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NOTE

From: Presidency

To: Working Party on Frontiers / Mixed Committee (EU-Iceland/Norway and Switzerland/Liechtenstein)

Subject: The future of Frontex: Governance and oversight

Frontex is among the largest EU agencies. This makes it relevant to continuously assess the governance framework applicable to the agency, particularly if the mandate or size of the agency is further expanded.

External oversight, Management Board, and operational planning

Regulation (EU) 2019/1896 on the European Border and Coast Guard includes clear provisions on external oversight by the European Parliament and the Council. For instance, article 116 includes detailed provisions on the implementation and control of the agency's budget by the European Parliament and the Council as well as the Court of Auditors.

Frontex's management board plays a key role in the governance of the agency. According to Regulation (EU) 2019/1896, the management board shall be composed of one representative of each Member State and two representatives of the Commission. Where possible, the member should be operational heads of the national services responsible for border management or their representatives¹. Article 101 stipulates that the management board members shall be appointed on the basis of the degree of their relevant high-level experience, their expertise in the field of operational cooperation on border management and return, and their relevant managerial, administrative and budgetary skills.

Article 100 lists more than 30 tasks of the Management Board. In addition, it may decide on any other matter, where provided for in the Regulation. The management board may establish an executive board of up to four representatives to assist it and the executive director with regard to the preparation of the decisions, programmes and activities to be adopted by the management board and to take certain provisional, urgent decisions on behalf of the management board when necessary. However, the Regulation does not provide for any formal preparatory body with the participation of all Member States. Given its current workload and possible new responsibilities of the Agency, the Presidency would like to discuss with delegations whether there is a need for modifications to the internal governance of the Agency, for instance with regard to return.

Article 106 lists the functions and powers of the executive director. These include evaluating, approving, and coordinating proposals made by Member States for joint operations or rapid border interventions as well as requests for return operations and return interventions.

¹ Recital 106

The Schengen evaluation and monitoring mechanism (SEEM) based on Regulation (EU) 2022/922 follows the logic of peer-to-peer review among Member States in accordance with Article 70 of the Treaty on the Functioning of the European Union. It allows for the verification of the activities of Frontex insofar as Frontex performs functions on behalf of the Member States, but there is no equivalent evaluation mechanism for Frontex's activities. In other words, Frontex's operations and the competence of its operational staff are not assessed by any external and transparent mechanism. Therefore, the Presidency would like to discuss with delegations whether Member States see a need to establish an external evaluation mechanism focused on Frontex's operational performance and its personnel's operational competence.

Against this backdrop, Member States may wish to consider whether targeted legislative or procedural adjustments are needed to:

- Clarify the powers and duties of the executive director and of the Management Board and possibly rebalance responsibilities between the Management Board and the Executive Director;
- Introduce measures to ensure permanent representation of return authorities in the Management Board;
- Formalize a preparatory or executive board structure with the participation of all Member States;
- Further strengthen operational planning.

Fundamental rights

Compliance with fundamental rights is a key element of governance. To that end, Regulation (EU) 2019/1896 already includes comprehensive provisions on fundamental rights.

Article 109 includes provisions of the tasks of the Fundamental Rights Officer. Among these is monitoring the Agency's compliance with fundamental rights, including by conducting investigations into any of its activities and managing at least 40 fundamental rights monitors. According to article 110, the fundamental rights monitors shall constantly assess the fundamental rights compliance of operational activities. In accordance with article 108, Frontex has also established a consultative forum which provides independent advice on fundamental rights matters. Article 111 tasks the Agency in cooperation with the fundamental rights officer to set up and further develop an independent and effective complaints mechanism to monitor and ensure respect for fundamental rights in all the activities of the Agency.

Article 46 regulates the contexts where the Agency might need to suspend, terminate or not launch activities, in whole or in part, for a number of operational reasons, including due to fundamental rights violations connected to the activity in question. In line with Article 46(4), in cases connected to fundamental rights concerns, the executive director shall, after consulting the fundamental rights officer and informing the Member State concerned, withdraw the financing for any activity by the Agency, or suspend or terminate any activity by the Agency, in whole or in part, if he or she considers that there are violations of fundamental rights.

Member States could discuss whether the current provisions on fundamental rights, including article 46, have proved sufficient to ensure effective monitoring of, and compliance with, fundamental rights in the context of Frontex's activities.

European Integrated Border Management

Regulation (EU) 2019/1896 provides for a multiannual strategic policy cycle as an overarching governance framework for European Integrated Border Management (EIBM), cf. annex. The strategic policy cycle is based on a communication from the Commission establishing the multiannual strategic policy for EIBM. Frontex plays a key role in the policy cycle as its management board subsequently adopts a technical and operational strategy which provides the starting point for Member States as they develop their national strategies for EIBM through close cooperation between all national authorities responsible for the management of external borders and return (article 8).

On the basis of the multiannual strategic policy cycle, moreover, Member States shall e.g. adopt contingency and national capability development plans as part of an integrated planning process for border management and return (article 9).

In accordance with Regulation (EU) 2019/1896, the Commission shall carry out a thorough evaluation of the implementation of the multiannual strategic EIBM policy in 2027. Without prejudice to the Commission's evaluation, Member States could discuss whether the framework of the multiannual policy cycle has proven useful, and whether there is a need to reexamine the EIBM components to ensure effective EIBM governance and avoid overlaps between the components. This could include the EIBM component relating to quality control mechanisms to avoid overlaps between e.g. Schengen evaluations and vulnerability assessments, keeping in mind that synergies are already foreseen in both Regulation (EU) 2019/1896 and the SEEM regulation.

Questions

Against this background, the Presidency would like to invite delegations to reflect on the following questions:

1. Do you see a need for legislative amendments or simplification as regards:
 - a. External oversight – including possibly an external evaluation mechanism regularly assessing Frontex operations and performance?
 - b. The Management Board?
 - c. Operational planning?
2. Is it necessary to amend the existing provisions on fundamental rights? Would the current framework on fundamental rights be sufficient to ensure effective monitoring of fundamental rights across Frontex's activities in view of possible changes in the tasks and mandate of Frontex?
3. How could the multiannual EIBM policy cycle be improved? Do you see a need to reexamine or simplify the EIBM components, for instance relating to quality control mechanisms?

Annex: European Integrated Border Management

The Treaty on the Functioning of the European Union stipulates that the Union shall develop a policy with a view to the gradual introduction of an integrated management system for external borders (Article 77(1)(c) TFEU).

Regulation (EU) 2019/1896 on the European Border and Coast Guard provides that European integrated border management should be based on the so-called four-tier access control model. This model comprises measures in third countries, such as under the common visa policy, measures with neighbouring third countries, border control measures at the external borders, risk analysis and measures within the Schengen area and return.

Moreover, Regulation 2019/1896 defines European integrated border management as consisting of the following components:

1. Border control, including measures to facilitate legitimate border crossings and, where appropriate, measures related to e.g. cross-border crime
2. Search and rescue operations
3. Risk analysis
4. Information exchange
5. Inter-agency cooperation
6. Cooperation among the relevant Union institutions, bodies, offices and agencies
7. Cooperation with third countries
8. Technical and operational measures within the Schengen area which are related to border control and designed to address illegal immigration and to counter cross-border crime better
9. Return
10. The use of state-of-the-art technology including large-scale information systems

11. A quality control mechanism, in particular the Schengen evaluation mechanism, the vulnerability assessment and possible national mechanisms

12. Solidarity mechanisms, in particular Union funding instruments

Fundamental rights, education and training, as well as research and innovation are overarching components in the implementation of European integrated border management.

