



Analysis

The Reform of Frontex: Saving Schengen at Refugees' Expense?

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Years ago, shortly before the creation of Frontex (the EU's border control agency) and the big EU enlargement of 2004, I discussed the future of EU borders policy with a senior German civil servant. Anxious about the forthcoming enlargement of the EU (and, in time, Schengen), his vision was that every Lithuanian or Polish border post would be jointly staffed by a friendly German.

Yesterday's proposals from the European Commission don't precisely reproduce that vision – but they do embody the same doubt that Member States (in the south, rather than the east) can be fully trusted to patrol the external border. Given that Frontex has been created in the meantime, it's the agency itself – flanked by reserves from national border agencies – which would be sent in to help patrol the borders of Member States, albeit only in certain cases.

This is only one of a batch of [proposals](#) made yesterday. I'll sum them all up, but focus on this one, as it's the most important. Overall, though, the proposals are flawed, in two contradictory ways: they simultaneously seek to do **too much in the area of border controls** (where the Frontex proposal exceeds EU powers and is politically unprincipled) and **too little in the area of asylum** (since there is no significant attempt to address humanitarian or protection needs within the EU). In short, they seek to save the Schengen system, at the expense of refugees.

Overview

There's a Commission [communication](#) issued yesterday which tries to sum up all the new proposals. But in an even smaller nutshell, here's what the Commission has tabled. The flagship proposal is a [Regulation](#) which would replace the existing Frontex legislation, creating a new 'European Border and Coast Guard' (EBCG)

consisting of national border guards plus the agency. This is accompanied by two proposals for minor consequential amendments to the Regulations establishing the EU's [Fisheries Control Agency](#) and [Maritime Safety Agency](#), whose work would be coordinated with the EBCG.

Next, an [amendment](#) to the Schengen Borders Code would increase checks at the external borders on EU citizens and, to some extent, non-EU citizens, for security purposes. A fifth proposed [Regulation](#) attempts to make expulsion and readmission more effective, by creating a uniform document to be used during removals of irregular migrants to their country of origin.

There are non-binding measures on border control issues too. The Commission has adopted a [Handbook](#) for use operating the EU's 'Eurosur' system of maritime surveillance. It has also released its latest regular report on the [Schengen system](#) in practice.

In the area of asylum, there's only one proposal for a binding measure: a [Decision](#) which would exempt Sweden from the EU's system of relocation of asylum-seekers (which I previously discussed [here](#)), for a period of one year. There's a non-binding Commission [Recommendation](#) for a voluntary humanitarian admission programme of refugees from Turkey. Finally, there are Commission reports on the operation of the 'hotspots' for immigration control in [Greece](#) and [Italy](#), and on the application of the recent plan to manage asylum and migration flows coming through the [Western Balkans](#).

The new European Border and Coast Guard

As noted already, the proposal would replace the existing legislation establishing Frontex, which was first adopted in 2004, then amended in 2007 and 2011. (I previously produced a codified text of the Regulation – see [here](#)). To compare it with the text of the rules it replaces, see the [Annex](#) to the proposal. There would be no change to the separate legislation, adopted in 2014, which regulates Frontex actions as regards maritime surveillance (see my comments on that law [here](#)).

It should be emphasised that the legislation would not apply to the UK or Ireland, because they don't participate fully in Frontex. In fact, according to CJEU [case law](#), they *can't* participate fully in Frontex unless they join the Schengen system fully – which is hardly likely, to say the least (it would require a referendum in the UK). However, the current loose cooperation between Frontex, the UK and Ireland would be retained, particularly for joint expulsions.

These new rules would – if agreed – significantly transform the status and role of Frontex. I won't examine every detail for now (I might come back to the finer points during or at the end of the negotiations). Rather, my focus here is on the key aspects of the proposal. Keep in mind that this proposal is far from a 'done deal', since it has to be approved by a qualified majority in the Council (the UK and Ireland don't have a vote, due to their opt-out) as well as the European Parliament. Already [press stories](#) suggest that many Member States oppose some key features of the proposal.

The first key feature of the law is the relationship between Frontex and national border forces. At present, the current Regulation states that 'the responsibility for the control and surveillance of the external borders lies with the Member States'. Frontex is merely tasked with the 'coordination' of national forces.

But the proposed Regulation would, in effect, promote Frontex from the job of tea lady to the role of chief executive officer. The new law would not just upgrade the EU agency itself, but create a 'European Border and Coast Guard' consisting of national forces *and* the Agency. The Agency will adopt an 'operational and technical strategy for the European integrated border control management'. National authorities then adopt their own strategies, but they must be 'coherent' with the Agency's strategy. To put the strategy into effect, the Agency will not only be 'reinforcing, assessing and coordinating' national forces, but also taking control of them when Member States are not able to do so effectively.

The current tasks of Frontex – training, risk analysis, research, operational support, border surveillance, and support for expulsions – would all be retained and considerably enhanced. For instance, Frontex would have powers to send liaison officers to Member States, to check the 'vulnerability' of external border controls, to create a 'return office', and to gather and analyse more personal data. It would also have powers to send staff to third countries to participate in operations, not just (as at present) liaison officers. It would have more staff and funding, as well as reserve forces from Member States to call upon for border control or joint return operations. Most significantly, it would be able to send forces to an external border, in certain cases, without a Member State's consent.

Is this power compatible with the limits on the powers of the EU? Article 72 TFEU states that the Justice and Home Affairs (JHA) Title of the Treaty 'shall not affect the exercises of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security'. This Article must apply to border control as well as policing, since there was an equivalent clause in the border controls and immigration Title of the Treaty before it was merged with the policing rules by the Treaty of Lisbon. It obviously does not rob the EU of *all* power to adopt laws regulating borders, since Article 77 TFEU goes on to confer powers to adopt laws on 'the checks to which persons crossing external borders are subject' and which are 'necessary for the gradual establishment of an integrated management system for external borders'.

But the JHA Title specifically restricts EU powers regarding intelligence agencies, and bans coercive powers for Europol (the EU police agency) and prosecutorial powers for Eurojust (the EU prosecutors' agency). In my view these restrictions are particular applications of the general rule set out in Article 72, which must mean that while the EU can establish rules on border controls and regulate how Member States' authorities implement them, it cannot itself replace Member States' powers of coercion or control, or require Member States to carry out a particular operation. This is consistent with Article 4(2) TEU, which requires the EU to respect Member States' 'essential state functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding internal security', and with the requirement that any common EU defence would have to be agreed unanimously and ratified by national parliaments.

So the EU does not have the powers to send Frontex or its reserve forces to other Member States without their consent, or to require Member States to deploy those reserve forces without their consent either. Moreover, this is politically problematic for many Member States, who have historic concerns about foreign forces coming on to their territory without consent, stemming from the Cold War, the Second World War, and earlier history besides. While Frontex and its reserves should not be regarded as an 'army', due to their limited size and functions, they will nonetheless be perceived as such. So this aspect of the proposals is not only legally suspect, but politically ill-judged.

What to make of Frontex's other enhanced powers, which Member States are rather more likely to accept? The key issue here is the accountability of Frontex for human rights abuses. The agency has fought a long battle with the EU Ombudsman to evade any accountability for individual cases, but it would finally lose that war, if this proposal is accepted. Individuals (or someone acting on their behalf) could make a complaint about human rights abuses, but it would be rejected if it was 'anonymous, malicious, frivolous, vexatious, hypothetical or inaccurate'. Each complaint would go through the Frontex Fundamental Rights Officer, who would decide on admissibility and then either forward the complaint to the Frontex Executive Director or a national border force. If the complaint is well-founded it will be followed up, possibly by disciplinary action.

However, the proposed process is inadequate. The Executive Director, who will decide on the merits of admissible claims, is obviously not independent of Frontex. There is no reference to a remedy if the complainant believes that his or his complaint has been wrongly rejected as inadmissible or not well-founded. Even where Frontex considers the complaint well-founded, the remedies are ineffective: there is no reference to damages, or a possible criminal prosecution in the most outrageous cases. Furthermore, the new rules are limited in scope, as they do not apply to national border guards, who are responsible for alleged cases of illegal push-backs and assaults upon migrants. To address this, the other proposals released yesterday should be amended to require Member States to hold independent investigations with effective remedies in any case where national border guards are alleged to have acted in breach of fundamental rights.

There is also a need for specific rules regulating Frontex (and national authorities') action as regards the 'hotspots' for migrants at external borders, to clarify that they are not making decisions on the merits of asylum applications or issuing return decisions, and that only national authorities can make such decisions with full respect for the safeguards and content of EU and national law. (For more on the lack of clarity regarding the 'hotspots', see Frances' Webber's analysis [here](#)).

Other new measures

The most significant other new measure is the proposal for changes to the **Schengen Borders Code**. At present (see codified text [here](#)), Member States must check EU citizens at the external borders (either on entry or exit), to ensure that they hold an EU Member State's passport which is not registered as lost or stolen. But there is no obligation to check them in security databases, except on a 'non-

systematic basis'. As for non-EU citizens, they must be more thoroughly checked on entry, including the use of security databases, but on exit the consultation is only optional, and security checks need only be carried out 'wherever possible'.

Both sets of rules would be amended by the new proposal. EU citizens would have to be checked in security databases, both on entry and exit. But if this 'would have a disproportionate impact on the flow of traffic' at land and sea borders, Member States could decide to carry out such checks on a 'targeted' basis. There is no such derogation for air borders, which will also be subject to separate legislation (recently [agreed](#) in principle) concerning the collection of passenger records (Member States will also apply this law to internal Schengen flights). Also, the enhanced border checks won't be recorded as such in a database, although that would happen in future if [recent plans](#) to include EU citizens in the future 'smart borders' rules are put into effect. As for non-EU citizens, the current derogation relating to exit will be abolished, and there will always have to be a check in security databases, regardless of any disproportionate impact on traffic.

So overall, checks on EU citizens in security databases would no longer be the exception to the rule (as at present); they would be the rule – subject to exceptions. The exceptions are relatively limited and the proposal does not accept that pressure at air borders could also be 'disproportionate'. Surely that is a possibility, since if checks add several seconds each to a check of hundreds of disembarking passengers, a back-up could swiftly ensue. Given that data on air passenger movements will soon be recorded anyway, and that the Schengen Information System can't be used to deny entry to EU citizens, the only practical use for the new rules would be in catching someone who was meant to be arrested, perhaps on the basis of a European Arrest Warrant, or who should be placed under surveillance. But in the latter case it might be awkward to arrange for the surveillance to start without tipping off the person concerned that it's happening. The proposal might prove useful in detecting people subject to potential arrest due to suspicion of receiving terrorist training (see the separate recent [proposal](#) on this point), but is it really necessary for that purpose that it apply at *all* air borders?

Overall, it may be questionable whether any increase in security that may result from this proposal is proportionate to its impact on passenger movements. There would be a stronger case to amend the Borders Code to allow Member States to check certain flights or border crossings systematically following a risk assessment. This may give rise to concerns about discrimination, but there are already distinctions based on nationality as to who needs a visa, and it would have to be specified that all those on the particular flight must be checked – not just those who 'appear Muslim'. Checks on all flights could only be justified if it were clear that 'foreign fighters' were returning to the EU via other countries too.

As for the **other proposals**, the Regulation on a standard travel document for expulsion would not change the substantive rules on expulsion; time will tell if it leads to non-EU countries accepting more expelled persons.

The real problem is with the lack of ambition of the **asylum measures**. As noted above, the only binding measure suggested yesterday would exempt Sweden from the EU's relocation rules. This is largely a cosmetic gesture, since only a tiny fraction

of the 160,000 who were meant to be relocated – which anyway is not a huge proportion of those entering Greece and Italy – have in fact been relocated. In the meantime, the capacity of Greece and other States to register migrants, process asylum applications, and ensure basic living conditions for the persons concerned is clearly under immense strain.

What the EU really needs is a new strategy to deal with these protection and humanitarian needs. Is there anything it can do to make the relocation programme work? Failing that, can it assist Member States to process asylum applications, or do more than it is doing to ensure basic living conditions are satisfied? Why the focus on empowering Frontex, and no parallel attempt to empower the EU's asylum support agency to play a greater role to address some or all of these issues?

Furthermore, pending a full review of the EU's Dublin system (to be completed early next year), the Commission could at least have issued a recommendation to Member States on how to apply the existing Dublin rules on family reunion, and to widen the admission of family members to admit siblings, and the relatives of EU citizens or non-EU citizens who are legally resident other than as refugees or asylum-seekers.

As Thomas Spijkerboer and Tamara Last have [pointed out](#), there is no shortage of migration controls in the EU. The death toll of migrants and refugees has built up over the decades in which visa requirements were imposed and carriers were sanctioned for letting those without authorisation get on a flight or a ferry. Bolstering Frontex may have an impact on the management of those who arrive, but solves neither the underlying problems in the country of origin or the huge pressure placed on national asylum systems – or the human misery that accompanies it.

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