

EUROPEAN CONFERENCE

FROM TAMPERE 20 TO TAMPERE 2.0

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Background Note: Agencies

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Pre-Conference Version

DISCLAIMER

The draft of this note has been prepared by Evangelia Tsourdi, Assistant Professor and Dutch Research Council grantee, University of Maastricht. The present document is, however, the result of a process during which some changes have been made following a preparatory workshop and in liaison with the author. This means that the author might not agree with all of the suggestions proposed in this note. Final versions of all the background notes, which will take account of the input provided by the conference, will be published and widely disseminated. References to authors quoted have been reduced to a strict minimum contrary to academic rules due to a lack of space. More details will be provided in the published version of this note.



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Tampere Conclusions:

22. A common active policy on visas and false documents should be further developed, including closer co-operation between EU consulates in third countries and, where necessary, the establishment of common EU visa issuing offices.

24. The European Council calls for closer co-operation and mutual technical assistance between the Member States' border control services, such as exchange programmes and technology transfer, especially on maritime borders, and for the rapid inclusion of the applicant States in this co-operation.

I. ASSESSMENT OF THE CURRENT SITUATION:

The spike in arrivals of individuals seeking asylum in the EU in 2015 highlighted the limitations inherent in the legal design and implementation modes of the EU asylum and border policies. The initial implementation design foresaw that national executives assume responsibility in the main for the application of European law. Institutionalisation of practical cooperation through EU agencies has begun to unsettle this. EU agencies have come at the forefront for two primary reasons: as vessels to overcome the policy implementation gap; as vessels to enhance inter-state solidarity. Initially their mandate was heavily focused on activities such as information-exchange, training, and risk analysis. It has expanded and so have their human and financial resources. Focusing specifically on the *de jure* and *de facto* mandate expansion of the European Asylum Support Office (EASO) and the European Border and Coast Guard Agency (EBCG, commonly referred to as Frontex) we note two broad trends:

- Firstly, the operational expansion of their mandates which has led to patterns of joint implementation, with own staff and experts deployed by these agencies involved in fields such as border control, return and the processing of asylum claims. For example, based on Greek national law, EASO-deployed experts are conducting part of the asylum process that entails administrative discretion emitting non-binding opinions on the admissibility of claims, or conducting interviews in the merits stage, while the final decision rests with the Greek Asylum Service. These developments point to the gradual emergence of an 'integrated European administration'.¹ In addition, these agencies are increasingly operational in third countries based on bilateral or multilateral agreements. This is linked with the impetus on externalising protection obligations, as exemplified by the 'EU-Turkey deal'.
- Secondly, the expansion of their mandate to include functions that go far beyond support, including operational support, or administrative cooperation. Reference is made to monitoring-like functions, as well as functions which have the potential to steer policy implementation. Monitoring-like functions include the vulnerability assessment conducted by the Frontex that could lead to recommendations, a binding decision by the Management Board setting out

¹ See analysis in De Bruycker (2016), 'The European Border and Coast Guard: A New Model Built on an Old Logic' (2016) 1(1) European Papers 559 and Tsourdi (2016), 'Bottom-up Salvation? From Practical Cooperation Towards Joint Implementation Through the European Asylum Support Office' (2016) 1(3) European Papers 997.

measures, or in cases of a situation at the external borders requiring urgent action a Council implementing act prescribing measures which are binding for the Member States. Nevertheless, there is no 'right to intervene' in a Member State, neither for the EBCG, nor for the EU institutions, e.g. enforcing deployments. The ultimate measure is recourse to the procedure to reintroduce internal border controls as foreseen in Article 29 Schengen Borders Code.

Given the political support to increased agency involvement to respond to functional pressures and to the unmet inter-state solidarity imperative, as well as to implement cooperation with third States in migration, these trends will only intensify. They may be the precursor of more radical shifts in the implementation modes of these policies.

II. IDEAS AND SUGGESTIONS FOR THE FUTURE:

The mandate expansion of EU agencies seems to move in the direction of recognising that external border management and asylum provision are, in essence, regional public goods benefitting all Member States regardless of their geographic position, of whether they are preferred destinations of asylum seekers or migrants etc. This also entails that external border management and asylum provision are shared responsibilities between the EU and its Member States. It has consequences on how these policies are to be implemented, and how the financial and human resource costs for their operationalisation are shared (see article 80 TFEU).

In terms of implementation, it means a shift towards forms of joint implementation whereby EU agency staff, deployed national experts from MSs, and national administrators work alongside implementing EU policy. In terms of sharing, it means a rethink from a predominantly national financing component for the operationalisation of these policies towards more centralised funding, both directly in money through EU funds, and indirectly by benefitting from agency deployments and joint implementation patterns. EU agencies are also gaining a key role in operationalising the cooperation between the EU and third States in migration management, which increasingly includes externalisation of protection obligations and containment of migrants in third transit States.

This background note focuses on possible paths for sustainable development of increased agency involvement in ways which address Member States' needs, while remaining within the existing constitutional and political limits of the EU treaties; as well as responding to the challenges of sufficient resourcing, independence, accountability, and respect for fundamental rights.

A. Balancing Joint Implementation and Supervision:

The recently agreed Regulation on a European and Border Coast Guard (hereafter: EBCG 2019) enounces European integrated border management as "a shared responsibility of the Agency and of the national authorities responsible for border management [...]" (article 7) while recognising in the same article that "Member States shall retain primary responsibility for the management of their sections of the external borders". The increased level of resources (financial, human) at the disposal of the EBCG, and the executive powers foreseen for the agency statutory staff and deployed national personnel subject to the authorisation of the host Member State, can be understood as effective means by which the EU can undertake its responsibility in operationalising European integrated border management. No legal text explicitly enounces this conception of a shared responsibility in relation to asylum, not even the proposal

for a revamped European Union Agency for Asylum (hereafter: EUAA 2016 proposal). However, the increased operational role foreseen for deployed experts and EASO staff whether *de jure* (EUAA 2016 proposal, articles 19 and 21) or *de facto* could be seen as implicitly moving in the same direction.

The monitoring-like functions of EU agencies (e.g. vulnerability assessment and role of liaison officers in EBCG, monitoring mechanism in EUAA compromise position) are inscribed in a different trend. These processes can be seen as supplementing the Commission's supervision mandate. These mechanisms are circumscribed in their focus on technical and operational aspects (existence of capabilities, infrastructure). They are in fact serving a double purpose: on the one hand identifying particular pressures to mobilise assistance and to map out weaknesses in order to remediate them; on the other hand, they are linked with a gradation of enforcement-type measures that could culminate to the adoption of Council implementing acts.

The two limbs of the expanded mandates (supervision and operational) are linked. Structural shortcomings and capacity issues first identified through the supervision-like processes could then be (partially) overcome through additional deployment of human and technical resources and enhancement of joint implementation actions. There is also an inherent underlying tension, especially if gradually these monitoring-like functions will expand from technical aspects to supervising the implementation of the policies themselves as was the initial conception of the Commission for the EUAA monitoring mechanism (see EUAA 2016 proposal, article 13). Here the agencies would be called to play a double, and at times slightly conflicting, role: that of jointly implementing while at the same time supervising the shortcomings in the implementation of these policies (some of which may not be exclusively linked with the lack of resources). The current example of the operationalisation of the hotspot approach in Greece is telling.

Therefore, it is worth reflecting on the following point:

- How is it best to address this potential tension between the two sides (joint implementation and monitoring) of the expanded mandates of the EBCG, and potentially the EUAA?

Initial suggestions and ideas include:

1. Involvement of European Commission staff (along the lines of the Schengen evaluation mechanism) and the European Parliament in the monitoring processes in order to make it more objective and impartial as required by article 70 TFEU.

2. A stronger role of the Executive Director in the culmination of measures leading up to the adoption of Council implementing acts.

B. Rethinking Agencies' Governance to Ensure their Independence:

To effectively operationalise their mandate, it would seem that agencies need to be independent from national interests and political influences. Independence is an element that is highlighted in agencies' founding regulations (see e.g. EASO Regulation, Art. 2(4); EU-Lisa Rec. 36; EBCG 2019, Art. 92(3), albeit nuanced in a different manner (EBCG 2019, Art. 92(3), EASO Regulation, Art. 2(4)). At the same time, EU agencies are institutionally and functionally dependent on EU institutions and Member States. This is exemplified through the design of their internal governance structures, specifically the Member State dominated Management Boards (EASO Regulation, Arts. 25-27; EBCG 2019, Art. 99) and the process by which they operationalise their mandate, which is inherently collaborative. Management boards have far-reaching functions in the areas of planning and operationalising the agencies' mandates, including pivotal

roles in the monitoring-like functions, or other novel steering processes such as the envisaged common analysis on countries of origin that would be endorsed by EUAA's management board.

It has been observed that "having all Member States represented at agency boards is in line with the conceptual understanding of the EU executive as an integrated administration and is an expression of the composite or shared character of the EU executive".² When the European level, through an EU agency, starts to be more implicated in policy implementation, including through the deployment of statutory staff and of experts on the ground, the MS naturally want to have a strong say. The operational tasks undertaken are intrinsically linked with the implementation of the asylum and external border control policies and the duty to implement legally rests with the Member States. While there is a gradual admission in external border control management that it is a shared responsibility, Member States still retain the 'primary responsibility' according to the EBCG 2019. Therefore, it cannot be concluded that the national level is seeking to "reappropriate powers through the back door".

At the same time the independence challenge posed should not be underestimated. There could be an underlying tension where it comes to the supervision functions of the agencies, that are linked with a gradation of enforcement-type measures without however a genuine 'right to intervene', and the strong role of the Management Board in these processes. Finally, a different type of danger is that given the distribution of power and political stakes in the field of asylum and border controls, the EBCG and the future EUAA risk being captured by strong regulators and used as 'proxies' to control weaker ones.³ Indeed, understanding 'national interest' in these fields as singular does not do justice to either the divergence of interests between Member States, nor to their power differential.

These considerations raise the following questions:

- Through which mechanisms or processes could the enhanced functions of EU agencies be reconciled with their internal governance structures? To what extent can their independence be ensured through accountability mechanisms?

Initial suggestions and ideas include:

3. Launch a study to analyse the numerous mechanisms of accountability of agencies to avoid unnecessary accountability overload.

4. Strengthen the independence of the Executive Director towards the Management Board, for e.g. by removing disciplinary authority over the Executive Director, or possibility of suspension or dismissal from the remit of the Management Board.

5. Rethink the composition of agency Management Boards, for e.g. through foreseeing a presence for the EP at least as non-voting member to enhance political scrutiny.

6. Strengthen the role of the EP as a political accountability forum for agencies and enhance types of measures in its disposal to influence agency dynamics.

7. Establish political accountability arrangements before national parliaments (e.g. reporting obligations or hearings). Joint parliamentary accountability mechanisms involving both the EP and national parliaments along the lines of EUROPOL's Joint Parliamentary Scrutiny Group could be considered.

² Vos (2016), 'EU Agencies and Independence', in Ritleg (ed.), *Independence and Legitimacy in the Institutional System of the European Union* (OUP 2016), 206.

³ Ripoll-Servent (2018), 'A New Form of Delegation in EU Asylum: Agencies as Proxies of Strong Regulators' (2018) 56 *Journal of Common Market Studies* 83.

C. Enhancing European solidarity through agencies:

By deploying operational personnel (made available through Member States' administrations or own personnel) and equipment (made available through Member States or own equipment), the EBCG agency and EASO enhance the human and financial resources of individual Member States, drawing from the EU budget. Further agency activities such as centralised management of large-scale IT systems through EU-Lisa, or the creation of standardised training modules for national administrators through EASO or the EBCG or of centralised country of origin information (COI) material for assessing asylum applications create economies of scale, further boosting implementation capacities. The modes of functioning of AFSJ agencies undoubtedly make them an indirect vessel for inter-state solidarity which seems to be more politically palatable compared to other envisaged forms of responsibility-sharing, such as relocation of physical persons among the MSs. Nevertheless, the operational element was initially tied down to the notion of emergency rendering it -in theory- an exceptionality, given that the entire operationalisation of the solidarity principle under Article 80 TFEU was emergency-driven.⁴

Gradually though, there seems to be a move away from such emergency-driven conceptions of agency involvement (and indirectly of intra-EU solidarity and fair sharing). This is exemplified by the move in EBCG of attaining a significant number of own agency operational staff (statutory staff) which should reach 3000 by 2027 (Annex I, EBCG 2019), while the number of staff to be made available through Member States for long-term secondments (i.e. at least 24 months duration prolongable once for an additional 12 or 24 months) should reach 1.500 by 2027 (Annex I, EBCG 2019), and for short-term deployments should reach 5.500 by 2027 (Annex I, EBCG 2019), so a total of 10.000. These numbers point to structural involvement in policy implementation, and consequently to structural forms of inter-state responsibility-sharing. The new enhanced role of the agency involvement in return policy, including through coordinating or organising return operations (Art. 51 and 54 EBCG 2019), points to this direction as well. Similar, but meeker, steps are portrayed in the EUAA 2016 proposal which decouples operational support from situations of disproportionate pressure, envisaging that operational support would be available in a broader context, provided it remains limited in time (see Art. 19 EUAA 2016 proposal). While these developments are potentially forthcoming *de jure*, the boost in numbers of EASO personnel, for example Greek-speaking personnel recruited and paid by EASO, assisting the Appeals Committees through the provision of COI, portrays the same development -albeit in a more limited scale- *de facto*.

These observations raise the following question:

- How can inter-state solidarity and fair responsibility-sharing be meaningfully enhanced through structural interventions of EU agencies?

Initial suggestions and ideas include:

8. Launch a study by an expert group about the asymmetric responsibilities in the areas of borders and asylum to evaluate concretely the breadth of the solidarity gap between Member States and the desirable size of EU compensation.

9. A push for greater augmentation in the number of agency statutory staff as established in the EBCG 2019 to address the difficulties raised by the short-term deployment model.

10. Creating a standing corps for EASO as for the EBCG with augmented statutory staff, and also staff from national administrations made available for longer-term secondments, i.e. at least for a duration of 24 months.

⁴ Tsourdi (2017), 'Solidarity at Work? The Prevalence of Emergency-driven Solidarity in the Administrative Governance of the Common European Asylum System' (2017) 24(5) Maastricht Journal of European and Comparative Law 667.

11. Further decoupling agency operational involvement from the notion of emergency to cover structural needs.

12. A greater allocation from the general EU budget towards border and asylum from which EU agencies (as well Member States) can draw from.

D. Addressing the fundamental rights challenge:

The exercise of executive powers and tasks entailing executive discretion by EU agency (deployed) staff result in greater direct interaction with individual migrants and asylum seekers, consequently affecting potentially their fundamental rights. The EU public liability regime fully applies and individuals may have recourse for violations before national Courts, or before the CJEU, if the strict conditions for *locus standi* for the latter are fulfilled.⁵ In addition, agency deployments in third countries raise additional fundamental rights concerns, and the need to coordinate action with international-level stakeholders.

However, there seems also to be a need for the development of extra-judicial accountability mechanisms both to ensure fundamental rights oversight and to establish flexible procedures through which individuals can claim redress for violations of fundamental rights, including the right to good administration, and the right to privacy and data protection. EU legislation on agencies have been developing novel fundamental rights oversight mechanisms, such as an independent Fundamental Rights Officer, a civil society dominated Consultative Forum, and ombudsman-type processes, through the establishment of an individual complaints mechanism.⁶ The mandate of the Fundamental Rights Office is further strengthened in the EBCG 2019, through the enhancement of its capacities, and the creation of the function of fundamental rights monitors.

These developments raise the following questions:

- How can we best ensure that the enhanced operational activities of EU agencies will be matched with adequate mechanisms at EU level ensuring effective access to justice for individuals?
- Is there a need for greater fundamental rights oversight for the EU agencies that are conducting tasks which are, on first sight, less 'operational', such as EU-Lisa?

Initial suggestions and ideas include:

13. Replicate the enhanced fundamental rights oversight mechanisms, such as the Fundamental Rights Office(r), that have been established for the EBCG in other EU agencies, most notably EASO. In the framework of EASO, fundamental rights monitors should be involved in evaluating the quality of asylum processing conducted by EASO (e.g. vulnerability assessment, admissibility interviews) including through case sampling and observation of proceedings.

14. Further develop ombudsman-type procedures, such as the individual complaints mechanism, which are flexible and non-adversarial, and can include violations beyond the realm of strict legality, e.g. administrative irregularities linked with asylum processing which violate soft norms such as guidance notes. When implementing those ensure that: i) a concrete follow up to the individual complaints assessment is established; ii) the organ examining these complaints enjoys functional independence and the necessary operational capacity (staffing).

⁵ Fink (2018) *Frontex and Human Rights: Responsibility in 'Multi-Actor Situations' Under the ECHR and EU Public Liability Law* (OUP 2018).

⁶ Rijpma (2016), *The proposal for a European Border and Coast Guard: evolution or revolution in external border management?* (European Parliament 2016).

15. Political accountability fora (EP, national parliaments where they may be involved) should pay special attention to fundamental rights issues reporting and link this to the measures at their disposal to influence agency dynamics.

16. Activities in third countries- including deployments- should be undertaken in close partnership with international stakeholders, especially United Nations agencies and organs, to enhance legitimacy and respect for fundamental rights.

E. Possible paths from joint implementation to full Europeanisation:

Joint implementation patterns and augmenting the financial and human resource means available to EU agencies could act as precursors to deeper forms of integration, eventually leading to full 'Europeanisation' of the implementation modes of these policies. This should not be specifically linked with political aspirations of an increasingly federalised EU but could be viewed as a pragmatic way to implement policies leading to the provision of regional public goods. Actually, Member States are subject to asymmetric pressures that are linked with objective factors, such as their geographic position, and issues of legal design, such as the Dublin responsibility-allocation system. This line of thinking admittedly relates to a broader time horizon than the next multi-annual policy framework, but it is nevertheless worth pursuing reflections on the legal and political practicality of such implementation modes.

Political limits are constantly shifting and further Europeanisation should take place on a needs-based model, and may therefore concern only a limited number of overburdened Member States while not affecting those able to implement their own responsibilities with less EU support. In terms of existing legal limits, the 'Meroni/Shortselling' criteria that the CJEU has established are not breached as long as executive discretion does not allow agencies to develop policy on their own.⁷ The EU treaties (Art. 4(2) TEU and 72 TFEU) could be interpreted as excluding full substitution of national authorities by an EU agency in external border management as they affirm that public order remains a Member States' responsibility. In addition, Article 78(2)(e) TFEU which foresees that 'a Member State' is to be responsible for the examination of an asylum application excludes centralised assessment of claims. This is food for thought in case of revision of the treaties in the future.

These developments raise the following question:

Should we aim for the centralisation of external border control and asylum policy in the EU? How should this be achieved within the legal limits?

Initial suggestions and ideas include:

17. For integrated border management: a flexible, needs-based model allowing for differentiation between Member States where national authorities keep the primary responsibility for integrated border management supervised by the EU, except in (overburdened) Member States willing to rely upon EU agencies to implement on their territory parts or the entirety of integrated border management.

18. For asylum policy: a flexible, 'needs-based' model where asylum policy remains in the remit of national administrations supervised by the EU, except in Member States willing to rely upon EU agencies to implement on their territory parts or the entirety of the asylum policy.

⁷ Chamon (2016) *EU Agencies: Legal and Political Limits to the Transformation of the EU Administration* (OUP 2016).