

Contemporary challenges in the area of shared management of the external borders of the European Union

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Abstract

For the last two years the problem of security on the European Union's external borders has become more and more important. In 2014, more than 276.000 migrants irregularly entered the EU – an increase of 159% compared to 2013. In 2015 detections of irregular border-crossing along the external borders already reached 1.820.000. This is over six times more than the number of detections in 2014. To enter the European Union via land, air or sea, most migrants turned to criminal networks of smugglers. At the same time the European Union's external borders have also increasingly been the scene of human tragedies. We can notice that the migration in the European Union needs to be better managed in all its aspects and shared responsibility.

In May 2015 the European Commission proposed the European Agenda on Migration. One of the most important aims of this programme was securing the external borders. This involves better management of the external border, in particular through solidarity towards those Member States that are located at the external borders and improving the efficiency of border crossings.

On 15 December 2015, the European Commission adopted an important project of a new regulation – set of measures to manage the EU's external borders and protect the Schengen area without internal borders. The aims of this proposal are, among others, to help to manage migration more effectively, improve the internal security in the EU and safeguard the principle of free movement of persons. One of the main elements of the new system will be the European Border and Coast Guard – to ensure strong and shared management of the external borders.

The aim of the article is to indicate the most important ideas of the proposal for the shared management of the EU's external borders. First of all, the article critically examines the Commission's proposal for the establishment of the European Border and Coast Guard.

Keywords: EU external borders, management of the external borders, European border guard.

Introduction

The conception of the shared management of the external borders of the European Union is connected with the European migration programme. European Union has been building the foundations and an overarching and comprehensive migration policy for almost twenty years.

At the beginning, Justice and Home Affairs were strictly a national competence. After entering into force of the Single European Act in 1987, competences in this field gradually shifted to the European level as well. Justice and Home Affairs were increasingly formalised and the European decision-making process has been put in place since the 1990s. One should remember that several aspects of that policy still remain a shared competence – on the European and the national level. The Lisbon Treaty in 2009 marked the new “community model” to the area of Justice and Home Affairs.

1. The evolution of the system of the external borders management

In the context of intensified migration movements in the direction of the external borders of the European Union during the last two years, the protection and management of external land and sea borders of the European Union is of particular importance. These borders are in fact the most common ways of transfer of illegal immigrants from third countries.

The creation of the Schengen area (in 1995) was associated with a shift of responsibility for ensuring the security of the territory and population of all the countries making up the zone on its external borders. The supervision of individual sections of the external border remains the sole responsibility of the competent authorities, bodies and departments of each country (see art. 6 Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, OJ L 239 , 22/09/2000 P. 0019 – 0062). It should be noted, however, that border control does not remain solely in the interests of the Member State on whose external borders it is carried out. It is in the interest of all Member States which have abolished border controls at internal borders. The current form of cooperation between the Member States in the field of management and in particular the protection of the border, constituting a common external border of the European Union, is the result of a long debate and long-term arrangements at various levels.

The idea of an integrated management of external borders was formulated by the European Council in Laeken on 14–15 December 2001. This idea was related to the need for sharing of responsibility and financial solidarity with countries outside the EU, potentially exposed to the strongest immigration pressure. The idea of an integrated management of the external borders of the EU was to take into account both the demands of countries with external borders of the EU, as well as those that border only with other Member States. The need to ensure the safety of the EU territory without creating the barriers to trade and movement of people was most frequently indicated as the main problem of the practical implementation of this concept (Hobbing, 2005, p. 1). The concept of integrated management of external borders and defined principles for cooperation between the Member States in this field was developed in the Communication from the Commission to the Council and the Parliament of 7.05.2002: Towards integrated management of the external borders of the Member States of the European Union. The key element of the proposed system was to be the adoption of common regulations relating to border controls and standards of border management (Burski, 2013, p. 5). At the same time, the Commission's idea of creating the European corps of border guards was presented (Monar, 2005, pp. 145–164). The increased security of the entire EU territory and the distribution of costs related to border management between all the Member States were emphasized as the main advantages of this approach. The main issue arousing controversy was, in turn, entrusting the border protection to persons who are not citizens of the country. In this context, it was decided to start on the creation of a network of liaison officers of border guards of the Member States and the introduction of joint controls at airports and seaports. However, the very idea of establishing a European system of border guards never fell as a long-term policy option (Parzymies, 2002, p. 41; Carrera, 2010, pp. 1–7).

The European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union – FRONTEX has finally become the effect of multi-faceted discussions between the Member States of the European Union (Jorry, 2007, pp. 5–9; Hobbing, 2006, pp. 169–192). The Agency began its formal operations on 1st May 2005, but actually on 3rd October 2005 on the basis of the Regulation (EC) 2007/2004.

Its creation was a crucial step towards an integrated management of the external borders of the Union (Papastavridis, 2010, pp. 75-111). Founding

FRONTEX, however, is not a final solution in the area of protection and management of external borders. The concept of establishing a European system of border guards / European border guard corps, is still present in the discussions in various institutions. Its founding was, for example, one of the key proposals of the Stockholm Programme, adopted by the European Council in December 2009. It also appeared in the Commission's work programs (in particular, for example, the EU Commissioner for Home Affairs – Cecilia Malmström (2010–2014)).

According to the FRONTEX's mandate, it was tasked with the promotion of an integrated approach to border management, through conducting risk analysis, drawing up training plans for border guards, or carrying out research. FRONTEX also coordinates joint border management operations and organizes return operations. Its role was strengthened over next years.

In 2007 the Rapid Border Intervention Teams (RABIT) were established, coordinating the national border guards deployed outside their own member state. Every member state in a crisis situation can request the deployment of RABITs border guard assistance for a limited period of time. Still, this mechanism was used rather rarely, for example: in 2010 on the Greek- Turkish border, or in 2016 on the Aegean Sea.

The role of the FRONTEX agency was further reinforced in 2011 (by Regulation (EU) 1168/2011) by the creation of the European Border Guard Teams (EBGT). They could be used for joint operations and rapid border interventions. Simultaneously, the surveillance capabilities of FRONTEX were enhanced by the creation of the Situational Centre. It provides a regularly updated picture of EU's external borders and migration situation. The next important step was the establishment of the European Border Surveillance System (Eurosur). FRONTEX may also conclude working arrangements on the management of operational cooperation with the third countries, send liaison officers to third countries and launch technical assistance projects in non EU countries. Finally, FRONTEX played a leading role in the creation of 'hotspots', Migration Management Support Teams. These teams play a double role. Firstly, they coordinate the European Asylum Support Office (EASO), Europol, FRONTEX and national authorities in the area of identify, screen and register migrants on the external border of the EU. Secondly, they help to coordinate actions in organization return operations.

Despite certain successes, functioning of FRONTEX turned out to be insufficient for the effective protection of the external border of the EU. In 2014, more than 276.000 migrants irregularly entered the EU, which represents an increase of 159% compared to 2013. In 2015, detections of irregular border-crossing through the external borders reached 1.820.000. This is over six times more than the number of detections reported in 2014. This put border authorities under big pressure, especially Greece, as the two main entry points were reporting up to 6.000 arrivals per day. For several other member states large scale inflows of migrants and asylum seekers was also a new experience. In response, 7 of the 26 Schengen countries (Germany, Austria, Sweden, Slovenia, Hungary, Norway, France) temporarily reintroduced controls on at least some of their borders, to manage increasing flows of migrants (Article 29 Schengen borders code).

The experiences of the last two years show that the Schengen area without internal borders is only sustainable if the external borders are effectively secured and protected. In this context the idea of pooling resources by setting up the European Border and Coast Guard system was revived.

2. The European Border and Coast Guard system

The European Commission's Communications on a European Agenda on Migration (COM (2015) 240 final) and on Managing the refugee crisis (COM(2015) 510 final) numbered some guidelines for a new conception of shared managing the EU's external borders. On 15 December 2015 the Commission came forward with the Proposal for a Regulation on the European Border and Coast Guard (EBCG) as a new instrument for ensuring the protection of the EU's external borders. According to the Commission's Communication, the purpose of the Regulation was both: improving the management of migration and ensuring internal security within the European Union.

The Commission proposed several changes in the existing system of coordination on the EU external borders. The new system of the European integrated border management, according to the European Commission, should consist of eight interrelated components – from effective border control related to the prosecution of cross-border crime, through the analysis of the risks for the internal security of the Schengen area and the analysis of threats to the EU's external borders, to organizing return operations for

third-country citizens who are illegally staying on the territory of the EU. Each of these actions at the EU level is to be supported by, among others, inter-institutional cooperation with the national authorities of the Member States and third countries (in particular neighboring countries and the so-called transit countries).

The main changes in the new system should relate to: firstly, the creation of the new European Border and Coast Guard Agency with expanded competences, compared to FRONTEX, and secondly – to introduce systematic, constant monitoring of all persons crossing the borders of the Schengen area – the citizens of the EU (which is related with the changes in the Borders Code).

The European Border and Coast Guard Agency is to be a key link in a new system of management of the external borders of the European Union. It has to work closely with the competent authorities of the Member States, responsible for the ongoing management of individual sections of the external border of the European Union in the framework of a European border and offshore guard.

The Commission proposal foresees several areas of activity of the new European border and offshore guard. First, it is to have a monitoring and oversight role. In practice, it is intended to carry out assessments of the capacity of Member States to meet the challenges in the field of conservation and management of its part of the external border of the EU. Such monitoring takes into account, for example, possessed equipment and personal resources of the Member States. Within the above-mentioned function, it is also planned to establish the centre of monitoring and risk analysis. Its task will be to monitor migration flows across borders outside the EU, as well as through internal borders and to conduct the analysis of potential threats. In its risk analysis the Agency will also take into account the problem of cross-border crime and terrorism.

Liaison officers, whose task will be to support the site of the emergency borders, are to be deployed to individual Member States. In case when the assessment of operational capacity, technical equipment or other resources of Member States done by the European Border and Coast Guard Agency was insufficient, the Agency may require the Member States concerned to take remedial action.

The European Border and Coast Guard Agency, on the basis of the proposals of the European Commission, is also to be equipped with the right to

intervene. The Member States may submit to it proposals for joint operations and rapid intervention at the borders and to support these operations by the European Border and Coast Guard Teams. In case when, for example, a Member State finds itself in a situation of extraordinary increase of migrants, threatening the Schengen area, and the national action would be insufficient, the Agency will be able to use the support of the European Border and Coast Guard Teams in order to provide on-site activities. It will be possible also in a situation when a Member State will not be able or will not want to take the necessary measures. It is important, however, that an executive decision would have to be made by the European Commission. This decision should specify that the situation on a particular section of the external border requires urgent action at European level.

Another area of competence of the new Agency will be supervising the coastguard. The National Coast Guard is to become the part of a European border and coast guard that performs tasks of border control. The activities of the new European Border and Coast Guard Agency will be linked, among others, with those of the European Fisheries Control Agency and the European Maritime Safety Agency. These agencies will be able to take joint actions in the field of monitoring and surveillance (eg. the use of drones in the Mediterranean). An important issue is providing the Agency a mandate to conduct operations in neighbouring third countries. The Agency will be able to send there liaison officers, as well as participate in joint activities, including third countries.

The project submitted by the Commission is planned to further extend the tasks of the new European Border and Coast Guard Agency. They are to cover, among others, setting up and deployment of European Border and Coast Guard Teams for joint operations and rapid border interventions, setting up a technical equipment pool, assisting in coordinating the activities of the migration management support teams at hotspot areas, training and research. The human resources of the Agency will be reinforced by the constitution of a rapid reserve pool which will be standing corps composed of a small percentage (2% – 3%) of the total number of border guards in the member states to a minimum of 1.500 border guards. These corps will be placed at the disposal of the Agency and should be deployable from each member state within three working days.

The European Border and Coast Guard Agency will have a stronger role (the coordination and organization) on return operations and return

interventions from one or more member states. A new Return Office will be set up in the structure of the Agency. It will be responsible for the European Return Intervention Teams composed of escorts, monitors and return specialists. The Agency will also provide national authorities more efficient and cost-effective multipurpose services carrying out coast guard functions in cooperation among the European Border and Coast Guard Agency, the European Fisheries Control Agency and the European Maritime Safety Agency.

Another element of the new system is the introduction of the concept of systematic checks on persons crossing the external borders of the Schengen area which is to cover (as it should be stressed) both entering and leaving people. Mandatory checks will also include EU citizens crossing any kind of external border: land, sea and air. The Commission proposed that they should be carried out on the basis of available databases, such as SIS, Interpol database (database of stolen or lost travel documents) and the related national databases of Member States. The purpose of the control is to verify whether passengers do not pose a threat to public order or public security for the Member States of the European Union. In the projected submitted in December 2015 the European Commission stressed the need for the verification of biometric identifiers in passports of EU citizens. The necessity of such a concern would be in cases of doubt concerning the authenticity of the passport or the identity of the person who uses it.

3. Conclusions – the evaluation a new concept of the European border and coast guard

According to legal analysts (Rijpma J., 2016), the provision of the right to intervene may exceed the EU's powers as framed in 72 TFEU (the Treaty '*shall not affect the exercises of the responsibilities incumbent upon the Member States with regard to the maintenance of law and order and the safeguarding of internal security*') and Article 4(2) TEU (the EU should to respect '*essential state functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding internal security*'). According to this interpretation, the EU can establish rules on border controls and regulate how the authorities of the member state implement them. On the other hand – the EU cannot replace member states' powers of coercion or control, or require from the member state to carry out a particular operation.

Some experts also point out that an increase in FRONTEX's competences and tasks will not be sufficient to remedy the structural deficiencies in the external border management systems in some member states (Carrera S., den Hertog L., 2016, pp. 1–5). The commentators also point out that the new European Border and Coast Guard Agency (a “reinforced” FRONTEX) would not be fully effective unless the structural and administrative capacities of the member states will be stronger and comply with the EU border and asylum standards. In literature we could also find the statement that the reinforcement of the FRONTEX mandate should be accompanied by a fundamental change in the current EU Dublin system (E Guild, C Costello et al, 2015, pp. 33–43; Rijpma J., 2016, pp.29–33; Carrera S.,den Hertog, 2016, pp.13–16;2016).

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