5 EUROSUR on Paper – in the Official Journal of the EU

The EUROSUR on the screen mediates the "new phenomenon to look at" (Latour 1986: 19): the external border of the EU. Since this work deals with the emergence of an EU external border, the question now arises whether the technical tool described above has told the entire story of its evolution. Is the EU's external border reified via the digital geo-coded mapping of border-related events and impact levels? Does EUROSUR, in fact, successfully produce an external border of the EU by providing a network and a situational picture? In other words: is this a story of technological determinism?

If the 'new' materiality of the border was, in fact, digitally produced, how would this border acquire its legitimacy? Isn't a border also a legal entity aside from being materially and cartographically represented; not only a product of practices but also of treaties?

This chapter examines how this external EU border in-the-making turns into an official border with legal authority. It traces different attempts to acquire legality for a supranational border which would provide law enforcement officers with the quality to act. While the external border materializes on the screen, its mandate and legitimacy assemble elsewhere. But where? And as what kind of product? How does the EUROSUR development phase play into this assembling of legality? To answer these questions, this chapter turns toward the second product of the EUROSUR development phase, namely the EUROSUR Regulation, and thus to an item of secondary EU law. In terms of their status in the legal framework of the EU, regulations are "binding in their entirety and have direct effects in the Member States" (Voermans 2009: 412). In the words of the Head of the Research and Development Unit at Frontex, the EUROSUR Regulation is the tangible result of the "bigger Commission project," which he distinguished in an interview from the "practical project" of the EUROSUR network.

"We have our own EUROSUR here, within Frontex, which is a very practical project, which focuses on the development of this network. This forms part of the bigger Commission project that has different steps, and that will lead to a further gradual build-up, integration of the EUROSUR idea in this bigger conceptual picture."[1]

This chapter is interested in the details, traits and traces of the "bigger conceptual picture," and thus in the other half of the story. It discusses in how far the "practical project" of the IT network described in the previous section relates to the political process of streamlining border policies among EU member states. In doing so, I intend to explore what precisely the kind of relation is that is behind the notion of the network-forming part of the "bigger conceptual picture."

While the previous chapter dealt with the generation of compliance, this chapter focusses on how the obligations concerning the exchange of information and the cooperation between member states and the Frontex agency became acceptable and binding. Officials of the European Commission know and underline that the acceptance is always very important, and that the mere saying that this is a binding rule is not enough. Yet, how did the "bigger Commission project"[2] of EUROSUR gain acceptance among member states and in the European Parliament to the effect of legal codification. How can the relation between the binding rule of the EUROSUR Regulation, i.e. the legal thing, and the acceptance of the technical EUROSUR network, i.e. the technical thing, be described?

Do politics thus have artifacts or legislations? With this question in mind, I want to follow the course of garnering legitimacy for common EU border policies, from the signing of the Schengen Agreement in June 1985 to the adoption of the EUROSUR Regulation in December 2013. Looking at different attempts of Europeanization in the field of immigration and border control policies since the Schengen Agreement, I intend to specify what the EUROSUR project does, assembles and mobilizes, all of which did not fall into place before.

For this purpose, I trace the political and institutional development of the EUROSUR, firstly by examining its precedent initiatives between 1985 and 2013, and secondly by paying particular attention to visions and catalysts of communitarian border policies in the EU. Generally, a move from "Europeanization by objectives" to "Europeanization by service" can be observed. This development can be traced on different plateaus, which I will explore in the following

1 Head of Research and Development at Frontex, telephone interview (October 28, 2011).

2 Ibid.

six sections. However, the heuristic division shall not suggest that the development was directed toward EUROSUR from the beginning. Rather, different attempts at mutualizing operational standards and exchanging information can be observed.

5.1 SCHENGEN AS A POSTNATIONAL LABORATORY AND FRAMEWORK FOR NEGOTIATIONS (1985-1997)

Unlike Latour's (1986: 17) description of a process of inscription, in which "paper always appears at the end," the following development was initiated with the signing of a paper. On June 14, 1985, the representatives of the five signatory states, West Germany, France, the Netherlands, Belgium and Luxembourg, signed the "Agreement on the gradual abolition of checks at their common borders": the Schengen Agreement.[3] For the act of signing the agreement, they left the firm ground of their territorial nation-states and boarded the riverboat Princess Marie-Astrid. This took them to the middle of the river Moselle, and thus to a *condominium*, a location of joint sovereignty. The choice of location was consciously a symbolic one.[4] It was meant to signify the overcoming of the "old" nationalisms in Europe and demonstrate the courage to base policies on joint considerations rather than on national sovereignty. As elaborated above, the aim of reconciliation through economic integration had been set with the Treaty of Rome. However, even though market integration was considered a path to stabil-

3 The agreement was signed by Robert Goebbels (Secretary of State for Foreign Affairs) for Luxembourg, Catherine Lalumière (Secretary of State for European Affairs) for France, Waldemar Schreckenberger (Secretary of State at the Federal Chancellery) for West Germany, Paul de Keersmaeker (Secretary of State for European Affairs) for Belgium, and by Wim van Eekelen (Secretary of State for Foreign Affairs) for the Netherlands.

4 According to the former Luxembourgish secretary of state Robert Goebbels, cosigner of the agreement, the symbolism was decisive for the choice of location. German original: "Wir haben das gemacht in Schengen, weil dies das Dreiländereck ist, dort, wo der Benelux, Deutschland und Frankreich zusammenstoßen, und auf einem Schiff in der Mosel, weil die Mosel ein Kondominium ist, das heißt deutsches und luxemburgisches Hoheitsgebiet" (quoted in Herter 2010). The Luxembourgian town of Schengen, from which the 'Princess Marie-Astrid' departed, gave name to the agreement.

ity and peace among previous bellicose states in Europe, the concrete political consequences of doing away with sovereign control at national border appeared too risky to the political actors and the general public in EEC countries (Hobbing 2006: 173; Zaiotti 2011: 4, 67-89). To a certain extent, the Schengen group thus acted as an avant-garde in putting a political will on paper that hadn't garnered consensus among all EEC member states.

What did this paper stipulate? Albeit a treaty on borders, it did not determine or redraw any borders by delimitating territory (see chapter 2.1). It constituted an area for the free movement for goods, capital, services and persons, which rendered cooperation necessary (Vobruba 2012: 135; Nagy 2006: 105). Unlike territorial border treaties, the Schengen Agreement did not resolve a conflict, nor organize a consensus. Neither did the Schengen Implementing Convention (SIC) of 1990. On the contrary, both papers fueled debates and requested further work and procedures. Signatory states agreed to "open discussions" on ways of cooperation and judicial assistance,[5] "to examine any [related] difficulties,"[6] to "endeavour" or "seek to harmonize" laws and regulations,[7] to "endeavour to approximate visa policies,"[8] and to "seek means to combat crime jointly."[9] The pragmatic and consented aim was formulated as the realization of an "equal level of control […] exercised at external borders."[10]

While the agreement enabled a common domestic market, the papers read as a recognition of the practical problems that the gradual abolition of "internal" borders could bring about, especially with regard to the mandate and organization of law enforcement. As has been noted above, the Schengen Agreement and Convention did not bring about the notion of legal authority for an external EU border or common border policies.

Unlike those contracts in modern politics that concealed national territorial borders, these two papers rather mark the beginning of displacements and mobilizations of competences in security policies in the EU. With the monopoly over the legitimate means of movement (Torpey 1998) being delegated to an arena of, "cooperation," "mutual recognition" and "shared responsibility," – as the jargon puts it – common Schengen border policies were required to work toward acquir-

5 Schengen Agreement, Art. 18.

6 Ibid, Art. 18 (b).

7 Ibid, Art. 13 and Art. 19.

8 Ibid, Art. 7.

9 Ibid, Art. 18 (c).

10 Schengen Implementing Convention, Art. 6 (5).

ing acceptance and legitimacy among member states and practitioners. Even though the five signatory states individually went ahead in working toward European market integration, this process was neither smooth nor easy. In fact, the implementation of the Schengen rules has been described as "tortuous," with difficulties ranging from "problems with the SIS computer system" to "concerns with transparency and democratic accountability," to public concerns or "panic […] about immigration and drugs" (Duff 1997: 53). Commentators thus saw Schengen as either "pathfinder" (ibid: 52), "competitor" (Jeandesboz 2009: para. 2), or "laboratory" (Monar 2001: 750-752) for cooperation in the areas of border and migration control.

Of these characterizations, the laboratory metaphor has gained the most currency. This is particularly true among academic commentators, who have deployed or quoted the metaphor to illustrate the agreement's secretive preparations or to criticize the intergovernmental procedures as illegitimate in terms of EU integration. For instance, William Walters (2002: 561) notes that Schengen had been developed and implemented outside the framework of the EU. The fact that this criticism concerns the authorship of the agreement and not its legality deserves careful attention. The Schengen Agreement's form – an international agreement – was not so critical to the acceptance of its rules, as was its formation: in fact, the preparation of the Schengen Agreement was largely based on a German-French initiative carried out under strict secrecy by then Chancellor Helmuth Kohl and then President François Mitterrand. In Germany, "neither the parliament nor the responsible ministries nor the public had been informed prior to the agreement" (Siebold 2013: 43; Baumann 2006: 80-81). Waldemar Schreckenberger, chief of the German Federal Chancellery (Ger.: *Bundeskanzleramt*) at that time, recalled in an interview with Mechthild Baumann that Helmuth Kohl personally requested him to work out the Schengen Agreement. "I succeeded ultimately to engage the responsible minister in intensive work. When I determined that a representative of the minister wasn't prepared to cooperate, then he wouldn't be invited anymore" (quoted in Baumann 2008: 22). By choosing the format of an intergovernmental agreement, which did not require ratification by national parliaments, Kohl and Mitterrand chose a procedure which was not made to generate acceptance or legitimacy, but rather aimed at getting things done.

When the laboratory metaphor is evoked today, it stirs up this sense of illegitimacy, secrecy and undemocratic decisions. However, unlike this impetus, the laboratory metaphor was first deployed by the political actors involved in order to actually counter the "sense of illegitimacy surrounding the Schengen initiative" (Zaiotti 2011: 75). Zaiotti actually found that "[t]he laboratory metaphor

and the family of related concepts ('testing,' 'experimenting,' 'trial,' etc.) surfaced in internal and public documents and speeches about the Schengen regime soon after the initiative was launched in the mid-1980s" (ibid). The Commission, for its parts, considered Schengen as a "separate but parallel and very relevant exercise";[11] it was considered a "testing ground" and "test-bed"[12] for the developments concerning free movement in the EU. The Commission did not consider the initiative as thwarting EU procedures and legislation. Instead, it actively tried to use it in order to accelerate EU wide integration in this regard.

"The Commission participates in the work of the Schengen Group which it finds invaluable in formulating its ideas in the wider Community context and which enables it to help ensure that Schengen is compatible with Community law and with the Community's objectives: but in no way would the Commission wish to slow down progress where progress can be made."[13]

It remains controversial whether intergovernmental cooperation in juridical and police matters is to be considered an "aberration" (Ger.: *Fehlentwicklung*, Stabenow 1995) or an "engine" for common European policies. Clearly, the Schengen Agreement and the Convention did not conceal supranational border and migration policies or an external EU border. They are, in fact, agreements for opening up a laboratory for postnational law enforcement, and they describe the first modes of functioning and equipment to be used in this setup.

11 Abolition of controls of persons at intra-community borders, COM(88) 640 final, para. 12.

12 Formulation used in: Written Question No. 413/89 by Mr. Ernest Glinne to the Commission of the European Community. Assessment of the Schengen agreement, OJ C 90 (9 April 1990): 11; quoted in Zaiotti (2011: 75).

13 Abolition of controls of persons at intra-community borders, COM(88) 640 final, para. 12.

5.2 IN SEARCH FOR NEW, SUPRANATIONAL HEADS (1997-2003)

When the heads of states and governments updated the Treaty of the European Union on June 18, 1997 in Amsterdam, they formalized the incorporation of the Schengen rules into the legal framework of the EU. The EU brought supranational legitimacy to the intergovernmental Schengen arrangement. With its "extensive list of working arrangements" and the then working Schengen Information System (SIS), Schengen increased the "operational capacity" of policies concerning police and judicial cooperation (Boer/Corrado 1999: 399). Monica den Boer and Laura Corrado see the Treaty of Amsterdam as a "momentum for a marriage of convenience between Schengen and the EU" (ibid), with the fiancés exchanging legitimacy for operational capacity.

The Treaty of Amsterdam redirected the efforts of the Schengen group into ambitions for an Area of Freedom, Security and Justice (AFSJ), a space instituted by way of police and justice cooperation. The latter was translated into a program for measures in Tampere, Finland in 1999. The Tampere Programme intended to render border and migration policies more coherent and more effective. It did so by taking into account that post-Amsterdam, the political and institutional setup would, in theory, facilitate communitarian policies. However, the forms of these common EU border and migration control policies and also the figures which could potentially operationalize them and enforce an external border were envisioned quite differently.

5.2.1 The Idea of a 'European Corps of Border Guards' or a 'European Border Police'

When the European Commission proposed a regulation on the European Border and Coast Guard in December 2015, observers of EU Justice and Home Affairs might have groaningly commented that this had only been a question of time.[14]

14 European Commission (2015): 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 (December 15, 2015).

In fact, what had been proposed and has been accepted in 2016[15] is not less than a supranational border police, which derives its mandate and strategy from supranational considerations. A European border police is not a recent idea. In fact, it has been around since the Treaty of Amsterdam and thus, since the incorporation of the Schengen rules into the EU legal framework. As early as 2000, word was out about an EU-wide integrated border police. If it was, in fact, only a question of time until EU border guards would be accepted, one can raise the question of what happened in the interim. Why has it been consented to now, and what is different now from then? Is it a proposal that just had to be digested, one that needed 15 years to mature so that the heads of state could simply "rubber stamp" (Eriksson 2016) it four months after it had been tabled by the Commission?

Against the background of the previous chapter, I argue that this development has required more than time, diplomatic patience and the persistent repetition of communitarian benefits. On the basis of the analyses in chapter 4, I claim that the vision of the European border guard was lacking a visualized localization for their mandate. The European situational picture generated in the EUROSUR framework embodies this visualization. In fact, a consideration of the first proposals around an EU border guard reveals similar ideas, concepts, and even semantics to those that now support the EUROSUR project. Yet, this early vision was still lacking the "optical consistency" (Latour 1986: 15) that EUROSUR later provided with its menu items, icons and reporting sheets.

Let us turn back to the first mentions of an EU border police. In 2000, various media outlets reported that Italy and Germany foresaw an exchange of troops, aiming "to serve as a vanguard of an EU-wide integrated border police" (*Migration News* (N.N.) 2000). Kurt Schelter, minister for justice and European affairs for the federal state Brandenburg, was quoted in the British *Telegraph* proposing the "deployment up to 10,000 of Germany's 40,000 Federal Border Guards in a joint EU border patrol. This was motivated by the fact that German frontiers with

15 Regulation (EU) No 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, in: OJ L 251/1 (September 16, 2016); [hereafter cited as Regulation on the European Border and Coast Guard Agency].

Poland and the Czech Republic are removed under the Schengen system" (Evans-Pritchard/Helm 2000). However, the intention to deploy border guards 'elsewhere' was not considered a mere geographical shift. The journalists Ambrose Evan-Pritchard and Toby Helm point to the "political sensitivities" of "stationing German border guards on Polish soil" and reported that "Berlin [was] looking at the idea of a joint EU force in which every country would participate on equal terms" (ibid). From this perspective, the communitarian vision still implicates the taming of the national. By contrast, the United Kingdom worked toward taming European and Schengen ambitions for an integrated force, while agreeing on the need for more cooperation in tackling illegal migration (Zaiotti 2011: 162-163).

In 2000, the Commission nevertheless commented with reserve on the border guard exchange between Italy and Germany. It emphasized that "such exercises were a matter for individual member states," that "there were no plans for a supranational force, and that the Commission's job was only to set common standards for dealing with asylum requests, refugees and illegal migrants" (quoted in *Migration News* (N.N.) 2000). Yet, the first official mention of the term "European Border Guard" can be traced back to the Commission's "Communication on Illegal Immigration" of November 15, 2001.[16] Therein, the Commission stresses that "the setting up of a European Border Guard" was a "core element" of a border management strategy; it also mentioned that the idea had "received strong political support" and that "exploratory work" was underway.[17] The exploratory work consisted of a) the first joint operations and b) conceptual explorations: the Commission supported a feasibility study on the idea of a European Border Police. The laboratory was thus generating its first outputs.

The "Feasibility Study for Setting-up of a European Border Police" was conducted by Italy together with Germany, Belgium, France and Spain, with 80 per cent of the financial support coming from the Odysseus Programme. The feasibility study was undertaken over a six-month period between November 2001 and May 2002 and was presented during a ministerial conference in Rome on 30 May 2002. It collected "input from a number of national experts, most of whom tended to defend their national methods and organisational structures" (Monar 2006: 196). Jörg Monar assumes that this rather protective stance toward national competences and organizational structures led to the study's proposition of a

16 Communication from the Commission to the Council and the European Parliament on a common policy on illegal immigration, COM(2001) 672 final (November 15, 2001).

17 Ibid, Section 4.4 (Border Management, p.17-18).

complex network of national border police forces. The form of organization was evoked as "polycentric and multipurpose system."[18] The network model was evoked as "a series of 'knots,' each of them related to specific and sector requirements/objectives."[19] The knots would specialize while the system remained flexible and elastic.[20]

In fact, the study used similar terms as would be later used in the context of the EUROSUR network. There was talk of centers and knots, for instance, which correspond to NCCs, and nodes in the system in the context of EUROSUR. At that time, however, the study's vision was not approved by member states. In the view of most national authorities involved, the proposal for a polycentric network model "was lacking in clarity, providing a mosaic of proposed structures and individual measures rather than a grand design" (Monar 2006: 196). Monar comments that "some of the participating Member states were not fully satisfied;" and he goes on to quote a Brussels newspaper article dismissing the "entire study, rather harshly, as '80 pages of waffle'" (quoted in ibid: 196-197).

Apparently, the study's network model was a strong vision that, however, was lacking its visual grip. Unlike BG Major Aleksandra Świąteka in 2012, authorities in 2003 could not *see* – and therefore could not recognize – the benefit of it all. In more abstract terms, the 2003 proposal of a European Border Police was lacking the "'optical consistency' necessary for power on a large scale" (Latour 1986: 15). As the new object to be guarded, the external border was neither considered natural, nor taken for granted institutionally. In other words, it was not rendered immutable or – as we are accustomed to in our formulation of borders – not yet natural. The EU external border could therefore not be seen, as it was not made visible, which is to say, interobjective.

In fact, the proposal of a European border police or border guard was advanced during a situation which, following Latour, can be described as an "agnostic situation" (Latour 1986: 8). Security personnel still believed in the strength of the national framework for law enforcement. However, they did not deny the eventual existence or rather necessity of an EU external border. Just, it was not taken for granted by the former national heads. In their mind, there was no picture of an EU external border. The mandate that was proposed – the guarding of a supranational border – was built on the projection, the enunciation of an

18 Feasibility Study for Setting-up of a European Border Police, Final Report, Rome (May 30, 2002), Section 13, p. 30.

19 Ibid, Section 14, p. 30.

20 Ibid, Section 19, p. 35-36.

"absent thing" (ibid). One the one hand, this was due to the spectral character of all borders. On the other hand, this was also due to fact that different heads of state and government and also the security personnel at the border had no "meeting ground" (ibid) for recognizing an EU external border. Peter Hobbing's description of the vested perspective on common border tasks illustrates the mistrust with regard to communitarian law enforcement at Schengen borders.

"Discussions sprang up, inside the territory, as to whether 'these foreigners on the border' would do a good job in keeping the border tight, or create loopholes that allowed organised crime and illicit migration to penetrate all the way through the Union. Right on the border, discussions went in the opposite direction: 'Why is it just us who bear all the responsibility and the financial burden?'" (Hobbing 2005: 1)

Oblivious to the apparition of a supranational border, the European Council did not find consensus on the proposal of a European border police. The Presidency's conclusion of the 2001 Laeken meeting abstained from using the term "European Border Guard" or "European Border Police" at all; and the Council's compromise has been described as "carefully worded" by commentators (Monar 2006: 195; Leonard 2009: 376-377). Echoing the prudent tone of the Schengen Convention, the Council's Laeken conclusion[21] calls on the group members to work toward an Europeanization of border surveillance and control.

Hence, ten years after the formulation of the SIC, and two years after the integration of the Schengen rules into the EU legal framework, border policies are still national in outlook. Communitarian control policies remain an objective to work toward. Actually, the Presidency's requests to the Council and the Commission is less a mandate than a vague declaration of intent, in which the Council members want to principally establish the conditions of possibility for common services of control. Council and Commission are concordantly requested to "work out arrangements for cooperation between services responsible for external border control and […] examine the conditions in which a mechanism or common services to control external borders could be created."[22] For the time being, the attempts were merely directed toward setting the course while examin-

21 Presidency Conclusions on Justice and Home Affairs, Laeken Conclusion No 42, 17 December 2001, SN 300/1/01.

22 Ibid, para. 42.

ing the "conditions in which"[23] the vision of a supranational border would be visible and politically thinkable as a supranational thing.

5.2.2 The Auxiliary and Displacing Notion of Integrated Border Management (IBM)

On 7 May 2002, the Commission responded to the Laeken conclusion.[24] Its response has been interpreted as an "effort to satisfy both the advocates and the sceptics" of a supranational border police (Monar 2006: 196). In its communication, the Commission placed emphasis on both "operational synergies" and on whatever "*practical* progress which could be achieved in various fields *in the meantime*" (ibid, emphasis added). Joint operations and border guard exchanges thus occurred while the legal codification of a supranational mandate was pending. Such a mandate would provide border guards with the power to sanction on behalf of the EU. Thus, while there was a lot of integrative work going on at the actual workplaces of border guards, there was no political agreement on the common legal framework which would place this cooperation under a supranational mandate.

Effectively, the ambition for a supranational force entails going beyond the principle of mutual recognition of decisions at national borders, which was foreseen in the Schengen Agreement and Convention. Ambitions for a supranational force have to deal with the question of where this supranational authority would be based. It also raises questions of which authority would enforce whose laws and grant access to what kinds of rights; for instance, whether Greek nationals would accept a French border guard patrolling along their borders. Apart from that issue, the figure of a European border guard was required to formulate, accept and enforce common (im)migration and asylum rules (of which there are none even until today) and grant European rights. The notion of integrated border management (IBM), as introduced by the Commission's Communication of May 7, 2002, mediated between practical cooperation, which suffered from its

23 Presidency Conclusions on Justice and Home Affairs, Laeken Conclusion No 42, 17 December 2001, SN 300/1/01, para. 42.

24 European Commission (2002): Communication from the Commission to the Council and the European Parliament, Towards Integrated Management of the External Borders of the Member States of the European Union, COM(2002) 233 final (May 7, 2002).

test character, and the reluctance toward official harmonization (in a legal sense). By pragmatically focusing on the optimization of controlling and surveilling movement across borders, the auxiliary notion of integrated management somewhat depoliticized the communitarization of border policies.

During the 1990s, the concept of integrated border management had been elaborated as a community concept (Hobbing 2005: 2). However, rather than the converging political impetus, a "pragmatic orientation" (Monar 2006) and a managerial tone of focusing on concrete tasks and measures took hold. The border was no longer evoked as a security shield or borderline but instead as a common task of security personnel. Border enforcement is thereby "detached from the territorial logic" (Jorry 2007: 14) and targeted toward certain groups of people and certain kinds of movements deemed relevant to border control – which in this case is translated into the control of movement. For this border work, neither geography, nor law stands as a unifier, but rather common challenges and common tasks. Integrated border management is thus an integrating task.

5.2.3 The CIVIPOL Feasibility Study and the Notion of the Virtual (Maritime) Border

With regard to the idea of a European border guards, the integrative vision of the Commission's communication has been relativized by the Councils pragmatic orientation. What remains integrated, however, in a managerial sense of a comprehensive approach, are the measures to counter illegal migration – particularly by sea. It is against the backdrop of the sea, that it is possible to reverse the question of localization of an EU external border and ask for the locus of common tasks, challenges, and risks. The CIVIPOL feasibility study, which had been commissioned to examine how the EU could strengthen "controls at maritime borders in order to combat illegal immigration," is a central document in this regard. [25]

In 2002, the Commission contracted CIVIPOL, a French think tank associated with the national Ministry of the Interior, to conduct the "Feasibility study on

25 CIVIPOL (2003): Feasibility study on the control of the European Union's maritime borders. Final report transmitted to DG JAI on July 4, 2003. Available as Council Document 11490/1/03 (September 19, 2003); [hereafter cited as CIVIPOL study or CIVIPOL feasibility study], here: p. 4.

the control of the European Union's maritime borders." The study was completed swiftly in the first half of 2003 and then presented in Brussels on July 4, 2003. The document was of central importance, as it presented new drafts of the location as well as the type of common external borders. Different commentators have identified the so called CIVIPOL feasibility study as an inflection point in the self-conception of EU border policies. For instance, Dimitris Papadopoulos, Niamh Stephenson and Vassilis Tsianos introduce the study as an example of the "virtualisation of borders, which consists of deterritorialising border controls and externalising camps" (Papadopoulos/Stephenson/Tsianos 2008: 176). Olivier Clochard and Bruno Dupeyron trace how the externalization of EU police activities to countries of departure became thinkable through the lens of the CIVIPOL feasibility study (Clochard/Dupeyron 2007: 27-29). Statewatch analyst Ben Hayes even considers the study "a law enforcement blueprint rather than any kind of objective or broad-based 'feasibility study'" (Hayes 2003: para. 9). In fact, operational practices of border enforcement agencies as well as national legislations changed in reference to the CIVIPOL study and its concept of the "virtual maritime border,"

The study (hereafter cited in the text) describes the special characteristics of maritime borders. According to the CIVIPOL study, maritime borders are prone to three types of "illegal immigration" which it classifies according to routes or possible entries into the EU. First, there are *port-to-port routes* with harbors as entry points where illegal immigrants enter as stowaways; second, there are *focal routes,* which are "geographically favourable" resulting in 70 to 80 per cent of illegal immigration occurring in this way: "The usual practice here is that a (disposable) light boat, overloaded and having absolutely no safety equipment, makes a night crossing."[26] Third, CIVIPOL sees *random routes* which involve ships from 300 to 500 GRT and which are "chartered by transnational criminal organisations with investment capacities and local accomplices in the port of departure."[27] The study states that, although only two to three per cent of illegal immigration occurs in this last manner, it attracted the greatest public attention as several hundred migrants were involved.[28] In terms of legal instruments, the study sees that illegal immigrations are "subject to international law on two grounds": They can either be "seen from the sea" or "from the land."[29] It has

26 CIVIPOL feasibility study, p. 9.

27 Ibid, p. 10, emphasis added.

28 Ibid.

29 Ibid, p. 20.

been argued that seen from the sea, "the legal bases for combating illegal immigration" are to be found in the December 10, 1982 Montego Bay Convention on the Law of the Sea. On this basis of flag state liability, the interception or containment of vessels with migrants on board could be justified in different maritime zones.[30] In contrast, seen from the land, the rights of migrants were emphasized:

"the right of asylum is the criterion which distinguishes a political refugee from an illegal immigrant as regards the right to enter and stay in a European country. All the Member States or Schengen States have ratified the Geneva Convention. They are required to apply it. An illegal immigrant will therefore, naturally, claim refugee status as long as possible one way or another."[31]

In short, at sea, the operational leeway for border enforcement was considered stronger in comparison to containment possibilities at land, where the obligation of states toward individuals weighs higher. In consequence, the study recommends that physical border controls may be supported and reinforced by "an upstream 'virtual border' for the operational management of the three types of routes,"[32] which means shifting controls to ports or countries of origin and departure. With this shift in competences being generally more available via sea operations, the notion of a virtual border and the notion of the maritime border merged. Operating on the ambiguous notion of a virtual border, the CIVIPOL study advocates that border controls be relocated to possible migrant departure and transit points (such as coasts and harbors). Hayes criticizes that "[t]he underlying principle is that the EU's 'sea border' extends to any country with which it shares an ocean, basically giving it the right to police the entire sea" (Hayes 2003: para. 10). The concept of the virtual maritime border was taken up by the European Council in its "Programme of measures to combat illegal immigration across the maritime borders of the Member States of the European Union":

30 CIVIPOL feasibility study, p. 37.

31 Ibid, p. 20.

32 Ibid, p.53.

"The programme adopts the concept of the virtual maritime border in order to reinforce the legal borders of Member States by means of joint operations and specific measures in the places where illegal migratory flows originate or transit."[33]

The legal borders of policing seem to easily blur at sea. Subsequently, the Council's interpretation allows for operational flexibility along "the virtual maritime border": it argued that the passage of migrant vessels was not innocent, and there such passage could be intercepted both in territorial waters and contiguous zones; furthermore, if the vessel was not flying a flag, it could legally be intercepted on the high seas; lastly, joint patrols with countries of departure were considered an option if consent was given. Commentators gave the impression that the management of maritime borders invited a rewriting of the law of the sea (Hayes 2003: para. 23-28).

In fact, the CIVIPOL study documents an uninhibited will to reinterpret the possibility of enforcement practices at sea. The relocalizing of the job site of border guards, the institutional widening of competences and the use of external relations are semantically fettled in the sentence "virtual maritime border." The concept of the virtual maritime border thus rendered plausible a flexibilization of border control. Linking the concept of the virtual border to the idea of a maritime border made it possible to open up the idea of precise territorial borders in their spatial dimension and use them to entice geographical ambiguity. In the process, the reference intrinsic to border enforcement is no longer external to geographical administrative markers. The semiotic proximity of the sea and virtuality (Schroer 2006: 258-264) certainly contributed to detaching the range of European border control measures from 24 nautical miles of the contiguous zone; it also diffused its spatial reference (Ellebrecht 2014b: 177). In the argument that follows, the concept of the virtual border will appear again in connection with the notion of one that is intelligence-led**.** It is with this concept that the jurisdiction of law enforcement and border authorities increases with regard to geographical reference and access to information.

33 European Council (2003): Programme of measures to combat illegal immigration across the maritime border of the Member States of the European Union, EC 15445/03 (November 28, 2003).

5.3 COORDINATED COOPERATION ALONG THE VIRTUAL BORDER (2003-2008)

5.3.1 The Creation of Frontex: From Europeanization by Objectives to Management by Service

The CIVIPOL study further served as a basis for proposing the establishment of the "European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union" which has been abbreviated as Frontex (from the French phrase *front*ières *ex*térieures). The Commission proposed its creation to the Council in November 2003. A year later the agency was established by the so called Frontex Regulation of October 26, 2004.[34] It took another year until the agency opened its headquarters in Warsaw on October 3, 2005. The stringent necessity to cooperate stemming from the Schengen Agreement and Convention was thus delegated for coordination to a community agency of the regulatory type.[35]

The creation of an agency was interpreted as "an ex post authorization of existing initiatives, and a streamlining of existing structures," with the regulation providing "little more than a window dressing exercise, giving a 'legal basis' to the *ad hoc* development of a whole host of operational bodies and measures that are already in place" (Hayes 2003: para. 2, original emphasis). Operational cooperation and the exchange of information which hitherto "all depended on the willingness of some member states to maybe share some information"[36] now depended on the knack the agency would show.

From the beginning the delegation of coordination to an agency was carefully framed as "support," "facilitation," and "service" to the member states, rather than any form of central, supranational border authority. In fact, since the establishment of Frontex "careful attention was paid to constantly refer to 'external

34 European Council (2004): Establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, Council Regulation EC/2007/2004, October 26, 2004, in: OJ L 349 (November 25, 2004) [hereafter cited as Frontex Regulation EC 2007/2004].

35 Sarah Leonard (2009: 373-374) aptly describes Frontex as a regulatory agency, which is set out in its own legal basis, whereas executive agencies are allotted more narrowly defined tasks.

36 Head of Research and Development at Frontex, personal interview (May 27, 2011).

borders of the Member States' in order to stress as clearly as possible that the competence over the area of 'borders' remains at the heart of sovereignty of the State" (Carrera 2008: 9).[37]

The agency has been introduced as coordinator and iterates its role. However, tasked with risk analysis,[38] the role of the coordinator translates into the "competence to carry out 'coordinating intelligence-driven operations' based on risk analysis and threat assessments" (Carrera 2008: 2). While border control remained in the responsibility of member states, the management of risks and threats gained plausibility as a community task. Risk analysis, however, could be provided as a service to the member states, which allows the agency to suggest, if not recommend, technical and operational measures. Thus comments Andrew Neal that Frontex "sits alongside the (perhaps deliberately) less controversial discourse of regulation, best practice, training, coordination and management. […] for the most part Frontex speaks 'risk' as a series of quiet, professional, technical practices" (Neal 2009: 351).

The Frontex Regulation has since been amended by the Council Decision of 2005/267/EC which established a secure web-based Information and Coordination Network for Member States' Migration Management Services, and two pieces of legislation: the Regulation on Rapid Border InterventionTeams, the revised mandate of September 2011. Both are no longer in force. The agency's personnel, budget, competences, and tasks have increased steadily. Since October 6, 2016, the abbreviated name Frontex has turned into a stand-in of sorts: Frontex now stands for the European Border and Coast Guard (EBCG) Agency.[39] This nominal transition to independence corresponds to an increase in autonomous competences: the coordinator pools means of violence (resources in the form of personnel and tools), and means of the power to decide (information and data). Furthermore in 2018, the Commission "proposed to strengthen the re-

37 However, already in 2006, Peter Hobbing expects that "with a growing need for operational assistance, [the agency] will develop into a body not too different from the European Border Guard originally intended" (Hobbing 2006: 184). The creation and also institutional development of Frontex has been analyzed and commented widely (cf. Carrera 2008; Fischer-Lescano/Lohr/Tohidipur 2009; Leonard 2009; Papastavridis 2010; Neal 2009; Kasparek 2010; Mungianu 2013; Perkowski 2018). For prompt analyses see the online blog *EU LAW Analysis* by Steve Peers at: http://eulaw analysis.blogspot.com.

38 Frontex Regulation EC 2007/2004, recital 6, Art. 2 (c), and Art. 4.

39 Regulation on the European Border and Coast Guard Agency of September 16, 2016.

cently created EBCG (2016) by providing the EBCG Agency […] with its own operational tool, a standing corps of 10,000 EU border guards with executive powers that would be operational from 2020."[40]

From the beginning, Frontex was not to be dependent on information that member states were eventually willing to share, nor did the Hague principle of availability of information relate to the agency's task in any way. Rather, the idea was to set up a coherent information base, one which would be supranational in outlook while also identifying the common tasks and threats of all EU member states. Overall, through the creation of an agency, the management of border policies in Europe has increasingly been achieved by various services, rather than by objectives. Therein the agency both fulfills the roll of a coordinator while at the same time providing the grounds – decision support, trend and risk analysis, background information, statistics, equipment – for both member states' and community operations along the external borders. In addition, "support to return operations" also counts as a service to the member states.

In fact, Frontex services gained more weight in the process of integration and harmonization than they did in the attempt for legal harmonization – pursued, for instance, by the Schengen Borders Code (SBC).[41] The Schengen Borders Code presented a renewed attempt to impose standardized external border controls and to apply common rules to the practices and procedures. Yet, the SBC states *how border guards should fulfill their mandate*: that is, according to which standards and procedures border policing should occur. Conversely, one of the major tasks of Frontex consists in providing evidence for the need of supranational activities, and thus evidence for the need of those operations which they are meant to coordinate. Frontex is thus tasked with rendering plausible the supranational mandate

40 European Commission (2018): Proposal for a Regulation of the European Parliament and the Council on the European Border and Coast Guard, COM(2018) 631 (September, 12, 2018). The quotation is taken from the "Legislative Train Schedule" a website by the European Parliament, at: http://www.europarl.europa.eu/legislative-train/theme-towards-a-new-policy-on-migration/file-european-border-and-coast-guard (accessed October 19, 2019). For an analysis of these developments see Carrera/den Hertog (2016) and Campesi (2018).

41 European Parliament & European Council (2008): Establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), EC/562/2006, March 15, 2006, in: OJ L 105 (April 13, 2006), [hereafter cited as Schengen Borders Code (2008)].

to the member states. The agency does this by conducting feasibility studies, by providing risk analysis (the criteria of which are defined by the agency itself), and through its services. The art of coordination exercised by Frontex consists in advising, giving recommendations and facilitating those tasks that are controversial in national parliaments. The mandate and the sovereign competences rest with the individual member state. In official terms, the agency does not interfere with the sovereignty of member states; in terms of service provision, competences are mediated.

5.3.2 From a "Maritime" to an "Intelligence-Led" Virtual Border

Two of the early tasks of Frontex consisted in the composition of two feasibility studies: first, the MEDSEA feasibility study on Mediterranean Coastal Patrols Network presented on July 14, 2006, and second, the BORTEC study on the technical feasibility of establishing a surveillance system (European Surveillance System) presented on January 12, 2007.

The BORTEC study has been of particular legitimizing relevance to the EUROSUR project. In the Commission's Communication "Reinforcing the management of the European Union's Southern Maritime Borders,"[42] the study was already referred to as evidence even though it was not yet presented officially to the Commission. To date, the BORTEC study remains unpublished; however, a summary is available in a working document entitled "Integrated maritime policy for the EU, Working Document III on Maritime Surveillance Systems" published by the European Commission and prepared by the Joint Research Centre in Ispra, Italy.[43]

From these documents it can be gleaned that the BORTEC study "made a thorough analysis of existing maritime surveillance systems and operators in Portugal, Spain, France, Italy, Slovenia, Malta, Greece and Cyprus,"[44] The summary gives two tables for each of the eight countries. The first table displays the authorities involved in maritime surveillance and their responsibilities. The sec-

42 European Commission (2006): Reinforcing the management of the European Union's Southern Maritime Borders, COM(2006) 733 final (November 30, 2006).

43 European Commission/Joint Research Center Ispra (2008): Integrated maritime policy for the EU, Working Document III on Maritime Surveillance Systems (June 14, 2008), at: https://ec.europa.eu/maritimeaffairs/sites/maritimeaffairs/files/docs/body/maritime-surveillance_en.pdf (accessed August 13, 2019).

44 Ibid, p. 23.

ond gives an overview of the technological systems in place. National plans to integrate existing surveillance systems were documented. While the data collection process took two months, the study was completed within six. Whereas the Commission's summary only gives the impression of a general inventory, the information in the BORTEC study must have been more precise in nature; the summary explicitly excluded information: 1) on the components of the systems, 2) on how the systems operate, 3) on the geographical range of surveillance coverage, 4) on the exact numbers and types of patrol boats, aircrafts and vehicles. Moreover, it can be assumed that policy recommendations were given, as repeated reference is made to their suggestions. As a supporting reference, the BORTEC study is an important document in reference to which the necessity to streamline border surveillance and control measures is supported.

The managerial premises that cooperation leads to more effective border surveillance and control and would thus be more cost-efficient – an assumption that has gained the status of self-evident by the time of the EUROSUR draft regulation – was introduced by the BORTEC study. The BORTEC study served as an exploration into the structural and political possibility of a European border surveillance and control system. In the beginning this European structure was thought to be based on: a) common border patrols and b) an information-based network, and its operational area stretched along the maritime border.

Since 2006, a reinterpretation – and extension, respectively – of the notion of a "virtual border" as introduced by the CIVIPOL feasibility study from maritime to intelligence-led is observable. In that year, the Commission published different Communications and strategy papers on priorities in the "fight against illegal immigration," which emphasize the potential benefit of "intelligent solutions" and "technological mechanisms,"[45] Contrary to earlier approaches, the emphasis on integrated border management is less on European (policy) integration, but rather on an "integrated technological approach – e-borders,"[46] which might integrate its participant in passing.

In its Communication on policy priorities in the "fight against illegal immigration of third-country nationals" of July 19, 2006, the Commission introduces the concept of intelligence-led border management described as "a process of

45 European Commission (2006): Policy priorities in the fight against illegal immigration of third-country nationals, COM(2006) 402 final (July 19, 2006).

46 Ibid, para. 23.

gathering and analyzing data for threat analysis and risk assessment, with a view to establishing certain risk criteria."[47]

Often e-borders are identified in the computerized handling of information which has been advanced as part of the Schengen Process since its beginning, most notable in the databases which have been created to support coordinated efforts, namely the Schengen Information System (SIS), the VISA Information System (VIS) and the European Dactyloscopy (EURODAC). These databases are mostly related to the border's filter function. When the Commission now states that intelligence-led border management "would allow border control authorities to filter out passengers who fall under one of these categories, in order to carry out additional checks,"[48] this bestows yet another quality to the generation of suspicion for law enforcement agencies.

The concept of the virtual border takes in the notion of an intelligence-driven approach to border management. This is exemplified in an article in "Focus," the in-house magazine of the AeroSpace and Defence Industries Association of Europe (ASD), in which Ilkka Laitinen, then Director of Frontex, explicitly referred to the operating value (Ger.: *Betriebswert*) of the concept of the virtual border.

> "In the 21st century border management must be intelligence-driven. This is a prerequisite of all actions taken regarding borders. Effective border management does not exist without sophisticated systems of data collection and analysis followed by its timely dissemination to officers making decisions on the ground, such as the eligibility for crossing of a person or cargo. Illegal entries represent a small percentage of the overall flow across a border. Nevertheless, in real numbers it is a massive flow. That's why the concept of a 'virtual border' is so important; because the management of a border starts even while gathering intelligence or issuing a visa in a third country. The physical border is, so to say, the 'last borderline.'"[49]

Different aspects are alluded to in this quotation: a detachment from territorial logic, a different time-space relation to the notion of border management, an increasing reliance on data, and the lack of a distinction between information and intelligence. As stated elsewhere (cf. Ellebrecht 2014a), the concept of the virtual border can be considered the guiding image (Ger.: *Leitbild*) to the Europeani-

47 European Commission (2006): Policy priorities in the fight against illegal immigration of third-country nationals, COM(2006) 402 final (July 19, 2006).

48 Ibid.

49 Laitinen, Ilkka (2008): "Shaping European Security," in: Focus 2/2008, p.8.

zation of border control. Its ability to take in the notion of the maritime border as operational area and its operational strategy as being intelligence-led merged in the notion of the virtual border and could be recalled flexibly but in an all-encompassing manner. The virtual border set aside the need to be localized and instead called for specific forms of information (surveillance information, namely), to support its control.

This is the discursive environment when the Commission presented first ideas on a European Border Surveillance System, abbreviated as EUROSUR. In its Communication to the Council "Reinforcing the management of the European Union's Southern Maritime Borders" of November 30, 2006, EUROSUR is sketched against the backdrop of the virtual border: its operational area is the maritime border and its operational means are intelligence-led. The first paragraph on EUROSUR reads as the intent to optimize existing surveillance activities and surveillance technologies.

"EUROSUR could in a first stage focus on synergies created by linking the existing national surveillance systems currently in use at the southern maritime external borders. In a second stage, however, it should gradually replace national surveillance systems at land and maritime borders, providing a cost-efficient solution, including for example, a combination of radar and satellite surveillance at European level, taking into account on-going developments realized in the framework of GMES (Global Monitoring for Environment and Security). EUROSUR will benefit from experience at national and European level with similar surveillance systems, possible synergies with existing European surveillance systems for other purposes should also be explored."[50]

According to the Commission, EUROSUR could first take stock of existing national surveillance systems, link them in a first step and replace them in a second step through itself, which is a European Border Surveillance System. The optimizing jargon of "synergies" and "cost-efficiency" presented integrated border management as a question of technical interoperability and technological progress.

50 European Commission (2006): Reinforcing the management of the European Union's Southern Maritime Borders, COM(2006) 733 final (November 30, 2006), Section 2.2 (A European surveillance system, para. 24).

5.4 FROM THE EUROSUR ROADMAP TO ITS DRAFT REGULATION (2008-2011): NATIONAL INFRASTRUCTURES, SUPRANATIONAL INCENTIVES

While Monar saw that pragmatism was understood in operational terms in 2003, pragmatism post 2006 was regarded in terms of 'technological solutions.' The Commission's Border Package from February 13, 2008 can be identified as the official turning point in this regard. The so-called Border Package consisted of three communications. The first communication sketched "A comprehensive vision for an integrated European border management system for the 21st century" and called for the creation of an entry/exit registration system.[51] In the second, the Commission presented the results of a first evaluation of the Frontex agency, which served as the basis for its proposals to strengthen Frontex's responsibilities and resources.[52] The third included plans for a European border surveillance system, later referred to as EUROSUR Roadmap.[53] During the respective press conference, Franco Frattini, then Commissioner for Justice and Home Affairs, described the Border Package as a proposal, a vision for the future development of border control; however, concrete measures or implementations could only be expected after a period of five to ten years (Kasparek 2008). Generally, the Commission drew a rather satisfactory balance of the developments thus far and considered the "ambitious agenda set by the Commission and the Council in 2002 […] completed."[54] The Schengen Borders Code of 2006 was referred to as a consolidation of the legislative framework. Cooperation was seen as institutionalized and fostered by the Frontex agency, which in the Commission's view had added an "operational dimension" to the European model for integrated bor-

51 European Commission (2008): Preparing the next Steps in Border Management for the European Union, COM(2008) 69 final (February 13, 2008).

52 European Commission (2008): Report on the Evaluation and Future Development of the Frontex Agency, COM(2008) 67 final (February 13, 2008).

53 European Commission (2008): Examining the Creation of a European Border Surveillance System (EUROSUR), COM(2008) 68 final (February 13, 2008), [hereafter cited as EUROSUR Roadmap, COM(2008) 68 final].

54 European Commission (2008): Preparing the next Steps in Border Management for the European Union, COM(2008) 69 final (February 13, 2008), Section 1.1 (Policy context).

der management.[55] Finally, in the spirit of "the best way to show solidarity is money,"[56] the Commission stated that the "concepts of burden-sharing and solidarity have been given real meaning by the European Border Fund (EBF) which, for the first time, allocates substantial financial resources to these policy areas."[57]

While practical effectiveness had been promoted for the purpose of integrating border policies, the next round in this narration of progress revolved around technological solutions, technical mechanisms and smart borders. In order to strike a balance between securing its citizens on the one hand, and granting freedom of movement on the other, the Commission put emphasis on "using the most advanced technology to reach the highest level of security."[58] Technological solutions were considered the most apt tools with which to strike that balance that had occupied the Schengen Process from the very beginning. "All new technologies, such as biometrics, unmanned aerial vehicles or entry-exit systems are expensive," admitted the former Director of Frontex Ilkka Laitinen, "but they will allow Europe to remain open and be ready for a fast response to constantly changing threats" (Laitinen 2008: 8).

With technological borders, there would supposedly be no trade-off between freedom and security, between an open and a secure Europe. Two initiatives were put forward under this "technological imperative" (Chapman 2004): the EUROSUR Roadmap and an outline for smart borders in the form of an entry/exit registration system. Both initiatives bet on technical solutions; in fact, they were themselves presented as "technical frameworks" or "technical mechanisms," This new tone led to criticism; Peter Hobbing, for instance, noted:

"All that seemed of doubtful value before, such as fully automated border checks, comprehensive systems of entry-exit control, air passenger surveillance and electronic travel

55 European Commission (2008): Preparing the next Steps in Border Management for the European Union, COM(2008) 69 final (February 13, 2008), Section 1.1 (Policy context).

56 EUROSUR Project Manager at Frontex, personal interview (May 15, 2012).

57 European Commission (2008): Preparing the next Steps in Border Management for the European Union, COM(2008) 69 final (February 13, 2008), Section 1.1 (Policy context).

58 European Commission (2008): Press release. A comprehensive Vision for an Integrated European Border Management System for the 21st Century, IP/08/215 (February 13, 2008).

authorisation, high-tech border installations including virtual fences, has all of a sudden become part of the EU's vision for the 21st century." (Hobbing 2010: 68)

The Border Package was about more than simply promoting the development and use of new technologies for surveillance and control. It set into motion the rhetoric of the *conflation* of surveillance instruments and means for policy integration: the integration of (different) surveillance systems was thus framed in terms of establishing common border policies.

5.4.1 The EUROSUR Roadmap

When EUROSUR was commissioned as part of the 2008 Border Package, the Commission set the defined aim of having a regulation ready and accepted within the current financial framework, which ran until 2013. Despite various research and development projects for smart and e-technologies, the targeted *political* result of the EUROSUR Roadmap was to establish an EC regulation. It is important to keep this in mind – particularly because, in this case, the making of the law proved to be overdetermined by the development of different technical elements used in the EUROSUR framework. This had the particular effect that neither the European Parliament nor the national parliaments were able to fulfill their function of control, because they were only involved at a time when the points had already been fixed.

Although conveyed as a vision, the communication for "[e]xamining the creation of a European Border Surveillance System (EUROSUR)" functioned not only as a Roadmap, but also as a mandate for the political, technical, informational and legal reconfigurations of border management at both national and European levels. It underscored the necessity of taking advantage of synergy between surveillance technologies and the sharing of information among border authorities in Europe. The Roadmap's stated objective was "to examine the parameters within which a European Border Surveillance System (EUROSUR) […] could be developed."[59] Although these parameters entailed both political, organizational, legal and technical dimensions, the technical aspect of system interoperability was also rhetorically prioritized. The European Border Surveillance System itself was meant to be "a common technical framework" that was built to

59 EUROSUR Roadmap, COM(2008) 68 final, Section 1 (Introduction).

"support Member States' authorities to act efficiently at local level, command at national level, coordinate at European level and cooperate with third countries in order to detect, identify, track and intercept persons attempting to enter the EU illegally outside border crossing points."[60]

If one looks at the levels where EUROSUR sought to improve border protection – reaction capability at the local level, allocation of resources and personnel at the national and European planning levels, and facilitation of inter-organizational information sharing and cooperation with third countries – the envisioned political and geographical reach of EUROSUR is remarkable. The all-encompassing notion of integrated management, which tackles a task (here border surveillance and control) from a holistic perspective, was projected onto the technological possibility of integrating surveillance systems. Furthermore, EUROSUR was thought of as a tool for border guards, analysts and policy makers. The "common technical framework" was to provide those authorities responsible for border control in the Member States "with more timely and reliable information," so that they are able to reduce the "number of illegal migrations who manage to enter the EU undetected," "contribute to the prevention of cross-border crime" as well as "enhance search and rescue capacity."[61]

This technical framework was thus envisioned as a universal problem-solver, or as it was termed in official rhetoric: a multi-purpose system. The ambivalence of the declared objectives – namely, to save migrants' lives at sea and to counter unauthorized migration – evaded the technological promises of a multi-purpose system. In addition, the integrative technical framework, which was seemingly not inconsistent with this idea, was supposed to be "set up without affecting the respective areas of jurisdiction of Member States nor replace any existing systems."[62] Where the system of systems was attractive and convincing, the idea of a European Border Guard stirred up reluctance regarding the subject of convergence. At this point, it is again important to underline that the technical framework that would later take shape in the EUROSUR network (see chapter 4) had not yet been specified in 2008. The EUROSUR Roadmap was delineated as eight steps in three phases.

60 EUROSUR Roadmap, COM(2008) 68 final, Section 3 (General concept).

61 Ibid, Section 2.2 (Objectives).

62 Ibid, COM(2008) 68 final, Section 3 (General concept).

The first phase dealt with national infrastructures, the second phase addressed surveillance tools, and the third phase foresaw the setup of an integrated network. What appears to be a chronological sequence is actually a successive Europeanization. While the first three steps addressed those areas where neither the Commission nor Frontex have decision-making or regulatory competencies, the second and third phase (steps 4 to 8) foresaw elements where responsibility was increasingly allotted to Frontex.

From the launching of the EUROSUR Roadmap in 2008 to the legislative proposal in 2011, it was almost exclusively up to the political will of member states whether EUROSUR would take off or not. The establishment of national coordination centers (indicated as step 1) as well as the acceptance and usage of the EUROSUR network (indicated as step 2) set the course for the success of EUROSUR. However, framed as preparatory or infrastructural, this decisive development phase was seldom recognized as such.

5.4.2 The First Phase: National Infrastructures – a Means or an End?

When examining the practicalities of the first phase projected in the Roadmap, an organizational reconfiguration of border management among European national authorities comes to the fore. The first three steps subsumed under "infrastructure" entail the building of national coordination centers (NCCs) (step 1), the development of the EUROSUR network (step 2), and the coordination of relations with third countries (step 3). In a (perhaps deliberately) ambiguous manner, the notion of infrastructure captured both an institutional and a technological aspect. First, it referred to the institutional reconfigurations within member states that came with the establishment of a single central office to coordinate border surveillance. The second notion of infrastructure involved the technical connection between computers and apparatuses and may have thus referred to both the infrastructure of surveillance technology and the ICT network. Effectively, the planned infrastructure was both technical and institutional. Furthermore, step 3 expanded the meaning of infrastructure to entail "relations with third countries." Political and electronic connections were thus also subsumed as infrastructure.

The first step of setting up the NCCs had the declared aim of "providing the essential border surveillance infrastructure at national level."[63] Subsequently,

63 EUROSUR Roadmap, COM(2008) 68 final, Section 4.1.1.

step 1 fanned out into a recommendation for surveillance systems – that is, equipment ("one single national border surveillance system") – *and* for the organizational level of national border surveillance and control ("one single national coordination centre").[64] The establishment of the physical office of the NCC was thus a different action than the upgrade of a national surveillance system that could be managed from that office. In any case, the Commission encouraged member states to "make full use of the financial support available under the External Borders Fund (EBF) for the above *two* actions."[65]

Shortly after launching the EUROSUR Roadmap, the Commission sent out a questionnaire to member states to collect information "on existing and planned national border surveillance infrastructure, communication and information exchange systems and on the use of surveillance tools such as satellites,"[66] It is likely that it also took stock of states' willingness to upgrade existing national surveillance infrastructures. The collected information served as initial input for the development of what is called the "EUROSUR guidelines," Following the interim report, these guidelines were thought to clarify "responsibilities and duties for national coordination centres"[67]. The Commission was thereby not allowed to dictate a technical standard, nor influence the internal business of member states.

That the Commission was working at the limits of its authority in the first phase can be seen when considering how the budgetary impact of EUROSUR was calculated. In estimating the costs of EUROSUR, only the amount used for the NCC, that is, "for the technical equipment inside, personnel and building maintenance costs, computers,"[68] was taken into account. Any expenditure for surveillance systems was excluded from the cost calculation for EUROSUR.

In keeping with this budgetary distinction, the Commission did not expect the establishment of NCCs to be overly expensive. It was estimated that it could amount to a maximum of several hundred thousand euros. However, when including the expenditure that indirectly went to the EUROSUR for "national border surveillance systems" vaguely specified in the official jargon as "all the equipment and such," 50 per cent of the external border fund of 1.8 billion euros

64 EUROSUR Roadmap, COM(2008) 68 final, Section 4.1 (Recommendations, p. 6-7).

65 Ibid, Section 4.1 (Recommendations, p. 7), emphasis added.

66 European Commission (2009): Report on Progress made in developing the European Border Surveillance System (EUROSUR), SEC(2009) 1265 final (September 24, 2009), Section 2.1.1.2 (Measures taken during the reporting period, p. 4).

67 Ibid.

68 EC official in Brussels, personal interview (December 2012).

went toward border surveillance. The Commission's reason for keeping these two items separate, why the surveillance apparatus should not be counted in the costs for EUROSUR, although EUROSUR is (as its name indicates) a surveillance system, can be explained by its limited authority: "We excluded national border surveillance because we do not regulate this."[69]

In this first phase, however, both surveillance gadgetry as well as office supplies for the establishment of NCCs were merged under the heading of infrastructure. The official budgetary balance abstractly noted that the establishment of the NCCs was to be co-financed 75 per cent with funds from the External Borders Fund, while the remaining 25 per cent were to be provided by the respective member states. Despite lengthy procedures of applying for and receiving funds, the Commission, by its own account, was satisfied with the use of the EBF. The infrastructure, in its reference to surveillance technologies and the physical office of the NCC, was also tied to the competences assembled in a NCC. Again, neither Frontex nor the Commission had the authority to regulate the competences that member states' authorities would transfer to or locate at the NCC. The Commission, however, sketched different ways to run a NCC. These so called "policy options" implied both different technological functionalities *and* a different degree of competence for the NCC. These competencies can be mainly distinguished by the degree of centralization instituted by the office (from bureaucratic information gathering to coordination, command and control), and with regard to the kind of information processed and available at the respective NCC (from unclassified to top secret).

The EUROSUR Roadmap and its accompanying impact assessments[70] detailed four policy options running up to 2013. Policy option 1, termed the "status quo option," recalled the 2004 Hague Programme and the related communication from the Commission from May 2005 entitled "Ten priorities for the next five

69 EC official in Brussels, personal interview (December 2012).

70 - European Commission (2008): Examining the Creation of a European Border Surveillance System (EUROSUR): Impact Assessment, SEC(2008) 151 (February 13, 2008), [hereafter cited as Impact Assessment of the EUROSUR Roadmap, SEC(2008) 151];

- European Commission (2008): Examining the creation of a European border surveillance system (EUROSUR): Summary of the Impact Assessment, SEC(2008) 152 (February 13, 2008), [hereafter cited as Summary of the Roadmap's Impact Assessment, SEC(2008) 152].

years." However, the timeline of these priorities already suggests that "the status quo option" was not an option.

The other three policy options were staggered according to the reach of system integration. While policy option 2 focused on "upgrading and streamlining existing surveillance systems and mechanisms at Member State level," policy option 3 entails "developing common tools and applications at European level," Finally, policy option 4 "builds upon the actions proposed in the two previous options and combines them in a coherent framework"[71]. However, when considering the Impact Assessments accompanying the 2011 EUROSUR draft regulation,[72] it quickly becomes clear that the policy options include more than the reach of system integration: it is about the NCC's own resources and competences, which are linked to the type and amount of data to be assembled and handled by the office. This is also shown in a figure from the EUROSUR Impact Assessment (figure 10), in which the status quo option is no longer shown.

71 Summary of the Roadmap's Impact Assessment, SEC(2008) 152, (Comparison of the Policy Options). For an analysis of the EUROSUR Roadmap and its relation to the development of Frontex see Jeandesboz (2008).

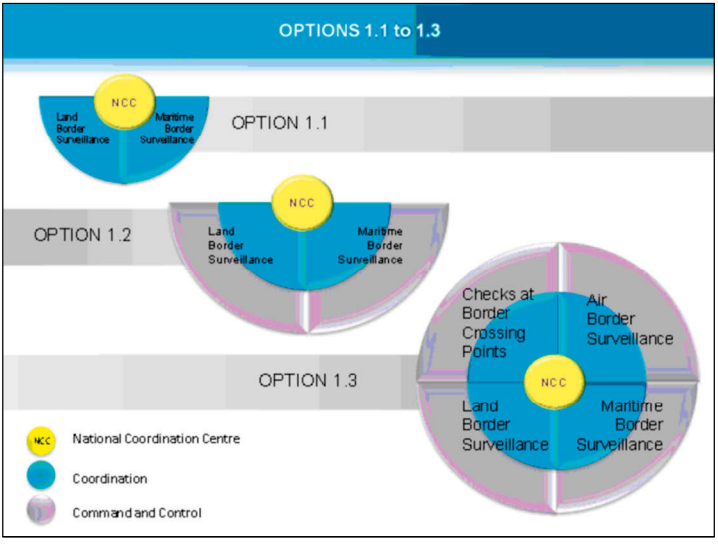
72 The EUROSUR legislative proposal has been accompanied by three Impact Assessments of together 114 pages, including 8 ANNEXES with cost estimates, list of expert groups, etc.

- European Commission (2011): Impact Assessment accompanying the Proposal for a Regulation of the European Parliament and of the Council establishing the European Border Surveillance System (EUROSUR), SEC(2011) 1536 final (December 12, 2011), (40 pages), [hereafter cited as EUROSUR Impact Assessment, SEC(2011) 1536 final];

- European Commission (2011): Executive Summary of the Impact Assessment accompanying the Proposal for a Regulation of the European Parliament and of the Council establishing the European Border Surveillance System (EUROSUR), SEC(2011) 1537 final (December 12, 2011), (9 pages), [hereafter cited as Executive Summary to the EUROSUR Impact Assessment SEC(2011) 1537 final];

- European Commission (2011): Impact Assessment accompanying the Proposal for a Regulation of the European Parliament and of the Council establishing the European Border Surveillance System (EUROSUR), SEC(2011) 1538 final (December 12, 2011), (65 pages), [hereafter cited as Compilation of Annexes to the EUROSUR Impact Assessment, SEC(2011) 1538].

Figure 10: Policy options, EUROSUR development (official illustration)



Source: EUROSUR Impact Assessment SEC(2011) 1536 final, p. 23

Furthermore, the selection of information from a certain area is displayed along with the competences as a circle, which suggests that these matters were logically related and strive for completion. It is also suggested that the option is not an either-or situation but a continuum, a possible successive upgrade and expansion – if nothing else, the achievement of a level of common technical frameworks as technical completion.

"There were different approaches. For the context of EUROSUR, merely land and maritime surveillance had been determined to be included. It was also an option to include border checks, which several member states opted for; or thirdly, to further include air border surveillance. This would result in a full command and control center, and this will be expensive, and there are a few member states which also did that."[73]

Thus, the more competences national authorities decided to transfer to the NCC, the more expensive the NCC would be. However, it is not the competence of command and control that costs, but the technologies needed to assemble all the

73 EC official in Brussels, personal interview (December 2012).

necessary surveillance and information at the center. In August 2011, member states' decisions concerning these policy options stood as summarized in table 1.

Table 1: Policy options as applied by 18 member states in 2011

Policy Option	**NCC competences**	**Countries**
1	NCC coordinates (at least) the surveillance of land and maritime surveillance	Italy, France, Netherlands, Belgium and Poland
2	NCC has command and control competences for (at least) land and maritime suveillance	Cyprus, Spain, Hungary Lata, Romaina, greece, Slovenia and Slovakai
3	NCC has command and control competencies for border control	Bulgaria, Estonia, Germany, Latvia, Lithunia, Portugal and Finnland

Source: EUROSUR Impact Assessment SEC(2011) 1536 final, p. 23

Technical equipment and the power to command and control are what related the ordinary task of setting up business offices to the political and technical competencies based and collected at these centers. Policy options were not only conditioned by technology; merging the two was already a political decision in itself. In this case, technology became a substitute for policy. The option of partially funding national surveillance systems for the NCC via the EBF served as an incentive to choose policies that might reduce the exclusive competence of member states in the information and operational environment of borders in favor of a computerized network or of integrated systems for monitoring and surveillance.

Various other sensitive political decisions also needed to be made in order to establish a NCC. What authorities were to be present at the center? What competences needed to be assigned to the NCCs? What data needed to be shared and to what level of secrecy? Was the handling of personal data supposed to be supported in the EUROSUR network? Should the data be transferred manually or automatically to the system? Should the NCC be a national command and control center and thus run 24/7? All these options had to be decided by national au-

thorities when establishing their NCC. The listing of policy options, however, suggested that member states could simply opt for either one, and it distracts from the fact that all these tensions and decisions between national authorities must be already solved, avoided or overthrown in order to establish an NCC.

Table 2 illustrates some of these decisions and alludes to the differences in tone toward the EU among the member states.[74] The table also illustrates what was easily forgotten later on: That the establishment and setup of an NCC is an entirely different procedure from its connection to the EUROSUR network (see the second and third column in table 2). The neat schedule provided by Frontex in its 2015 report on the functioning of EUROSUR stands in sharp contrast to the more than 50 pages concerning policy options in the Commission's Impact Assessments of 2011.[75] Furthermore, the Frontex report again conflates technical and political infrastructure. Bureaucratically speaking, EUROSUR provided financial support for the technical NCC infrastructure. Developed as a technical framework, political decisions fell short and were cloaked as "infrastructure" in the first step of the EUROSUR Roadmap. The question of whether there should be a national surveillance system was overwritten by the question of what kind of technology. Moreover, the table shows that being connected to the EUROSUR network cannot be equated with establishing an NCC.

74 The table has been compiled in December 2016 and, for most parts, quotes member states answers to questionnaires by the European Commission; the boxes are thus filled in quite heterogeneously. The information in the third column indicating the NCC's connection to the EUROSUR network has been taken from the 2015 Frontex Report "The functioning of EUROSUR," at http://statewatch.org/news/ 2016/mar/eu-frontex-report-on-eurosur-functioning-12-2015.pdf (accessed December 5, 2016). All other information have been taken from the Compilation of Annexes to the EUROSUR Impact Assessment, SEC(2011) 1538: Annex 4.2 (Overview of coordination of the NCCs with other national authorities and third countries, p. 27-29), Annex 4.3a (Classification level of information shared in NCCs, p. 30), Annex 4.4 (Costs of setting up, upgrading and maintaining NCCs and FSC (2007-2010), p. 33), Annex 4.5 (Annual staff in NCCs and FSC (2007-2010), p. 34).

75 EUROSUR Impact Assessment, SEC(2011) 1536 final, p. 19-39; Executive Summary to the EUROSUR Impact Assessment SEC(2011) 1537 final, p. 4-5; Compilation of Annexes to the EUROSUR Impact Assessment, SEC(2011) 1538, p. 25-52.

Table 2: NCC set-up and connections

Node / Country	NCC setup	Connection to EUROSUR network	Costs (in EUR) 2007-2010	Responsible authority for NCC	Classification level of information shared in NCC's (Sep. 2011)	Coordination with third countries	Staff figure (2010)
FSC	2008	21.09.2011	2,238,499				2
Poland	2010	21.09.2011	201,01	Chief of Polish Border Guards	Up to 'Restricted'	Mainly Russia, Belarus & Ukraine	12
Finland	2005	18.10.2011	6,638,798	Finnish Border Guard	Up to 'Secret'	Y	19
Spain	2009	03.11.2019	3,084,768	Guardia Civil	Up to 'Secret'	Morocco, Mauritania, Senegal, Cape Verde, Gambia, G. Bissau, Algeria	19
Slovakia	2007	15.11.2011	18,894,418	Presidium of police force	Up to 'Confidential'	Ukraine	30
Italy	2011	22.11.2011	32,540,000	Ministry of Interior	Only unclassified	North African Countries	3

Node / Country	NCC setup	Connection to EUROSUR network	Costs (in EUR) 2007-2010	Responsible authority for NCC	Classification level of information shared in NCC's (Sep. 2011)	Coordination with third countries	Staff figure (2010)
France	2010	29.11.2011	597,00	General Secretary of the Sea; Service du Premier Ministre	Protected, but unclassified	N	11
Greece	2013	18.05.2012	0	Ministry of Citizen Protection	Up to 'Top secret'	Albania, FYROM, Turkey, Egypt	
Lithuania	2011	31.05.2012	0	State Border Guard Service	Protected, but unclassified	Russian Fed., Rep. of Belarus	
Portugal	2009	15.06.2012		SEF	Up to 'Secret'	YES (Undetermined)	6
Cyprus	2010	25.06.2012	320,00	Cyprus Police - (Port and Marine Police Unit)	Protected, but unclassified	N	28

Bulgaria	2010	17.07.2012	500,00	Ministry of Interior, Chief Directorate Border Police	Protected, but unclassified	Serbia, FYROM, Turkey, Ukraine, Russia, Georgia	42
Hungary	2011	20.07.2012	0	Police	Up to 'Restricted'	Ukraine, Serbia	
Romania	2010	28.09.2012	22,51	Romanian Border Headquarters	Only unclassified	Turkey, Georgia, Russian Fed., Ukraine	
Norway	—	05.10.2012	No data provided	NR		NR	
Latvia	2007	31.10.2012	605,45	State Border Guard	Protected, but unclassified	Russian Fed., Rep. of Belarus	11
Estonia	2009	09.11.2012	292,30	Police and Border Guard Board authorities	Up to 'Restricted'	Russian Fed., Rep. of Belarus	13

Node / Country	NCC setup	Connection to EUROSUR network	Costs (in EUR) 2007-2010	Responsible authority for NCC	Classification level of information shared in NCC's (Sep. 2011)	Coordination with third countries	Staff figure (2010)
Slovenia	2007	05.12.2012	200,00	Ministry of Interior – Police	Protected, but unclassified	Italian LCC (Trieste) within FRONTEX EPN	
Malta	2008	14.12.2012	7,528,588	Armed Forces of Malta	Only unclassified	Worldwide	50
Croatia		25.03.2014					
Denmark		25.04.2014	No data provided	?		No Response	
Iceland		30.04.2014	No data provided	?		No Response	
Luxembourg		04.06.2014					
Sweden		24.06.2014	No data provided			No Response	

Czech Republic		27.06.2014					
Switzerland		09.09.2014					
Liechtenstein		17.09.2014					
Germany	2008	15.10.2014		Federal Police (Bundespolizei)	Up to 'Restricted'	N	
Belgium	2007	21.10.2014	1,170,000	MIK – coast guards	Up to 'Top Secret'	All European EU-countries via MOC	9
Netherlands	2011	13.11.2014		Min. of Home affairs and Kingdom relations	Up to 'Restricted'	N	
Austria		25.11.2014					

Legend
Green: member states participating in the first pilot phase
Orange: member states participating in the "big pilot" phase
Blue: member states which joint post the acceptance of the EUROSUR Regulation

Sources: see fotenote 74, p. 160

However, in later documentation, it is only the connection to the EUROSUR network that is documented and communicated as the decisive element. As such, the political reconfigurations at the national level are rendered invisible. Institutionally, however, the inconspicuous establishment of NCCs is justified with reference to the role and responsibility of Frontex. The agency is in charge of only the development of the network, and as such only reports from the connected NCCs to the EUROSUR network. As a result, the establishment of the NCCs is not documented as being part of the political setup of EUROSUR, even though NCCs are extolled as the "backbone" of the system.[76] In this process, it was obviously possible to transform something taboo into something attractive. While conducting my interviews, I was told different anecdotes about "fights" among law enforcement authorities in several member states concerning the establishment of the NCCs. Accordingly, the more advanced the application of the EUROSUR network became, the more diffuse the initial skepticism became. In the end, authorities even "started fighting for the NCC"[77] for the assumed reasons of status and recognition.

When a member state decides to establish an NCC, it is then equipped with a server that connects it to the EUROSUR network. The commissioning of the server is staged as a symbolic act, for which the responsible Frontex official specially arrives. It thus seems no coincidence that the "big computer rack" hosting different servers for the EUROSUR application played a recurring role in many different conversations with Frontex officials, be it when joking that EUROSUR could not be delivered "in your pocket," or by showing a photograph of two men in work clothes carrying a computer rack. At this point in time, the EUROSUR test application was already on the server. The EUROSUR project manager at Frontex even talked about the computer rack and network as a gift to member states: "My biggest satisfaction is hearing the member states say: 'thank you very much for what you are doing,' because I am providing them with *something* for *free*, and something that is useful."[78] As a gift, the material artifact stood for the possibility to connect to the EUROSUR network, to exchange as well as receive information. However, the gift also brought on a backlash, quite in the

76 Cf. for instance, the description on the Frontex website "The backbone of Eurosur is a network of national coordination centers (NCCs)," at: http://frontex.europa.eu/intelligence/eurosur/ (accessed February 4, 2017), as well as EUROSUR draft regulation: p. 2 and 29.

77 EUROSUR Project Manager at Frontex, personal interview (May 15, 2012).

78 Ibid.

Maussian (2016 [1925]) sense, because it concomitantly represented an expectation to actually connect to the EUROSUR network, to use it and feed it with information. In this way, the network instituted a relationship of mutual obligation that would ultimately be more beneficial for the donor. Moreover, a further spin was given to this gift-induced dependency: Frontex not only provided the network as a gift; it also remained part of the equation by using the network itself, as the following interview excerpt demonstrates.

Head of R&D (Frontex): Basically Frontex is also part of the EUROSUR network, also a kind of NCC although not national, but we are at the same level. It is very flat. We are not in charge, it is flat, a flat platform. And we are also only one of the participants in that exchange schema. But we have taken it upon us to develop the EUROSUR network, which means basically the technical installations that are needed to be present in the NCCs for making the exchange of incident-related information possible. This is developed here.

S.E.: What kind of technical equipment is that?

Head of R&D (Frontex): It is basically a big computer rack that is duplicated in each of the member states to make this exchange from a technical point of view possible; […] there is no database, it is just exchange of the information.[79]

The role of Frontex and the impact of the EUROSUR are played down here by the rhetorical analogies between technological elements and political structures. Frontex routinely stresses its coordinating role in the context of the EUROSUR project ("We are not in charge"), which also suggests that the hierarchies within EUROSUR are flat ("it is flat"), and epitomizing "it" as the communication platform itself ("it is flat, a flat platform"). The flat platform embodies and presents as plausible Frontex's claim of being "on the same level." Furthermore, the "technical installations" are reduced to the big computer network, while the process of defining menu items and border-related incidents, which is the guts of the installation (see chapters 4.1. and 4.2), is excluded.

In sum, in the first three years of the EUROSUR development phase, the institutional reconfiguration in member states toward establishing NCCs, as well as the potential of the electronic EUROSUR network, were systematically trivialized and played down: the technology at stake in the European surveillance system was portrayed as "just a big computer rack" (and not as an integration of

79 Head of Research and Development at Frontex, personal interview (May 27, 2011).

national surveillance systems), "just a network" (and not as a proposal for a mandatory European communicational format), "just the equipment for an office" (the NCC) (and not as surveillance technology or as the acquisition and centralization of competences), "just exchange of information," (and not as a database or an increase in power). Moreover, only after the institutional changes were set in motion was EUROSUR's legislative proposal issued. After the infrastructure was laid, the EP and national parliaments became involved, and while the paper's formulations were still being discussed, the political and institutional reconfigurations were already being taken for granted. Establishing an NCC ostensibly meant connecting to a computerized network for information exchange. The network was an incentive to access a new arena of information and intelligence that was – and this is where we find the optical device – supranational in outlook. Effectively, the arena of European competences took shape as a technical innovation in the field of border surveillance and not as an encroachment on exclusive national competences.

5.4.3 The Second Phase: Surveillance Tools – Incentive, Subterfuge or Qualitative Change of Border Management?

Effectively, the Roadmap's second phase can be described as an arena of supranational services, incentives and devices. As such, its relation to the first phase is not chronological but rather structural and political. While the first three steps addressed member states' competences, the second phase sketched how EUROSUR could generate surveillance information and thus produce an "added value" for member states – namely, that of surveillance information generated at the supranational level. The second phase concentrated on surveillance tools, both in terms of research and development (step 4) and their common application (step 5), as well as the common pre-frontier intelligence picture (CPIP) (step 6). The Commission explicitly invited research and development projects on border surveillance within the framework of the Seventh Framework Programme for Research and Technological Development (FP7) with a view to EUROSUR as a potential "end-user." The Commission Staff Working Paper of January 28, 2011 mentioned nine border surveillance projects it recommended taking "into account when developing EUROSUR"[80]. Generally, the Roadmap's recommenda-

80 European Commission (2011): Determining the technical and operational framework of the European Border Surveillance System (EUROSUR) and the actions to be taken

tions revealed the extensive understanding of surveillance that underpinned the EUROSUR project and its sole focus on maritime surveillance.

"The 7th Framework Program for research and development (security and space themes) should be used to improve the performance *and use* of surveillance tools, to increase the area covered, the number of suspicious activities detected as well as to improve the identification of potentially suspicious targets *and the access* to high resolution observation satellite data."[81]

Simply put, this framework states that this technology's capability must be improved (development, engineering), *and* the number of end users increased (market). Moreover, the power, reach and effectiveness of surveillance should also be increased by expanding "the area covered," raising "the number of suspicious activities detected," and by improving "the identification of potentially suspicious targets," This surveillance gaze is deep and wide and should be further improved in resolution. Surveillance expands the idea of what it may be able to reveal and thereby achieve in our imagination. It is fostered both by a proliferation of its tools as well as its ends. In this vein, EUROSUR has also been portrayed as a surveillance behemoth that, with its drones, radar surveillance and so forth, is advancing the militarization of borders (cf. Lemberg-Pedersen 2013: 152-153; Monroy 2011).

However, it is virtually impossible to document the concrete and measurable influence of FP7 projects in border surveillance on EUROSUR. Nevertheless, a significant, indirect influence can be assumed when listing different FP7 projects in which the EUROSUR is the "end-user" along with their defined objectives and the volume of funding they received. Taking this approach, Hayes and Vermeulen conclude that, by 2012, the EU had provided more than 170 million Euros in funding to 16 projects that promised direct or indirect synergy with the EUROSUR system (Hayes/Vermeulen 2012: 60-64). These included the development and testing of unmanned aerial vehicles (UAVs) and satellites for use in civil-security applications.

Similarly, Martin Lemberg-Pedersen presented EUROSUR as an "example of outsourced research and development in border control systems, which in-

for its establishment, SEC(2011) 145 final (January 28, .2011), Section 5.4 (Research and development to improve the performance of surveillance tools).

81 EUROSUR Roadmap, COM(2008) 68 final, Section 4.2 (Recommendation, p. 8-9), emphasis added.

volve a substantial amount of sub-contracting" (Lemberg-Pedersen 2013: 156-157). Based on his own calculations and the remodeling of contracts and grants per project, he regards EUROSUR as subsidizing the arms industry, and argued that the influence of private security companies on the governance of borders has been "more pervasive […] than mediatized political discourses categorizing immigration as a security threat" (ibid: 157).

There are essentially two issues at stake. First, there is the question of to what extent the diverse new surveillance technologies that were proposed to serve EUROSUR are changing operational practices and value orientation, and thus the quality of border work. There have been initial general enquires into the question of how these new technologies of surveillance and production of suspicion are impacting enforcement practices (see for instance den Boer 2011). However, as the period of investigation does not include when EUROSUR became operational, an evaluation of the effects of surveillance technologies on border policing goes beyond the reach of the material of this study.

The second issue is that private military companies were able to influence the definition of political problems, because private military contractors "can no longer content themselves with being mere technical experts. They become security experts shaping understanding of and decisions about security" (Leander 2005: 612). Because of competition in the security technologies market and for funding, technologies not only have to be good, they also have the following paradoxical effect:

> "The competition for market shares pushes PMCs to become lobbyists, security advisers and public-opinion-makers. […] They create a demand for the services they offer by making clients [in this case policy makers and legislators] aware of the many threats they need protections against." (Leander 2005: 612)

In the market for security technologies, supply and demand is distorted by the factor "risk" which, however, is calculated, assessed and provided as needs assessment by the suppliers themselves. This can result in lock-in effects that make it rather difficult to reverse the technological upgrading of borders.

For the case of EUROSUR, sources also suggest that the supply-side of security companies and security research projects intended to define the setup and thus the abilities of the system. According to one Frontex source, the agency concluded from tests that satellite surveillance was not contributing to improving maritime response, and that the main reason was the time of latency. Satellite imagery was considered virtually useless for operational purposes in which mov-

ing targets were to be detected between waves. An official of the European Commission also admitted that companies were preferable that do not develop their own technology, as "they don't want to sell you something all the time." According to another Brussel's official, the development and use of drones in EUROSUR projects had only been incorporated into the EUROSUR draft regulation on request from the Directorate-General Enterprise and Industry (DG-ENTR). However, the Directorate General for Migration and Home Affairs (DG Home) wanted to keep a low profile and did not want to attract public outrage for having mentioned drones, which in any case were not decisive for the success of EUROSUR. Effectively, Anna Leander's words resonate in so far as the technical experts not only generate their own demand, but lobbyists and advisers to policy makers do so as well to an extent where political decision-makers have to make a conscious effort to decide against technological solutions.

In the end, the question to be asked is what technologies were and are behind the notion of advanced solutions in the case of EUROSUR. Presented as a "system of systems," the dominant reception of EUROSUR has primarily revolved around surveillance technology, particularly around drones and satellite surveillance. However, the most important technology of the EUROSUR framework is the ICT application of the EUROSUR network. From the beginning, EUROSUR has 'played' with an extensive understanding of surveillance that includes monitoring technologies, data processing and the assembling and integration of much information.

The promise of creating better awareness and a more timely response enables us to subsume variable notions of surveillance into a central idea, thus diverting criticism of big bad systems, while achieving almost clinical silence and seclusion in order to build trust in and compliance with an IT system for the exchange of operational information. In either case, the entire legal text of the EUROSUR Regulation was predetermined by technical semantics and functionalities. In this vein, the Commission described the draft regulation as "the result of summarizing 1500 pages of technical specifications in 21 articles" (quoted in Bellanova/Duez 2016: 28).

5.5 "THIS IS A BEAUTIFUL SITUATION HERE" – EUROSUR'S DRAFTING PROCEDURES AND THE PILOT PHASE (2011-2012)

When the draft regulation was launched by the Commission on December 12, 2011, the European Parliament and the Council began negotiating their respective positions in preparation of the *trialogue* between the European Council, European Parliament and European Commission. Between December 2011 and December 2012, they staked out their positions parallel to the so-called "big pilot," the testphase of the EUROSUR network. This parallel adjustment of a piece of legislation and a piece of technology has been considered "a beautiful situation":

"There is some beautiful situation here; we are developing a system which is in a test phase, and at the same time, there is a legislative proposal in parallel. The legislative proposal is taking the ideas from this system, and we may propose changes to the legislative proposal based on the use of the EUROSUR, of this system. So I think this is a beautiful situation here. Now, we have here an application, this application which is very much in line with the legislative proposal."[82]

Considering the time line, the result of this suitable regulation is not surprising. Because "the legislative proposal is taking the ideas from this system," the application consequently seems to be "in line with the legislative proposal." In fact, as the previous chapter has illustrated, what much of the regulation describes is software architecture. However, this statement also implies that legislation is the authority by which to set standards and with which to be in line. The "beautiful situation" of developing both an IT application and legislation in parallel was thus, in fact, regarded as a rather comfortable and gainful one for the success of the EUROSUR project.

When voting on the EUROSUR Regulation, member states were expected to be less under the impression that they were voting on a binding EU law, and more that they were reconfirming what they had already developed and what they were already using in daily practice. Their acceptance thus appears in a somewhat depoliticized light: it is a user's acceptance of technology, and not a member state's willingness to further integrate and accept Europeanization to the effect of legal codification. An official from the Commission and hence a figure

82 EUROSUR Project Manager at Frontex, personal interview (May 15, 2012).

representing the legislative body similarly noted in December 2012, the system and the legislation were consciously developed in parallel "in order to trial and error, in order to test things. That way we were able to integrate feedback from the technical development of the EUROSUR network into the legislation, and we are still able to do so."[83] To a certain extent, this echoes the laboratory metaphor deployed in the early days of the Schengen process. When applied to technology, the metaphor seems even more plausible.

Technology requires test phases "in order to trial and error, in order to test things." In the case of legislation, however, the officials at DG Home by their own accounts know that "if you go too far and want to define too much, things are not accepted." In the case of EUROSUR, however, the Commission has said that it witnessed a common spirit, in the sense that it honorably mentioned that the member states had committed themselves to EUROSUR and that all of them put effort into the project. The Commission stated that it was important that member states maintained a sense of ownership and responsibility. However, ownership and responsibility were thought of almost exclusively with reference to the development and setup of the EUROSUR network. In terms of legislation, the influence of member states was minimized, particularly meaning the question of subsidiarity – that is, the question of whether the EU was in charge in this matter – was only directed at national parliaments after the NCCs had been established, the EBF had been used and the network application was up and running, as the following section describes.

5.5.1 National Parliaments and the Principle of Subsidiarity

After the European Commission proposed the EUROSUR legislation in December 2011, member states were called upon to clarify the issue of subsidiarity – that is, to determine in their own national parliaments whether the EU had competency in this area.[84] In the case of the proposed EUROSUR Regulation, only the Swedish parliament, the Riksdag, had concerns regarding the competency of the EU. In a reasoned opinion, it stated that "it is not sufficiently clear that the goals of the proposed measures cannot be achieved at national level. Nor is it clear that the goals of the proposed measures can better be achieved if undertak-

83 EC official in Brussels, personal interview (December 2012).

84 Cf. Article 5 (3) of the Treaty of the European Union (TEU) and the Protocol on the Application of the Principles of Subsidiarity and Proportionality.

en at EU level."[85] The Swedish Riksdag was thereby the only institution to officially call into question the widely accepted premises of a causal relation between the quality of border surveillance and control and the quantity of shared information and data. The basic idea of EUROSUR that situational awareness would better be achieved at the level of the EU was thus not shared by the Swedish Riksdag.

At the time of the legislative proposal, the Commission, by contrast, argued that EUROSUR was in line with the principle of subsidiarity, as it "follows a decentralized approach, with the national coordination centres for border surveillance forming the backbone of the EUROSUR cooperation."[86] The Commission supported its argument by weighing the amount of information and data against the quality of analyzing it. While "in quantitative terms most information would be managed in the national coordination centres, without Frontex being able to see this information,"[87] the EU level was fostered in qualitative terms of situational awareness. In fact, sharing and interlinking systems and information in the supranational format of EUROSUR was thought to bring "*true added value to border surveillance*."[88] The Commission argued that

"[b]etter information sharing will help to identify targets such as boats used for irregular migration and cross-border crime more accurately and therefore allow a more targeted timely and cost-efficient use of available equipment for interception. This is an objective which cannot be sufficiently achieved by the Member States alone and which can be better achieved at Union level."[89]

5.5.2 Drafting Procedures in the European Parliament and the European Council

Before the *trialogue* between the European Council, European Parliament and European Commission could be opened in December 2012, the Council and Par-

85 Swedish Riksdag (2011): Reasoned Opinion of the Riksdag, Statement 2011/12: JuU29 Appendix 4.

86 EUROSUR Impact Assessment, SEC(2011) 1536 final, Section 3.5 (Subsidiarity, p. 11).

87 Ibid.

88 Ibid.

89 Ibid.

liament first needed to negotiate their individual positions. The rapporteur in the European Parliament was Jan Mulder from the Liberal Party, with Ska Keller from the EP Greens functioned as shadow rapporteur. When the EUROSUR Regulation was proposed, the Council was under the Polish presidency. Then, during the first six months of the drafting procedure, amendments were formulated under Danish presidency, while the final draft issued by the Council in December 2012 was submitted under Cypriot presidency.

In both the European Parliament and the European Council, the most controversial issue was to what extent "the saving of migrants' lives" should be part of the EUROSUR provisions. From the "first documents coming out of the Danish Council Presidency and the European Parliament before the summer of 2012," Jorrit Rijpma and Mathias Vermeulen conclude that "both institutions wanted to ensure *that EUROSUR would improve the capacity* of FRONTEX and the Member States to save lives of migrants" (2015: 464, emphasis added). However, the issue of saving migrants at sea was not difficult and controversial in terms of capacity; it was not debated whether migrants could better be rescued with larger or smaller vessels, or whether they were spotted at sea easier by binoculars or satellite- or thermo-cameras. The question was rather whether a humanitarian objective was meant to be part of the surveillance system at all. The European Parliament intended, if nothing else, to attach a humanitarian end to the proposed improvement of capacities and it proposed the following wording for recital 2 of the EUROSUR Regulation:

"The practice of travelling in small and unseaworthy vessels has dramatically increased the number of migrants drowning at the southern maritime external borders. EUROSUR should considerably improve the operational and technical ability of the Agency and Member States to detect and track these small vessels, *leading in the mid-term to a considerable reduction of the loss of migrants and refugees at sea."* (quoted in Rijpma/Vermeulen 2015: 464, emphasis added)

The final regulation, however, provides a formulation that relativizes the responsibility toward persons and vessels at sea. The ability to detect vessels is still formulated as an objective, but the aim of tracking is no longer mentioned in the introductory recital, whereby any impression of potentially witnessing distress at sea is avoided. The final official commitment is indirect at best and plainly evasive at worst: "to detect such small vessels and to improve the reaction capability of the Member States, thereby *contributing* to reducing the loss of lives of mi-

grants."[90] As information alone can already be declared as a contribution to saving lives at sea, an actual effort to rescue persons at sea is not part of the commitment fostered by EUROSUR. Reaction capabilities thus rather serve the hunter who is hoping not to be required as a friend.

The compromise text put forth by the Danish Presidency proposed that the information that would go into the European situational picture (ESP) and the Common Pre-frontier Intelligence Picture (CPIP) would "reflect information that would be relevant for the protection of lives of migrants" (Rijpma/Vermeulen 2015: 464). A consequence of this amendment would have been that distress calls would be visualized on the electronic map of the ESP. Moreover, the Danish presidency even went one step further and proposed to link operational obligations to the availability of information on migrants endangered at sea by proposing to broaden the definition of "reaction capability" in Article 3(b) to also imply "protecting lives of migrants at the external borders."[91] In the Council, however, "the compromise text was not well received, in particular by the southern Member States, who feared that the EUROSUR Regulation would only increase their responsibilities for intercepted migrants and asylum seekers, rather than alleviate the burden" (ibid). These proposals were thus withdrawn from the new draft which the Cypriot Presidency tabled at the first *trialogue* meeting with the EP rapporteur in December 2012.

The Commission, for its part, felt that the negotiations with the European Parliament and Council had run smoothly and easily, and an EC official assumed that this would not have been the case without the pilot project. For this reason, it is worth looking again at how the EUROSUR network was accepted by the users during the test phase of the so-called "big pilot."

5.5.3 How Did the System Take Off?

According to aggregated data on the activities in EUROSUR in 2012 provided to me by Frontex, there was a constant increase in information entered in the EUROSUR network in 2012. In total, Frontex created 4,484 "artifacts," while the Member States entered 3,062 pieces of information. According to the information at hand, the system started to really pick up after July 2012. While there

90 EUROSUR Regulation (EU) No 1052/2013, Recital 2, emphasis added.

91 European Council (2012): Proposal for a regulation of the European Parliament and of the Council establishing the European Border Surveillance System EUROSUR – Note to working party on frontiers/mixed committee, EC 11437/12 (June 20, 2012).

were 1,342 entries registered under the name of Frontex in July 2012, member states' artifacts amounted to only 273. Within six months, that is, by January 2013, the entry of artifacts increased threefold for Frontex and more than ten times for member states. Of the total number of 7,584 artifacts created, 32 were maps, 1,757 were documents and the majority of 5,757 were incidents.[92]

Although the sample period is too short to draw conclusions, it can be noted that Frontex was more active in the system than the other nodes. The second basic trend that can be seen in the charts is that incident reports were used the most. However, considering the usage by (new) participants, an observer to the big pilot phase stated that caution should be used when reading the figures, stressing that these did not allow for reliable statements to be made just yet. The observer told me:

"In the current situation, member states enter a lot of data when they are first connected, but then it levels out pretty quickly because Frontex is not yet always able to provide feedback. They all faithfully do their part in the beginning, then they don't get anything back […]. But that's hopefully over now – that the member states had to enter in something for EUROSUR and for another Frontex system that was built at the same time, meaning they had to enter the same information for Frontex two times and were wondering why they had to do that twice and what Frontex was doing on the other end […] but that is being fixed now."[93]

The observer mentions the well-known risks that frequently emerge when new technologies are introduced in organizations. On the one hand, there is a reluctance to accept extra or double work. On the other hand, a neglect of, or even a disregard for, new technologies can quickly set in when nothing is offered in return – for example, if the surplus value is not available or evident.

As to the practical acceptance of EUROSUR, which was critical for its development, the following occurred. Political acceptance, which had long been secondary to issues of usability, became more important, because the draft regulation that was presented more or less parallel to the "big pilot" already proposed a political compromise. This made it unlikely that the system would be generally rejected at that point: not only had a mandatory use of the system been proposed,

92 Data on EUROSUR activity from July 2012to January 2013, provided by Frontex via Email on February 1, 2013 (Repository S. Ellebrecht).

93 Own conversation protocol, December 2012; the quotation has been authorized in 2016.

the member states, as users of the system, were now involved in negotiating the means of communication while the medium was being set up. Losing their status as users would have meant losing their ability to help shape the draft regulation.

Beyond the development phase, when looking at the report about the functioning of EUROSUR that was tabled by Frontex in December 2015, it can be concluded that double work was resolved, while the general trend of usage continued: "the incidents reported into JORA (Joint operations reporting application) are being fed by Frontex into the Eurosur network application."[94] Frontex remained the most active node in the system with "64,355 events uploaded in the application" between November 2011 and November 2015.

In total "the Eurosur network application has recorded a total of 117,721 events, while 9,125 documents were stored in its repository. In terms of events most reported in the Eurosur network application, these are firstly related to 'irregular migration' (over 90,000), followed by 'related cross-border crime' (over 20,000). Only a minority of events are related to the 'crisis' category (just over 100)."[95]

5.6 EUROSUR AS AN ITEM OF LAW: THE FINAL REGULATION OF 22 OCTOBER 2013

When EUROSUR was commissioned as part of the 2008 Border Package, it was foreseen to be completed in a regulation within the ongoing financial framework running from 2007 to 2013. The procedure toward the EUROSUR Regulation

94 Frontex Report to the European Parliament and the Council on Art 22 (2) of the Regulation EU 1052/2013, The functioning of EUROSUR, (December 1, 2015), [hereafter cited as Frontex Report on the functioning of EUROSUR (2015)], p.10. The report states: "From the beginning of the Eurosur network implementation, emphasis was put on the integration between the existing JORA incident reporting and the Eurosur network application. Frontex ensured early that there is no duplication of incident reporting during Frontex coordinated Joint Operations, which contributed significantly to the compilation of a reliable and coherent European Situational Picture" (p. 12). Against the background of unauthorized sources, this assessment seems to profit strongly from its ex-post perspective. For a recent comparison of the activities in EUROSUR and JORA, see Martina Tazzioli's (2018) astute analysis.

95 Frontex Report on the functioning of EUROSUR (2015), p.18.

was quick and neat. The publication of the Roadmap in February 2008 was followed by a period during which political and technical feasibility studies were carried out. By 2012, the EU had provided funding worth over 170 million euros to 16 research and development projects that promised synergies with the EUROSUR system (Hayes/Vermeulen 2012: 60-64). In addition, the development of the IT application for the EUROSUR network began in November 2009. Structures and definitions that provided themselves in the network's test phases were included in the legislative proposal tabled by the Commission on December 12, 2011.

At this point in time, the member states were requested to clarify the issue of subsidiarity, that is, to determine in their own national parliaments whether the EU had competency in this area. After the Council of the European Union and the European Parliament had determined their positions on the proposed legislation, the *trialogue* between Council, Parliament, and Commission was inaugurated under the Cypriot presidency. The ultimate aim was to adopt the regulation by October 2013. And so it happened. The ordinary legislative procedure ended with the Council of the European Union adopting the regulation on October 22, 2013 without discussion.[96] Two weeks earlier, the European Parliament had approved the EUROSUR Regulation, by 479 votes to 101, with 20 abstentions.[97] As a consequence, the exchange of information and interagency cooperation has been carried out on the legal basis of the EUROSUR Regulation since December 2, 2013.

What does this item of law do? In simple terms, it renders interactions obligatory, which were previously subject to change or dismissal. These interactions concern the exchange of information and operational coordination between border agencies in Europe. The EUROSUR Regulation provided Frontex and member states with a binding "communicational format" aimed at underpinning border surveillance and control practices, data collection and analysis, as well as op-

96 Council of the European Union, *Council adopts regulation establishing the EUROSUR system*, 15031/13, press release, October 22, 2013, at: https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/139099.pdf (accessed August 26, 2019).

97 European Parliament News, EU border surveillance: MEPPs approve Eurosur operating rules, press release, October 10, 2013, at: http://www.europarl.europa.eu/news/en/news-room/20131007IPR211624/html/EU-border-surveillance-MEPs-approve-Eurosur-operating-rules (accessed October 12, 2013).

erational cooperation and planning. For this purpose, the EUROSUR Regulation has rendered the following components compulsory:

"(a) national coordination centres;
(b) national situational pictures;
(c) a communication network;
(d) a European situational picture;
(e) a common pre-frontier intelligence picture;
(f) a common application of surveillance tools"[98]

These elements are results of the EUROSUR development process and yet heretofore *did not exist*. By means of the EUROSUR Regulation these elements are not only accepted, but are rendered official, legitimate, and mandatory. Basically, the EUROSUR Regulation obliges member states to have a national coordination centre and to contribute information to the European situational picture (ESP) by operating the EUROSUR network from this bureau. To a certain extent, the regulation encompasses a software architecture and fixes the definitions on menu items, reporting formats, layers, informational sources and modes of visualization as agreed upon during the development phase. The regulation covers the composition of situational pictures, the necessary communication routines to stipulate the network, as well as the structure and the sources of the final ESP, which, to a degree, brings us back again to the beginning of this chapter – to the EUROSUR network and its devising actors. However, due to the provision, the technical framework has turned into a legal framework for the exchange of information and operational coordination. By means of the regulation, EUROSUR is no longer merely a tool or network but also a set of obligations.

While the previous chapter has shed light on the packing of a black box, namely that of the EUROSUR network, the item of law, the regulation, cannot be unpacked as it is no black box which would substitute, accelerate or delegate anything (Latour 2014: 272-273). In fact, Latour considers an item of law a very different object from a technological artifact. While, for instance, a speed bump (the example is Latour's 1994: 38-40) replaces the police patrol, that is, speed control is delegated to a material artifact, a corresponding item of law – be it on speed limits or the official rules for installing speed bumps – neither controls nor delegates. It rather states that the kind of mobilization and mediation inscribed in the

98 EUROSUR Regulation (EU) No 1052/2013, Art. 4 (1).

speed bump is lawful. An item of law does not replace or coagulate an interaction, nor is anything accelerated, delegated or innovated by a legal text. Unlike technical mediation, an item of law does not stabilize an interaction but renders the stabilized set of interactions official and binding. It turns them into an obligation and lends an atmosphere of legal authority to the arrangement, very much in the Weberian sense of an impersonal and rational order.

How does it accomplish this? Rather than making a detour, law bases itself on a constant invocation of other, precedent legal documents: decisions and signatures of this and that date in such and such place. "The legal document 'cools down' the hot process of production: it is the extensity that emerges from the intensive ordeal, which is composed entirely of associations" (McGee 2014: 146). Correspondingly, a legal document is not a black box, it cannot be unpacked as it requires itself to be spread around, to be distributed and to be associated and cross-referenced to other procedures and texts. At this point, when the object is propagated by the treaty, associations are not only objectified, but justified – in the case of borders often to the extent of naturalization and fetishization. As an item of law, EUROSUR can be spread, visited, researched, consulted and referred to by policy makers.