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New Thrust for the CSDP from the Refugee and Migrant Crisis

STEVEN BLOCKMANS
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Foreword

There can be no doubt that the refugee crisis possesses a security dimension. Armed conflicts with scant prospect of speedy resolution are driving people to seek refuge abroad. Their growing numbers represent an enormous challenge for a string of states — from the immediate neighbourhood with its gigantic refugee camps through the transit countries to the Member States of the European Union. What does this mean for the European security order and its central actors, first and foremost the United Nations (UN), the Common Foreign and Security Policy of the European Union (CSDP) and the Organisation for Security and Cooperation in Europe (OSCE)? How does the crisis affect the German armed forces, facing increasing demands at home on top of growing obligations abroad? How does the refugee crisis alter the role and self-perception of the security institutions, and what influence does it exert on ongoing strategy processes?

The Friedrich-Ebert-Stiftung has asked renowned experts to analyse the impact of the refugee crisis on the UN, the CSDP, the OSCE and the German armed forces. The publication series started with »Caught in the Crossfire — United Nations Security and Policy Perspectives on the Refugee Crisis« by Claire Hajaj and Tuesday Reitano, published in June 2016. The present analysis points to the impact of the so-called »migrant and refugee crisis« on the EU's Common Foreign and Security Policy (CSDP): The dramatic spike in asylum applications to EU member states in 2014/2015 has put to the test the added value and legitimacy of the European Union as a Foreign Policy actor. It has demonstrated to what extend the boundaries between external and internal security have become blurred.

Steven Blockmans' analysis traces the development the CSDP has undergone as a result of the refugee crisis. He examines the inroads the crisis has made into the policies supporting the Area of Freedom, Security and Justice (AFSJ) and the efforts that have been made to join up the different actors and instruments towards a more comprehensive approach. As a result of the refugee crisis, the EU has increasingly blended military efforts into its comprehensive approach to external action (while being blamed by others for an alleged militarisation of the humanitarian crisis) but still struggles to ensure a strategic and well-coordinated use of all its instruments.

Blockmans stresses that the growing nexus between the CSDP and the EU's internal security activities (including measures to safeguard the Area of Freedom, Security and Justice) raises questions about the limits of the Lisbon Treaty. Cross-fertilisation of lessons learnt in the hitherto separate spheres of internal and external, of AFSJ and CSDP, should benefit not only strategic analysis, planning and conduct of operations, but also the design, development and training of civil-military capabilities.

Anna Maria Kellner, Friedrich-Ebert-Stiftung

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1. Introduction

The dramatic spike in asylum applications to EU member states in 2014/2015 is one of the most distressing consequences of the deteriorated security environment on the European Union's outer periphery.[1] The run on »fortress Europe« has created a crisis in EU member states' border management, not to mention a humanitarian disaster of proportions not seen since the Second World War. One should keep both aspects in mind when using the term »refugee and migrant crisis«.

The last two years have put to the test the added value and legitimacy of the European Union when responding to the multifaceted crisis. The public outcry and unprecedented levels of political and media attention devoted to the dreadful experiences and unsettling images of the arriving asylum seekers have placed huge pressure on the Union to show that it is up to the challenge. The crisis response by individual member states, the EU's institutions and external border control agency Frontex, as well as NATO, is exemplary for the blurring of boundaries between external and internal security. Yet, the EU policy responses, both internally and in cooperation with third countries, have so far lacked the »comprehensive approach« which the EU professes to employ in its strategic actions. In practice, EU institutions and member states have given priority to security-driven (home affairs) and military concerns. The focus on border controls, return and readmission, and fighting against smuggling has by and large prevailed, instead of first ensuring full compliance with fundamental human rights standards and principles. This, as has been argued elsewhere, »constitutes one of the Achilles heels of the current European Agenda on Migration«.[2]

Nevertheless, the European Agenda adopts a holistic approach to migration which aims to respond to the immediate need to save lives and address emergency situations, tackle the root causes of irregular migration,

and fight traffickers. Indeed, it is only in conjunction with an effective internal strategy to safeguard the Area of Freedom, Security and Justice (AFSJ) that the EU's external action, including that under the Common Security and Defence Policy (CSDP), can work. In this respect, it is worth noting that the Council Decision to launch EUNAVFOR MED, one of the most emblematic EU responses to the refugee crisis, states that the CSDP naval operation will closely cooperate and coordinate activities with AFSJ actors like Frontex and Europol and conclude arrangements to that end.[3] At the same time, the High Representative for Foreign and Security Policy, who is also Vice-President of the European Commission has spearheaded EU efforts to establish partnerships with, inter alia, the International Organisation for Migration (IOM), the UN High Commissioner for Refugees (UNHCR) and other members of the UN family, as well as regional partners (such as the African Union and the »G5« of the Sahel: Mali, Mauritania, Niger, Chad, Burkina Faso) to tackle some of the root causes of fragility in the regions of origin, namely poverty, unemployment and conflict, and decide on joint approaches to stemming migratory streams and fighting human trafficking. One dubious initiative minted by the European Commission in June 2016 was intended to replicate the infamous but effective EU-Turkey deal,[4] and make development aid to Ethiopia, Mali, Niger, Nigeria and Senegal conditional on their agreement to help stop people going to Europe.[5] These so-called »migration compacts« were not to be restricted to Africa but would also extend to Lebanon, Jordan and other parts of the Middle East.[6] At the Sahel G5 meeting in

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1. Eurostat figures for 2014 show more than 600,000 asylum applications (almost 200,000 more than the highest figure in the fifteen previous years), whereas 2015 broke all records with almost 1.4 million applications.

2. See S. Carrera, S. Blockmans, D. Gros and E. Guild, »The EU's Response to the Refugee Crisis: Taking Stock and Setting Policy Priorities«, CEPS Essay No. 20, 16 December 2015; E. Guild and S. Carrera, »EU Borders and Their Controls: Preventing Unwanted Movement of People in the EU?«, CEPS Essay No. 6, 14 November 2013; and S. Carrera, »The EU's Dialogue on Migration, Mobility and Security with the Southern Mediterranean: Filling the Gaps in the Global Approach to Migration«, CEPS Paper in Liberty and Security in Europe, June 2011.

3. Council Decision 2015/778/CFSP of 18 May 2015, OJ 2015 L 122/31, Article 8.3. More generally, working arrangements between the EEAS, Frontex and Europol had already been signed.

4. See S. Carrera and E. Guild, »EU-Turkey Plan for Handling Refugees Is Fraught with Legal and Procedural Challenges«, CEPS Commentary, 10 March 2016; and W. Booth, »Greece Was Once the Fast Lane to Europe for Refugees. Now It's a Grim Waiting Room«, *Washington Post,* 7 July 2016: »Arrivals in the Greek islands are down 97 percent.«

5. See Foreign Affairs Council Conclusions on the Sahel of 20 June 2016. With backing from all member states for the negotiation of partnership frameworks, the HRVP on 17 June 2016 initiated migration compacts with two of the G5 Sahel countries: Mali and Niger. She was asked by Commission President Juncker to form a specific project team on this with Commissioners and Vice-Presidents. In addition, the Trust Fund for Africa established at the Valletta Summit had reached a total of 2.3 billion euros from EU funds by the end of June 2016 and a start had been made with the financing of projects. For the Sahel, about 530 million euros worth of projects were being funded, including security and border management projects to ensure more effective territorial control and to more effectively tackle illicit flows and trafficking.

6. As reported by E. Zalan, »EU to Make Aid Conditional on Help with Migrants«, *EU Observer,* 7 June 2016; and N. Nielsen, »EU Development Aid to Finance Armies in Africa«, *EU Observer,* 5 July 2016.

Brussels on 17 June 2016, the HRVP also launched an EU facilitated dialogue between Libya, Chad and Niger on border management.

While recognising the existing efforts and deficiencies in the multi-sector approach of the EU, the current paper asks how the Common Security and Defence Policy has developed as a result of the ongoing refugee and migrant crisis, and what inroads it has made into the policies supporting the Area of Freedom, Security and Justice to join up the different actors and instruments in order to arrive at a more comprehensive approach. The emphasis of the analysis rests on Operation EUNAVFOR MED »Sophia« and the emergence of a semi-military European Border and Coast Guard. The EU Integrated Border Management Assistance Mission in Libya (EUBAM Libya), which was launched in 2013 but terminated in 2015 due to the instability of the country, will remain outside the scope of the present paper.[7]

2. Inter-institutional Action

Whereas the southern frontline states of the EU have been coping with refugee and migrant flows for years, they have largely shouldered the burden on their own, despite sudden spikes in numbers (for example in 2005 with the »assault« on the border fences at Ceuta and Melilla) and calls for a common response. It is the dramatic increase in the numbers seeking refuge from the wars in the Middle East, leading economic migrants from further afield to follow in their wake to try their luck in finding a better life in Europe, that has provoked an EU-wide reaction.

The refugee crisis has been concentrated in two migratory routes: the south-central Mediterranean and the Aegean Sea.[8] The origins of the EU's military response to the crisis date back 18 months before a CSDP mission was officially sent to the waters surrounding Lampedusa. In November 2013, Italian Foreign Affairs Minister Emma Bonino and Defence Minister Mario Mauro asked then High Representative Catherine Ashton for various measures, including the establishment of a naval rescue operation and action against traffickers, the strengthen-

ing of Frontex, and a discussion with third countries on migration. The options developed were military, civilian and diplomatic. Italy and Greece agreed to act together, but their push to involve other member states failed; most refused to fund the Italian-run rescue operation Mare Nostrum and the European Council of December 2013 ended without results. Rome and Athens did not give up, however, and supported by Malta, Spain and Bulgaria, demanded more European solidarity.

In response to a rise in deadly tragedies at sea since February 2015, »migration« has become a key domain of intervention by High Representative Federica Mogherini, who in her capacity as Vice-President is responsible for the Commissioners' Group on External Action (CGEA):[9]

We cannot allow other tragedies at sea in the coming weeks and months; we need to be able to give a strong political and operational response. As I have announced today during the College in Strasbourg, I will convene an extraordinary meeting of the Commissioners' Group on External Action in the coming days in order to discuss with the Commissioner for Migration, Home Affairs and Citizenship, Dimitris Avramopoulos, a review of our policies. I've also decided to put a discussion on migration on the agenda of the Foreign Affairs Council soon. The fight against smuggling and trafficking, the rescue of migrants at sea, the protection of asylum-seekers are shared challenges; they require a stronger exercise of shared responsibility.[10]

The Foreign Affairs Council in March 2015 (the first in ten years to discuss »migration«) decided to organise an extraordinary meeting of foreign and interior ministers on 20 April. This first-ever joint ministerial prepared the first »special« European Council meeting on the refugee crisis on 23 April, after the single most deadly shipwreck in the Mediterranean claimed more than nine hundred lives. Mogherini has since played an instrumental role in keeping the external dimension of the refugee crisis on the agenda.

Whereas »the need to manage migration properly« (and strengthen Triton, as the Frontex Operation in the south-central Mediterranean, and the EU's support for

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7. EUBAM Libya was tasked to support the Libyan authorities in a non-executive function.

8. For an overview of routes: http://frontex.europa.eu/trends-and-routes/migratory-routes-map/.

9. See S. Blockmans and S. Russack, »The Commissioners' Group on External Action – Key Political Facilitator«, CEPS Special Report No. 125, 17 December 2015. The CGEA includes Commissioner Avramopoulos (DG HOME) in the broader cluster.

10. See http://eeas.europa.eu/statements-eeas/2015/150210_03_en.htm.

the countries of origin and transit) had already been recognised by EU heads of state and government in 2014, European Council President Donald Tusk sought to respond to the concerns expressed by an ever-louder chorus of EU leaders by coordinating a more concerted effort at the highest political level. He appointed the European External Action Service's former Executive Secretary General Pierre Vimont as his point man for the Valetta Summit process and has kept refugee and migration issues on the agenda of every regular European Council summit since. In parallel, the CSDP track was developed. It is in this context that the EU congratulated itself on the unanimity and speed with which a decision was taken, on 22 June, to launch a common military response — two months after the most deadly shipwreck to date.

3. South-central Mediterranean

3.1 EUNAVFOR MED: The Need for Speed

Seen through the narrow prism of the CSDP, the time needed to move from the political initiative to conceive the operation, to identify capabilities, to build consensus for activation by Council decision and start deployment was indeed remarkably short, even compared to previous rapid EU deployments in Congo in 2003 (Operation Artemis) and Georgia in 2008 (civilian monitoring mission).[11] Force generation, the usual headache in mounting EU operations (witness Chad in 2008), took only one month to be agreed upon, in line with the initial intention for the Foreign Affairs Council to finalise planning in June 2015. The CSDP military operation in the south-central Mediterranean was given a mandate to »identify, capture and dispose of vessels as well as enabling assets used or suspected of being used by migrant smugglers or traffickers«.[12]

The price which the EU paid for the speed of deployment of its new naval force in the Mediterranean (EUNAVFOR MED) was the criticism it drew from international partners and the general public alike when plans for a »boat-sinking« operation were unveiled, raising fears about unacceptable levels of violence and collat-

eral damage; a European version of Mexico's drug war. Civil society organisations and some international partners (such as Ban Ki-Moon speaking at the European Parliament on 27 May 2015) have reacted negatively to an operation that appears to heighten humanitarian risk by putting migrants in the firing line. Mogherini was on the defensive, stating time and again that the targets were not migrants but »those who are making money on their lives and too often on their deaths«.[13] For the first time in years, the EU was being criticised for overreaction rather for than its absence from crises.

Yet the problems of EUNAVFOR MED lay less in clumsy public diplomacy than in the perilous mismatch between its stated objectives and the absence of a clear strategy and a mandate under international law, thus creating both operational and political risks for involved member states. Phase 1 of the operation (surveillance and assessment) began with no legal mandate to carry out the crucial phases 2 and 3 (search and destroy), whose military planning and outcomes were undetermined. Despite these limitations, the naval force nevertheless marked a turning point in the EU's security narrative, because it meant that the Union was finally addressing the threats to security and humanitarian tragedies in the south-central Mediterranean.

3.2 Scope and Mandate of the Military Operation

The operational model of EUNAVFOR MED is largely inspired by the EU's Naval Force Operation Atalanta off the Horn of Africa and in the western Indian Ocean. Launched in 2008, Atalanta has allowed the EU to acquire valuable know-how in maritime security, namely in deterring and disrupting acts of piracy and armed robbery, not just on the high seas but also ashore (for example helicopter gunship attacks to destroy pirates' logistical bases on land). This operational experience helped the EU to plan EUNAVFOR MED, which is embedded in the idea of a holistic approach to migration.

The operation was launched on 22 June 2015. It initially comprised nine surface units (warships), one submarine, three fixed-wing maritime patrol aircraft, five helicopters

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11. Sections 3.1 and 3.2 draw on G. Faleg and S. Blockmans, »EN Naval Force EUNAVFOR MED Sets Sail in Troubled Waters«, CEPS Commentary, 26 June 2015.

12. Council Decision (CFSP) 2015/778 of 18 May 2015, Official Journal of the EU, 2015 L 122/31, Article 1(1).

13. Statement by High Representative/Vice-President Federica Mogherini on the Council decision to launch the naval operation EUNAVFOR Med, Luxembourg, 22 June 2015.

Operational Strength of EUNAVFOR MED (June 2016)
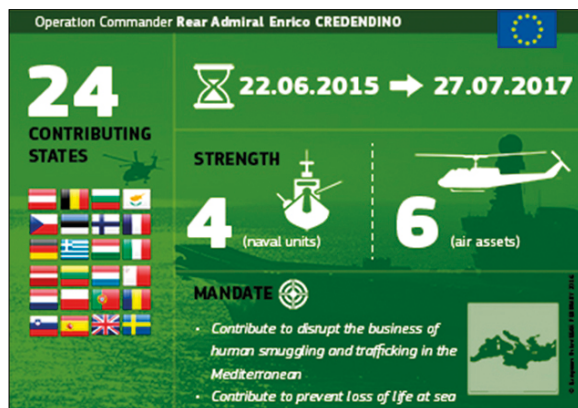
Source: http://eeas.europa.eu/csdp/missions-and-operations/eunavfor-med/news/20160527_01_en.htm

and one drone, operating under the national flags of fourteen member states (Belgium Finland, France, Germany, Greece, Hungary, Italy, Lithuania, Luxembourg, the Netherlands, Slovenia, Spain, Sweden, and the UK).[14] The operational strength achieved by June 2016 is depicted in the infographic above.

In many respects, EUNAVFOR MED is the trickiest CSDP operation in years. As mentioned above, public diplomacy has clearly lagged behind its inception process. But the real blind spots of the operation had to do with its strategy, legal mandate and operational practicalities. Phase 1 did not need a UN Security Council (UNSC) Resolution, because surveillance is executed in international waters and airspace. But beyond this point there was little indication of what EU forces should do during phases 2 and 3; which means and budget should be used to carry out these tasks; and what conditions would have to be met for the Council to decide on the transition beyond phase 1, entering Libyan territory. Success was not assured, either. Attacking traffickers and destroying their means might lead to counter-attacks by the militias that protect these resources and benefit from or organise trafficking in one way or another. Indeed, the EU would have to calibrate its military activities, particularly when moving into Libyan territory or territorial waters, to avoid destabilising a political process by collateral damage, by disrupting legitimate economic activity or by creating a perception of having taken sides.[15]

These considerations led to protracted discussions with Russia and China on the language of a UN Security Council resolution. Russia, in particular, insisted on a watertight mandate to prevent a repetition of what it considered to be an abuse by Western nations of a resolution to intervene militarily in Libya in 2011. The discussions in the Security Council revolved, inter alia, around the word »disposal« (read: sinking) of vessels and related assets, »before use«, and the legal definitions of »traffickers« and »smugglers«, who, unlike pirates, fall outside the scope of classic international law. Ultimately, Operation EUNAVFOR MED was granted an international legal mandate by way of UNSC Resolution 2240 of 9 October 2015. The Resolution authorises states and regional organisations to intercept, inspect, seize and dispose (i. e. destroy) vessels on the high seas off the coast of Libya for a period of one year, but only where they have »reasonable grounds to believe« that these vessels, inflatable boats, rafts and dinghies are being used for smuggling and human trafficking from Libya.

In fact, UNSC Resolution 2240 circumscribes the type, level and reach of the intervention within strict rule of law parameters. For instance, it places special emphasis on the need for states and regional organisations to display »good faith efforts to obtain the consent of the flag state« before inspecting vessels. Any subsequent seizure or disposal of such vessels must occur in accordance with applicable international law »with due consideration of the interests of any third parties who have acted in good faith«. The Resolution also stresses the obligation of states and regional organisations carrying out such UNSC mandated activities »to provide safety for the persons on board as an utmost priority and to avoid causing harm to the maritime environment or to the safety of navigation« (cf. paragraphs 7, 8 and 10 of the Resolution).

Adopted under Chapter VII of the UN Charter, the Resolution thus effectively details the circumstances under which the use of force may be used, all in keeping with the protection of migrants' rights, international human rights obligations, international refugee law and the UN Convention on the Law of the Sea. In short, UNSC

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14. See EEAS(2016) 126, 27 January 2016, available at https://wikileaks.org/eu-military-refugees/EEAS-2016-126.

15. Illustrative in this respect is the report of 25 January 2016 by the Operation Commander, Rear Admiral Enrico Credendino of the Italian Navy, for the EU Military Committee and the Political and Security Committee.

It gives refugee flow statistics and outlines the performed and planned operation phases (1, 2A, 2B and 3), the corresponding activities of the joint EU forces operating in the Mediterranean and the future strategies for the operation. See EEAS, »EUNAVFOR MED Op SOPHIA – Six Monthly Report 22 June–31 December 2015«, EEAS(2016) 126, 27 January 2016, available at https://wikileaks.org/eu-military-refugees/EEAS-2016-126.

Resolution 2240 lays down a set of standards that may well complicate the practical running of the operation, especially when confronted with smugglers who have proven to possess callous disregard for the well-being of their »clients«. On the other hand, UNSC Resolution 2240 does not authorise EUNAVFOR MED to act within the territorial and internal waters of Libya, let alone on Libyan territory, as projected by the Decision adopted by the Council of the EU.[16]

The alternative legal justification for the implementation of phases 2 and 3 of EUNAVFOR MED would be for the EU to act on the invitation of the legitimate government of Libya. However, with two power centres vying for dominance, any strategy that hinged on the invitation of one of the rival parties (i. e. that of the internationally recognised »government« in Tobruk) risked irking the other (i. e. the Islamist »government« in Tripoli). The EU's operation therefore carried serious political risks and might have even ended in impasse. For this reason the EU actively supported the efforts of the UN Secretary General's Special Envoy (first Bernardino de Léon, then Martin Kobler) to mediate an agreement for the formation of a unity government in Libya. Efforts to bring the competing parliaments and their backers together in a »Government of National Accord« were further supported in an Italo-American process which led to the adoption of the Rome Communiqué of 13 December 2015, which formed the basis of the UN-brokered »Libyan Political Agreement« reached at Skhirat on 16 December which was, in turn, unanimously endorsed by UNSC Resolution 2259 of 23 December. The first meeting of the cabinet of the Government of National Accord took place on 2 January 2016 in Tunis but it was not until 30 March 2016 that key members arrived in Tripoli.

In the meantime, the practice of fighting traffickers had led to the re-naming of EUNAVFOR MED to »Operation Sophia«, after the name given to a baby born on a ship participating the operation, which rescued her mother off the coast of Libya on 22 August 2015.[17] Shortly afterwards, on 7 October 2015, EUNAVFOR MED »Sophia« entered its second phase. According to the information presented on the website of the EEAS, the operation contributed to saving more than 14,800 lives in its first

year of deployment, while 71 people were reported to the Italian authorities as possible smugglers and 127 vessels »removed« from the control of illegal organisations.

On 20 June 2016 the Council decided to extend the mandate of Operation Sophia for one year and give it two additional tasks: training of Libyan coastguards and contributing to the implementation of the UN arms embargo on the high seas. These extra tasks were suggested by HRVP Mogherini to the Libyan Government of National Accord,[18] which asked the EU for support one month later.[19] This was subsequently unanimously endorsed by the UNSC in Resolution 2292 on 14 June 2016. The latter is, indeed, a very strong signal of the international support for the EU's role in the Mediterranean in tackling the smugglers' networks, something which France and UK, in particular, had been insisting on for a long time.[20] The UNSC Resolution also constitutes an implicit Russian snub to NATO, which was active in Libyan airspace and territorial waters in 2011.

Thus, Operation Sophia matured from its surveillance and rescue phase into a proper »Chapter VII« operation, since it will help enforce the arms embargo imposed by the UN Security Council. The last time the EU member states carried out such an operation was in the Adriatic under the auspices of the Western European Union in the context of the wars in former Yugoslavia (1992–93). That operation was carried out in cooperation with NATO.[21]

4. Aegean Sea: NATO first?

Until February 2016 the response to the refugee crisis was completely managed by the EU. While member states have traditionally preferred to act through the EU to address »soft« security issues, the mandate of EUNAVFOR MED showed governments willing to push for more robust EU action. This raises the question why an operation in the Aegean Sea was not launched under

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16. See part (ii) of phase 2 as well as phase 3 of the Operation, in Article 2(2)(b) and (c) of Council Decision 2015/778.

17. See Council Conclusions on Migration, 12 October 2015, available at http://www.consilium.europa.eu/en/policies/migratory-pressures.

18. Remarks by High Representative/Vice-President Federica Mogherini at the press conference on Libya, Luxembourg, 18 April 2016; and Ministerial Meeting for Libya Joint Communique, Vienna, 16 May 2016.

19. Statement by the HR/VP Federica Mogherini on Libya, Brussels, 22 May 2016.

20. N. Gros-Verheyde, »L'opération Sophia devient une »vraie« mission de présence en mer«, Bruxelles2.com, 20 June 2016. The German government was less insistent, as it has to obtain a new mandate from the Bundestag.

21. S. Blockmans, *Tough Love: The EU's Relations with the Western Balkans* (The Hague: Asser, 2007), p. 178.

the umbrella of the CSDP, either by broadening the geographical mandate of EUNAVFOR MED or by launching a similar operation in full cooperation with Frontex. Arguably, the activation of NATO's Standing NATO Maritime Group 2 (SNMG2) in the Aegean served political purposes in Greece, Germany and Turkey, the three countries which requested the Alliance to intervene. Germany, as the preferred destination for many refugees and migrants, obviously had an interest in disrupting smuggling routes departing from Turkey's Aegean coastline. Berlin's bilateral efforts to spearhead an EU agreement with Ankara to stem the flow of people across the Aegean Sea, sought to launch a surveillance assistance mission that could straddle Turkey's territorial waters and help stabilise relations with Greece in the process. The choice to cooperate through an organisation of which the three countries are a member was obvious enough. NATO's Secretary General underlined the rationale:

> Our added value is that we can facilitate closer cooperation and assist in greater exchange of information between Greece and Turkey, as both are NATO Allies, but only Greece is in the EU. Today's agreement also means that we are working closer with the EU than ever before. So NATO has a unique role to play as a platform for cooperation.[22]

The scope of the NATO mission in the Aegean is more limited than its EU counterpart in the South-central Mediterranean. While Operation Sophia has its own capabilities and is trying to tackle the smuggling networks, NATO has not been tasked with boarding, searching, seizing and destroying boats or apprehending smugglers. SNMG2's goal is »to find the intelligence to cue« the Turkish and Greek coastguards and Frontex assets, »to be able to intercept the migrant boats and bring them back onshore into Turkey«.[23] NATO is tasked to conduct reconnaissance and to that end »arrangements have been established on the operational and tactical level providing for the exchange of liaison officers and real-time information sharing.«[24] Yet, cooperation between NATO, Frontex and Greek coastguards is taking place outside of the established CSDP-NATO framework, which diversifies inter-organisational cooperation

but thereby also risks further complicating EU-NATO coordination in crisis management. Likewise, there is no »formal intelligence sharing arrangement« between NATO and Operation Sophia.[25] This appears particularly odd, given that the two operations — while geographically and institutionally discrete — both take aim at smuggling networks based on the shores of the Mediterranean. There is, in other words, »an overlap in the intelligence required«.[26] It would seem, however, that »certain Allied national positions on EU-NATO co-operation (…) limit the scope for [mutual] support« between the EU and NATO in the Mediterranean.[27] The reference here is to the continuing disagreements between Turkey and Cyprus.[28]

The decision to launch a NATO mission of little to no added value constitutes a missed opportunity to enhance an intra-EU comprehensive approach to efficient and effective crisis management. Whereas ad hoc and informal cooperation at both the »Brussels level«[29] and in the field may resolve part of the problem and lead to new synergies in crisis management, the EU-NATO relationship is in practice constrained by diverging political considerations of member states, as well as differences in institutional cultures and lines of control and command. In an age of austerity in defence spending and a European neighbourhood in turmoil, NATO and CSDP efforts should be fully complementary.[30] In particular, common strategic direction will be indispensable. After all, »[p]ragmatism and ad hocery are unlikely to provide a convincing rationale to meet the challenges of a rapidly changing geopolitical context.«[31]

In the first-ever joint EU-NATO declaration, signed by Presidents Tusk and Juncker and NATO Secretary General Stoltenberg in Warsaw on 8 July 2016, new areas of increased practical cooperation were outlined as a

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22. Statement by the NATO Secretary General on NATO support to assist with the refugee and migrant crisis, 25 February 2016.

23. See the evidence provided to the House of Lords, »Operation Sophia, the EU's Naval Mission in the Mediterranean: An Impossible Challenge«, HL Paper No. 144, May 2016, point 86.

24. NATO Overview of Aegean Sea Mission 2016.

25. HL Paper No. 144, point 88.

26. Ibid., point 91.

27. Ibid., point 92.

28. See also S. Blockmans, »Participation of Turkey in European Security and Defence Policy: Kingmaker or Trojan Horse?« Leuven Centre for Global Governance Studies Working Paper No. 41, April 2010.

29. As the city hosting both the EU and NATO.

30. S. Blockmans and G. Faleg, »More Union in European Defence«, report of the CEPS Task Force chaired by Javier Solana, CEPS 2015.

31. S. Duke and S. Vanhoonacker, »EU-NATO Relations: Top-down Strategic Paralysis, Bottom-up Cooperation«, Paper prepared for the UACES 45th Annual Conference at the University of Deusto, 7–9 September 2015, p. 17.

»strategic priority« to confront »unprecedented challenges emanating from the South and East«.[32] The signatories stress the urgent need to, inter alia, »[b]roaden and adapt our operational cooperation including at sea, and on migration, through increased sharing of maritime situational awareness as well as better coordination and mutual reinforcement of our activities in the Mediterranean and elsewhere«. Building resilience in strategic communications, coordinated EU-NATO exercises and strengthened maritime security cooperation through capacity building are all listed as examples for the new impetus in EU-NATO cooperation. As »speedy implementation is essential«, both organisations are called upon »to invest the necessary political capital and resources to make this reinforced partnership a success«. The EEAS and the NATO International Staff, together with Commission services as appropriate, have been tasked to develop concrete options for implementation, including appropriate staff coordination mechanisms, to be presented by December 2016. On the EU side, HR/VP Mogherini will steer and coordinate this endeavour.

5. Towards a Semi-military European Border and Coast Guard?

The refugee crises in the south-central Mediterranean and the Aegean Sea have both been covered by Frontex border missions (Triton and Poseidon, respectively), and supported by a military operations (CSDP and NATO, respectively). The European Agenda on Migration adopted in May 2015 anticipated that »within the scope of the Treaties and its relevant Protocols«, the European Commission would launch a reflection on how to foster »a shared management of the European border«. It stipulated that:

> a European System of Border Guards (…) would cover a new approach to coastguard functions in the EU, looking at initiatives such as asset sharing, joint exercises and dual use of resources as well as the possibility of moving towards a European Coastguard.[33]

To be sure, the idea of establishing an integrated system for the management of external borders and setting up

a European System of Border Guards is not new. It has been under discussion since 2001, when the idea was floated in the Laeken Declaration.[34] Spurred by discussions in the framework of Working Group No. 10 of the Convention on the Future of Europe, the Frontex external border control agency was set up in 2005.[35] But as a result of the dramatic increase in first-time asylum applications to EU member states in 2014/5, Commission President Juncker declared in his 2015 state of the Union speech the need to significantly reinforce Frontex's competences and »develop it into a fully operational European border and coast guard system«.[36] This policy priority was reflected in the Commission's Work Programme for 2016, »No Time for Business as Usual«,[37] which anticipated the presentation of proposals by the end of 2015 »for a European Border and Coast Guard, building on a significant strengthening of Frontex«. In the European Council Conclusions of 15 October, the member states' political leaders called for action to:

> in accordance with the distribution of competences under the Treaty, in full respect of the national competence of the Member States, enhance the mandate of Frontex in the context of discussions over the development of a European Border and Coast Guard System, including as regards the deployment of Rapid Border Intervention Teams in cases where Schengen evaluations or risk analysis demonstrate the need for robust and prompt action, in cooperation with the Member State concerned.[38]

The Commission followed up with the publication on 15 December 2015 of a package of proposals for legislative measures.[39] The Communication »A European

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32. The text of the joint declaration is available at http://www.nato.int/cps/en/natohq/official_texts_133163.htm.

33. European Agenda on Migration, COM (2015) 240, 13 May 2015, p. 17.

34. European Council Conclusions, Laeken, 14 and 15 December 2001, point 42. This led to a study on the possibility of establishing a »European border police«.

35. Council Regulation (EC) 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 349/1, 25 November 2004.

36. See http://ec.europa.eu/priorities/soteu/docs/state_of_the_union_2015_en.pdf.

37. COM (2015) 610, 27 October 2015.

38. See http://www.consilium.europa.eu/en/press/press-releases/2015/10/16-euco-conclusions/.

39. See http://europa.eu/rapid/press-release_IP-15-6327_en.htm. The package includes a Proposal for a Regulation amending Regulation No 562/2006 (EC) as regards the reinforcement of checks against relevant databases at external borders, COM (2015) 670 final, 15 December 2015; a Recommendation Adopting the Practical Handbook for Implementing and Managing the European Border Surveillance System (EUROSUR), C (2015) 9206 final, 15 December 2015; the Eighth Biannual Report on the Functioning of the Schengen Area 1 May – 10 December 2015, COM

Border and Coast Guard and effective management of Europe's external borders« laid down the main components of the Commission's initiatives and the features of the new European Border and Coast Guard (EBCG).[40]

Based on Articles 77.2(b) and (d) and Article 79.2(c) of the Treaty on the Functioning of the EU (TFEU), the EBCG was developed in the shape of a regulation under the ordinary legislative procedure.[41] Endorsed in first reading by the European Parliament on 6 July 2016, i. e. barely half a year after the Commission tabled its proposal, the EU was swift in delivering on its commitments.[42] But the need for speed has resulted in less resolute legislative action than anticipated.

The EBCG will be based on a new agency that builds on Frontex and the national authorities are responsible for border management. While retaining the same legal personality as Frontex, with full continuity in all its activities and procedures, the tasks of the new EBCG Agency have been expanded to include, first, facilitating the development and implementation of common EU border management standards; and second, operationally supporting frontline EU member states whose national border authorities are not effectively coping with the challenges on the ground. According to Article 7 of the Regulation,[43] the Agency will have four main additional competences: developing the so-called »hotspot« approach; coordination of operational cooperation with neighbouring third countries; initiating return operations and supporting member states in returns; and providing technical and operational assistance to member states and third countries, in support of search and rescue operations for persons in distress which may arise during border surveillance operations at sea.

Some of the proposals made by the Commission have proven controversial with member states, and have subsequently been modified following discussions in various Council working parties. Significantly, the possibility for »direct interventions« by the Agency in those member states deemed to be inadequately controlling their borders has been removed. Instead, there will be a possibility for the other member states to reintroduce temporary border controls as a last resort. This makes the approach a more European one, as the decision will be made by the Council and not by a member state acting unilaterally.

In cases where a member state fails to take necessary measures in line with the vulnerability assessment or in the event of disproportionate pressure at the external borders where a member state has not requested the Agency for sufficient support or is not taking the necessary actions for implementation of these measures, rendering the control at the external border ineffective to an extent that risks jeopardising the functioning of the Schengen area, a unified, rapid and effective response could henceforth be delivered at EU level. For the purpose of mitigating these risks, and to ensure better coordination at EU level, the Regulation provides for the Commission to identify and propose to the Council the measures to be implemented by the Agency and requires the member state concerned to cooperate with the Agency in the implementation of those measures. The implementing power to adopt such a decision is conferred on the Council because of the potentially politically sensitive nature of the measures to be decided, often touching on national executive and enforcement powers. The EBCG Agency should then determine the actions to be taken for the practical execution of the measures indicated in the Council decision, and an operational plan should be drawn up with the member state concerned. In cases where a member state does not comply within thirty days with the Council decision and fails to cooperate with the Agency in the implementation of the measures contained in the decision, the Commission may trigger the application of the specific procedure where »exceptional circumstances« put the overall functioning of the area without internal border control at risk.[44] A rapid reaction force of 1,500 guards drawing on a pool of technical equipment would be able to deploy even if a member state did not ask for its help.

(2015) 675 final, 15 December 2015. Other measures are indicated in the text and footnotes below.

40. COM (2015) 673 final, 15 December 2015.

41. A consolidated text of the compromise Regulation is available at http://statewatch.org/news/2016/jun/eu-border-coast-guard-consolidated-text-6-16.pdf.

42. Joint Statement on the adoption by the European Parliament of the Commission's proposal for the creation of a European Border and Coast Guard, STATEMENT/16/2431, Strasbourg, 6 July 2016. See also the provisional version of the European Parliament legislative resolution of 6 July 2016 on the proposal for a regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC (COM(2015)0671 – C8-0408/2015 – 2015/0310(COD)), P8_TA-PROV(2016)0305, available at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONS-GML+TA+P8-TA-2016-0305+0+DOC+PDF+V0//EN.

43. The text of Article 7 is reproduced in the Appendix to this paper.

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44. Cf. Article 29 of Regulation (EU) 2016/399 on the Schengen Border Code, which will be amended accordingly.

As such, the EBCG Agency would serve as a safety net whereby national border guards in EU member states will be supported in exceptional situations. If it is properly resourced, there should in principle no longer be shortages of staff or equipment for operations at the EU's external borders.

The functioning of the Agency relies on *liaison officers* who will be sent or seconded by the agency to the EU member states concerned.[45] They will be fully integrated into the national authorities' work and information systems, so that the Agency will be informed in real time. Thus, the new agency will continue to rely on the EU member states' authorities responsible for border control and national coastal guard authorities when they perform maritime border surveillance. As regards the budgetary implications of the proposal, the Commission envisaged an amount of »at least« 31.5 million in 2017 to be added to the Agency's Union budget of 238 million euros (a 13 percent increase) and an additional 602 posts (329 establishment plan posts and 273 external staff) until 2020.[46] The Agency will be granted an autonomous budget whose revenue comes essentially from a a subsidy from the EU entered in the general budget (Commission section), and – to a lesser extent – from contributions from the countries associated with the implementation, application and development of the Schengen acquis, any voluntary contribution from

the member states and fees for services provided (Article 75.1). The expenditure of the Agency includes the staff, administrative, infrastructure and operational expenses for actions at the external borders of the EU (Article 13.3) and for return operations, giving priority to those conducted by more than one member state, or from hotspot areas (cf. Articles 26.1(f), 27.6 and 32.6).

To avoid the shortcomings witnessed in the past, the Agency will for the first time be able to acquire equipment itself (Article 37) and to draw on a pool of technical equipment provided by the member states (Article 38). In terms of capability development, the EBCG would benefit from cooperation with the European Defence Agency (EDA) and thus enhance the kind of civil-military (CIV-MIL) dimension that the European Council called for in its conclusions of December 2013. As such, the EBCG could have a beneficial impact on the full life-cycle of dual-use capabilities, from design to disposal, including training and exercises. One area of cooperation relates to common maritime information sharing, where the EDA is already working intensively on its project for an EU military naval maritime surveillance network (MARSUR) to become an interoperable part of the Common Information Sharing Environment (CISE). If the EBCG is to overcome legal, security and other constraints, there is a need for such interoperable solutions and procedures. In order to leverage CIV-MIL synergies, ensure the best use of resources and maximise operational output, the EBCG's personnel will also have to be educated and trained in similar principles and procedures. The EBCG should therefore cooperate with existing initiatives in maritime training; a »Coastguard Academy Network« run and developed by the European Coastguard Functions Forum (ECGFF); a civilian Maritime Training network developed by a contractor (ECORISE); and a Naval Training Network developed by the EDA. In short, cooperation with the EDA will give the EBCG a credible and enhanced ability.

6. Concluding Remarks

The EU plays an important role in responding to the multi-faceted »refugee« crisis in the Mediterranean and in addressing the root causes of fragility and instability which lie further afield. Applying its full range of instruments in the field of diplomacy, humanitarian assistance, long-term development cooperation, support for human rights, and institution- and resilience-building, the EU is

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45. Article 11.3 of the Regulation lays down the specific tasks of the officers, which include »(a) act as an interface between the Agency and the national authorities responsible for border management, including coast guards to the extent that they carry out border control tasks; (aa) support the collection of information required by the Agency for the monitoring of irregular migration and risk analyses referred in Article 10; (b) support the collection of information as referred to in Article 12 and required by the Agency for carrying out the vulnerability assessment referred to in Article 12; (c) monitor the measures taken by the Member State at border sections to which a high impact level has been attributed in accordance with Regulation (EU) No 1052/2013; (ca) contribute to promoting the application of the Union acquis relating to the management of external borders, including with regard to respect for fundamental rights; (d) where possible assist the Member States in preparing their contingency plans concerning border management; (da) facilitate the communication between the Member State and the Agency, share relevant information from the Agency with the Member State, including information about ongoing operations; (e) report regularly to the Executive Director on the situation at the external border and the capacity of the Member State concerned to deal effectively with the situation at the external borders and on the execution of return operations towards relevant third countries. If the report raises concerns about one or more of these aspects relevant for the Member State concerned, the latter will be informed without delay by the Executive Director; (f) monitor the measures taken by the Member State with regard to a situation requiring urgent action at the external borders as referred to in Article 18.«

46. See Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC, COM (2015) 671 final, 15 December 2015, p. 8.

increasingly blending military efforts into its comprehensive approach to external action. This highlights the need, which is felt among institutions and member states alike, to ensure that the instruments available to the EU are used strategically and in a coordinated manner in search of efficiencies and synergies. At the same time, it has triggered criticism about the »militarisation of a humanitarian crisis«.[47]

Around the Horn of Africa, EUNAVFOR Atalanta has already demonstrated the EU's capacity to act as an effective crisis responder, as part of a more holistic and strategic approach to the Sahel region. EUNAVFOR MED is following the same model and has signalled the beginning of more proactive European engagement to restore stability in the wider Mediterranean region. The uncertainties and risks surrounding the launch of Operation »Sophia« were the by-product of ten years of strategic inertia by the EU in the Mediterranean. But in the dramatically altered security climate of the past two years, action could no longer be deferred. As former High Representative Javier Solana is fond of saying: all operations have unknowns and risks. Indeed, waiting until all the elements fell into place to execute a detailed Mediterranean operation could have posed a far greater risk. A more assertive European presence in the Mediterranean was badly needed, as civilian measures (deployed by individual member states, through Frontex operations and through an EU Border Assistance Mission to Libya) had proved ineffective.

The missions mounted in response to the refugee crisis are the living proof of the growing AFSJ-CSDP nexus. Not only has the existing civilian crisis management of Frontex morphed into the military realm of operations like Sophia, plans have also matured to forge a semi-militarised European Border and Coast Guard. As a result, we are witnessing the convergence of objectives, mandates and operations pursued by EU actors hitherto confined to either internal or external security, whereas their decision-making procedures, budgetary modalities and staffing arrangements remain distinct. This evolution

shows the propensity of the EU collectively, i.e. institutions and member states alike, to adapt to new circumstances rather than getting stuck in old paradigms.[48] It is testament to the idea that no medium-to-small EU member state can address today's security challenges on its own.[49]

As the Common Security and Defence Policy moves closer to the EU's internal security activities, questions about the limits posed by the Lisbon Treaty to territorial defence (cf. Article 42.7 TEU) and intra-EU solidarity (Article 222 TFEU) will come into sharper focus.[50] Simultaneously, AFSJ actors are being lured »out-of-area«, as shown in the competences attributed to the new CBCG to conduct operations in third countries and in the cooperation between Frontex and NATO in the Aegean, a maritime area where – because of political idiosyncrasies in bilateral relations with Turkey – working through the North Atlantic Alliance trumps a CSDP deployment. Cross-fertilisation of lessons learnt in the hitherto separate spheres of AFSJ and CSDP should benefit not only strategic analysis, planning and conduct of operations,[51] but also the design, development and training of civil-military capabilities (e.g. CBCG-EDA). It is time, therefore, to take the comprehensive approach to EU external action up a notch and involve elements and actors of the Area of Freedom, Security and Justice on a more structural basis. It is only then that the blurred boundaries between internal and external security will gel into a continuum and enable a more efficient and effective handling of the crises confronting the European Union.

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48. See T. Tardy, »Civilian Crisis Management: Towards a New Paradigm«, EUISS Brief No. 23, July 2016.

49. »Shared Vision, Common Action: A Stronger Europe – A Global Strategy for the European Union's Foreign and Security Policy«, June 2016.

50. S. Blockmans, »L'Union fait la force: Making the Most of the Solidarity Clause (Art. 222 TFEU)«, in I. Govaere and S. Poli (eds.), *EU Management of Global Emergencies: Legal Framework for Combating Threats and Crises* (Brill, 2014), pp. 111–135.

51. See, e.g., the Joint Staff Working Paper, »Strengthening Ties Between CSDP and FSJ Actors«, SEC (2011) 560, and the creation of a CIVCOM-COSI Support Group; the working arrangements between the EEAS and AFSJ agencies like EUROPOL and FRONTEX, annexed in the EEAS Working Document, »Strengthening Ties between CSDP and FSJ: Road Map Implementation – Fourth Annual Progress Report«, EEAS (2015) 1422, 26 October 2015; and Joint Communication of the European Commission and the High Representative to the European Parliament and the Council, »Elements for an EU-wide Strategic Framework for supporting Security Sector Reform«, JOIN (2016) 31 final, 5 July 2016.

47. A. Rettman, »Nato to Join EU Warships in Libya Migrant Operation«, *EU Observer,* 10 July 2016.

Annex

Article 7 – Tasks (Text of the EBCG Regulation Endorsed by the EP on 6 July 2016)

1. In view of contributing to an efficient, high and uniform level of border control and return, the Agency shall perform the following tasks:

    (a) monitor migratory flows and to carry out risk analysis as regards all aspects of integrated border management;

    (b) carry out a vulnerability assessment including the assessment of the capacity and readiness of Member States to face threats and challenges at the external borders;

    (ba) monitor the management of the external borders through liaison officers of the Agency in Member States;

    (c) assist Member States in circumstances requiring increased technical and operational assistance at the external borders by coordinating and organising joint operations, taking into account that some situations may involve humanitarian emergencies and rescue at sea in accordance with Union and international law;

    (d) assist Member States in circumstances requiring increased technical and operational assistance at the external borders, by launching rapid border interventions at the external borders of those Member States facing specific and disproportionate challenges, taking into account that some situations may involve humanitarian emergencies and rescue at sea in accordance with Union and international law;

    (da) in accordance with Regulation (EU) No 656/2014 and international law provide technical and operational assistance to Member States and third countries, in support of search and rescue operations for persons in distress at sea which may arise during border surveillance operations at sea;

    (e) set up and deploy European Border and Coast Guard Teams, including a rapid reaction pool, that are to be deployed during joint operations and rapid border interventions and in the framework of the migration management support teams;

    (f) set up a technical equipment pool to be deployed in joint operations, rapid border interventions and in the framework of migration management support teams, as well as in return operations and return interventions;

    (g) Within the framework of the migration management support teams at hotspot areas:

        1. deploy European Border and Coast Guard Teams and technical equipment to provide assistance in screening, debriefing, identification and fingerprinting;

        2. establish in cooperation with the European Asylum Support Office (EASO) and national authorities a procedure for the provision of initial information to and the referral of persons who are in need of, or wish to apply for, international protection;

    (h) support the development of technical standards for equipment, especially for tactical level command, control and communication as well as technical surveillance to ensure interoperability at Union and national level;

    (i) deploy the necessary equipment and border guards and other relevant staff of the rapid reaction pool for the practical execution of the measures needed to be taken in a situation requiring urgent action at the external borders;

    (j) assist Member States in circumstances requiring increased technical assistance and operational assistance for implementing the obligation to return those third-country nationals, who are the subject of return decisions, including through the coordination or organisation of return operations;

        (ja) within the respective mandates of the agencies concerned, cooperate with Europol and Eurojust and provide support to Member States in circumstances requiring increased technical and operational assistance at the external borders in the fight against organized cross-border crime and terrorism;

    (k) set up pools of forced return monitors, forced return escorts and return specialists;

    (l) set up and deploy European Return Intervention Teams during return interventions;

    (m) assist Member States on training of national border guards, other relevant staff and experts on return, including the establishment of common training standards;

    (n) participate in the development and management of research and innovation activities relevant for the control and surveillance of external borders, including the use of advanced surveillance technology and develop pilot projects regarding matters covered by this Regulation;

    (o) develop and operate, in accordance with Regulation (EC) No 45/2001 and Framework Decision 2008/977/JHA, information systems that enable swift and reliable exchanges of information regarding emerging risks at the management of the external borders, illegal immigration and return, in close cooperation with the Commission, Union agencies, bodies and offices as well as the European Migration Network established by Council Decision 2008/381/EC;

    (p) provide the necessary assistance for the development and operation of a European border surveillance system and, as appropriate, to the development of a common information-sharing environment, including interoperability of systems, in particular by developing, maintaining and coordinating the Eurosur framework in accordance with Regulation (EU) No 1052/2013;

    (q) cooperate with the European Fisheries Control Agency and the European Maritime Safety Agency, each within their mandate, to support the national authorities carrying out coast guard functions, as set out in Article 52, by providing services, information, equipment and training, as well as by coordinating multipurpose operations;

    (r) assist Member States and third countries in the context of technical and operational cooperation between them in the matters covered by this Regulation.

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