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Bossong, Raphael

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The Expansion of Frontex

Symbolic Measures and Long-term Changes in EU Border Management

Raphael Bossong

Strengthening external border management remains the lowest common denominator among Member States of the European Union (EU). Plans to expand the European Border and Coastguard Agency (Frontex) were formally adopted at the beginning of November. However, they will do little to meet the most pressing challenges of the EU's migration policy. The goal of placing 10,000 border guards under the command of Frontex can only be achieved in the medium term. While some EU Member States currently use illegal practices to secure their national borders, Frontex is increasingly subject to legal controls; operational missions are only possible by invitation from the country of deployment. Without violating legal principles, Frontex alone will not be able to accelerate the return of those who are the subject of removal orders from the EU. Nevertheless, the forthcoming Frontex reform will provide some additional technical value for securing the EU's external borders. Under changed political circumstances, the agency may be a pioneer for more European and operational security cooperation.

The migration crisis in Europe could flare up again at any time. The voluntary coalition of EU Member States — founded on Malta in September to distribute irregular migrants coming via the central Mediterranean — is too small and does not include all those countries affected by the currently critical situation in the Aegean. The EU remains politically divided and dependent on third countries such as Turkey, which is increasingly pursuing conflicting interests. Contrary to the promises of the new European Commission, there is no prospect of a "new start" on common asylum policy in sight.

However, the EU could agree to further strengthen its external borders and the European border management agency Frontex. This reform, introduced by the EU Commission in summer 2018, was agreed by all EU institutions towards the end of the last legislative period; the Council finally adopted it on 8 November 2019. In the 2019 European election campaign, politicians promoted the related objective of creating a force of 10,000 EU border guards in order to make its citizens aware of the Union's growing security role.

In principle, EU border police can help countries in crisis, such as Greece, to track irregular immigration and to combat smuggling networks more effectively. Large Frontex deployments could also send out a political signal: states with an EU external

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border will no longer be left alone in dealing with irregular migration, thus restoring confidence in the security of the Schengen zone among other Member States.

In 2016 a prior reform of Frontex was passed for similar purposes. Many of the measures envisaged at that time have not yet been fully implemented, for example the creation of a European reserve of 1,500 border guards, the posting of Frontex liaison officers to Member States or the establishment of an EU vehicle pool.

Obviously, there is a gap between the continuing acute migration crisis and the gradual development of Frontex. Smugglers are becoming increasingly professional and refugees are using alternative routes. In contrast, the new Frontex task force of 10,000 EU border guards will not be fully deployed until 2027. Even at full strength, Frontex will only be able to provide operational support for selected sections of the EU's external border. The main responsibility for migration control and border security remains with the individual Member State, each with its own security structures and operational capacities.

Both in 2016 and 2018, a majority of Member States rejected calls for Frontex to carry out completely independent controls at EU external borders, as this would violate their national sovereignty. The latest reform could also not be used to strengthen Frontex specifically for the task of sea rescues in the Mediterranean. For many liberal critics, Frontex is therefore, more than ever, a symbol of the EU's illegitimate border policies, which violate human rights and push refugees into ever more precarious situations. Instead, the EU should promote legal access routes and fair asylum procedures in all Member States.

Real progress beyond the public debate on migration

There will be no visible changes to how the EU's external borders are protected. Even with a reinforced mandate, European citizens will hardly experience directly how, where and why Frontex is deployed. It will primarily address specific weaknesses and promote technical reforms in national border management systems.

At this technical level, however, the expansion of Frontex may provide added value in terms of security as well as upholding the principles of the rule of law. This requires a closer look at the four main pillars of the adopted reform:

Firstly, Frontex will receive significantly more resources and administer them more independently. Around one third of the 10,000 border guards will form a new category of EU security staff directly recruited by Frontex. This partial decoupling from nationally seconded border police could make the planning and implementation of Frontex operations more reliable. In order to support the growth in personnel, the Frontex budget is to increase to around €9.4 billion in total in the coming multiannual EU financial framework (2021—2027). If spread evenly over this funding period, Frontex would receive more than €1.3 billion per year, more than triple the current budget. As a result, Frontex will also be able to purchase high-quality equipment (e.g. ships, helicopters) and new border technology (e.g. drones). This makes European cooperation (also) materially more interesting, especially for Member States on the EU's external border.

Secondly, the reform extends the agency's remit and competences. Member States will be under a greater obligation to implement the concept of "integrated border management" in close consultation with Frontex. The aim is to implement targeted and effective control measures, both upstream and downstream of the geographical border. All Member States are under pressure to boost their respective capacities and improve their organisational processes for integrated border management. In addition, Frontex will act as a coordination centre for pre-border area surveillance (by means of the EUROSUR system) and for the operation of risk-driven individualised border controls, such as the analysis of Passenger

Name Records (PNR) data and the forthcoming electronic entry permit for visa-free travellers (ETIAS). Last but not least, Frontex will be able to independently organise and implement return operations.

Thirdly, the reform will boost Frontex's international profile. For some years already, Frontex has been empowered to conclude administrative agreements with third countries, to post liaison officers abroad and to send border operations to neighbouring EU countries. Albania serves as a precedent for these operations: since spring 2019, a small Frontex team has been carrying out operational border security tasks there. The new regulation should make it possible to carry out similar operations in geographically more distant states.

Fourthly, Frontex will be subjected to more oversight and legal obligations to uphold fundamental rights. The EU's more recent data protection laws will be applied, as Frontex processes increasing volumes of personal data. The individual complaints mechanism for persons that may have been negatively affected by the actions of Frontex staff is to be strengthened. The executive director of Frontex now needs to justify his or her decisions with regard to such complaints. Furthermore, the latest Frontex regulation includes a general clause to hold the agency itself liable for damages. This may become pertinent given that a new category of EU border guards is to be created which could potentially exercise force or other coercive measures. The Frontex Fundamental Rights Office is to be better equipped and will in future draw up assessments of deployment plans and cooperation projects with third countries, as well as a produce an annual report on the activities of the agency. Finally, independent observers are to be deployed to all Frontex border security missions and return operations to ensure respect for human rights and refugee law.

All in all, the new Frontex regulation reinforces the agency's existing profile to promote integrated border management. We will see increased technical checks on persons, data and risk analyses on irregular migration, and networking with third countries. In all likelihood, these measures will not significantly reduce the overall number of irregular migrants. Nevertheless, Frontex will become a key reference point for EU decision-makers and will stimulate further reforms at all political levels. Frontex is already the EU's largest internal security agency in terms of personnel and funding and will continue to expand on a considerable scale. Other EU agencies working in the Area of Freedom, Security and Justice will, however, have to fight even harder to obtain sufficient resources and support for their equally growing tasks. In the area of migration management alone, this applies to the European Asylum Support Office (EASO), the European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (eu-LISA) as well as the European Union Agency for Law Enforcement Cooperation (EUROPOL). Seen differently, the concentration of funds to create an independent EU border force and to acquire extensive technical means for border control could serve European integration in the long term, similar to the logic of the European Defence Fund and the Common Security and Defence Policy (CSDP). The new Frontex could, thus, serve as a pioneer on the way to a genuinely operational "security union" which focuses on European internal security in a broad sense.

This long-term perspective — rather than the current state of the European migration debate — necessitates a deeper and critical engagement with the future implementation of the new Frontex mandate.

Return operations and the accountability of Frontex

In expert as well as political debates, the issue of border control is increasingly surpassed by the question of "effective" returns of irregular migrants and rejected asylum seekers. The further evolution of Frontex is critical in this regard. Frontex will use its increased financial budget as

leverage: In return for more in-kind contributions or training, the agency will deepen cooperation on returns with countries of origin and transit in the European neighbourhood. Third countries such as Tunisia are often primarily interested in technical equipment assistance and in strengthening border protection.

In the course of the political negotiations, the European Parliament (EP) prevented Frontex being empowered to support return operations from non-European transit countries to countries of origin, for instance from Morocco to Nigeria. In such a constellation, it is almost impossible to guarantee that European human rights standards are adhered to. Nevertheless, some Member States, such as Poland, emphasised that it was absolutely necessary that Frontex helped to ensure that irregular migrants are stopped in the EU's neighbourhood (for example in Bosnia and Herzegovina) and directly returned to their country of origin. In light of this, the EP considerably weakened the effectiveness of the latest Frontex reform. Further informal or bilateral agreements on returns between EU Member States and various transit states in the EU's neighbourhood are, therefore, to be expected in the coming years.

In contrast, human rights and refugee organisations argue that the supervisory mechanisms for Frontex remain far too weak. There is still no credible sanctioning mechanism for human rights violations committed by Frontex itself or with regard to the situation of refugees in countries where Frontex operates. Sending independent observers to protect the rights of refugees — as provided for in the new Frontex Regulation — is of little help. Ultimately, Frontex can only terminate its own operations in response to critical reports and allegations. So far, there is no precedent for such a decision, which diminishes the credibility of the agency. In any case, the suspension of a Frontex mission is not an effective instrument to exert pressure on Member States or third countries that systematically violate fundamental rights. That is one more reason why, from the point of view of refugee organisations, Frontex must not expand its cooperation with countries of transit and origin.

The EU must seek a balance between these positions in the coming years. Member States are pressing for a measurable reduction in irregular immigration and for more people to be expelled from the EU. By contrast, the new EP and the responsible LIBE committee will continue to stress that the EU Charter of Fundamental Rights and the current standards under the Common European Asylum System must be observed.

Recruitment and training of EU border guards

The other major challenge in implementing the forthcoming Frontex reform is to develop and train new staff. In October 2019, the agency published adverts to recruit 700 European border guards. These forces will no longer be seconded from the Member States, as has been the case to date, but will be recruited directly by Frontex. The entire standing Frontex border force will still be primarily composed of national border guards. The current objective is to have 1,500 national border police officers on call; by 2021 the figure is expected to be around 5,000. At the same time, there is to be a shift from short-term to long-term deployments to Frontex. Member States are, therefore, becoming less and less flexible in the use of their human resources for border security.

The new Frontex mandate also stipulates that the number of EU border guards should double from 1,500 to 3,000 following an evaluation in 2024. Together with the forces of the Member States, Frontex is to reach its full strength of 10,000 border guards by 2027. German politicians have repeatedly argued that this process must be accelerated. In practice, these appeals generate little resonance. Several Member States already think the target date of 2027 is too challenging. Human resources are lacking at both the national and the European level, not least as there is a constant increase in

tasks and requirements for internal security. In Germany, for example, this applies to a possible intensification of so-called *Schleierfahndung* (dragnet controls) in border areas.

Moreover, the EU is concerned that there will be an insufficient response to Frontex's new job advertisements. Applicants may not be sufficiently qualified and/or not all Member States may be represented equally, not least because employees in Warsaw (where the agency is based) receive below-average pay compared to other European countries. Salaries for EU employees are offset using a correction coefficient depending on the cost of living compared to Belgium and Luxembourg; in the case of Poland it is about 30 percent lower.

The creation of a new category of EU border guards also raises a number of further questions. For example, their training and professional standards need clarifying. National border guards seconded to Frontex draw on the knowledge and legal frameworks of their respective home countries. In its latest call for applications, Frontex mentions a six-month training course to become a European border guard. In order to make this possible in practice, the call is initially directed at former employees of national security and law enforcement agencies who could bring broadly comparable work experience to the table. In this context, it should be noted that Frontex's most recent recruitment drive is also aimed at former members of the military. With such a pragmatic recruitment strategy, it must be ensured that the new EU's own border guards adhere to high standards. The Common European Asylum System (GEAS) and the EU Charter of Fundamental Rights must be respected.

Frontex forces and the country of deployment

Conversely, it remains to be seen whether the pool of new Frontex forces will be used extensively in practice. The Member States should implement the agency's recommendations in their respective border management systems. The recent reform reinforces the right of the Frontex Director to make reform proposals to individual states in this regard. Should a Member State fail to take appropriate measures, even if called upon by further joint decisions by the Commission and the Council of Home Affairs Ministers, the Council may ultimately decide to suspend that Member State as a full member of the Schengen zone.

These mechanisms confer considerable power on Frontex as an expert authority. Nevertheless, an operational Frontex mission can only be deployed in cooperation with the respective external border state. The inviting state also commands the Frontex forces on the ground. National responsibility for public security under Article 4 (2) of the Treaty of the European Union is thus preserved. From a practical point of view, Frontex forces also need to cooperate closely with the country of deployment. For example, irregular migrants or suspects must be handed over to local authorities to initiate asylum proceedings or police investigations. A unilateral supranational takeover of sections of the EU's external borders by Frontex forces is therefore neither legally possible nor realistic.

Meanwhile, national and European border guards are obliged to grant all arriving persons a fair asylum procedure upon request, including irregular migrants. They must be granted leave to remain on European territory until the procedure has been completed. Only in exceptional cases should surveillance systems that extend into areas beyond European external borders be used to involve neighbouring states, so that the latter can intercept irregular migrants at an early stage. Indirect European migration control through data transfer to third parties outside the EU is illegal if there is no reliable humanitarian protection for the people concerned.

Thus, an increased Frontex presence at Europe's external borders cannot be equated with a clear reduction in irregular migration. The main task of Frontex operations is

to better record and register migratory movements which may entail taking legal responsibility for persons seeking protection. As long as no Community mechanism for the distribution of refugees within the EU is established, individual Member States will remain tempted to pursue measures that are contrary to European migration and refugee law. Examples are the "waving through" of irregular migrants, border pushbacks and "hot returns", the use of systematic police violence in border regions or maintaining inhumane reception conditions as a deterrence. It cannot be presumed that states at the EU's external border will voluntarily invite large Frontex missions, if such missions are accompanied by greater transparency and stricter control over border security practices — as should legally be the case. This assumption is based on the fact that several external border states in Southern and Eastern Europe have officially spoken out against the new Frontex reform.

Frontex for border procedures

As an alternative to border controls, the new Frontex forces could help speed up asylum procedures near borders. A number of Member States with EU external borders could create facilities that go beyond the existing and often dysfunctional hotspots in Italy and Greece. Irregular migrants and asylum seekers should not only be registered and identified there, but should also receive a decision on their protection status as soon as possible. Frontex could provide security support for such centres and organise the rapid repatriation of rejected applicants.

The concept of so-called "controlled centres", which the European Council considered in the summer of 2018, was already headed in this direction. These closed centres should, as far as possible, provide for equivalent evaluation procedures of irregular migrants, after which they would be distributed throughout the Union as asylum seekers or repatriated. To this end, the European Asylum Support Office (EASO) would eventually have to be empowered to make decisions, i.e. to become a genuine EU asylum agency. Europol would have to devote more attention to security screening irregular migrants and combatting smuggling. These EU agencies could thus act in joint "European support teams for migration management".

In anticipation of its EU Presidency in the second half of 2020, Germany has submitted a renewed version of this concept to be debated over the coming months. Similarly, there should be a timely preliminary examination of asylum seekers in closed centres near the border. If there were no obvious reasons for refusal, applicants could be distributed to other EU Member States where a complete asylum procedure would be undertaken. Frontex would also be responsible for returning asylum seekers rejected at that first stage.

No substantial progress can be expected on this until the situation in Greece improves significantly. The country's preliminary screening and immediate return procedures based on the EU-Turkey agreement have largely failed so far. The new conservative Greek government has decided to dismantle the existing camps on several Greek islands and to create new, closed facilities for asylum seekers on the mainland. At the time of writing, most observers are deeply sceptical that the Greek authorities will manage to ensure faster and fairer asylum procedures as well as decent reception conditions and living conditions in these new centres. In addition, the return of irregular migrants to Turkey is more problematic than ever under the current political conditions.

Closed centres for European asylum and return procedures also face general legal challenges. For example, if EU agencies were to take over these centres and procedures directly — be it only for the preliminary examination of asylum claims — individual rights to a fair trial remain with the respective country. In the case of measures as sensitive as forced returns, legal remedies can at most be sped up, but should by no

means be effectively annulled. Northern European Member States, too, struggle to uphold these guarantees and avoid asylum seekers being detained for a disproportionately lengthy period. All EU Member States must continue to build up their national capacities for processing asylum claims swiftly and according to the rule of law. Only then can Frontex make a sustainable contribution to screening and returning asylum applicants in closed centres.

Frontex for international missions

One last option for the growing Frontex border force is to deploy them on international border missions. In this context, Frontex staff may carry out border control tasks in third countries, which go beyond coordinating returns. The first such Frontex mission started in Albania in spring 2019. This mission, which currently consists of slightly over 60 border police officers from the EU, is considered a successful pilot project. Albanian authorities have almost no border guards and technical resources and are grateful for any assistance. Similar missions to strengthen operational border controls may follow in Montenegro and other Western Balkan countries, with the exception of Kosovo. The necessary status agreements have already been signed and are in the process of being ratified. These legal steps contrast with the humanitarian situation of irregular migrants, some of whom have been stuck in the region for years. Further flight movements from Turkey to Greece will aggravate the situation. Future Frontex missions in the Western Balkans will therefore operate in a much tenser environment. The refusal to open EU accession negotiations with Northern Macedonia and Albania will further weaken European influence.

Against this background, the latest Frontex reform extends the permissible theatre of operations beyond states that directly share a border with the EU. In purely legal terms, this makes it possible for Frontex to conduct missions in North Africa or other transit countries and countries of origin for migration to Europe. Frontex is already present in many of these countries in an advisory capacity and provides technical support or equipment. However, Frontex missions with operational tasks depend on an invitation from the respective country of deployment — comparable to the situation within the EU (see above). It is not clear which third country would wish to issue such an invitation and how this would overlap with EU CSDP operations. Particularly in Sahel countries, both military operations and civilian missions have been extended to include border protection or newly established for this purpose. Comparable Frontex missions would focus even more explicitly on the EU's interest in deterring and detaining irregular migrants before they reach the shores of the Mediterranean. A maximalist scenario would be as follows: Frontex missions secure and support humanitarian reception camps in third countries, to which irregular migrants could be taken after being intercepted (rescued) at sea and/or in which they could file an extraterritorial asylum application for Europe. Previous pilot projects in Niger have shown, however, that only a very small number of vulnerable persons were relocated to Europe for humanitarian protection. This is one of the reasons why the African Union has clearly rejected what are known as "disembarkation platforms" or new centres in which extraterritorial asylum applications can be lodged.

The more relevant question today is whether the establishment of 10,000 Frontex border guards undermines the CSDP's capacity to develop its management of civilian crises. The EU is currently pursuing a new approach with its Civilian CSDP Compact. National police officers and border guards are both eligible to take part in either CSDP or Frontex missions. So far, the Union has not presented an overarching concept for a respective division of labour. One could assume that CSDP operations are to continue to focus on security sector reform and conflict management, while

Frontex missions could only take on narrowly defined border management tasks in third countries. If the political situation in Europe changes, Frontex may also become more active in sea rescues beyond coastal waters. In this context, Frontex is obliged to apply all EU legislation on asylum and refugee protection, which is not necessarily the case with comparable CSDP operations, such as EU Sophia. Yet a recent ruling of the Court of Justice has blocked external requests for more transparency with regard to the movements and operational deployment of Frontex ships. It remains, therefore, open to debate as to how a renewed European effort for rescue missions on the Mediterranean Sea should best be organised.

Recommendations

The latest reform of Frontex requires a long-term vision. If political decision-makers place too great an emphasis on quick recruitment of EU border guards, the risks will outweigh the benefits. Moreover, the expansion of Frontex cannot mask the lack of consensus on how to deal with irregular migration. Additional steps to strengthen controls at the EU's borders are not decisive. The thorny problems of "burden-sharing", the development of capacities in national asylum systems and the political willingness to promote "safe, orderly and regular" migration have to be tackled head on.

The EU should also remember that the Frontex reform was meant to be flanked by a genuine European asylum authority. An upgraded EASO with more competences to supervise the Member States and make decisions at early stages of individual asylum claims would be needed if (closed) application and processing centres in the vicinity of EU external borders are to make sense. All further reform efforts must ensure two things: the rule of law and access to effective legal remedies in states of arrival. The expansion of Frontex, in contrast, should not be abused to accelerate return operations at the cost of fundamental rights.

Rather, Frontex should focus on its core mandate, namely to promote professional standards and new technical means for border control. This should be done with the highest possible degree of transparency and accountability for irregular migrants and those seeking protection. This applies both to the EU's own border guards and to its cooperation with national border police forces, both inside and outside Europe. In times of persistently high migration pressure, this is not an unrealistic yardstick, but the necessary basis for a viable long-term integration of European security authorities.

Dr Raphael Bossong is an Associate in the EU/Europe Division at SWP.

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SWP
Stiftung Wissenschaft und Politik
German Institute for International and Security Affairs

Ludwigkirchplatz 3—4
10719 Berlin
Telephone +49 30 880 07-0
Fax +49 30 880 07-100
www.swp-berlin.org
swp@swp-berlin.org

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