Analysis
EU: Guns, guards and guidelines: reinforcement of Frontex runs into problems
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May 2020

An internal report circulated by Frontex to EU government delegations highlights a series of issues in implementing the agency’s new legislation. Despite the Covid-19 pandemic, the agency is urging swift action to implement the mandate and is pressing ahead with the recruitment of its new ‘standing corps’. However, there are legal problems with the acquisition, registration, storage and transport of weapons. The agency is also calling for derogations from EU rules on staff disciplinary measures in relation to the use of force; and wants an extended set of privileges and immunities. Furthermore, it is assisting with “voluntary return” despite this activity appearing to fall outside of its legal mandate.

State-of-play report
At the end of April 2020, Frontex circulated a report to EU government delegations in the Council outlining the state of play of the implementation of its new Regulation (“EBCG 2.0 Regulation”, in the agency and Commission’s words), especially relating to “current challenges”. Presumably, this refers to the outbreak of a pandemic, though the report also acknowledges challenges created by the legal ambiguities contained in the Regulation itself, in particular with regard to the acquisition of weapons, supervisory and disciplinary mechanisms, legal privileges and immunities and involvement in “voluntary return” operations.

The path set out in the report is that the “operational autonomy of the agency will gradually increase towards 2027” until it is a “fully-fledged and reliable partner” to EU and Schengen states. It acknowledges the impacts of unforeseen world events on the EU’s forthcoming budget (Multi-annual Financial Framework, MFF) for 2021-27, and hints at the impact this will have on Frontex’s own budget and objectives. Nevertheless, the agency is still determined to “continue increasing the capabilities” of the agency, including its acquisition of new equipment and employment of new staff for its standing corps.

The main issues covered by the report are: Frontex’s new standing corps of staff, executive powers and the use of force, fundamental rights and data protection, and the integration into Frontex of EUROPSUR, the European Border Surveillance System.

The new standing corps

Recruitment

A new standing corps of 10,000 Frontex staff by 2024 is to be, in the words of the agency, its “biggest game changer”.\(^2\) The report notes that the establishment of the standing corps has been heavily affected by the outbreak of Covid-19. According to the report, 7,238 individuals had applied to join the standing corps before the outbreak of the pandemic. 5,482 of these – over 75% - were assessed by the agency as eligible, with a final 304 passing the entire selection process to be on the “reserve lists”\(^3\).

Despite interruptions to the recruitment procedure following worldwide lockdown measures, interviews for Category 1 staff – permanent Frontex staff members to be deployed on operations – were resumed via video by the end of April. 80 candidates were shortlisted for the first week, and Frontex aims to interview 1,000 people in total. Despite this adaptation, successful candidates will have to wait for Frontex’s contractor to re-open in order to carry out medical tests, an obligatory requirement for the standing corps\(^4\).

In 2020, Frontex joined the European Defence Agency’s Satellite Communications (SatCom) and Communications and Information System (CIS) services in order to ensure ICT support for the standing corps in operation as of 2021\(^5\). The EDA describes SatCom and CIS as “fundamental for Communication, Command and Control in military operations… [enabling] EU Commanders to connect forces in remote areas with HQs and capitals and to manage the forces missions and tasks”\(^6\).

Training

The basic training programme, endorsed by the management board in October 2019, is designed for Category 1 staff. It includes specific training in interoperability and “harmonisation with member states”. The actual syllabus, content and materials for this basic training were developed by March 2020; Statewatch has made a request for access to these documents, which is currently pending with the Frontex Transparency Office. This process has also been affected by the novel coronavirus, though the report insists that “no delay is foreseen in the availability of the specialised profile related training of the standing corps”.

\(^3\) Section 1.1, state of play report
\(^5\) Section 7.1, state of play report
Use of force

The state-of-play-report acknowledges a number of legal ambiguities surrounding some of the more controversial powers outlined in Frontex’s 2019 Regulation, highlighting perhaps that political ambition, rather than serious consideration and assessment, propelled the legislation, overtaking adequate procedure and oversight. The incentive to enact the legislation within a short timeframe is cited as a reason that no impact assessment was carried out on the proposed recast to the agency’s mandate. This draft was rushed through negotiations and approved in an unprecedented six-month period, and the details lost in its wake are now coming to light.

Article 82 of the 2019 Regulation refers to the use of force and carriage of weapons by Frontex staff, while a supervisory mechanism for the use of force by statutory staff is established by Article 55. This says:

“On the basis of a proposal from the executive director, the management board shall:
(a) establish an appropriate supervisory mechanism to monitor the application of the provisions on use of force by statutory staff, including rules on reporting and specific measures, such as those of a disciplinary nature, with regard to the use of force during deployments”

The agency’s management board is expected to make a decision about this supervisory mechanism, including specific measures and reporting, by the end of June 2020.

The state-of-play report posits that the legal terms of Article 55 are inconsistent with the standard rules on administrative enquiries and disciplinary measures concerning EU staff. These outline, *inter alia*, that a dedicated disciplinary board will be established in each institution including at least one member from outside the institution, that this board must be independent and its proceedings secret. Frontex insists that its staff will be a special case as the “first uniformed service of the EU”, and will therefore require “special arrangements or derogations to the Staff Regulations” to comply with the “totally different nature of tasks and risks associated with their deployments”.

What is particularly astounding about Frontex demanding special treatment for oversight, particularly on use of force and weapons is that, as the report acknowledges, the agency cannot yet legally store or transport any weapons it acquires.

Regarding service weapons and “non-lethal equipment”, legal analysis by “external experts and a regulatory law firm” concluded that the 2019 Regulation does not provide a legal basis for acquiring, registering, storing or transporting weapons in Poland, where the agency’s headquarters is located. Frontex has applied to the Commission for clarity on how to proceed,

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9 Chapter III, state of play report
10 Section 2.5, state of play report
says the report. Both Frontex and the Commission declined to comment on the status of this consultation and any indications of the next steps the agency will take.

Until Frontex has the legal basis to do so, it cannot launch a tender for firearms and “non-lethal equipment” (which includes batons, pepper spray and handcuffs). However, the report implies the agency is ready to do so as soon as it receives the green light. Technical specifications are currently being finalised for “non-lethal equipment” and Frontex still plans to complete acquisition by the end of the year.

Privileges and immunities

The agency is also seeking special treatment with regard to the legal privileges and immunities it and its officials enjoy. Article 96 of the 2019 Regulation outlines the privileges and immunities of Frontex officers, stating:

“Protocol No 7 on the Privileges and Immunities of the European Union annexed to the Treaty on European Union (TEU) and to the TFEU shall apply to the Agency and its statutory staff.”

However, Frontex notes that the Protocol does not apply to non-EU states, nor does it “offer a full protection, or take into account a need for the inviolability of assets owned by Frontex (service vehicles, vessels, aircraft)”. Frontex is increasingly involved in operations taking place on non-EU territory. For instance, the agency has entered into working agreements with Balkan states, under which Frontex staff can use executive powers. The agency therefore seeks an “EU-level status of forces agreement… to account for the partial absence of rules”.

Law enforcement

To implement its enhanced functions regarding cross-border crime, Frontex will continue to participate in Europol’s four-year policy cycle addressing “serious international and organised crime”. The agency is also developing a pilot project, “Investigation Support Activities- Cross Border Crime” (ISA-CBC), addressing drug trafficking and terrorism.

Fundamental rights and data protection

The ‘EBCG 2.0 Regulation’ requires several changes to fundamental rights measures by the agency, which, aside from some vague “legal analyses” seem to be undergoing development with only internal oversight.

Firstly, to facilitate adequate independence of the Fundamental Rights Officer (FRO), special rules have to be established. The FRO was introduced under Frontex’s 2016 Regulation, but has since then been understaffed and underfunded by the agency. The 2019 Regulation

12 Chapter III, state of play report
obliges the agency to ensure "sufficient and adequate human and financial resources" for the office, as well as 40 fundamental rights monitors. These standing corps staff members will be responsible for monitoring compliance with fundamental rights standards, providing advice and assistance on the agency’s plans and activities, and will visit and evaluate operations, including acting as forced return monitors.

During negotiations over the proposed Regulation 2.0, MEPs introduced extended powers for the Fundamental Rights Officer themselves. The FRO was previously responsible for contributing to Frontex’s fundamental rights strategy and monitoring its compliance with and promotion of fundamental rights. Now, they will be able to monitor compliance by conducting investigations; offering advice where deemed necessary or upon request of the agency; providing opinions on operational plans, pilot projects and technical assistance; and carrying out on-the-spot visits. The executive director is now obliged to respond “as to how concerns regarding possible violations of fundamental rights... have been addressed,” and the management board “shall ensure that action is taken with regard to recommendations of the fundamental rights officer.” The investigatory powers of the FRO are not, however, set out in the Regulation.

The state-of-play report says that “legal analyses and exchanges” are ongoing, and will inform an eventual management board decision, but no timeline for this is offered. The agency will also need to adapt its much criticised individual complaints mechanism to fit the requirements of the 2019 Regulation; executive director Fabrice Leggeri’s first-draft decision on this process is currently undergoing internal consultations. Even the explicit requirement set out in the 2019 Regulation for an “independent and effective” complaints mechanism, does not meet minimum standards to qualify as an effective remedy, which include institutional independence, accessibility in practice, and capacity to carry out thorough and prompt investigations.

Frontex has entered into a service level agreement (SLA) with the EU’s Fundamental Rights Agency (FRA) for support in establishing and training the team of fundamental rights monitors introduced by the 2019 Regulation. These monitors are to be statutory staff of the agency and will assess fundamental rights compliance of operational activities, advising, assisting and contributing to “the promotion of fundamental rights”. The scope and objectives for this team were finalised at the end of March this year, and the agency will establish the team by the end of the year. Statewatch has requested clarification as to what is to be included in the team’s scope and objectives, pending with the Frontex Transparency Office.


16 Article 110(6), Article 109, 2019 Regulation
17 Article 110, 2019 Regulation
18 Article 109, 2019 Regulation
19 Section 8, state of play report
20 Article 111(1), 2019 Regulation
22 Article 110(1), 2019 Regulation
Regarding data protection, the agency plans a package of implementing rules (covering issues ranging from the position of data protection officer to the restriction of rights for returnees and restrictions under administrative data processing) to be implemented throughout 2020. The management board will review a first draft of the implementing rules on the data protection officer in the second quarter of 2020.

Returns

The European Return and Reintegration Network (ERRIN) – a network of 15 European states and the Commission facilitating cooperation over return operations “as part of the EU efforts to manage migration” – is to be handed over to Frontex. A handover plan is currently under the final stage of review; it reportedly outlines the scoping of activities and details of “which groups of returnees will be eligible for Frontex assistance in the future”. A request from Statewatch to Frontex for comment on what assistance will be provided by the agency to such returnees was unanswered at the time of publication.

Since the entry into force of its new mandate, Frontex has also been providing technical assistance for so-called voluntary returns, with the first two such operations carried out on scheduled flights (as opposed to charter flights) in February 2020. A total of 28 people were returned by mid-April, despite the fact that there is no legal clarity over what the definition “voluntary return” actually refers to, as the state-of-play report also explains:

“The terminology of voluntary return was introduced in the Regulation without providing any definition thereof. This terminology (voluntary departure vs voluntary return) is moreover not in line with the terminology used in the Return Directive (EBCG 2.0 refers to the definition of returns provided for in the Return Directive. The Return Directive, however, does not cover voluntary returns; a voluntary return is not a return within the meaning of the Return Directive). Further elaboration is needed.”

On top of requiring “further clarification”, if Frontex is assisting with “voluntary returns” that are not governed by the Returns Directive, it is acting outside of its legal mandate. Statewatch has launched an investigation into the agency’s activities relating to voluntary returns, to outline the number of such operations to date, their country of return and country of destination.

Frontex is currently developing a module dedicated to voluntary returns by charter flight for its FAR (Frontex Application for Returns) platform (part of its return case management system). On top of the technical support delivered by the agency, Frontex also foresees the provision of on-the-ground support from Frontex representatives or a “return counsellor”, who will form part of the dedicated return teams planned for the standing corps from 2021.

Frontex has updated its return case management system (RECAMAS), an online platform for member state authorities and Frontex to communicate and plan return operations, to manage an increased scope. The state-of-play report implies that this includes detail on post-return activities in a new “post-return module”, indicating that Frontex is acting on commitments to

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23 Section 9, state of play report
24 ERRIN, https://returnnetwork.eu/
25 Section 3.2, state of play report
26 Chapter III, state of play report
27 Section 3.2, state of play report
expand its activity in this area. According to the agency’s roadmap on implementing the 2019 Regulation, an action plan on how the agency will provide post-return support to people (Article 48(1), 2019 Regulation) will be written by the third quarter of 2020.28

In its closing paragraph, related to the budgetary impact of COVID-19 regarding return operations, the agency notes that although activities will resume once aerial transportation restrictions are eased, “the agency will not be able to provide what has been initially intended, undermining the concept of the EBCG as a whole”.29

EUROSUR

The Commission is leading progress on adopting the implementing act for the integration of EUROSUR into Frontex, which will define the implementation of new aerial surveillance,30 expected by the end of the year.31 Frontex is discussing new working arrangements with the European Aviation Safety Agency (EASA) and the European Organisation for the Safety of Air Navigation (EUROCONTROL). The development by Frontex of the surveillance project’s communications network will require significant budgetary investment, as the agency plans to maintain the current system ahead of its planned replacement in 2025.32 This investment is projected despite the agency’s recognition of the economic impact of Covid-19 on member states, and the consequent adjustments to the MFF 2021-27.

Summary

Drafted and published as the world responds to an unprecedented pandemic, the “current challenges” referred to in the report appear, on first read, to refer to the budgetary and staffing implications of global shut down. However, the report maintains throughout that the agency’s determination to expand, in terms of powers as well as staffing, will not be stalled despite delays and budgeting adjustments. Indeed, it is implied more than once that the “current challenges” necessitate more than ever that these powers be assumed. The true challenges, from the agency’s point of view, stem from the fact that its current mandate was rushed through negotiations in six months, leading to legal ambiguities that leave it unable to acquire or transport weapons and in a tricky relationship with the EU protocol on privileges and immunities when operating in third countries. Given the violence that so frequently accompanies border control operations in the EU, it will come as a relief to many that Frontex is having difficulties acquiring its own weaponry. However, it is far from reassuring that the introduction of new measures on fundamental rights and accountability are being carried out internally and remain unavailable for public scrutiny.

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29 State of play report, p. 19
31 Section 4, state of play report
32 Section 7.2, state of play report

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