THE NEW FRONTEX AND THE FUTURE OF SCHENGEN

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A BRICK FORTRESS, OR A CASTLE MADE OF SAND?

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- The role and capacity of Frontex have quickly been modified in order to respond to the challenges of irregular migration and transnational terrorism.

- Concerns about losing national sovereignty due to the new and enhanced role of Frontex are groundless: Member states will still have the final say on how to control their own borders.

- While it has been easy to strengthen control, there is still one unanswered, vital question for the future of Schengen: How to share the burden of migration?

- If the question on burden-sharing remains unanswered, the EU will be dependent on externalizing the challenge of migration through dubious bilateral agreements with volatile and disinterested neighbours.

- Enhanced control over the external borders is a welcome measure, but it is not a definitive solution for tackling the challenges of irregular migration and transnational terrorism. Europe needs more effective control inside the Schengen area, but there are no easy remedies for how this could be achieved without compromising the core principle of freedom of movement inside Schengen.

Drivers of change: Migration and foreign terrorist fighters

Sometimes the best drivers of change emerge from crises. In 2015, the European Union faced a sudden increase in the number of migrants and refugees coming from its Southeastern borders, which put the national border controls and migration management on the main entry routes, namely in Greece, Hungary and Italy, to the test. They failed. As a result, thousands of migrants crossed the external borders of the EU and continued their journey within the Schengen area to their target destination, or somewhere in-between if they were not able to reach their goal. This decision sidelined the Dublin regulation on refugees, according to which, one can only apply for asylum from one EU member state, that is, the one in which the asylum-seeker first registers within the EU. This should be the country that the applicant first enters, but due to the exceptional situation in 2015, the procedure has not functioned as planned. A common response to the issue was not reached, since the political atmosphere in many member states was not amenable to such a number of asylum-seekers. In order to send a message to potential incomers, many member states set up temporary border controls on their national borders, inside the Schengen area. The lack of a common response and solidarity among member states has created discord within the EU and jeopardized the whole principle of freedom of movement.

Another significant driver of normative changes has been the foreign terrorist fighter issue. It is estimated that some 5,000 to 6,000 volunteers have travelled from Europe to take part in the civil war in Syria and Iraq. Many of the volunteers have joined the terrorist organization ISIS and committed war crimes. As the Charlie Hebdo and November 2015 attacks in Paris demonstrated, returnees from terrorist organizations can bring warfare to Europe upon their return. As a result, there has been an increased impetus to adopt new criminal law measures in order to lower the threshold for bringing foreign terrorist fighters to justice. For example, in some countries the mere act of travelling to the conflict zone in Syria has become illegal, if it is suspected that the traveller might join some of the terrorist organizations on the ground.

In response to the above-mentioned challenges to the Schengen border control, the European Agency for the Management of Operational Cooperation at the External Borders, commonly known as Frontex, has undergone serious reform whereby its role, mandate and capabilities have been enhanced. The new Agency has been renamed the European Border and Coast Guard Agency, but in order to avoid confusion, the name Frontex is still used. This briefing paper analyzes these recent changes, and although insufficient time has elapsed to appraise all the practical impacts, it is nonetheless possible to estimate how certain aspects of the new mandate and technical measures will affect the addressed issues of migration and counterterrorism.

Bricks in the wall

In September 2015, before the attacks in Paris, European Commission President Jean-Claude Juncker gave a speech to the EU Parliament on the State of the Union, calling for "fundamental changes" to the way in which Europe deals with asylum applications and proposing that "Frontex should be strengthened and developed into a fully operational European border and coast guard system". Juncker's call led to very rapid institutional and mandate changes regarding border control. In the aftermath of the Paris attacks, attention was also paid to technical enhancements regarding traveller databases and their usage. In all, the main changes proposed included:

1. Defining European Border Management as a shared responsibility for Frontex and the national authorities.
2. Extending the role and capacity of Frontex, which was re-named the European Border and Coast Guard Agency, and launched in October 2016.
3. Adopting an entry-exit system (EES) for non-EU citizens at the external borders. The goal is to obtain data on when and where every third-country citizen enters and exits the Schengen area. In addition to this, a European Travel Information and Authorization System (ETIAS) for visa-free non-EU citizens will be established.
4. Executing systematic database checks on Schengen citizens as well, when they cross the external borders. This amendment to the Schengen border code was added on March 7, 2017. Checks are made using the Schengen Information System II database, whereby relevant national institutions like the Police,

Customs, and Border Guards can inform other institutions about people and items that they are searching for.

The Commission actually proposed an even stronger Frontex, one that would have had more executive powers over member states, but this was not accepted. Besides the issue on sovereignty, there was little resistance to other measures increasing control over the external borders. They are in effect "bricks in the wall", measures that will make physical border control more effective when tackling issues like irregular migration, criminal networking, and the threat of returning foreign terrorist fighters.

Mandate of the new Frontex Agency

The new European Border and Coast Guard comprises the European Border and Coast Guard Agency, namely Frontex, and all the national border control authorities in the member states. The difference is that the responsibility for border control is now shared, whereas previously each member state only took care of their own borders. To give an impression of the scale, there are approximately one thousand employees in the Frontex agency, whereas the national institutions employ nearly half a million. Furthermore, the mandates of the European Fisheries Control Agency and the European Maritime Safety Agency have been aligned with that of the new European Border Guard, since they also operate in international waters and cooperate closely with third countries. The role of the Agency is above all to coordinate and facilitate cooperation between the national authorities.

In order to prevent a reoccurrence of the 2015 migration events, the renewed Agency is to carry out continuous "vulnerability assessments" on external border controls and identify measures that the EU should take to address those shortcomings. For example, it may conclude that the Finnish Coast Guard should acquire new vessels, and the Finnish state should then respond to these demands. Furthermore, in the event of an emergency at the external borders, Frontex can propose that the EU member state facing the emergency should draw up to 1,500 EU border guard staff from the "rapid reaction pool" to assist in the national border control,

and the member state is expected to welcome them in.[1]

Another significant change to Frontex is that it now has the capability to negotiate and execute operational cooperation with third countries on border management. This means that the Agency could – at least in principle – make bilateral arrangements with border countries neighbouring the EU, for example with the Russian border guards, that would be binding on the national authorities in the member states. However, the goal of the agency is to support the member states in border control, not to override them. It can also organize joint operations with third countries, meaning that it could send staff outside the EU's borders, to international waters for example, or to third countries through bilateral agreements. Participation in such operations in third countries is voluntary for the EU member states.

The above-mentioned changes are understandably raising concerns about losing national sovereignty over state borders and decision-making over cooperation with non-EU next-door neighbours. These concerns are – if not completely groundless – at least premature. It remains to be seen how the new Frontex will use its enhanced mandate, but national institutions will still have the last word on budgetary issues related to acquiring new border control equipment, and on how to use the rapid reaction pool, if it is dispatched to the member state. All in all, the new European Border and Coast Guard and the Agency are parts of the same system, and the Agency is led by a management board consisting of representatives from all EU member states. This means that the Agency in Warsaw, despite having some resources of its own, still relies heavily on the cooperation and expertise of the member states in order to perform its tasks effectively.

In the hypothetical case that a member state disagrees with the Frontex requirements, or does not execute them in due time, the issue at hand passes to the Council of the EU. If the member state still wants to oppose the requirements and the Council decision, the EU Commission can trigger the specific

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1   Regulation (EU) 2016/1624 of the European Parliament and of the Council.

procedure[2] on reintroducing internal border control over the borders facing the member state in question. In practice, this means temporary exclusion of the member state from the area of free movement. Despite the fact that this measure sounds dramatic, it is not necessarily that different from the exceptional measures that countries like Germany, Denmark, Sweden, Norway and Austria have been allowed to use of their own volition when facing incoming migrants and refugees in 2016 and 2017.[3]

The new Frontex has the capability of negotiating directly with third countries on border and coastal issues. It remains to be seen what this means in practice. However, it is unlikely that Frontex would try to bypass the will of the member states, except in very extraordinary circumstances. In the regulations of the new institutions, terms like "providing technical and operational assistance" and "engaging in communication activities"[4] insinuate that this new capability does not override national sovereignty. Hence, the new Frontex Agency is not going to bypass the Finnish Border Control regarding cooperation with the Russian Border Guard. If something did turn really sour in Finnish-Russian border control cooperation, Finland could take the issue to the EU Council and Commission to let them decide how to proceed, and how the Frontex Agency can lend its assistance. In the event of an unresolved disagreement between Finland, Frontex and the EU Council on border cooperation with Russia, Finland could be temporarily excluded from the area of free movement, as in the above-mentioned case.

Enhancing surveillance and information-gathering

Regarding the third and fourth "bricks in the wall", adopting new information-gathering systems and databases is a clear example of how effective identification, registration, and management of everyone arriving in the Schengen area, not just those who meet protection needs, are important border-control tools. These measures not only constitute a straightforward response to the challenge of

migration, but to foreign terrorist fighters, some of whom are returning EU citizens.

An entry-exit system and ETIAS are systems designed to gather information on non-EU citizens entering and exiting the common area, with or without a visa. In addition, there is also a EURODAC system, whereby the EU can store biometric fingerprint data on persons who enter the EU without the proper travel documents. This prevents people from using multiple identities and falsified documents, which has been the case regarding returning foreign terrorist fighters after ISIS seized certain tools in order to fabricate Syrian passports.

Maintaining databases on non-EU citizens is nothing new as such. A step towards as yet uncharted territory is checking EU citizens within all the relevant databases when they exit or enter the common Schengen area. This means that all criminal suspects, including terrorists, that any member state has entered into the Schengen Information System II, will be apprehended at the external borders. The big question for the future is whether this system will also be adopted by internal border controls, and if so, when, where and how. The political will exists to gravitate in that direction. France in particular has expressed the will to limit the freedom of movement inside Schengen in the aftermath of the terrorist attacks of 2015 and 2016.

Increasing control and surveillance inside the Schengen area would certainly mark the end of Schengen as we know it. Hence, the issue is a matter of conflicting values. Restricting movement means increased bureaucracy, financial costs, and travel times. This would most certainly have an economic impact on trade. In addition to raising existential questions about Schengen's raison d'être, these measures would introduce new challenges with regard to the way in which the data on people's movements would be safeguarded, and what the limitations on its use would be.

A completely different question is whether imposing stronger border control at the internal borders would have the desired impact on limiting the movement of terrorists. A current trend in European terrorism is that individuals inspired by global jihadist ideology are committing terrorist attacks with small arms or by using vehicles or knives as their weapon of choice. Most of the attackers do not

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2   Article 29 of Regulation (EU) 2016/399 of the European Parliament and of the Council.

3   Recommendation of the Council of 7 February 2017, 6020/17.

4   Regulation (EU) 2016/1624 of the European Parliament and of the Council, Article 8.

have real connections to known terrorist organizations, and therefore it is hard, if not completely impossible, to detect them beforehand. There is overwhelming intelligence on many individuals that are considered "risky", but it is not possible to place them all under full surveillance. Furthermore, limiting their movement within the current legislation would require a court decision and a crime that is under investigation, and – thus far – radical thinking is not a crime. Increased border control would certainly provide information on the movements of people under surveillance and prevent pursued criminals from escaping, but as a tool for preventing terrorism it offers only limited added value, if any. Hence it is more likely that surveillance of EU citizens will be advanced for the most part by means other than border control, namely by the Police and Intelligence institutions. They could, for example, make use of the passenger data gathered by private companies. This is already carried out with regard to airline passengers through the EU Passenger Name Record directive,[5] which was approved in April 2016.

The elephant in the room: Sharing the burden of migration

Despite the fact that the EU was remarkably fast and efficient in pushing through the border-control reforms after president Juncker's State of the Union speech in 2015, a number of major issues remain unresolved. Enforcing external border control, creating so-called "hotspot areas" for migration management (areas where enhanced migration and border control is required), and travel surveillance procedures are definitely enhancing the ability to deal with upcoming movement issues, including high volumes of migrants and refugees. However, there is still no agreement on how best to share the burden of migration on a permanent basis. Since the Common European Asylum System (CEAS) does not seem to address this issue well enough, there is a need for a new regulation.

The 2015 "migration crisis" mainly overwhelmed only those countries on the entry routes, while many countries inside the Union were reluctant to show any solidarity towards them due to prioritizing their own internal political dynamics. This issue remains unresolved. In 2015 the EU decided to relocate about 100,000 incomers registered in Greece and Italy for management in other member states in order to alleviate the burden of the countries on the entrance routes. By early 2017, roughly 16,000 of those relocations had been carried out.[6] This lack of solidarity in practice clearly demonstrates how vulnerable the EU still is to new waves of migration.

The idea of sharing the burden of migration more equally on a permanent basis is particularly opposed in Eastern member states, such as Hungary and Poland, but big member states like France and the UK have also shown little interest in sharing the burden. However, those countries on the external border of the EU would be the ones to benefit the most from sharing the burden of migration. Bearing in mind that the migration flows have been shifting over the years from the Southwest to the East, the next hotspots for entering the EU might lie along its Eastern border. Blocking the route from Turkey stopped this development and pushed the main route back to Libya, but this might be temporary given the perspective of the last two decades.

An efficient aspect of successful border control has been cooperation with third countries. Earlier routes from West Africa to Spain were managed better after reaching agreement with Morocco. This example was also behind the agreement with Turkey in March 2016, which helped to stem the flows to Greece and sweep the problem out of sight. According to the agreement, Greece is allowed to return "all new irregular migrants" to Turkey. In exchange, EU member states will increase the resettlement of Syrian refugees residing in Turkey, accelerate visa liberalization for Turkish nationals, and boost existing financial support for Turkey's refugee population. No agreement with Libya has been possible to date on account of the fragile situation in the country.

NGOs and Human Rights activists have been particularly critical of the EU-Turkey agreement, due to the fact that the EU cannot guarantee that the refugees will receive fair and just treatment in a country that

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5 Directive (EU) 2016/681 of the European Parliament and of the Council.

6 European Commission press release 12 April, 2017. Available at: *http://europa.eu/rapid/press-release_IP-17-908_en.htm* last accessed 2 May.

is increasingly divided and authoritarian. Hence, by returning the refugees, the EU might be breaching its own basic principles. Added to this, the agreement may also have serious political ramifications by giving an uncomfortable advantage to Turkey. Turkey can exert leverage over the EU by threatening to withdraw from the agreement. Without a proper internal buffer, that is to say burden-sharing inside the EU, the Union lacks tangible options. On the other hand, closing the entrance routes, even with the high human costs it incurs, is a cynical way to show all the other potential migrants that Europe is closed.

If the irregular migration routes were to shift further to the East, Russia would be in a similar position to Turkey, holding the keys to the next European "migration crisis". This could have a serious impact on the EU-Russia relationship. Would Russia try to coerce Europe into giving up its sanctions policy and, by doing so, into accepting the division and occupation of Ukraine? Would Russia try to divide the EU by making bilateral agreements with its neighbouring EU member states, such as Finland? These scenarios are mere speculation, but they underline the importance of having the European response on a solid footing.

Another side effect of not being able to deal with the elephant in the room is that some of the EU member states have "raced to the bottom" by modifying their national policies so that they become less tempting destinations for asylum-seekers and migrants. This has bent and broken the principles of the rule of law and Human Rights in many countries, mainly regarding the fair and equal treatment of migrants in relation to the citizens of that very country. For example, Hungary has built a fence along its southern border and is setting up camps on its borders to prevent migrants from entering the country. Although most countries have not adopted such drastic measures as Hungary, many have made concessions to the laws, allowing the faster and more efficient return of asylum seekers, often at the price of their legal rights. For example, Finland has reduced the time for court appeals for asylum-seekers during the asylum application process

from 30 days to 21 or 14 days.[7] In other cases, people have 30 days to appeal, which means that asylum applicants are being discriminated against regarding their rights in Finland. These discrepancies in migration management between the EU member states underline the importance of having common rules and procedures in migration management. The EU is seeking answers to these problems, and some coordination is already taking place. Whether or not this will lead to tackling the big issue of burden-sharing remains to be seen.

Due to toughened stances towards asylum-seekers, there is an increasing problem within the Schengen area concerning the growing number of people who have not been granted asylum, but who are not leaving the Schengen area voluntarily. The EU has tried to find common solutions to this issue as well, one of which is speeding up forced returns. For example, in October 2016 the EU made a deal with Afghanistan on returning 80,000 Afghan refugees to their country of origin, despite the fact that the security situation in the country is very volatile, and no safe returns can be guaranteed. In addition to the moral aspects of sending people back to a conflict situation, the practice has also raised internal issues, namely how to identify irregular migrants with no papers inside the Schengen area without limiting the free movement of people in the borderless area? Since there is no way to control the movement of irregular migrants without controlling the movement of other people at the same time, pinpointing those without the requisite documents might come at the expense of the freedom of movement.

Prospects

Reinforcing the EU's external border control was vital for the EU in a number of respects. Stronger institutions, swifter reaction capability, and the ability to act even in situations where a member state is negligent in facing up to its own shortcomings are improving the Union's external border control. However, these "bricks in the wall" do not have a solid foundation as yet. Efficient border control cannot exist without efficient and just migration

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7   Muutos 646/2016, available in the Finlex database: _http://www.finlex.fi/fi/laki/alkup/2016/20160646_ last accessed 2 May.

control. Therefore the EU must reach a decision on a new asylum system, and on how to share the burden of migration on a permanent basis in the future, instead of making ad-hoc agreements that do not function as well as planned. Unfortunately, this remains the elephant in the room – a topic that the member states disagree about so vehemently that it is left undebated. The main reason for this is that there are strong differential views on the issue inside many member states.

Making bilateral agreements with countries like Turkey on externalizing the issue of migration is necessary in the absence of a renewed migration policy, but such agreements are shortsighted and increase the political vulnerability of the EU regarding the agreement partner. Furthermore, they cast the EU into murky waters in legislative terms, which can undermine the whole notion of a norm-based Europe. This does not seem to be an issue yet. It is politically easier to sweep the problems regarding migration under the carpet by externalizing them.

Tougher asylum policies are creating a new problem inside the EU. An increasing number of asylum-seekers are not being granted asylum, but they are not willing to leave the EU. Remaining inside the Schengen area leaves them in a very vulnerable position, and it is of the utmost importance to address this issue, either by simply allowing them to stay legally, or by forcing them to leave the EU. Both options come at a political cost, but so does the option of doing nothing. By granting them asylum, it is feared that more asylum-seekers will try to enter the EU, which in turn would create deeper disagreement on migration policies. On the other hand, the only way to identify all those within the EU with no legitimate right to remain requires stronger control over internal travelling within the Schengen area. This would come at a high economic price since it requires numerous resources, while slowing down movement and trade. The political cost would therefore be the collapse of the whole Schengen system.

Caught between a rock and a hard place, it is likely that the EU will attempt to circumvent the problem of internal control by increasing surveillance that does not slow down or prevent the movement of people. By collecting biometric data on everyone entering or exiting the EU, and moving within it, it is easier to identify people who lack the requisite

documents. However, this is also a costly option that poses additional challenges. The EU needs to determine how to safeguard the surveillance data, as well as address the issue of how it can be used, and by whom. As this represents a conflict of values for the EU, it remains to be seen whether it would really be willing to take such a step.