</sup> Schengen Borders Code. The legal base according to the regulation on the Schengen Borders Code: ‘Having regard to the Treaty on the Functioning of the European Union, and in particular Article 77(2)(b) and (e) thereof, [...]’.

<sup>88</sup> 2019 Frontex Regulation. The legal base according to the 2019 Frontex regulation: ‘Having regard to the Treaty on the Functioning of the European Union, and in particular Article 77(2)(b) and (d) and Article 79(2)(c) thereof, [...]’.

<sup>89</sup> Regulation (EU) 1052/2013 of 22 October 2013 establishing the European Border Surveillance System (EUROSUR) [2013] OJ L295/11. The legal base according to the EUROSUR was: ‘Having regard to the Treaty on the Functioning of the European Union, and in particular Article 77(2)(d) thereof, [...]’.

<sup>90</sup> 2019 Frontex Regulation, art. 28(2)(b).

<sup>91</sup> C(2019)7131 final, Brussels, 8.10.2019, Annex to the Commission Recommendation establishing a common “Practical Handbook for Border Guards” to be used by Member States’ competent authorities when carrying out the border control of persons and replacing Commission Recommendation C(2006) 5186 of 6 November 2006.

Mediterranean Sea area led up to the adoption of a 2010 Council Decision,<sup>92</sup> and the subsequent adoption of Regulation 656/2014.<sup>93</sup>

The 2010 Council Decision in question contained guidelines on SAR and disembarkation and was challenged by the European Parliament, supported by the European Commission. The Decision was annulled by the CJEU in case C-355/10 in 2012.<sup>94</sup> The Court was of the view that political choices would have to be made regarding measures in the Decision; depending on these political choices the powers of the border guards may vary significantly.<sup>95</sup> The Court concluded that the contested measures in question, such as detection and interception, constituted essential elements of external maritime border surveillance, and that they should be adopted through a legislative act,<sup>96</sup> in accordance with the Court's case-law on essential elements.<sup>97</sup> Advocate General Mengozzi had elaborated on border surveillance in his Opinion in case C-355/10 and stated *inter alia* that surveillance is defined in the Schengen Borders Code essentially through its objectives and that that definition sets out a particularly broad concept, capable of encompassing any measure aimed at avoiding or preventing circumvention of border checks.<sup>98</sup> He also asserted that the concept of surveillance must be interpreted in a dynamic and flexible manner.<sup>99</sup>

Thereafter, a new legislative act, Regulation 656/2014,<sup>100</sup> was negotiated and adopted, establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by Frontex. (One aim of the adoption of Regulation 656/2014 Regulation was to codify the *Hirsi v. Italy* judgment).<sup>101</sup> The adoption of Regulation 656/2014 was the result of a long and troubled process of negotiating concerning the rules applicable to Frontex sea border surveillance operations.<sup>102</sup> The outcome entails that in this specific context, within the scope of Regulation 656/2014, which encompasses and is limited to Frontex joint operations, border surveillance includes detection, interception, including on

---

<sup>92</sup> Council Decision 2010/252/EU of 26 April 2010 supplementing Schengen Borders Code as regards the surveillance of the sea external borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2010] OJ 2010 L 111/20.

<sup>93</sup> Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Regulation 656/2014) [2014] OJ L189/93.

<sup>94</sup> Case C-355/10 *European Parliament v Council of the European Union* [2012] ECLI:EU:C:2012:516.

<sup>95</sup> *ibid*, para 56: 'First, the adoption of rules on the conferral of enforcement powers on border guards, referred to in paragraphs 74 and 75 above, entails political choices falling within the responsibilities of the European Union legislature, in that it requires the conflicting interests at issue to be weighed up on the basis of a number of assessments. [...] Thus, the adoption of such rules constitutes a major development in the SBC system.'

<sup>96</sup> *ibid*, para 84: 'In those circumstances, the contested decision must be annulled in its entirety because it contains essential elements of the surveillance of the sea external borders of the Member States which go beyond the scope of the additional measures within the meaning of Article 12(5) of the SBC, and only the European Union legislature was entitled to adopt such a decision.'

<sup>97</sup> *ibid*, para 64.

<sup>98</sup> Case C-355/10 *European Parliament v Council of the European Union* [2012] ECLI:EU:C:2012:516, Opinion of AG Mengozzi, para 57.

<sup>99</sup> *ibid*.

<sup>100</sup> Regulation 656/2014; Carrera, den Hertog (n 1) 3-13.

<sup>101</sup> Carrera, den Hertog (n 1) 10-1.

<sup>102</sup> The negotiations leading up to the adoption of the Regulation have been discussed by *inter alia* Carrera, den Hertog (n 1) 12.

the high seas, and even SAR.<sup>103</sup> The limited scope – border surveillance operations carried out by member states at their external sea borders in the context of operational cooperation coordinated by the Frontex – ‘persuaded’ the Member States that were hesitant to accept for instance the inclusion of SAR in the regulation.<sup>104</sup> EU member states resistance originated from the fundamental distinction they made between activities under the rubric of border surveillance, under EU competence, and SAR, which remain formally under the sovereignty of national competent authorities of EU member states.<sup>105</sup>

Sergio Carrera and Leonhard den Hertog have analysed the case and underlines that it was *prima facie* a legal institutional dispute, but the essential dispute concerned who had the authority to decide on the content and scope of the rule of law frameworks: member states pushed for only a narrow set of guidelines on SAR and disembarkation only in the scope of Frontex joint operations in the 2010 Decision, and ended up with a full-fledged regulation and the full involvement of the EU’s legislature.<sup>106</sup>

Carrera and den Hertog assert that member states in the end could accept Regulation 656/2014 only if it was not applicable to their national authorities’ activities, not creating additional obligations, responsibilities and liabilities,<sup>107</sup> and argue that the scope of Regulation 656/2014 should be extended to member states national authorities’ sea border surveillance activities, which constitute the majority of European sea border activities.<sup>108</sup>

In conclusion, it is notable that within the scope of Regulation 656/2014, ie Frontex joint operations, border surveillance even explicitly encompasses detection, interception and SAR, which is not the case according to the definition of ‘border surveillance’ in the Schengen Borders Code.

### 3.3 EUROPEAN AGENCY FOR THE MANAGEMENT OF OPERATIONAL COOPERATION AT THE EXTERNAL BORDERS – FRONTEX

Frontex is an actor in multilevel system of actors, in a field subject to multilevel governance. Therefore, despite the fact that Frontex involvement in the Swedish Coast Guard’s activities can be described as limited, it is necessary to take account of Frontex’ role. For the purpose of this text it is relevant, first, to try to describe Frontex’ role as an EU agency in border surveillance activities primarily in relation to such activities by a member state, and second, to describe accountability possibilities regarding specifically Frontex’ activities.

Frontex was initially established in 2004 through the first Frontex Regulation<sup>109</sup> to improve integrated border management and the implementation of EU instruments for the management of external borders. Subsequently the Frontex Regulation has been amended

---

<sup>103</sup> *ibid*; Regulation 656/2014, recitals 1, 3, art 1.

<sup>104</sup> Carrera, den Hertog (n 1) 12.

<sup>105</sup> *ibid*, 11f: ‘Six member states with Mediterranean borders (Greece, Spain, France, Italy, Cyprus and Malta) argued that the ‘regulation of search and rescue and disembarkation in an EU legislative act is unacceptable’.

<sup>106</sup> *ibid* 13.

<sup>107</sup> *ibid*.

<sup>108</sup> *ibid* 26.

<sup>109</sup> Regulation (EC) 2007/2004 of 26 October 2004 Establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2004] OJ L 349/1.



on several occasions.<sup>110</sup> The latest regulation dates from November 2019.<sup>111</sup> Its legal basis is found in arts. 77 and 79 TFEU.

Migratory pressures in the Mediterranean, and events such as the 2015 Paris attack, were reasons for the Commission's proposal 2015 for an even stronger Frontex. The aim was to provide Frontex with stronger executive powers over member states.<sup>112</sup> The establishment of Frontex in 2004 came out of a compromise between the Commission's ambition to create a European Corps of Border Guards, and the reluctance of member states to devolve too much of their sovereign competences to the supranational level. The to some extent ambiguous text of the 2016 Frontex Regulation was also the result of difficulties to move forward in an area which is closely linked to members states' national sovereignty,<sup>113</sup> although the role of Frontex is above all still to coordinate and facilitate cooperation between member states. According to art. 7 in the Frontex Regulation, integrated border management is to be implemented as a shared responsibility of Frontex and of the national authorities responsible for border management, including coast guards to the extent that they carry out maritime border surveillance operations.<sup>114</sup> Every Frontex-EU member state joint operation also requires an operational plan, according to art. 38 in the 2019 Frontex Regulation,<sup>115</sup> which gives the member state an influence on the actions to be taken: Frontex and the host member state, in consultation with participating member states, shall agree on the operational plan detailing the organisational and procedural aspects of the joint operation. It is also of relevance to note the mandates (in the respective regulations) for cooperation between the European Fisheries Control Agency (EFCA), the European Maritime Safety Agency (EMSA) and Frontex.<sup>116</sup> The modalities of the cooperation between the agencies have been defined in a Tripartite Working Arrangement (TWA), managed by a Steering Committee and implemented according to an Annual Strategic Plan.

There are elements in the Frontex Regulations that have been adopted that seem to challenge the sovereignty of member states. In 2016 a new wording was included in art. 19 (now in arts. 41-42), perhaps the most controversial element at the time, which ruled that in situations 'at the external borders requiring urgent action', it is possible for the EU Council to require the member state in question to cooperate with Frontex in the implementation of certain measures. It created a possibility that a member state can be overruled by the Council regarding how a specific border situation should be handled. The essential elements of this

---

<sup>110</sup> The regulation on Frontex has been reformed for instance through Regulation (EU) 1168/2011 of 25 October 2011, and Regulation (EC) 863/2007 of 11 July 2007 Establishing a Mechanism for the Creation of Rapid Border Intervention Teams [...] [2007], OJ L199/30 establishing a mechanism for the creation of Rapid Border Intervention Teams.

<sup>111</sup> 2019 Frontex Regulation.

<sup>112</sup> Herbert Rosenfelt, 'Establishing the European Border and Coast Guard: all-new or Frontex reloaded?' (2016), available at <http://eulawanalysis.blogspot.com/2016/10/establishing-european-border-and-coast.html>.

<sup>113</sup> David Fernández Rojo, 'It's a new agency. It's a federal agency. It's the European Border Coast Guard! No wait... it's Frontex' (2017), available at <https://eulawenforcement.com/?p=267>.

<sup>114</sup> 2019 Frontex Regulation, art. 7(1): 'The European Border and Coast Guard shall implement European integrated border management as a shared responsibility of the Agency and of the national authorities responsible for border management, including coast guards to the extent that they carry out maritime border surveillance operations and any other border control tasks. Member States shall retain primary responsibility for the management of their sections of the external borders.'

<sup>115</sup> 2016 Frontex Regulation, art 16 and 2019 Frontex Regulation, art 28.

<sup>116</sup> 2019 Frontex Regulation, art 69.

provision remain the same in the 2019 Frontex Regulation. Both in 2016 and 2018 a majority of member states rejected calls for Frontex to carry out completely independent controls at EU external borders, as this would violate their national sovereignty.<sup>117</sup> The main responsibility for border security remains with the member state in question which retain the primary responsibility to control its part of the external borders.<sup>118</sup> Furthermore, the reform in 2019 could not be used to strengthen Frontex specifically for the task of sea rescues in the Mediterranean.<sup>119</sup>

In the aim of the 2016 reform of Frontex was similar to the aim of the 2019 reform. However, many of the measures envisaged in 2016 have not yet been fully implemented, for example the creation of a European reserve of 1,500 border guards, the posting of Frontex liaison officers to member states or the establishment of an EU vehicle pool.<sup>120</sup>

A new element which received attention in the debate in the run-up to the adoption of the 2019 Regulation was the creation of a Frontex task force of 10,000 EU border guards. However, this Frontex task force of 10,000 EU border guards will not be fully deployed until 2027.<sup>121</sup>

The 2019 Frontex Regulation is a core piece of legislation in a border surveillance context, but the Regulation does not contain any explicit definition of border surveillance – it makes reference to the definition of it in the Schengen Borders Code.

In sum: As indicated, Frontex of today cannot be seen as an independent actor in the EU border management field, rather, its role can still be characterized as supportive. The main responsibility for border security remains with the member state in question, with its own security structures and operational capacities.

### 3.3[a] *The Accountability of Frontex*

This section strives to give an overview of the accountability of Frontex, since in multilevel system of actors this is relevant for the understanding also of the Swedish Coast Guard's accountability regarding border management and border surveillance issues.

Frontex' accountability has been widely discussed and analysed. For instance, at a general level, Mungianu's view is that Frontex has moved from pure border guard culture to fundamental rights culture,<sup>122</sup> and Carrera and den Hertog have stated that Frontex has gradually become embedded in a rule of law framework.<sup>123</sup> However, it is assessed by several experts that there are still shortcomings, of which examples are given below.

As an EU agency, Frontex is under the obligation to perform its tasks in line with the requirements in the EU Charter, and to ensure the protection of the fundamental rights (eg

---

<sup>117</sup> Raphael Bossong, 'The Expansion of Frontex Symbolic Measures and Long-term Changes in EU Border Management' (2019) Stiftung Wissenschaft und Politik/German Institute for International and Security Affairs.

<sup>118</sup> eg 2019 Frontex Regulation, recital 12, art 7, Annex V (3).

<sup>119</sup> Bossong (n 117) 2.

<sup>120</sup> *ibid.*

<sup>121</sup> *ibid.* 4.

<sup>122</sup> Roberta Mungianu, *Frontex and Non-Refoulement. The International Responsibility of the EU* (Cambridge University Press 2016) 225.

<sup>123</sup> Carrera, den Hertog (n 1) 11, 21.

physical integrity and dignity, and effective remedy and the protection of personal data).<sup>124</sup> This is important not least since the use of force, including service weapons and ammunition, is allowed for Frontex officers participating in operations.<sup>125</sup>

According to the 2019 Frontex Regulation, Frontex will be subjected to more oversight obligations to uphold fundamental rights than what was previously the case. The EU's more recent data protection laws will be applied, since Frontex processes rising volumes of personal data. The individual Complaints Mechanism, in which a Fundamentals Rights Officer (FRO) receives and handles complaints, is to be strengthened. For instance, the executive director of Frontex now will have to justify his or her decisions with regard to an individual complaint. The scope has been expanded to actions in third countries and to 'failures to act'. However, it has been assessed that all in all, the Complaint Mechanism entails an internal procedure conducted by internal bodies, and therefore it lacks independence.<sup>126</sup> It has been suggested that one way of making it stronger is to allow appeal against decisions by the FRO to the European Ombudsman or an independent complaints commission.<sup>127</sup>

With the entry into force of the Lisbon Treaty, the jurisdiction of the CJEU was extended to cover also the review of the legality of acts of EU agencies.<sup>128</sup> Frontex can be brought before the CJEU to account for the conformity of its conduct with EU law.<sup>129</sup> The principal direct actions available to individuals against acts of Union bodies, including Frontex, are the action for annulment according to Article 263 TFEU and the action for damages according to Article 340 TFEU. However, border management is largely consisting of 'factual conduct', as pointed out by Melanie Fink, and therefore action for annulment does not seem to be a useful avenue.<sup>130</sup> Fink argues that the action for damages may be the means through which to close the accountability gap that arises when EU administration is delivered in the form of informal or factual conduct, at least as long as there are no good alternatives internally or externally.<sup>131</sup> It remains to be seen how this will play out.<sup>132</sup>

Turning to other possible accountability mechanism than purely legal avenues, the European Ombudsman (who urged Frontex to establish a complaint mechanism in 2013 and continued to monitor Frontex) is pivotal.<sup>133</sup> The Ombudsman has a mandate to inquire into cases of maladministration by EU institutions, bodies, offices, and agencies,<sup>134</sup> and has an important role in overseeing and ensuring the respect of fundamental rights of migrants.<sup>135</sup>

---

<sup>124</sup> EU Charter art. 51, 2019 Frontex Regulation art.80. Carrera, Stefan, *Complaint Mechanisms in Border Management and Expulsion Operations in Europe: Effective Remedies for Victims of Human Rights Violations?* (n 20) 23.

<sup>125</sup> 2019 Frontex Regulation, art 82 and Annex V.

<sup>126</sup> *ibid*; Jari Pirjola, 'Complaint mechanism during return flights The European border and Coast Guard Agency' in Sergio Carrera, Marco Stefan (eds), *Fundamental Rights Challenges in Border Controls and Expulsion of Irregular Immigrants in the European Union Complaint Mechanisms and Access to Justice* (Routledge 2020) 223.

<sup>127</sup> Pirjola (n 126) 229.

<sup>128</sup> TFEU, art 263. Gkliati (n 22) 25.

<sup>129</sup> Melanie Fink, 'The Action for Damages as a Fundamental Rights Remedy: Holding Frontex Liable' (2020) 3 (21) *German Law Journal*, 532.

<sup>130</sup> Fink (n 29).

<sup>131</sup> *ibid* 533, 548.

<sup>132</sup> Gkliati (n 22) 7.

<sup>133</sup> Carrera, Stefan, 'Human rights complaints at international borders or during expulsion procedures International, European, and EU standards' (n 61) 240.

<sup>134</sup> TFEU, arts 20, 24, 228, EU Charter, art 43.

<sup>135</sup> Carrera, Stefan, 'Human rights complaints at international borders or during expulsion procedures International, European, and EU standards' (n 61) 265.

Finally, it is useful for the purposes of this text to mention, concerning accountability of the Frontex officers that are deployed to national authorities, that these remain subject to the national institution with which they are affiliated.<sup>136</sup>

#### 4 THE COAST GUARD IN SWEDEN

The aim of this section is to attempt to describe the role of the Coast Guard, and the accountability aspects related to the Coast Guard's maritime border surveillance activities for the purpose of attempting to establish whether the EU rules undermine the accountability. First, the regulatory framework and the actors that apply the multilevel rules related to border control issues in Sweden are (briefly) described, and, second, an overview of accountability mechanisms is made and discussed.

There is no single border or immigration authority in Sweden. The police authority is the main responsible for border control of persons in Sweden. The core legal provisions governing the police authority are the Police Act (1984:387), the Ordinance (2014:1102) containing instructions for the Police Authority, and the Police Ordinance (2014:1104). These acts and ordinances do not include provisions on border surveillance. The rules on border control of persons are found in the Aliens Act (2005:716): In Chapter 9 sec. 1 in the Aliens Act it is stated that the police authority is responsible for the border control of persons in accordance with the Schengen Borders Code, with the assistance of the Customs Authority, the Coast Guard and the Migration Agency. It is made clear in Chapter 9 sec. 2 in the Aliens Act that the Coast Guard has the same rights as a policeman when carrying out border checks.

The Migration Agency is the main authority assessing applications for asylum and permits to stay in Sweden and takes decisions in such cases. In certain cases, which can be assessed as 'evident', also the Police can take rejection decisions (but never when the person in question has applied for asylum).<sup>137</sup>

The Central Border Management Division (within the Swedish National Bureau of Investigations) of the police authority is the Frontex National Point of Contact. The Police is also responsible for the EUROSUR National Coordination Center (NCC), but the Coast Guard participates in the NCC.<sup>138</sup> Both the Police and the Coast Guard are included in the Frontex list of national authorities.<sup>139</sup>

However, the authority in charge of the 'control of the maritime traffic'<sup>140</sup> is the Coast Guard,<sup>141</sup> and, as mentioned, it assists the Police with border control and border checks. (The scope of the term maritime traffic has been discussed in Swedish Government Reports, for instance in 2004<sup>142</sup> and 2008).<sup>143</sup> The Coast Guard is a civilian authority, operating under the

---

<sup>136</sup> Carrera, Stefan, 'Introduction Justicing Europe's frontiers: effective access to remedies and justice in bordering and expulsion policies' (n 27) 19.

<sup>137</sup> Aliens Act (2005:716) chap. 8 sec. 17.

<sup>138</sup> The Coast Guard's Annual Report (Kustbevakningens årsredovisning) 2018 (28) and 2019 (43)

<sup>139</sup> Frontex webpage <<https://frontex.europa.eu/partners/national-authorities/a/>> accessed 5 April 2020.

<sup>140</sup> In Swedish: 'sjötrafik'.

<sup>141</sup> Aliens Act (2005:716) sec. 9.1.

<sup>142</sup> Swedish Government Report SOU 2004:110.

<sup>143</sup> Swedish Government Report SOU 2008:55.

Ministry of Justice. It is responsible for a broad range of issues, like fisheries inspection, environmental protection and search and rescue (SAR).<sup>144</sup>

The Coast Guard exercises ‘maritime surveillance’<sup>145</sup> in accordance with the Ordinance with an instruction for the Coast Guard.<sup>146</sup> In the latest version of the Ordinance it is made clear in sec. 1 that the Coast Guard is responsible for maritime surveillance and Search and Rescue (SAR), but maritime surveillance is not explicitly defined. In sec. 15 it is stated that the Coast Guard is tasked to coordinate civilian needs of ‘maritime surveillance’ and transfer civilian ‘maritime information’ to concerned authorities. The Coast Guard’s National Strategy for Maritime Surveillance 2016 (elaborated by the Swedish Coast Guard in cooperation with several other authorities) clarifies that the involved authorities have arrived at a joint interpretation of ‘maritime surveillance’, which *inter alia* includes that maritime surveillance is a systematic surveillance of marine and maritime objects and activities, including monitoring, information gathering and analysis of relevant information.<sup>147</sup>

Besides vessels and boats, the Coast Guard has three advanced aircraft (Dash 8 Q-300) for maritime surveillance, as well as a range of other kinds of technological equipment.

It is of interest to examine the term border surveillance in the national context a bit further: The term border surveillance<sup>148</sup> has earlier been reserved for the application of the Act 1979:1088 on Border Surveillance in Wartime. In a Government Report 2002 the term border surveillance<sup>149</sup> was discussed.<sup>150</sup> It was stated in the report that there is no single provision in the Swedish legal system that lays down the difference between border surveillance and border control.<sup>151</sup> The conclusion in the report is that based on the then applicable legal provisions, border surveillance can be described as surveillance that has been coordinated according to the provisions in the Act on Border Surveillance in Wartime, with *inter alia* the purpose of preventing crime against the security of the nation. However, as clarified above, the term border surveillance is now used in the supranational EU provisions; the current Swedish translation of the Schengen Borders Code includes the term ‘border surveillance’ (Swedish: ‘gränsövervakning’) and a definition of it.

Before 2015 there was no national legal provision mentioning that provisions on border control of persons crossing the internal and external borders could be found in the Schengen Borders Code. In Government Bill 2014/15:32 it was proposed that a new section should be inserted in the Aliens Act, explicitly referring to the Schengen Borders Code. In 2015 such a provision was inserted into the Aliens Act in chap. 1 sec. 16.

Furthermore, it is not completely out of place to mention that there are also national rules related to territorial integrity of Sweden. The Ordinance (1982:756) concerning Intervention by Defence Forces in the event of Violations of Swedish Territory in Peacetime

---

<sup>144</sup> The Coast Guard also assists the Police in checks on the ‘foreigners’ staying in Sweden, Aliens Act (2005:716) chap. 9, sec. 9.

<sup>145</sup> In Swedish: ‘sjöövervakning’.

<sup>146</sup> Ordinance with an instruction for the Coast Guard (2019:84).

<sup>147</sup> In Swedish: ‘Sjöövervakning är en systematisk övervakning av marina och maritima objekt, aktiviteter och skeenden för att skapa en sjölägesbild. Sjöövervakning omfattar insamling, bearbetning, analys, förmedling av sjöläges- och sjöinformation. Syftet är att samordna och inrikta resurser effektivt’.

<sup>148</sup> In Swedish: ‘gränsövervakning’.

<sup>149</sup> *ibid.*

<sup>150</sup> Swedish Government Report SOU 2002:4.

<sup>151</sup> In Swedish: ‘gränskontroll’.

and in Neutrality etc. (IKFN Ordinance) (applicable in peace time)<sup>152</sup> states that the Defence Forces are the main responsible for detecting violations of the Swedish territory.<sup>153</sup> According to secs. 28-34 in the IKFN Ordinance, the Defence Forces can assist in the control of the maritime traffic. There are no provisions explicitly mentioning ‘surveillance’ or ‘border surveillance’ in the IKFN Ordinance. In a 2002 Government Report<sup>154</sup> it is emphasised that the Defence Forces actions according to the IKFN Ordinance do not fall within border control.<sup>155</sup> Instead such actions are regarded as control of admission.<sup>156</sup>

On the same note, it could be of interest to mention that the cooperation between the Coast Guard and the Marine has been discussed extensively at government level, for instance in the Government Bill ‘The New Defense’,<sup>157</sup> where it was stated that the division of responsibilities should be clarified. It was suggested in the Government Report ‘Maritime Cooperation’ 2012 that the Coast Guard and the Marine should be joined to a common Sea Defense (along the lines of the Norwegian model).<sup>158</sup> The Swedish Government has not proceeded along those lines. The purpose of describing these aspects related to ‘military border surveillance’ is to show that also in Sweden there are other actors involved in (what is also termed) border surveillance, but who are not, or are not seen as, participating in the implementation of the Schengen acquis and remain exempt from its legal obligations and scrutiny systems.<sup>159</sup> However, it is interesting to note that the exchange and cooperation in the field of maritime surveillance between the Marine and the Coast Guard seemingly is not that extensive.<sup>160</sup>

Returning to the activities of the Coast Guard, it can be noted that the Coast Guard, as mentioned, can take certain ‘control’ decisions according to the Aliens Act. Examples of this are taking a person (foreigner) into custody (the decision by the Coast Guard in such a case must as soon as possible be assessed by the Police),<sup>161</sup> subjecting a person to a personal search, investigating luggage, and requiring a person, under certain circumstances, to present the passport or other documents to the Coast Guard.<sup>162</sup> A Coast Guard official is allowed to use a certain amount of force when exercising her or his ‘control activities’.<sup>163</sup>

---

<sup>152</sup> Ordinance (1982:756) concerning Intervention by Defence Forces in the event of Violations of Swedish Territory in Peacetime and in Neutrality (IKFN Ordinance). In Ordinance (1982:314) there are provisions on the Defence Forces’ use of the Coast Guard under reinforced alert and war time.

<sup>153</sup> IKFN Ordinance (n 152) sec. 3.

<sup>154</sup> Swedish Government Report 2002:4 (n 150).

<sup>155</sup> In Swedish: ‘gränskontroll’.

<sup>156</sup> In Swedish: ‘tillträdeskontroll’, which is dealt with in the Ordinance (1992:118) concerning the Admission to Swedish Territory of Foreign State Vessels and State Aircraft (Admission Ordinance).

<sup>157</sup> Swedish Government Bill 1999/2000:30.

<sup>158</sup> Swedish Government Report SOU 2012:48.

<sup>159</sup> Carrera, Stefan, *Complaint Mechanisms in Border Management and Expulsion Operations in Europe: Effective Remedies for Victims of Human Rights Violations?* (n 26) 19.

<sup>160</sup> Niklas Wiklund, [*Övervakning av svenskt sjöterritorium Rationell samverkan eller vattentäta skott?*] (Surveillance of Swedish Sea Territory: Rational cooperation or separate lanes?), Bachelor thesis (Lund University 2018).

<sup>161</sup> Aliens Act (2005:716) chap. 10, sec. 17.

<sup>162</sup> Aliens Act (2005:716) chap. 9.

<sup>163</sup> Coast Guard Act (2019:32) chap. 6 sec. 2, Chap. 2 sec. 4.

#### 4.1 THE ACCOUNTABILITY OF THE COAST GUARD

Applying the framework elaborated on above regarding accountability, the mechanisms of interest are, first, possible internal instruments, and, second, external avenues, both legal and other institutions.

The first level, an internal oversight body within the authority, is missing. There is a council (Insynsråd) connected to the Coast Guard, and but it does not engage in, or follow up, individual cases or decisions. The Council gives advice to the leadership of the Coast Guard and its members are appointed by the Swedish Government.

Turning to external avenues, first, it is necessary to describe the possibilities to appeal decisions by the Coast Guard. As mentioned, the Coast Guard is a public authority. In general decisions by a public authority are appealed to an administrative court (the first level constitutes of the local Administrative Court), according to rules in the Administrative Procedure Act (2017:900). However, there are several exceptions to this provision related to the activities of the Coast Guard, which is active regarding a range of substantial issues according to a number of Acts. A prominent exception is the Guard's crime combatting and maintenance of order competencies, normally police duties: The new Coast Guard Act that came into force in April 2019 meant that the Coast Guard's crime combatting and maintenance of order competences were reinforced in different ways.<sup>164</sup> Decisions taken within that field are appealed according to the Code of Judicial Procedure, which governs the public courts' proceedings (the first level constitutes of the local District Court). Other rules of relevance are the provisions in the Aliens Act, according to which most decisions, usually taken by the Swedish Migration Agency, on issues like deportation or refusal of entry, are appealed to the special Administrative Courts; the Migration Courts. Without exploring the Coast Guard's border surveillance activities empirically and exhaustively in this field, that is examining whether there are decisions within the field of the Coast Guard's border surveillance activities that actually have been appealed, it is clear that legal appeal avenues exist, depending on what type of decision that is concerned.

However, it can be assumed that a good deal of border surveillance activities constitutes factual conduct (cf Melanie Fink's elaboration on border management as factual conduct, in a discussion of the accountability of Frontex)<sup>165</sup> and therefore, it seems even more useful to investigate complaints possibilities, both at national and international level.

A national human rights institution has not yet been established in Sweden, but the issue has been debated extensively. The classification B, on the scale A-C, has been used by the Global Alliance of National Human Rights Institutions, GANHRI, for the Swedish Equality Ombudsman (DO),<sup>166</sup> but no institution has been classified as a 'fully compliant with the Paris Principles'. There are several government agencies whose tasks correspond in part, or are related, to the tasks that a national human rights institution should have according to the Paris Principles. Besides the Equality Ombudsman (DO), these include the Parliamentary Ombudsmen (JO), the Chancellor of Justice (JK), and the Ombudsman for

---

<sup>164</sup> *ibid.*

<sup>165</sup> Fink (n 129) 8.

<sup>166</sup> Accreditation Status as of 4 March 2019, Global Alliance of National Human Rights Institutions (GANHRI).

Children (BO). In the 2017 Swedish Strategy for national efforts with human rights,<sup>167</sup> the Swedish Government proposed that an NHRI be established with the Parliament as a principal. However, the Parliament was of the view that a human rights institution for various reasons should not be established under the Parliament. In the Swedish 2019 Universal Periodic Review (UPR) report it was stated that the Prime Minister in 2019 had given the information that an independent institution for the protection of human rights will be established,<sup>168</sup> even though that is not yet the case.

Nevertheless, the Parliamentary Ombudsmen (JO) constitute an avenue for lodging a complaint by anybody who believes that he or she has been treated wrongly or unjustly by a public authority or an official employed by the civil service or local government. The Ombudsmen are appointed by the Swedish Parliament to ensure that public authorities and their staff comply with the laws governing their actions. The Ombudsmen are independent and acts outside of the division of the powers of the state, legislative, executive, and judicial.<sup>169</sup> The Ombudsmen can be considered as an independent institution, based on a strong constitutional mandate.<sup>170</sup> There have not been any 'Coast Guard cases' dealt with by the Ombudsmen of relevance for this text.

A claim can also be submitted to the Office of Chancellor of Justice, similarly, as in cases before the JO, by anybody who believes that he or she has been treated wrongly or unjustly by a public authority. The Office of the Chancellor of Justice is an independent authority and the Chancellor performs his or her duties from a strictly legal point of view.<sup>171</sup>

Finally, as concerns the international level, the recourse to the ECtHR, if domestic remedies have been exhausted, should be mentioned,<sup>172</sup> as should the possibility for individuals to lodge complaints with the Committees that monitor the implementation of UN human rights conventions, for instance with the Human Rights Committee that monitors the implementation of the International Covenant on Civil and Political Rights (ICCPR).

Finally, as regards recourse to the CJEU for individuals, there is no direct recourse when it comes to border surveillance conducted by the Swedish Coast Guard, including when the Coast Guard is implementing the binding EU regulations on border surveillance. However, the instrument of preliminary rulings provides an indirect recourse when the Coast Guard is implementing EU law, which *inter alia* serves the purpose of securing legal unity: According to art. 267 TFEU the courts and tribunals of the member states may refer a question to the CJEU on the interpretation or validity of EU law where they consider that a

---

<sup>167</sup> Strategy for National Efforts with Human Rights, 2017.

<sup>168</sup> National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21 (2019) A/HRC/WG.6/35/SWE/1.

<sup>169</sup> cf Pirjola (n 126) 226.

<sup>170</sup> *ibid.*

<sup>171</sup> The webpage of Office of Chancellor of Justice <<https://www.jk.se/other-languages/english/>> accessed 5 April 2020.

<sup>172</sup> It can be noted that on 1 October 2018 Protocol No. 16 to the ECHR entered into force, which allows the highest national courts to ask the ECtHR for advisory opinions in pending cases before them regarding the rights and freedoms defined in the Convention or the protocols thereto. The new procedure resembles to a certain extent the preliminary ruling procedure of the CJEU. Sweden has not yet ratified the Protocol (as of 10 June 2020).



decision of the Court on the question is necessary to enable them to give judgment.<sup>173</sup> A question concerning interpretation cannot concern the national rules; it must concern the EU rules. With regard to references for a preliminary ruling concerning the interpretation of the EU Charter, under art. 51(1) of the EU Charter, the provisions of the Charter are addressed to the member states only when they are implementing EU law.<sup>174</sup> It must be clear from the request for a preliminary ruling that a rule of EU law other than the Charter is applicable to the case. The individual cannot by himself or herself involve the CJEU in a specific case since it is for the national court to make the decision to refer a case to the CJEU, not the individual. The question of whether an ombudsman can refer a preliminary question to the CJEU is of interest here. Generally member states' ombudsmen issue recommendations which are not legally binding on the public authorities in question. Therefore, they are not – generally – considered as courts or tribunals for the purposes of art. 267 TFEU. However, whether an ombudsman could fulfil the criteria and be considered courts or tribunals for the purposes of art. 267 TFEU, and can refer preliminary questions to the CJEU, will need to be considered on a case-by-case basis.<sup>175</sup> In a case involving an Austrian Environment Ombudsman (*Umweltanwalt*) the CJEU has concluded that it was a legally established, permanent and independent body with compulsory jurisdiction which applies rules of law.<sup>176</sup> The Swedish JO would seemingly not qualify as a court for the purposes of art. 267, taking into account its legally non-binding decisions. In sum, based on the individual accountability concept applied in this contribution, the instrument of preliminary rulings does not seem to constitute a 'strong' accountability avenue.

## 5 CONCLUDING COMMENTS

An attempt at tentative concluding comments is made here.

Ever since the Schengen rules were incorporated into EU law in 1999 through the Amsterdam Treaty, numerous policy initiatives, and changes in the EU legislation, have been presented. The point of the above account of the developments regarding the EU rules is to show that there has been a gradual development towards the EU supranational rules, but that the 'sovereignty dimension' and the 'human rights dimension' have created tensions and have influenced both the development of the treaties and secondary legislation. However, the 'de-pillarisation' in the post-Lisbon Treaty era allows for a new cross-sectoral alliances – although there are still legal boundaries – and a different mindset that results in other actors emerging and exercising influence.<sup>177</sup>

---

<sup>173</sup> TFEU, art 267: 'The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of the Treaties; (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union; Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon. Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court. [...]

<sup>174</sup> Court of Justice of the European Union, Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings [2018] 2018/C 257/01 2.

<sup>175</sup> Jaime Rodriguez-Medal, 'Concept of a court or tribunal under the reference for a preliminary ruling: who can refer questions to the Court of Justice of the EU?' (2015) 8 *European journal of legal studies* 1, 135-136.

<sup>176</sup> C-205/08 *Umweltanwalt von Kärnten v Karntner Landesregierung* [2009] ECLI:EU:C:2009:767, para 36.

<sup>177</sup> Carrera, den Hertog (n 1) 22.

As concerns the definitions of maritime border surveillance in the EU regulations discussed above, the following can be noted: The definition and scope of ‘border surveillance’ are not identical in the legally binding EU regulations; the Schengen Borders Code, and Regulation 656/2014. The ‘core’ border surveillance definition is included in the Schengen Borders Code. A wider scope of ‘border surveillance of maritime borders’ in the EU is found in Regulation 656/2014. The fact that border surveillance according to that Regulation encompasses detection, interception, including on the high seas, and even SAR, can be seen as a complicating factor conceptually – even though the Regulation is limited to the scope of being applied in Frontex joint operations concerning maritime surveillance. It can be noted that from a pragmatic view the wide scope is perhaps not of a great interest in the Baltic Sea, since the large joint sea operations that have attracted much attention in the Mediterranean have not been used in the Baltic Sea. If they would, the integrated approach of the Swedish Coast Guard, in that it has responsibilities both for border surveillance and SAR, could be useful. In this context it can be noted that it might be a challenge for Frontex to execute border surveillance of varying scope, for different reasons, such as issues related to resources and expertise, as it would also for some national authorities. When trying to pinpoint what EU ‘maritime border surveillance’ actually encompasses, Advocate General Mengozzi’s statement comes to mind: that surveillance is defined in the Schengen Borders Code essentially through its objectives and that the definition sets out a particularly broad concept, capable of encompassing any measure aimed at avoiding or preventing circumvention of border checks,<sup>178</sup> and that the concept of surveillance must be interpreted in a dynamic and flexible manner.<sup>179</sup>

In this context it is interesting to note that in Sweden the concept ‘maritime surveillance’, which does not entirely correspond to the (different) EU concepts, is part of a legal Ordinance, adopted at state level. Furthermore, the involved authorities in Sweden have arrived at a joint interpretation of ‘maritime surveillance’.

At this point it seems appropriate to return to the research question: How does EU law, and the instruments that are directly applicable in the member states, impact on the accountability of the Swedish Coast Guard in the field of maritime border surveillance?

The article has given an overview of the division of competencies, and accountability possibilities, at EU level and the national level in Sweden.

Concerning the answer to the question whether multi-level regulation promote or undermine accountability accessible for individuals, it is to some extent dependent on which concept of accountability one holds.<sup>180</sup> Applying the concept of accountability that I have chosen, seemingly an overarching conclusion of the investigation above of the Coast Guard and the multilevel context in which its activities are performed, both concerning rules and actor, is that the existence of a range of accountability avenues regarding the Coast Guard’s activities is at hand, accessible also for third-country nationals. On the face of it, this could seem satisfactory with two important reservations: first, the *regulatory* framework regarding maritime border surveillance and the *existence* of accountability mechanisms have been described above, with just some pieces of empirical information on actual ‘cases’, and,

---

<sup>178</sup> Opinion of AG Mengozzi (n 103).

<sup>179</sup> *ibid.*

<sup>180</sup> Reinold, Heupel (n 9).

second, as soon as more actors are involved in the operations, the conditions for accountability could change drastically.

Regarding the former reservation, theoretically, the reasoning often heard in connection with Mediterranean states and border surveillance could also be applied to Sweden: Maritime border surveillance takes place on out-of-sight locations (where for instance physical integrity could be at risk),<sup>181</sup> as well as through technological means (where for instance the protection of personal data could be at risk), and, in most cases, if a person is no longer in the territory of the concerned state, the initiation of an accountability procedure could be less easily accessible.<sup>182</sup>

Regarding the latter reservation, one important conclusion is that increasing involvement of additional actors (Frontex, other member states, third states), which takes place in accordance with the multilevel rules, decreases accountability possibilities, in the sense that it would make it more difficult for the individual to address the 'right' actor. The attempt to answer the research question has shed further light on the fragmentation caused by the complex multi-actor landscape related to maritime border surveillance in the EU, a fact which apparently impact the accountability.

Frontex has become one of the major players in European external border management. and the importance of the accountability of Frontex is increasing. While member states can be held accountable before their own national courts and before international courts, neither of these options are available in relation to Frontex. It can be brought before the CJEU to account for the conformity of its conduct with EU law, but in practice this does not, for different reasons, such as the limited actions available to individuals, play an important role, as things stands today.<sup>183</sup>

---

<sup>181</sup> Giuseppe Campesi, 'Police accountability and human rights at the Italian borders' in Sergio Carrera, Marco Stefan (eds), *Fundamental Rights Challenges in Border Controls and Expulsion of Irregular Immigrants in the European Union Complaint Mechanisms and Access to Justice* (Routledge 2020) 137.

<sup>182</sup> Drakopoulou, Konstantinou and Koros (n 28) 159.

<sup>183</sup> Fink (n 129) 532.

## LIST OF REFERENCES

Bache I and Flinders M, *Multi-level governance* (OUP 2004)

DOI: <https://doi.org/10.1093/0199259259.001.0001>

Bigo D, *Police en Réseaux: l'Expérience Européenne* (Press de Science Po. 1996)

Bosson R, *The Expansion of Frontex Symbolic Measures and Long-term Changes in EU Border Management* (Stiftung Wissenschaft und Politik/ German Institute for International and Security Affairs 2019)

DOI: <https://doi.org/10.18449/2019C47>

Campesi G, 'Police accountability and human rights at the Italian borders' in Carrera S and Stefan M (eds), *Fundamental Rights Challenges in Border Controls and Expulsion of Irregular Immigrants in the European Union Complaint Mechanisms and Access to Justice* (Routledge 2020)

DOI: <https://doi.org/10.4324/9780429203275>

Carrera S and den Hertog L, 'Whose Mare? Rule of Law Challenges in the Field of European Border Surveillance in the Mediterranean', *Liberty and Security* (2015) No. 79 January, Centre of European Policy Studies

Carrera S, Blockmans S, Cassarino J-P, Gros D and Guild E, *The European Border and Coast Guard: Addressing Migration and Asylum Challenges in the Mediterranean?* (2017) Centre for European Policy Studies

Carrera S and Stefan M, *Complaint Mechanisms in Border Management and Expulsion Operations in Europe: Effective Remedies for Victims of Human Rights Violations?* (2018) Centre for European Policy Studies

Carrera S and Stefan M, 'Introduction Justicing Europe's frontiers: effective access to remedies and justice in bordering and expulsion policies' in Carrera S and Stefan M (eds), *Fundamental Rights Challenges in Border Controls and Expulsion of Irregular Immigrants in the European Union Complaint Mechanisms and Access to Justice* (Routledge 2020)

DOI: <https://doi.org/10.4324/9780429203275>

Carrera S and Stefan M, 'Human rights complaints at international borders or during expulsion procedures International, European, and EU standards' in Carrera S and Stefan M (eds), *Fundamental Rights Challenges in Border Controls and Expulsion of Irregular Immigrants in the European Union Complaint Mechanisms and Access to Justice* (London Routledge 2020)

DOI: <https://doi.org/10.4324/9780429203275>

Chowdhury N and Wessel R A, 'Conceptualising Multilevel Regulation in the EU: A Legal Translation of Multilevel Governance?' (2012) 18 *European Law Journal* 3

DOI: <https://doi.org/10.1111/j.1468-0386.2012.00603.x>

Craig P and de Burca G, *EU Law: Text, Cases and Materials* (OUP 2003)

Daase C, 'Security, Intervention, and the Responsibility to Protect: Transforming the State by Reinterpreting Sovereignty' in Leibfried S, Huber E, Lange M, Levy J D, Nullmeier F and Stephens J D (eds), *The Oxford Handbook of Transformations of the State* (OUP 2015)

Damen M, 'Accountability in a multilevel setting: Cohesion Policy', Paper presented at Regional Studies Association European Conference (2013)

Krisch N, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (OUP 2010)

DOI: <https://doi.org/10.1093/acprof:oso/9780199228317.001.0001>

Drakopoulou A, Konstantinou A and Koros K, 'Border management at the external Schengen Borders: Border controls, return operations, and obstacles to effective remedies in Greece' in Carrera S and Stefan M (eds), *Fundamental Rights Challenges in Border Controls and Expulsion of Irregular Immigrants in the European Union Complaint Mechanisms and Access to Justice* (Routledge 2020)

DOI: <https://doi.org/10.4324/9780429203275>

Fernández Rojo D, 'It's a new agency. It's a federal agency. It's the European Border Coast Guard! No wait... it's Frontex' (2017) EU Law Enforcement, available at: <<https://eulawenforcement.com/?p=267>> (Accessed 5 April 2020)

Fink M, 'The Action for Damages as a Fundamental Rights Remedy: Holding Frontex Liable' (2020) 21 German Law Journal 3

DOI: <https://doi.org/10.1017/glj.2020.20>

Føllesdal A, 'Epilogue: Toward More Legitimate Multilevel Regulation' in Føllesdal A, Wessel R A and Wouters J (eds), *Multilevel regulation and the EU: The interplay between global, European, and national normative processes* (Martinus Nijhoff Publishers 2008)

Gkliati M, 'A Nexus Approach to the Responsibility of the European Border and Coast Guard: From Individual to Systemic Accountability' (2018) SSRN Electronic Journal, <<https://ssrn.com/abstract=3118551>> accessed 15 April 2020

DOI: <https://doi.org/10.2139/ssrn.3118551>

Guiraudon V, 'European and Integration Policy: Vertical Policy Making as Venue Shopping' (2000) 38 Journal of Common Market Studies 2

DOI: <https://doi.org/10.1111/1468-5965.00219>

Gustafsson Å, 'The Baltic Sea Region Border Control Cooperation (BSRBCC) and border management in the Baltic Sea region: A case study' (2018) 98 Marine Policy

DOI: <https://doi.org/10.1016/j.marpol.2018.09.028>

Heidbreder E G, 'Multilevel Elements of EU Migration Policy' (2014) 2 King Project-Political Science Unit, In-depth Study

Hooghe L and Marks G, *Multi-level Governance and European Integration* (Rowman & Littlefield 2001)

Hooghe L and Marks G, 'Types of multi-level governance' in Enderlein H, Wälti S and Zürn M (eds), *Handbook on multi-level governance* (Edward Elgar 2010)

Isiksel T and Thies A, 'Changing subjects: Rights, remedies and responsibilities of individuals under global legal pluralism' (2013) 2 Global Constitutionalism

DOI: <https://doi.org/10.1017/S2045381713000117>

Jacobsson M, 'Maritime Security: an Individual or Collective Responsibility?' in Petman J M and Klabbers J (eds) *Nordic Cosmopolitanism: Essays in International Law for Martti Koskenniemi* (Martinus Nijhoff 2003)

Jenness V, Smith D A and Stepan-Norris J, 'Taking a Look at Surveillance Studies' (2007) 36 *Contemporary Sociology: A Journal of Reviews* 2  
DOI: <https://doi.org/10.1177/009430610703600201>

Jumbert Gabrielsen M, 'Controlling the Mediterranean Space through Surveillance: The Politics and Discourse of Surveillance as an All-Encompassing Solution to EU Maritime Border Management Issues' (2012) 3 *Espace Populations Sociétés* 35  
DOI: <https://doi.org/10.4000/eps.5272>

Maurer A and Parkes R. *Democracy and European Justice and Policies under the Shadow of September 11* (Stiftung Wissenschaft und Politik/ German Institute for International and Security Affairs, Working Paper 2005)

Miller L, *The Emergence of EU Contract Law: Exploring Europeanization* (Oxford University Press 2011)  
DOI: [https://doi.org/10.1111/eulj.12038\\_3](https://doi.org/10.1111/eulj.12038_3)

Monar J, 'The External Shield of the Area of Freedom, Security and Justice: Progress and Deficits of the Integrated Management of External EU Borders' in de Zwaan J and Goudappel F A N J (eds), *Freedom, Security and Justice in the European Union: Implementation of The Hague Programme* (T.M.C. Asser Press 2006)

Mungianu R, *Frontex and Non-Refoulement. The International Responsibility of the EU* (CUP)

Nollkaemper A and Curtin D, 'Conceptualizing Accountability in International and European Law' (2007) 36 *Netherlands Yearbook of International Law*

Nollkaemper A, Wouters J and Hachez N, 'Accountability and the Rule of Law at International Level' (2008) Policy brief

OSCE, *Guidebook on Democratic Policing*, by the Senior Police Adviser to the OSCE Secretary General (2008)

Panara C, 'Multi-Level Governance as a Constitutional Principle in the Legal System of the European Union' (2016) 16 *Croatian and Comparative Public Administration* 4  
DOI: <https://doi.org/10.31297/hkju.16.4.7>

Peers S, 'Immigration and Asylum' in Bernard C and Peers S (eds), *European Union Law* (OUP 2014)

Piattoni S, *The Theory of Multi-level governance: Conceptual, Empirical, and Normative Challenges* (OUP 2010)  
DOI: <https://doi.org/10.1093/acprof:oso/9780199562923.001.0001>

Pirjola J, 'Complaint mechanism during return flights The European border and Coast Guard Agency' in Carrera S and Stefan M (eds), *Fundamental Rights Challenges in Border Controls and Expulsion of Irregular Immigrants in the European Union Complaint Mechanisms and Access to Justice* (Routledge 2020)  
DOI: <https://doi.org/10.4324/9780429203275>

Reinold T and Heupel M, 'Introduction: The Rule of Law in an Era of Multi-level Governance and Global Legal Pluralism' in Reinold T and Heupel M (eds), *The Rule of Law in Global Governance* (Palgrave Macmillan 2016)

Rodriguez-Medal J, 'Concept of a court or tribunal under the reference for a preliminary ruling: who can refer questions to the Court of Justice of the EU?' (2015) 8 *European journal of legal studies* 1

Rosenfelt H, 'Establishing the European Border and Coast Guard: all-new or Frontex reloaded?' (2016) *EU Law Analysis*

Thym D, 'Legal framework for entry and border controls', in Hailbronner K and Thym D (eds), *EU immigration and asylum law – a commentary* (C.H. Beck/Hart/Nomos 2016)

von Arnault A and Buszewski S, 'Modes of Legal Accountability: The Srebrenica Example' (2013) 88 *Die Friedens-Warte* ¾ 15

Wessel R A and Wouters J, 'The phenomenon of multilevel regulation: Interactions between global, EU and national regulatory spheres' in Føllesdal A, Wessel R A and Wouters J (eds), *Multilevel regulation and the EU: The interplay between global, European, and national normative processes* (Martinus Nijhoff Publishers 2008)

Wiklund N, *Övervakning av svenskt sjöterritorium Rationell samverkan eller vattentäta skott?* (Surveillance of Swedish Sea Territory: Rational cooperation or separate lanes?), Bachelor thesis (Lund University 2018)

Wolff S, 'EU Integrated Border Management Beyond Lisbon: Contrasting Policies and Practice' (Clingendael European Studies Programme 2009)