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A New Mandate for FRONTEX - The Way Forward

The European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX), in operation since 2005, has been given a new mandate with the proposal for a Regulation amending the current Frontex Regulation.¹ Frontex's main task is the effective implementation of 'integrated border management' and its tasks can be classified as both "operational cooperation and coordination" and "capacity building by training, research and development". With regards to the former, Frontex is responsible for organizing joint operations, providing technical support to Member States along with facilitation of cooperation with third countries and international organizations. As for the capacity building activities, its major responsibilities involve risk analysis, training and processing of research and equipment. Although Frontex is the main institutional instrument available at EU level for border management and as such marks a significant step in the evolution of a genuine 'Area of Freedom, Security and Justice', it is important to assess what the new proposal brings and in which ways it is aiming to clarify the mandate of the Agency and to address the major shortcomings it possesses.

First and foremost, it should be noted that competences of Frontex over coordination heavily rely on Member States' solidarity. The new proposal like the previous one starts out by saying "*While the responsibility for the control and surveillance of external border lies with the Member States, the Agency shall facilitate and render more effective the application of existing and future EU measures relating to the management of external borders*". Here the explicit reference to external borders and role of Member States is to stress that the competence over border management rests solely with the Sovereign States. However, an amendment to Article 1 paragraph 2, refers to Schengen Borders Code, obligations related to access to international protection and fundamental rights, and as such further clarifies the legal framework in which the Agency operates.

Regarding joint operations and pilot projects at the external borders, a new article is inserted which sets out the obligation to draw an operational plan for all operations, followed by agreement to be reached between the Agency and the requesting Member States on the operational plan. In addition, the obligation for the Agency to establish a pool of border guards (Frontex Joint Support Teams) is something new. There is also the possibility for increased financial support, whereby the Agency may decide to finance or co-finance the joint operations and pilot projects with grants from its budget. As regards technical equipment,

¹ Proposal for Amending Council Regulation No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX)

there is a new obligation on the Agency to set up and keep centralised records of a Technical Equipment Pool. Moreover, it is made compulsory for Member States to contribute to TEP to allow for a minimum amount of equipment covering the needs of the Agency. These modifications point to the fact the 'voluntary' nature of the Agency, which left too much room for discretion on behalf of Member States is curbed to a certain degree. Also to alleviate the differences between national border guard services with a view to enhancing operational cooperation, Member States are obliged to integrate the common core curricula in the training of national border guards, which includes fundamental rights and access to international protection (Article 5). It could be argued that here we see a cognitive shift from a control-based approach to a more rights-based approach, which is a positive move.

With respect to return cooperation, one of the most controversial areas, the modifications to the existing provisions seem to be most progressive and welcome. By inserting new paragraphs, the EU return policy is set out more clearly in accordance with Directive 2008/115/EC. The Agency, in addition to providing necessary assistance upon request by Member States, will ensure coordination for organising joint return operations. Also, there is again the possibility to finance or co-finance the operations from its own budget. It is important to draw attention to the fact that any financial assistance to be given to Member States is conditional upon full respect of the Charter of Fundamental Rights.

What's more, a Code of Conduct laying down standardized guidelines to facilitate the return of illegal third country nationals conducted in line with EU values and human rights will be endorsed in all the joint operations coordinated by the Agency via air. Member States need to inform the Agency of their planned operations and the degree of assistance they are seeking from the Agency.

Regarding operational cooperation with third countries, the proposal broadens the scope of possible cooperation through the possibility of deploying liaison officers by the Agency in third countries. In the founding regulation, the scope of the foreseen cooperation between the Agency and third countries was confined to EU external relations policy and working arrangements concluded with authorities of third countries. These liaison officers will work closely with the competent third country authorities with a view to tackling illegal migration and assisting successful return. At the same time Article 14 (2) puts emphasis on safeguarding human rights by pointing out that only those third countries, most notably source or transit countries, in which border management practices respect minimum human rights standards will be given priority. In addition to this, the Agency may initiate and finance technical assistance projects in third countries within the remit of the tasks entrusted to it by this Regulation.

Frontex carries out joint operations based on risk analyses and threat assessments. However, risk analyses are completely secret and therefore there is lack of transparency. "In addition to this complete lack of transparency, the reports also suffer from a lack of democratic accountability since the European Parliament is completely left out of the ex ante and ex post process."² The new proposal does not bring anything new to address this democratic deficit or to improve transparency.³

² Carrera, Sergio (2007), The EU Border Management Strategy Frontex and the Challenges of Irregular Immigration in the Canary Islands, *CEPS Working Document* No.261.

³ The new Article 4 reads as follows: "It shall prepare both general and tailored risk analyses to be submitted to the Council and the Commission. For these purposes, Member States shall provide the Agency with all necessary information regarding the situation and possible threats at the external borders."

The external dimension of integrated border management by Frontex raises several issues for considering. It needs clear rules of engagement for the joint patrolling and disembarkation of rescued persons. At this point it would be too soon to comment on this issue since it is still in the making, however given the increasing prominence of protection of most notably the Southern maritime borders, the developments in this field both in terms of juridical clarity and human rights, will be critical in the effective functioning of Frontex in the months to come.