

EUROPEAN BORDER AND COAST GUARD AGENCY – A SOLUTION TO THE MIGRATION CRISIS?

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ABSTRACT:

This paper presents the process of establishing European Border and Coast Guard Agency as part of the EU external borders security and management system. It analyses factors that shaped the outcome of the legislative process focusing on monitoring and crisis prevention and return operations and interventions. The analysis is based mainly on legal regulations.

KEYWORDS:

Migration and refugee crisis, Schengen area, European Border and Coast Guard,

INTRODUCTION

The second decade of 21st Century has been marked by a global refugee crisis. According to the United Nations, almost 60 million people were displaced for various reasons – the highest level since WWII (Boehler, Pacenha, 2015). The situation was particularly striking in the European Union (EU), which was facing the most challenging humanitarian crisis in its history. The flood of migrants and refugees cast doubt on one of the basic freedoms

in the EU, which is freedom of movement and threatened to deepen rifts among Member States, where some like Germany are ready to accept asylum seekers while others like Hungary and Poland try to avert the automatic displacement mechanism of asylum seekers.

Due to its scale and potential dire consequences, the crisis requires actions to secure the functioning of Schengen area. As one of the elements of a broader solution, attempting to implement the effective management of the EU's external borders, fundamental for the well-functioning of the free movement among Member States, the EU established the European Border and Coast Guard Agency (the Agency) the purpose of which is to improve coordination in securing the external land and maritime borders of the EU Member States.

The aim of the article is to present the EU system for securing and managing its external borders, in which the new agency is replacing FRONTEX. Additionally, it is to answer questions if this action is the right answer to challenges posed by migrant and refugee crisis.

MIGRANT AND REFUGEE CRISIS

The European migrant and refugee crisis began in 2011 when the so-called Arab Spring (a wave of public unrest in Arab countries) resulted in the change of government

in Tunisia, overthrow of the Kaddafi regime in Libya and finally brought in the Syrian civil war (Park, 2015). As a result of the above-mentioned process, we witnessed a rapid growth of refugees and migrants travelling across the Mediterranean to reach the shores of Italy and Greece to seek asylum. Most of them were coming from Syria, Afghanistan and Iraq, but some were also escaping from the authoritarian rule in Eritrea (UNHCR, 2016). The tragic consequences of the inflow of migrants and refugees were the rising numbers of deaths at sea (Missing Migrants Project, 2016).

The crisis spread to the eastern part of the Mediterranean when in mid-June 2015, Macedonia decided to change its policy on migrants entering the country illegally, which resulted in opening of the so-called “Balkan route” (VoA, 2016). By the end of August 2015, German officials stated that “The Dublin procedure for Syrian citizens is at this point in time effectively no longer being adhered to” (Oltermann, 2016). As a result, according to Eurostat, in 2015 four Member States (Germany, Hungary, Sweden and Austria) received approximately two-thirds of 1.2 million of all asylum applications submitted in the EU countries in 2015, which was more than a double number of those in 2014 (EUROSTAT, 2016). Moreover, German Chancellor Angela Merkel decided not to limit the number of refugees Germany would accept, which dramatically

changed the situation by increasing the number of Syrians trying to get to Europe (Spiegel, 2016).

The inflow of migrants and refugees not only created a humanitarian need for action but because of the lack of rapid and decisive collective response, some Member States decided to take matters in their own hands by re-establishing border controls and building fences on their borders with third countries (Dearden, 2016). Implementing an effective management of the EU's external borders became a fundamental right to freedom of movement of people within the EU.

Multifaceted nature of the crisis caused the situation where, apart from finding a political solution with countries like Turkey, it became paramount for the EU to increase operational capabilities of their institutions responsible for the security and borders management.

DEVELOPING A SOLUTION

Since 2005, the main EU agency responsible for promotion, coordination and development of integrated border management was Frontex, whose role was only to support Member States in the management of their external borders. However, the refugee crisis has shown Frontex's limitations and inadequate resources in terms of staff and equipment and its inability to perform return and border management

operations in the absence of an explicit authority to conduct search and rescue operations (European Commission, 2015).

A good example of Frontex's problems in effective dealing with the crisis was the case of Operation Triton. The purpose of the operation, replacing the Italy-run operation Mare Nostrum ongoing since 2013, was to prevent a growing humanitarian crisis in the Mediterranean Sea basin. Additionally, Operation Sophia was implemented, with the purpose to prevent human trafficking by neutralising refugee smuggling routes in the Mediterranean. Operations were hardly a success and brought mixed results, especially Triton (BBC, 2014). Lack of funding and appropriate assets was a proof to some countries that the EU was not capable to deal with the challenge (The Guardian, 2015). Moreover, some human rights organisation criticised Frontex for doing too little to protect refugees' human rights (Hartmann, Papanicolopulu, 2015).

With every month of the continuation of the crisis, it was becoming more and more obvious that its size and potential dire consequences required more profound answer from Brussels – not only an ad hoc solution but also a more systematic and institutionalised approach.

The first to express its expectation of change was the European Parliament, which in its resolution

of 2 April 2014 “on the mid-term review of the Stockholm Programme” had stressed that Schengen external borders should in the future be guarded with the support of European border guards (European Parliament, 2014).

Another example of the will to change the EU approach was European Agenda on Migration of May 2015. The document identified the need for shared management of the external borders, in line with the objective of the “gradual introduction of an integrated management system for external borders” set out in Article 77 of the Treaty on the Functioning of the European Union (European Commission, 2015b).

Not only did the European Commission (the Commission) express the need for action but so did the European Council (the Council) at its meeting on 25-26 June 2015 called for “wider efforts including the reinforcement of the management of the Union’s external borders are required to better contain the growing flow of illegal migration” (European Council, 2015a).

On 9 September 2015, President of the Commission Jean-Claude Juncker delivered his second State of the Union address. Speaking of migration crisis, he pointed out that “there is not enough Europe in this Union. And there is not enough Union in this Union” (European Commission, 2015c). As a necessary element for a workable common asylum policy, President Juncker recognised

stronger joint efforts to secure the external borders of Schengen area Member States. In order to achieve this goal, he stressed the need for the significant strengthening of Frontex and developing it into a fully operational European border and coast guard system. He announced taking steps toward establishing the European Border and Coast Guard before the end of the year (European Commission, 2015c).

The announcement after the informal meeting on migration on 23 September 2015 was yet another signal sent by the EU leaders that stated the need “to tackle the dramatic situation at our external borders and strengthen controls at those borders, including through additional resources for Frontex, EASO and Europol, and with personnel and equipment from Member States” (European Council, 2015b).

In the aftermath of the Council’s meeting on 15 October 2015, an intent was formulated to work “towards the gradual establishment of an integrated management system for external borders” (European Council, 2015c). In connection with the discussion on the development of such European system, the intent was to expand Frontex’s mandate and as a result, develop an agency with significantly bigger operational capabilities (European Council, 2015c).

The need for swift action in order to reinforce security controls at the EU’s external borders was declared again

in conclusions of the meeting of the Council on Counter-Terrorism, which took place on 2 November 2015. During this meeting, which was an aftermath of terrorist attacks in Paris, representatives of the Member States agreed to undertake steps to improve situation “at the external borders which are most exposed, in particular by deploying, when the situation so requires, rapid border intervention teams (RABITs) and police officers to ensure systematic screening and security checks” (Council of European Union, 2015).

On 15 December 2015, the Commission presented a package of proposals aimed at securing the EU external borders and managing migration more effectively. Among other measures, part of the proposed solution was establishing European and Coast Guard “to ensure a strong and shared management of the external borders” (European Commission, 2015d). According to the Commission, “the proposal will help to manage migration more effectively, improve the internal security of the European Union, and safeguard the principle of free movement of persons” (European Commission, 2015d). As the European Commission First Vice-President, Frans Timmermans said, “In an area of free movement without internal borders, managing Europe’s external borders must be a shared responsibility. The crisis has exposed clear weaknesses and gaps in existing mechanisms aimed at making sure that EU standards are upheld. Therefore,

it is now time to move to a truly integrated system of border management” (European Commission, 2015d).

The announced system of European Border and Coast Guard would consist of two elements:

- a) European Border and Coast Guard Agency (the Agency);
- b) Member States` authorities responsible for border management.

According to the Commission`s proposal, the Agency will share responsibility with Member States in implementing an integrated border management system. As a result, the Agency will “ensure the effective application of strong common border management standards and provide operational support and intervention where necessary to promptly respond to emerging crises at the external border” (European Commission, 2015a).

The main organisational change concerned Frontex (the European Agency for the Management of Operational Cooperation at the External Borders of the EU). Changing its name to European Border and Coast Guard Agency is meant to reflect its reinforced mandate and new responsibilities. Additionally, the new body, compared to Frontex, would have increased capabilities regarding monitoring, crisis prevention, reaction to situation requiring urgent action, support for return operations in cooperation with third countries and personal data processing (European Commission, 2015a).

According to the Commission's proposal, the Agency will be able to better reinforce Member States in management of its external borders with joint operations and rapid border interventions with a pool of resources given by the Member States. They will be ready for immediate deployment in situations when a Member State asks for support as well as when a Member State is unable or unwilling to act (European Commission, 2015a).

The most controversial aspect of the proposal concerned the situation when a Member State fails to implement corrective measures given in vulnerability assessment and the Commission considers the control of the external border as ineffective and posing a high risk to the functioning of the Schengen area (for example, in case of increased pressure at the external borders resulting in risks to the proper functioning of the Schengen area). The draft assumed that the Agency will be able to demand a Member State to take actions in order to improve identified problems. The Member State will be obliged to implement this decision within a defined timeframe. In cases where the Member State in question fails to put these measures in place, the issue will be referred to the Agency's Management Board for a further decision, which at a final stage could include a "direct intervention by the Agency aimed at eliminating any risks to the proper

functioning of the Schengen area” (European Commission, 2015a).

The implementation of the decision for immediate intervention when a country does not comply with Agency’s recommendations to control its external borders for the benefit of the EU as a whole, will be done on the basis of qualified majority voting in the Council of European Union in what is known as a comitology procedure (Defence24.pl, 2016). In its proposal, the Commission cites Article 77 of the Treaty on the Functioning of the European Union (TFEU), concerning the integrated border management system in the EU. While Member States resisting, the proposal underline the provisions in Articles 72 and 79 of TFEU, which clearly state the exclusive right of the Member States to secure their internal security and to decide upon number of admission of third-country nationals (Kaca, 2015). As a result, the draft assumed that the Agency would be authorised to launch an emergency intervention without the Member State’s consent, however as a last resort solution (European Commission, 2015a). Additionally, for the Agency’s operations, its staff is requested to perform its duties in the presence of personnel from the host country and under the laws of Member State (Kaca, 2015).

Another important novelty presented in the draft concerned improving Agency’s operational capabilities by not only

a simple increase of staff members but also by creating a standing corps at the disposal of the Agency. This is a result of getting experience from the Frontex's failures when each operation depended on Member States' voluntary contribution of staff and assets. The Agency will be able within 3 days to call on the pool consisting of 1,500 border guards in the circumstances requiring a rapid response (European Commission 2015d). Additionally, upon request, Member States will have to contribute equipment unless they need the requested equipment for the management of their section of the external border when facing an exceptional situation (Proposal for the regulation of the European Parliament and the Council on the European Border and Coast Guard, 2015, article 37). Moreover, in order to further increase Agency's operational capabilities, draft regulations entitled the Agency to purchase "alone or in co-ownership with a Member State the technical equipment necessary to carry out joint operations, rapid border interventions and other operational activities" (Proposal for the regulation of the European Parliament and the Council on the European Border and Coast Guard, 2015, article 37).

The increased mandate assumed by the draft regulation required a gradual increase in the Agency's budget from €143 million originally planned for 2015 up to €322 million in 2020 when the Agency will reach its target

number of employees (1,000 in comparison to 402 staff members in 2016) (Kaca, 2015).

Despite controversies, the Commission's proposal was advanced further. In mid- February 2016, the Commission called on the Council and the European Parliament (the Parliament) to reach a political agreement on the basis of proposal submitted by July 2016. On 29 February, the Parliamentary Civil Liberties, Justice and Home Affairs (LIBE) Committee organised a joint debate with Matthias Ruete, Director-General of DG HOME as proposed by the Commission. On 6 April 2016, the Council agreed on a negotiating position as the basis for negotiations with the Parliament. On 30 May 2016, the Parliament Civil Liberties Committee adopted a report and a mandate to open interinstitutional negotiations. The Parliament's position was to reach the following goals:

- Enhance the efficiency in dealing with the challenges faced by the EU at its borders, with regard to both migration and internal security and with the aim of preserving the right to freedom of movement within the Schengen area;
- Increase transparency and accountability to the European Parliament while respecting the sovereignty of the EU Member States;
- To further expand the Agency's role on return by allowing it to assist Member States in return operations (i.e. returning illegally staying non-EU nationals to their country of origin), both operationally and technically, while the decision itself stays at the national level;

- Ensure that the Agency does not organise return operations to any third country where risks of fundamental rights violations exist, in accordance with the non-refoulement principle;
- Ensure that the Agency is accountable to the Parliament and the Council (European Parliament, 2016).

Most importantly, the Committee wanted to amend the original Commission's proposal concerning the decision-making process regarding intervention. The position of the Committee was to give Member States (in the Council) the right to decide on the intervention by qualified majority voting rather than the Commission (European Parliament, 2016).

The Parliament adopted its position at first reading under the ordinary legislative procedure on 6 July 2016. Several days later, the public opinion was informed of the Parliament, the Commission and the Council reaching a political consensus on the Commission's proposal. European Commission President Jean-Claude Juncker commented, stating "the agreement on the creation of a European Border and Coast Guard shows that Europe is able to act swiftly and resolutely to deal with common challenges" (European Commission, 2016a).

Despite reservations from Hungary and Poland afraid of losing the important aspect of their sovereignty and a strong support from France and Germany (BBC,

2015), the Council adopted the final text of the proposal on 13 September 2016. Robert Kaliňák, Minister of the Interior of Slovakia and President of the Council, said, “I welcome the speed and the efficiency with which the Council and the Parliament have acted on this important issue. The way we manage our external borders directly affects the entire Schengen area, including its internal borders. The European Border and Coast Guard will help us better face today's challenges together. Only with effective management of our external borders can we return to normality within Schengen. There is no other way” (Council of the European Union, 2016).

The Regulation was published in the Official Journal on 16 September 2016 and entered into force on 6 October 2016, less than 10 months after the initial proposal presentation. The Agency was officially launched at the Bulgarian-Turkish border. Attending the event the Commissioner for Migration, Home Affairs and Citizenship, Dimitris Avramopoulos, said, “Today is a milestone in the history of European border management. From now onwards, the external EU border of one Member State is the external border of all Member States – both legally and operationally. In less than one year we have established a fully-fledged European Border and Coast Guard system, turning into reality the principles of shared responsibility and solidarity among the Member States and the Union” (Frontex, 2016).

The Agency did not have its fully operational capabilities from the day one. The provisions related to the setting up of the reserve and technical equipment pools will enter into force two months after the rest of the regulation and those related to the return pools and three months after the rest of the regulations (Council of the European Union, 2016). According to the timetable, by 7 December, the Agency acquired means to conduct rapid responses and by 7 January, it will be able to send back illegal migrants to the countries of origin (Defence24.pl, 2016). The first vulnerability assessments will be conducted between January and March 2017 (European Commission, 2016b).

TASKS AND MEASURES

Based on Regulation (EU) 2016/1624 of the European Parliament and of the Council on the European Border and Coast Guard, the European integrated border management is a shared responsibility of the Agency and of the national authorities responsible for border management (Regulation, 2016, article 3). The regulation firmly states that the Member States are primarily responsible for the management of their sections of external borders while the role of the Agency is to support “the application of Union measures relating to the management of the external borders by reinforcing,

assessing and coordinating the actions of Member States” (Regulation, 2016, article 5).

The most important duties performed by the Agency are as follows:

- To monitor migratory flows and conduct risk analysis;
- To carry out a vulnerability assessment including the assessment of Member States` readiness to face challenges at the external borders;
- To assist Member States with technical and operational tasks (including deployment of the European Border and Coast Guard teams and rapid reaction pool);
- To assist Member States and third countries in the context of cooperation in the matters covered by the Regulation i.e. return operations (Regulation, 2016, article 8)

To carry out the above duties, the Agency will provide technical and operational assistance to the host Member State by:

- Coordinating joint operation for one or more Member States;
- Organising rapid border interventions and deploying European Coast Guard teams from the rapid response pool;
- Coordinating joint operations with neighbouring third countries;
- Providing support to Member States and third countries necessary to conduct search and rescue operation at sea (Regulation, 2016, article 14 (2)).

Especially in relation to the last item, the regulation increases Agency's capabilities for search and rescue operations that were particularly lacking in Frontex. The regulation assumes an improved coordination at the national and EU level. On the EU level, the Agency will cooperate and coordinate the European Fisheries Control Agency and the European Maritime Safety Agency in order to support national authorities carrying out coast guard functions (Regulation, 2016, article 53 (1)). Said institutions will be able to perform joint surveillance operations including joint operation with the use of Remotely Piloted Aircraft Systems (drones) in the Mediterranean Sea basin (European Commission, 2015a).

Equally important is the issue of fostering the cooperation with Member States and EU agencies in order to develop working relations between the Agency and key third countries like Turkey, which are the countries of origin and transit for unregulated migration. The area of cooperation between the Agency and the third country will cover return operations, acquisition of travel documents and joint operations at the external borders involving a Member State and a neighbouring third country (Regulation, 2016, article 54 (2)). In order to facilitate the cooperation, the Agency is authorised to deploy liaison officers to such third countries (Regulation, 2016, article 55 (1)).

MONITORING AND CRISIS PREVENTION

Section 2 of Chapter II of the Regulation covers monitoring and crisis prevention. To perform responsibilities resulting from the above, the Agency and national authorities responsible for border management and return operations will maintain communications in order to share all necessary information in a timely and accurate manner (Regulation, 2016, article 10).

In order to ensure regular monitoring of Member States' management of the external borders, the Agency executive director will appoint liaisons officers out of the staff of the Agency. Their main task will be to support the collection of information required by the Agency and monitor measures taken by the Member States at their section of external border threatened by the migratory pressure (Regulation, 2016, article 12).

Based on information provided by a Member State, the Agency will perform a vulnerability assessment in order to check how the Members States are prepared to secure its borders. To do that the Member States will be obliged to inform the Agency on their preparedness to carry out border management at their section of the external border. Based on the provided information, the Agency will prepare a vulnerability assessment concerning the level of readiness of the Member States to deal with present and future challenges related to border security. Secondly, it will show

the ability of the Member State to participate in the rapid reserve pool (Regulation, 2016, article 13 (4)). The vulnerability assessment would also contain recommendations for the Member States concerning corrective actions and the time limit within which such measures must be taken (Regulation, 2016, article 13 (6)).

At the request of the Member State facing disproportionate challenges at the external borders, including a large number of third-country nationals trying to enter illegally the territory of the Member State in question, within two days the Agency will take a decision on the request to launch a rapid border intervention (Regulation, 2016, article 17 (4)). When the executive director decides to launch a rapid border intervention together with the Member State, they jointly develop an operation plan (Regulation, 2016, article 17 (6)). Deployment of the rapid reaction pool will take place within five working days after the agreement on the plan. When necessary, additional European Border and Coast Guard teams will be deployed within seven working days from the deployment of rapid reaction pool (Regulation, 2016, article 17 (10)).

Additionally, the Member State facing a dire situation in the so-called hotspot areas of its external border characterised by large inward mixed migratory flows may request technical and operational reinforcement by the migration management support teams (Regulation,

2016, article 18 (1)). The technical and operational reinforcement provided by the European Border and Coast Guard teams, the European return intervention teams and experts from the Agency's staff may include providing assistance in screening of third-country nationals arriving at the external borders, providing initial information to persons who wish to apply for international protection and last but not least, technical and operational assistance in the field of repatriation, including the preparation and organisation of return operations (Regulation, 2016, article 18 (4)).

The key operational resource of the Agency is a rapid reaction pool, which can be deployed from each Member State within five working days from the date of the agreement on the operational plan. The decision concerning their profiles is made by the Agency's management board (Regulation, 2016, article 20 (5)). Each country will be responsible for its contribution to the number of border guards according to Annex I (Regulation, 2016, article 20 (6)). For example, Poland's minimum contribution is 100 while Germany's is 227. (Regulation, 2016, annex 1). The Regulation allows to decrease the size of the contribution when a Member State is facing a situation on its external borders (Regulation, 2016, article 20 (7)). It is worth mentioning that the Agency covers all costs incurred by the Member States in sharing their border guards to deploy

the European Border and Coast Guard teams (Regulation, 2016, article 24 (1)).

What is important, in accordance with the operation plan, the host Member State will issue instructions to the European Border and Coast Guards teams (Regulation, 2016, article 21 (1)). The host Member State should take under the consideration the Agency's views on instructions and follow them to the extent possible (Regulation, 2016, article 21 (2)). Concerning the legal liability of members of the teams participating in joint operation or rapid border interventions, they remain subject to the disciplinary measures of their home Member State, which acts in accordance with its national regulation and international law (Regulation, 2016, article 21 (5)).

In order to coordinate joint operations and rapid border interventions, the Agency's executive director shall appoint a coordinating officer whose role is to intermediate among the Agency, the host Member State and the members of the European Border and Coast Guard teams on all issues concerning the operation (Regulation, 2016, article 22 (3)).

Overall, the legal framework of interventions concluded in the Regulation is, due to widespread controversies among Member States, different from what was presented in the EC's proposal. Only the concerned Member State now remains in full control of each stage of the operation: it asks the Agency for the support launching EBCG operation

and it agrees on the operational plan submitted by the Agency. However, the future will show how the unwilling Member States will lead a joint operation in a case of emergency (Rosenfeldt, 2016).

One of the most important issues discussed during the legislative procedure was what to do if a Member State with the external border that is at disproportionate pressure does not want to cooperate. According to Regulation, when the Member State in question fails to implement recommended steps from vulnerability assessment within indicated time frame, the executive director will notify the management board and the Commission (Regulation, 2016, article 13 (8)). When the Member State fails again to implement recommendations by not taking necessary measures or due to disproportionate challenges at the external borders and as a result of ineffective control of the external border to the extent jeopardising the functioning of the Schengen area, the Council based on a proposal from the Commission may adopt a decision identifying measures to mitigate those risks to be implemented by the Agency and require concerned Member States to cooperate with the Agency in the implementation of those measures, which may be as follows:

- A rapid border intervention;
- Deployment of the European Border and Coast Guard teams to hot spot areas;
- Coordination of cooperation between Member State and third countries;
- Deployment of technical equipment;

- Organising return interventions (Regulation, 2016, article 19 (3))

If a Member State within 30 days still does not comply with the Council's decision and does not cooperate with the Agency, a procedure provided for in Article 29 of Regulation (EU) 2016/399 Schengen Border Code may be applied, which assumes that the Council, under the Council's proposal may, as a last resort and as a measure to protect the common interests within the Schengen area, recommend to one or more Member States to reintroduce border control at all or at specific parts of their internal borders (Schengen Borders Code, 2016, article 29). As a result, Member States that do not – for any reason – cooperate at their external borders in emergencies can de facto be temporarily excluded from the area of free movement. However, there is no way to enforce this duty or to deploy EBCG teams on their territory against their will (Rosenfeldt, 2016).

RETURN OPERATIONS AND INTERVENTIONS

In comparison to Frontex's, Agency's provisions concerning participation in return operations and interventions were fundamentally new.

In return operations, the Agency will support Member States in the organisation of repatriation procedures, such as chartering of aircraft for the purpose of such operations (Regulation, 2016, article 28 (1)). The Agency can also ensure coordination of organisations for the return operations for which the means of transport and forced return escorts are provided by a third country (the so-called “Collective return operations”). (Regulation, 2016, article 28 (3)). The Agency will provide financing, coordination and organisation for return operations by cooperating with relevant third-country authorities (Regulation, 2016, article 28 (9)).

European Return Intervention Teams, composed of escorts, monitors and return specialists, will be available to Member States facing problems with returning third-country nationals who are the subject of return decisions issued by a Member State (Regulation, 2016, article 33 (1)). In urgent situations, Rapid European Return Intervention Teams could be deployed at the request of a Member State or the Agency's own initiative (Regulation, 2016, article 33 (2)). Nevertheless, despite the above-mentioned changes and tools in possession of the Agency to support organisation of return operations and interventions, the Member States will still remain responsible for these activities, including making decisions on who has the right to asylum (Regulation, 2016, article 28 (1)).

Stronger role in border management and enhanced operational tasks, especially a mandate to carry out return activities, created the question how the new body will ensure respect for fundamental human rights. It is stated that the Agency's return activities will be carried out in strict compliance with the Charter of Fundamental Rights of the European Union and Protocol 4 to the European Convention on Human Rights. The rights and obligations of migrants are always assessed and determined individually, including the risk of non-refoulement (Regulation, 2016, article 34 (1)).

The Regulation addressed those issues by establishing the following fundamental rights safeguards:

- a) The establishment of a Consultative Forum on fundamental rights (Regulation, 2016, article 70)
- b) Fundamental rights officer (Regulation, 2016, article 71)
- c) Monitoring of return operations (Regulation, 2016, article 28 (6))
- d) A complaint mechanism by which any person who considers himself or herself to have been the subject of a breach of fundamental rights during activities carried out by the Agency or any third-party intervener, may report a complaint to the European Border and Coast Guard Agency (Regulation, 2016, article 72)

The regulations concerning the complaint mechanism seem to be especially inadequate. The Executive Director, who will decide on the merits of claims, is obviously not impartial. There is no procedure for appeal when a complaint has been overruled. Even when the Agency considers the complaint well-founded, the remedies are ineffective. There is no reference to possible criminal prosecution. Moreover, resources are lacking to deal with the expected amount of complaints. Furthermore, the new rules are limited in scope, as they do not apply to national border guards (Peers, 2015).

CONCLUSIONS

Despite the new name that creates an impression that the Agency is some kind of a supranational European body with legal instruments to act without the consent of the Member States, on 6 October 2016, no new agency was created, no European Border and Coast Guard under EU command and control was established and no right to intervene at Member States' external borders against their will was introduced. The European Border and Coast Guard will combine a new reinforced Agency, building on the foundations laid by Frontex, with the ability to draw on a reserve pool of people and equipment. It is rather a framework connecting national and European structures

and institutions responsible for border management (Szymańska, 2016). The framework that, due to new regulations, cleared some important legal issues like merging Frontex Regulation with the Regulation on Rapid Border Intervention Teams into one. However, Regulations on EUROSUR and surveillance of the external sea borders remained untouched (Rosenfeldt, 2016).

The main role of the Agency is still only to assist Member States in the “integrated border management at the external borders” (Council of the European Union, 2016). It is expected that the Agency “will ensure the effective management of migration flows and provide a high level of security for the EU. At the same time, it will help safeguard the right to freedom of movement within the EU and fully respect the fundamental rights” (Council of the European Union, 2016). The central aspect of the newly established body is the implementation of an operational strategy for border management and the coordination of assistance from all Member States (Council of the European Union, 2016).

The Agency’s enhanced tasks and powers will go hand in hand with more responsibility and accountability, but the latter has yet to be improved. Although the complaints mechanism is a step in the right direction, its design could have been more effective (Rosenfeldt, 2016).

As a result of the aforementioned changes, the Agency will become a centre of expertise supporting national border and guard authorities with authorities with such tools as regular risk analysis, improved inter-agency cooperation and the use of state-of-the-art technology (European Commission, 2015a). Time will tell how efficient the Agency will be in managing its resources and cooperating with the Member States in which jurisdiction is to make the decision on entry or to return migrants and other agencies such as EASO and EUROPOL.

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