



ON THE AGENDA: THE REFUGEE CRISIS AND EUROPEAN INTEGRATION

THE EUROPEAN BORDER AND COAST GUARD: A NEW MODEL BUILT ON AN OLD LOGIC

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ABSTRACT: Due to the refugee crisis, the Proposal made by the Commission in December 2015 to create a European Border and Coast Guard (EBCG) will soon become legislation adopted in record time with a large consensus. Wrongly considered as an ambitious solution, it is based on highly questionable principles. Firstly, it transforms the EBCG Agency into the Chief Executive Officer of the Member States authorities in charge of border controls. This is a welcome new model because of the current powerlessness of Frontex, but it does not guarantee the independence towards Member States of this new Agency that will remain intergovernmental. In reality, the Proposal does not create in the true sense an EBCG that will be nothing more than a legal fiction while its misleading title will keep going the confusion between the numerous concepts used in the European borders policy. Secondly, although the Commission pretends to share border controls between the EU and its Member States, the latter will remain responsible for their implementation which is in contradiction with the principle of solidarity, with the consequence that the funding of the European borders policy will remain an unsolved problem. Actually, the Proposal follows the old logic of a supposed principle of responsibility and gives it the priority over the necessary solidarity in violation of the Treaty and in contradiction with the new orientation given by the Commission to the asylum policy. The EBCG could be a short-term solution to the situation at the Greek borders, but it will not solve the structural problem of border controls in the EU that requires a centralised agency for which there is no legal basis in the Treaty.

KEYWORDS: border controls – European Agencies – Frontex – European Border Guard – responsibility – solidarity.

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I. INTRODUCTION

The crisis that the European Union faced in 2015 with the massive arrival of asylum seekers and migrants through the Western Balkans route is closely linked to the issue of controlling the external borders of the European Union. This is not the only issue related to the crisis: the unfair “Dublin” rules on allocating responsibility for asylum seekers are also an important factor, and the crisis can in no way be reduced to border controls despite efforts by some political leaders (particularly those in Central Europe) to do so. However, it is clear that borders are a key issue, as Greece’s loss of control over its external borders had repercussions on the entire Schengen Area. The security concerns linked to the recent terrorist attacks only increased the relevance of this issue.

One can therefore understand why on 15 December 2015 the Commission tabled a Proposal for a Regulation on the European Border and Coast Guard (EBCG) “in order to ensure a European integrated border management” by bringing it “to a qualitatively different level”, in particular by expanding substantially the competences of the Frontex Agency by transforming it into a EBCG Agency.¹ Having “identified the need to move to a shared management of external borders”, the Commission also intends “to render border management more effective and reliable by bringing it to a new level of responsibility and solidarity”.² Thus, the EBCG Proposal presented by the Commission seemed to be an ambitious one. This impression was reinforced by the political controversy that followed the Proposal, which centred on the possibility for the new Agency to substitute itself for Member States not controlling their own external borders. If Member States oppose it in the name of their sovereignty, could it be that it is not really a powerful new European tool?

On the basis of the idea that the EBCG is needed as soon as possible, the EU institutions are advancing through the legislative process at full speed in order to adopt the Proposal by the summer of 2016. As the legislature³ is in line with the Commission Proposal, this extremely tight calendar (seven months for the Council and the Parliament to adopt an important Proposal in co-decision!) will be respected, although one may won-

¹ Commission Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC, COM(2015) 671 final.

² See Proposal for a Regulation COM(2015) 671, cit. See also the Communication from the Commission to the European Parliament and the Council, *A European Border and Coast Guard and effective management of Europe’s external borders*, COM(2015)673 of 15 December 2015, which summarises the goals of the borders policy.

³ See Council Mandate of negotiations with the European Parliament of 8 April 2016, 7649/16 and European Parliament, Libe Committee, Rapporteur: Artis Pabriks, Draft Report of 23 March 2016 on the proposal for a regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC. The European Parliament approved the text in plenary on 6 July and the legislative procedure will end soon with the approval by the Council.

der if it will be possible to implement the new regulation by launching the EBCG Agency within a few months as intended.

However, the principles on which the Commission Proposal is based are questionable. Firstly, even if it represents an important change towards a new, but problematic, model of the new Agency's role in relation to the Member States, it maintains a level of confusion surrounding the different concepts related to border controls by wrongly claiming to create a European Border and Coast Guard. Secondly, it pretends to change the way responsibilities are shared between the EU and its Member States while it preserves the old logic of implementing border controls by emphasising a supposed principle of responsibility as superior to the principle of solidarity, in contravention of the Treaty.

II. A NEW MODEL? HIERARCHY WITHIN AN INTERGOVERNMENTAL NETWORK

The Frontex Agency was built by Council Regulation (EC) 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union as the core of a network made of the national authorities in charge of border controls. Despite the Commission Proposal's intention to considerably enlarge Frontex' competences, the biggest envisaged change concerns the nature of the Agency: if the Proposal is adopted without fundamental changes, the new European borders Agency will become the line manager or even the Chief Executive Officer (CEO)⁴ of Member States' authorities in charge of external border control. The goal of the Proposal is to prevent future crises and to remedy the insufficient power of the Agency over Member States. Frontex desperately needs Member States' cooperation, however, they do not always collaborate fully, and the Agency has neither the necessary information to act nor the power to force the Member States to do so.

In that sense, the EBCG Proposal is a crucial step in the evolution of the Agency. The Proposal gives it progressively more and more power over the Member States, as demonstrated by several provisions:

- the Agency will adopt a European "operational and technical strategy" with which the "national strategies" of Member States will have to be "*coherent*" (Art. 3);
- Member States shall "take Frontex risk analysis *into account* when planning their activities" (Art. 10, para. 6);
- Member States have a general obligation to provide timely and accurate information to the Agency (Art. 9);

⁴ Following the words of S. PEERS, *The Reform of Frontex: Saving Schengen at Refugee's Expense?*, 16 December 2015, eulawanalysis.blogspot.it.

- the Agency will deploy its own Liaison Officers to Member States. These officers will report regularly to the Executive Director of the Agency on the capacity of Member States to deal with the situation at their external borders (Art. 11, para. 3, let. e);

- the Agency shall evaluate Member States' "capacity" to control their section of the external borders by a "vulnerability assessment" (Art. 12); previously "capacity assessment" was a task that the Agency was authorized to undertake on the basis of Art. 4, second indent of the Frontex Regulation as amended in 2011, however, it was a possibility – not an obligation for the Agency – and it has not been implemented due to a lack of resources and resistance from Member States following the evaluation of the Agency's activities carried out in 2015 by Ramboll;⁵

- if this "vulnerability assessment" concludes that their capacity is insufficient, a sanction is foreseen: the Executive Director can take a "binding decision imposing corrective measures" on the Member State, and if this decision is not implemented, the Management board of the Agency and the European Commission may intervene (Art. 12);

- finally, the Proposal contains a provision which gives the Agency the power to substitute itself for a Member State in the case of failure to implement the corrective measures following a vulnerability assessment or in the case of "disproportionate migratory pressure at the external border, which risks putting in jeopardy the functioning of the Schengen Area". In such case, the Member State will be obliged to cooperate with the Agency, which will apply the measures identified by the Commission. This mechanism, foreseen by Art. 18 of the Proposal, became famous immediately after the presentation of the Commission Proposal, as several Member States expressed their opposition to what they considered a violation of their sovereignty. Following this political positioning, Member States in the Council do not currently oppose the substitution mechanism as such, but propose instead to give the power to act against a Member State to the Council rather than the Commission. It is not certain that such a change constitutes an adequate answer to the constitutional problem that has been raised. Some experts consider indeed that "The right to intervene under the Commission's Proposal raises serious concerns as regards Arts 4, para. 2, TEU and 72 TFEU".⁶ The same seems to be true for the Council amendment as what is at stake is not the horizontal division of powers between the EU institutions but the vertical distribution of competences between the EU and the Member States. The Treaty provisions indeed preserve the power of each Member State to act for the maintenance of law and order.

This change of model from a flat network to a kind of hierarchy also raises the problem of the institutional configuration of the Agency. One may wonder if it will bene-

⁵ External evaluation of the Agency under Art. 33 of the Frontex Regulation, 2015, frontex.europa.eu, p. 35.

⁶ J. RJPMA, *The Proposal for a European Border and Coast Guard: Evolution or Revolution in External Border Management*, Libe Committee of the European Parliament, 2016, www.europarl.europa.eu, p. 18.

fit from enough independence from the Member States to carry out authentic vulnerability assessments, in particular if the Executive Director is “completely (sic) independent” (Art. 67, para. 1, of the Proposal) to make the necessary recommendations, and if the management board is able to adopt the necessary decisions on this basis in order to eliminate the identified vulnerabilities. These questions are relevant, as Frontex is (and the EBCG will remain) an Agency of intergovernmental nature, where most of the power belongs to the Member States through the Management board and to the Executive Director appointed by the Management Board and accountable to him. The Commission proposed the creation of a new supervisory board made of the Deputy Executive Director, four senior officials of the Agency and one representative of the Commission in order to advise him, in other words, not to leave him to decide on such important and delicate issues alone. The Council and the Parliament seem willing to delete this provision, but do not seek to address the issue otherwise. It is true that the issue is new, as most of the literature on agencies to date has focused on the issue of accountability of the agencies rather than their independence,⁷ but independence must also be addressed, as the agencies in the area of freedom, security and justice are confronted more often than the others with highly political and even politicised issues.

Finally, contrary to what it pretends, the Proposal does not create a European Border and Coast Guard (EBCG). It is important to understand the meaning of this notion and differentiate it from integrated border management,⁸ which is not easy due to the proliferation of notions lacking a precise meaning.

European integrated border management (generally abbreviated IBM) refers to the material dimension of border policy. It was defined in Council Conclusions of 4-5 December 2006 and for the first time it will be introduced into hard law by the Proposal. It is often presented as a four-tier model comprising measures in third countries (like the visa policy), measures with neighbouring countries, border control measures and measures within the Schengen Area (in particular return). However, IBM is not only about where border controls take place, but also about the function and scope of those controls. Art. 4 of the Proposal lists no less than ten elements, in particular the prevention and detection of illegal border crossings, analysis of the risks for internal security, cooperation between Member States, cooperation between the different agencies responsible for border control or other tasks carried out at the border, cooperation with third and particularly neighbouring countries, measures to counter cross-border crime, return of third-country nationals staying illegally, use of large scale information systems like the Schengen Information System (SIS), quality control and even solidarity mecha-

⁷ See for instance M. BUSUIOC, *European Agencies: Law and Practice of Accountability*, Oxford: Oxford University Press, 2013, who however mentions the issue of double hats when the members of the Board's Agency are also the heads of the national agencies in the same area.

⁸ One should keep in mind that the legal basis of the European borders policy (Art. 77 TFEU) uses the different notion of an “integrated management system” as the ultimate objective.

nisms. This long list reflects the tasks that the legislator would like to be managed in an integrated way, with the notable exception of customs, as the Council would like to underline in the preamble.

The EBCG refers to the institutional dimension of border policy and deals with the place assigned to the European and national levels in the area of border controls. One does not understand immediately Art. 1 of the Proposal following which “A European Border and Coast Guard is hereby set up to ensure a European integrated border management [...]”. An institutional operation like the creation of the EBCG does indeed not automatically have an effect on the tasks of border guards. Jorrit Rijpma accurately notes that the Agency’s tasks listed in Art. 7 of the Proposal do not reflect all the elements of IBM listed under Art. 4 and are silent regarding internal security in particular,⁹ which is rather strange at a moment when security is one of the EU’s top priorities.

But there is more. Art. 3, para. 1, of the Proposal, following which “the EBCG Agency and the national authorities of Member States which are responsible for border management shall constitute the EBCG” is a rather strange and complicated provision. The EBCG appears to be a legal fiction composed of the new European Agency that will replace Frontex and the national border guards. As explained by Jörg Monar,¹⁰ the idea of creating a European Border Guard was launched by Italy and Germany in 2001, but it lost momentum with the feasibility study for the setting up of a “European Border Police”¹¹ carried out by some Member States which advocated, despite its title, a network model prefiguring the creation of the Frontex Agency in 2004. One should note that following Art. 33, para. 2, let. a) introduced in the Frontex Regulation 2007/2004 in 2011, “The first evaluation following the entry into force of Regulation (EU) No 1168/2011 shall also analyse the needs for further increased coordination of the management of the external borders of the Member States, including the feasibility of the creation of a *European system of border guards*”. This last notion – one more! – appeared with the Hague and Stockholm programmes adopted by the European Council respectively in 2004 and 2009 for the programming of the development of the Area of Freedom, Security and Justice.¹² The consultancy company in charge of this study proposed an approach in 3 phases. Under the last one, called “full integration at EU level”, a “European Border Corps” similar to the European Border Police initially envisaged would be created.

Trying to find a way through all the notions that are used leads us to realise that the Proposal, despite its misleading title, does not create a true “European Border Guard”

⁹ J. RIJPMMA, *The Proposal for a European Border and Coast Guard*, cit., p. 14.

¹⁰ J. MONAR, *The Project of a European Border Guard: Origins, Models and Prospects in the Context of the EU’s Integrated External Border Management*, in M. CAPARINI, O. MARENIN, *Borders and Security Governance*, LIT verlag, 2006, www.dcaf.ch.

¹¹ www.statewatch.org.

¹² See about this S. CARRERA, *Towards a Common European Border Service*, in *Ceps Working Document no. 331*, June 2010, www.ceps.eu.

understood as a European body made of borders guards replacing national border guards but rather a "Frontex +" Agency following the expression of Sergio Carrera and Leonhard den Hertog.¹³ The fact that national border guards will remain almost untouched proves this. This is not only an institutional discussion. It also has important consequences for the issue of solidarity inside the EU, which must be considered in liaison with the allocation of responsibilities between the EU and its Member States.

III. AN OLD LOGIC! PRIORITISING RESPONSIBILITY OVER SOLIDARITY

While the competence to legislate on borders is a shared one, Art. 1, para. 2, of the Frontex Regulation 2007/2004 states clearly that "the responsibility for the control and surveillance of external borders lies with the Member States". The Commission Proposal pretends to share this responsibility between the new Agency and the national authorities in charge of border management (Art. 5, para. 1). However, the preamble of the proposal is clear on the way this responsibility will be shared by saying that "Member States retain the primary responsibility for the management of their section of the external borders in their interest and in the interest of all Member States" (point 5). This is actually an under-statement as, despite the strengthening of the prerogatives of the Agency, border controls will in principle still be implemented by each Member State. This is confirmed by Art. 5, para. 1, let. a), of the Proposal, which the Council wishes to amend to read "Member States shall ensure the management of *their* external borders". This indicates clearly that there are no European borders that would be controlled by the Agency.

However, Member States do not control their external borders only in their own interests but also in the interest of the Schengen Area (and even the Northern States like the UK and Ireland which do not participate in it). If border guards simultaneously fulfil a double function at national and European level, they remain organically national as their appointment, salary and equipment correspond to a responsibility of each of the Member States. The longer a Member States' external border, the more they are supposed to contribute to the Schengen Area by implementing controls. It is easy to understand that burdens generated by border controls are unequally distributed between Member States when we compare Luxembourg, which only has a small airport, with Greece with its many islands or Italy with its long coast. This is what is called asymmetric burdens between the EU Member States.

Strong solidarity is therefore needed in the area of borders if their control is left to Member States, as it is still the case in the Commission Proposal on the EBCG. There is actually an inversely proportional relationship between responsibility and solidarity: the

¹³ S. CARRERA, L. DEN HERTO, *A European Border and Coast Guard: What's in a Name?*, in *CEPS Paper in Liberty and Security in Europe* no. 88, March 2016, www.ceps.eu.

more responsibility given to the EU, the less there is a need for solidarity between Member States; the less responsibility the EU has, the more there is a need for solidarity between Member States. This has been recognised by Art. 80 TFEU following which “The policies of the Union set out in this Chapter (including external borders) and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the Union acts adopted pursuant to this chapter shall contain appropriate measures to give effect to this principle”. This provision, however, is disregarded by the EU institutions and poorly applied.

Jörg Monar has clearly shown this by analysing the EU funding which is the main tool for implementing solidarity in border policy. While acknowledging that financial solidarity has been expanded for the period 2014/20 compared to the previous financial perspectives and that the amounts are distributed between Member States on the basis of burden indicators,¹⁴ he considers that “the financial envelope must be regarded as very modest” in comparison with the costs faced by the Member States and that “it may even be regarded as verging on the purely symbolic” in comparison with other European policies.¹⁵ If adopted, the Proposal on the EBCG would do little to change this. The level of solidarity will of course improve with the increase of the prerogatives, budget and human resources of the new Agency in comparison with the means currently allocated to Frontex, but only in a limited way.

This does not mean that the Proposal will not contribute to solving the crisis at the Greek external borders. On the contrary, the substitution mechanism described above presenting solidarity as a sanction with the diminishing of the sovereignty of an irresponsible Member State, can make it more acceptable. Instead of being unwilling to acknowledge the help provided to Greece, which is sometimes considered a reward for an irresponsible Member State, political leaders will have the possibility to claim they are sanctioning Greece by depriving it of part of its sovereignty with the EBCG Agency taking over the control of its external borders.

The new mechanism envisaged to deploy Border Guards in a Rapid Border Intervention should also be more efficient than the current one used in Greece. The Proposal envisages the creation of a “Rapid Reserve Pool” (RRP) as a “standing corps placed at the immediate disposal of the Agency and which can be deployed from each Member State within three working days from when the operational plan is agreed by Frontex Executive Director and the Host Member States” (Art. 19, para. 5). This RRP should be made of a minimum of 1500 national border guards that Member States would have to

¹⁴ See also on this point European Court of Auditors, Special Report 15/2014, *The External Borders Fund Has Fostered Financial Solidarity but Requires Better Measurement of Results and Needs to Provide Further EU Added Value*, point 31, p. 21.

¹⁵ J. MONAR, *Solidarity as a Challenge for the EU: The Case of Justice and Home Affairs*, in *EUの連帯*, 2015, p. 14.

deploy without having the possibility to argue that they are “faced with an exceptional situation substantially affecting the discharge of national tasks” as they can do when it is about complementing the RRP with extra border guards (Art. 19, para. 6).

If the Proposal on the EBCG can be considered a concrete sign of solidarity towards Greece by contributing to a solution to the crisis at its external borders in the short term, it still raises serious questions in the long term regarding the balance established between responsibility and solidarity.

Firstly, the RRP looks extremely modest as it corresponds only to two or three per cent of the total number of national border guards. One can of course argue that, apart from the RRP, Member States also have the obligation to provide supplementary border guards to the Agency, the total number of staff necessary for European Border Guards Team being determined by its management board. However, such a mechanism already exists in the current Frontex Regulation 2007/2004 (Art. 3, let. b)) and does not work as it should due to the resistance of Member States to provide the necessary staff. One may wonder if there is a reason why it would improve once the EBCG is adopted. Let us hope that the creation of the RRP will not have the perverse consequence of allowing Member States to consider that they have done their duty by contributing to it and have no further duty to provide human resources to the rest of the European Border Guard teams, knowing that they will in that case still be authorised to invoke an “exceptional situation substantially affecting the discharge of national tasks” (Art. 19, paras 3 and 6).

Secondly, the EBCG provides only a temporary solution to a structural problem as the envisaged tools are conceived as temporary.¹⁶ Such an ambiguity raises the question of whether the EU expects one Member State facing a disproportionate pressure at its external borders due to its geographical location to take the measures necessary to regain control of the situation with its own means in the future. This would mean that responsibility would override solidarity as time goes by.

The current level of solidarity seems to be in contradiction with the Treaty. Contrary to what is often said, Art. 80 TFEU does not put the principle of responsibility – following which Member States should control their section of the external borders themselves – in opposition to the principle of solidarity – following which overburdened Member States should get help from the EU. On the contrary, Art. 80 TFEU is about “the principle of solidarity *and* fair sharing of responsibility”. Instead of an opposition between two principles, this provision – which itself deserves an in-depth analysis that cannot be developed in the present publication – can be considered to complete the rather large idea of solidarity with a more precise and demanding idea of *fair* sharing of responsibility.

¹⁶ See Arts 14, para. 2, regarding Rapid Border Interventions, and 15, para. 3, let. b), regarding Joint Operations.

IV. CONCLUSIONS

Our analysis leads to the conclusion that the EBCG Proposal is not an ambitious proposal. It envisages a short-term solution to the structural problem of the crisis at the Greek borders, which instead requires a fundamental change. In order to understand the level of ambition of the Commission Proposal, it is important to avoid any misunderstanding regarding what the proposed "European Border and Coast Guard" is, as one can easily get lost in the different concepts that have been proposed over time regarding the institutionalisation of the common border policy. Actually, the name "EBCG" proposed by the European Commission is a flag of convenience that is misleading. It is only a legal fiction made of the addition of the new Agency to the national authorities of Member States that remain mainly responsible for border management. It has nothing to do with the European Corps, Guard or Police imagined before, including by the Commission, to replace the national border guards.

The Proposal is therefore not the end of the evolution of the institutional organisation of border controls in the EU. Unless the Rapid Reserve Pool and the European Border and Coast Guard Teams grow to the point that they will almost replace the border guards of some Member States unable to face disproportionate pressures, the need for more solidarity will increase. The case of Italy, which is beginning to face an increasing number of arrivals, shows, if it was necessary, that the Greek case is not the only one. It is good to remember that the previous idea of creating a European body for guarding the external borders was supposed to answer to the need for more burden sharing between the Member States.

One could be tempted to conclude that more financial solidarity between Member States in the border policy is the solution or, from a Euro-careful point of view, the remedy to avoid the creation of a true EBCG replacing the national border guards. However, the Member States that would be requested to contribute more and more financially will understandably argue that they want to decide about how their money is used, in particular if they do not trust, as it is the case for the moment, the Member States in charge of the Southern external borders. Therefore, a real solution seems to require progress towards a model where the responsibility for the control of the external borders would no longer be shared with Member States, but rather would become extremely centralised into a European Agency, a real and not a fictive European Border and Coast Guard. The Commission Proposal so appears as a typical example of another EU attempt to transform a crisis into an opportunity in order to progress a bit more in the process of European integration.

This may be the right strategy as it would be better to have the EBCG as proposed rather than nothing due to the fact that a fully-fledged European Agency would be politically unacceptable, and even legally impossible in the absence of a sufficient legal basis

in the Treaty.¹⁷ This may be true, but it means that we are just waiting to accomplish the enormous but necessary step towards a kind of federal integration in the common border policy by creating a centralised agency for borders. It would also mean that we risk creating false expectations in the future by proposing a fake ECBG. In the meantime, it is contradictory that the Commission sticks to the old logic of responsibility when proposing a reform of the common border policy, when at the same time, it accepts a new logic of solidarity in the common asylum policy in its proposal to reform the “Dublin” mechanism of determining the Member State responsible for examining an asylum application¹⁸ which includes a distribution key reflecting the population and GDP of each Member State in the European Union.

¹⁷ J. RIJPMAN, *The Proposal for a European Border and Coast Guard*, cit., p. 26.

¹⁸ Commission Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), COM(2016)270 final.

