

# EU agencies

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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.*

# PART 1: ASSESSMENT OF THE CURRENT SITUATION

The 2015 spike in arrivals of individuals seeking asylum in the EU 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 for the application of European law in the main. The institutionalisation of practical cooperation through EU agencies has begun to unsettle this, however. EU agencies are now at the forefront of policy implementation for two primary reasons: to overcome the policy implementation gap and enhance interstate solidarity. Their mandate was initially heavily focused on activities, such as information exchange, training and risk analysis. It has constantly been expanding, 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), two broad trends become apparent:

- ▶ Firstly, the operational expansion of EU agencies' mandates has led to patterns of joint implementation, with their staff and experts deployed in fields such as border control, returns and the processing of asylum claims. For example, Greek national law allows EASO-deployed experts to conduct parts of the asylum process that entail administrative discretion (i.e. emitting non-binding opinions on the admissibility of claims and conducting interviews in the merits stage, while the final decision on admissibility and on granting international protection rests with the Greek Asylum Service). These developments point to the gradual emergence of an "integrated European administration".<sup>2</sup> In addition,

these agencies are increasingly operational in third countries due to bilateral or multilateral agreements. This is linked with the impetus of the EU on externalising protection obligations, as exemplified by the 2016 EU-Turkey deal.

- ▶ Secondly, their mandate has expanded to encompass functions that far exceed support, including operational support and administrative cooperation. Reference is made to monitoring-like functions, as well as to functions which have the potential of steering policy implementation. Monitoring-like functions include Frontex's vulnerability assessment, which could lead to recommendations; a binding decision of measures set out by its Management Board; or, in cases where the external borders require urgent action, a Council implementing act prescribing measures which become binding for the member states. Nevertheless, there is no 'right to intervene' in a member state – not for the EBCG, nor for the EU institutions (e.g. enforcing deployments on the ground). The ultimate measure is recourse to the procedure to reintroduce internal border controls, as foreseen in Article 29 of the Schengen Borders Code 2016/399.

Given the member states' support for increased agency involvement to better respond to functional pressures and the unmet interstate solidarity imperative as well as to implement cooperation with non-EU countries in migration, these two trends will only intensify. They may well become the precursor of more radical shifts in the implementation modes of these policies.

## PART 2: IDEAS AND SUGGESTIONS FOR THE FUTURE

The mandate expansion of EU agencies appears to be based on the recognition that external border management and asylum provision are, in essence, regional public goods that benefit all member states regardless of their geographic position (i.e. regardless of their proximity to EU's external borders). This also entails that external border management and asylum provision are shared responsibilities between the EU and its member states. The fact that it is shared has consequences on how the asylum and external border control policies are to be implemented, and how the financial and human resource costs for their operationalisation are distributed (Article 80 TFEU).

It also implies a shift towards forms of joint implementation whereby EU agency staff, deployed experts from member states and national administrators work side by side in implementing EU policies. In addition,

it means a shift from a predominantly national financing component towards more centralised funding, both directly through EU funds and indirectly by benefitting from agency deployments and joint implementation patterns. EU agencies also have a central role in operationalising the cooperation between EU and non-EU countries in managing migration from the latter countries, which increasingly includes the externalisation of protection obligations and containment of migrants in third transit states.

This chapter focuses on possible pathways for the sustainable development of increased agency involvement, which address member states' needs while remaining within the existing constitutional and political limits of the EU treaties; and responding to the challenges of resourcing, independence, accountability and respect for fundamental rights.

### A. Balancing joint implementation and supervision

The recently agreed Regulation on the European Border and Coast Guard 2019/1896 (EBCG 2019) enounces European integrated border management as “a shared responsibility of the Agency and of the national authorities responsible for border management”, while recognising in the same article that “Member States shall retain primary responsibility for the management of their sections of the external borders.”<sup>3</sup> Increased EBCG resources (financial, human) and the executive powers foreseen for its statutory staff and deployed national personnel (subject to the

authorisation of its 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 shared responsibility in the context of asylum, not even the proposal for a revamped European Union Agency for Asylum (EUAA 2016).<sup>4</sup> However, the increased operational role foreseen for deployed experts and EASO staff – whether *de jure*<sup>5</sup> or *de facto* – can be considered as implicitly moving in the same direction.

The monitoring-like functions of EU agencies (e.g. EBCG's vulnerability assessment and role of liaison officers, EUAA's monitoring mechanism) are inscribed in a different trend. These processes can be seen as supplements of the Commission's supervision mandate. These mechanisms are circumscribed in their focus on technical and operational aspects (i.e. the existence of capabilities, infrastructure). In fact, they serve a double purpose: on the one hand, they identify particular pressures to mobilise assistance and map out weaknesses in order to remediate them; on the other, they are linked to the gradation of enforcement-type measures that could culminate into 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 the additional deployment of human and technical resources and enhancement of joint implementation actions. There is also an inherent underlying tension, especially if these monitoring-like functions gradually expand from technical aspects to the supervision of the implementation of the policies themselves, as was the European Commission's initial conception of the EUAA monitoring mechanism.<sup>6</sup> In this case, the agencies would be called on to play a double, and at times contradictory, role: implementing jointly while simultaneously supervising their implementation. The example of the current operationalisation of the 'hotspot approach' in Greece is telling.

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### **THESE OBSERVATIONS RAISE THE FOLLOWING QUESTION:**

- What is the best approach in addressing the potential tension between the two roles (i.e. joint implementation and monitoring) of the expanded mandates of the EBCG, and potentially the EUAA?

### **INITIAL SUGGESTIONS AND IDEAS:**

1. Involving European Commission staff (along the lines of the Schengen evaluation and monitoring 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. Strengthening the role of the agencies' Executive Director, in terms of the culmination of measures leading up to the adoption of Council implementing acts.

## B. Rethinking the agencies' governance to ensure their independence

**It implies a shift towards forms of joint implementation whereby EU agency staff, deployed experts from member states and national administrators work side by side in implementing EU policies.**

In order to operationalise their mandate effectively, agencies must be independent of national interests and political influences. Independence is an element that is highlighted in the agencies' founding regulations,<sup>7</sup> albeit with different nuances.<sup>8</sup> 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<sup>9</sup> and the process by which they operationalise their mandate, which is inherently collaborative. Management boards have far-reaching functions in regards to the planning and operationalisation of the agencies' mandates, including pivotal roles in the monitoring-like functions.

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.”<sup>10</sup> When the European level, through an EU agency, starts to be more implicated in policy implementation, including through the deployment of statutory staff and experts on the ground, member states are understandably keen to have a strong say. The operational tasks undertaken are intrinsically linked with the implementation of asylum and external border control policies, and the duty to implement the EU asylum and external border control policies legally rests with the member states. While external border control management is increasingly admitting that it is a shared responsibility, member states still retain the “primary responsibility”, according to the EBCG 2019.<sup>11</sup> 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 surrounding the agencies' supervision functions that are linked to a gradation of enforcement-type measures that lack a genuine ‘right to intervene’, and to the strong role of the agencies' Management Board in these processes. Finally, another 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.<sup>12</sup> Indeed, understanding ‘national interest’ in these fields as one-dimensional does not do justice to the divergence of interests between member states, nor 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:**

3. Launching a study to analyse the numerous mechanisms of accountability of agencies to avoid unnecessary accountability overload.
4. Strengthening the independence of the agencies’ Executive Director towards the agencies’ Management Boards (e.g. by

removing the disciplinary authority over the Executive Director, suspending or dismissing the Executive Director from the remit of the Management Board).

5. Rethinking the composition of the management boards of the agencies (e.g. foreseeing a role for the European Parliament as a non-voting member at the very least, to enhance political scrutiny).

6. Strengthening the role of the European Parliament as a political accountability forum for agencies, by enhancing the means (e.g. answering ad hoc questions in writing, informing on Management Board meetings through a comprehensive and meaningful record) and measures of its disposal to influence agency dynamics.

7. Establishing political accountability arrangements before national parliaments (e.g. reporting obligations or hearings). Joint parliamentary accountability mechanisms involving both the European Parliament and national parliaments that go along the lines of the European Union Agency for Law Enforcement Cooperation’s (Europol) Joint Parliamentary Scrutiny Group could be considered.

## **C. Enhancing European solidarity through agencies**

By deploying operational personnel (made available through member states’ administrations or personnel) and equipment (made available through member states or their equipment), the EBCG and EASO enhance the human and financial resources of individual member states by drawing from the EU budget. Further agency activities – for example, the European Union Agency for the Operational Management of Large-Scale IT Systems in

the Area of Freedom, Security and Justice (eu-LISA), the creation of standardised training modules for national administrators through the EBCG or EASO, and the creation of centralised Country of Origin Information (COI) to assess asylum applications – create economies of scale, thus boosting implementation capacities further.

The modes of functioning of area of freedom, security and justice agencies

undoubtedly make them an indirect vessel for interstate solidarity, which seems to be more politically palatable compared to other envisaged forms of responsibility sharing, such as relocating persons among member states. 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.<sup>13</sup>

However, the EU seems to be moving away from such emergency-driven conceptions of agency involvement (and indirectly of intra-EU solidarity and fair sharing). This is exemplified by EBCG's move to increase its operational (i.e. statutory) staff to 3,000 by 2027, while the number of staff to be provided by member states for long-term secondments (i.e. minimum of 24 months, extendable once for an additional 12 or 24 months) should reach 1,500 by 2027, and for short-term deployments should reach 5,500 by 2027.<sup>14</sup> The total would amount to 10,000.

**These numbers point to structural involvement in policy implementation, and consequently to structural forms of interstate responsibility sharing.**

These numbers point to structural involvement in policy implementation and consequently to structural forms of interstate responsibility sharing. The new enhanced role of the agencies in return policy, including in the coordination and organisation of return operations,<sup>15</sup> points to this direction as well. Similar, but meeker, steps are portrayed in EUAA 2016, 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.<sup>16</sup> While these developments are potentially forthcoming de jure, the boost in EASO personnel (e.g. Greek-speaking personnel recruited and paid by EASO) assisting the Greek Appeals Committees through the provision of COI portrays the same de facto development, albeit on a more limited scale.

#### **THESE OBSERVATIONS RAISE THE FOLLOWING QUESTION:**

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

#### **INITIAL SUGGESTIONS AND IDEAS:**

8. Launching a study by an expert group on the member states' asymmetric responsibilities of border and asylum policies, to concretely evaluate the breadth of the solidarity gap between

member states and the desirable size of EU compensation.

9. Pushing for greater augmentation of statutory agency staff, as established in 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. Also, make staff from national

administrations available for longer-term secondments (i.e. a minimum of 24 months).

11. Decoupling agency operational involvement from the notion of emergency further, to cover structural needs.

12. Allocating most of the general EU budget towards border and asylum policies, from which EU agencies (and member states) can draw.

## D. Addressing the challenge of fundamental rights

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 potentially affecting their fundamental rights. The EU public liability regime is fully applicable in such situations, and individuals may have recourse for violations before national courts or the Court of Justice of the European Union (CJEU) if the strict conditions of *locus standi* for the latter are fulfilled.<sup>17</sup> In addition, agency deployments in third countries raise additional fundamental rights concerns and the need to coordinate action with international level stakeholders.

However, there also appears to be a need for the development of extrajudicial accountability mechanisms, to both ensure the oversight of fundamental rights and establish flexible procedures through which individuals can claim redress for violations of their fundamental rights (e.g. the right to good administration, privacy, data protection). Consecutive amendments to the EBCG Regulation have led to the development of novel fundamental rights oversight mechanisms, such as an independent Fundamental Rights Officer, a

civil society-dominated Consultative Forum and ombudsman-type processes complete with an individual complaints mechanism.<sup>18</sup> The mandate of the Fundamental Rights Office is further strengthened in the EBCG 2019, thanks to the enhancement of its capacities and the creation of fundamental rights monitors.

### THESE DEVELOPMENTS RAISE THE FOLLOWING QUESTIONS:

- ▶ How can it be ensured that the enhanced operational activities of EU agencies will be matched with adequate mechanisms at the EU level, thus guaranteeing individuals' effective access to justice?
- ▶ Do the EU agencies that conduct seemingly 'less operational' tasks (e.g. eu-LISA) require greater fundamental rights oversight?

### INITIAL SUGGESTIONS AND IDEAS:

13. Replicating the enhanced fundamental rights oversight mechanisms that have been established for the EBCG in other EU

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agencies, most notably EASO (e.g. the Fundamental Rights Office). Under the EASO framework, fundamental rights monitors should be involved in the evaluation of the quality of EASO's asylum processing (e.g. vulnerability assessments, admissibility interviews), including case sampling and proceeding observation.

14. Developing ombudsman-type procedures that are flexible, non-adversarial and can include violations beyond the realm of strict legality (e.g. administrative irregularities linked to asylum processing which violate soft norms such as guidance notes) further (e.g. individual complaints mechanism). Ensuring during the implementation of these procedures that a concrete follow-up to the individual complaints assessment is established, and the organ examining these complaints enjoys functional independence and the necessary operational capacity (staffing).

15. The political accountability fora (i.e. European Parliament, national parliaments) paying special attention to fundamental rights issue reporting and linking this to the measures at their disposal to influence agency dynamics.

16. Undertaking activities in third countries – including deployments – in close partnership with international stakeholders, especially UN agencies and organs, to enhance legitimacy and respect for fundamental rights.

## **E. Possible paths, from joint implementation to full Europeanisation**

Joint implementation patterns and the augmentation of the financial and human resources available to EU agencies could act as precursors to deeper forms of integration, eventually leading to a full 'Europeanisation' of these policies' implementation modes. This should not be specifically linked with political aspirations of an increasingly federalised EU, but rather could be viewed as a pragmatic approach to implementing policies that lead to the provision of regional public goods. Member states are subject to asymmetric pressures that are linked with objective factors (e.g. geographic position) and issues of legal design (e.g. the Dublin system's responsibility allocation). This line of

thinking admittedly relates to a broader time horizon than the next multiannual policy framework, but it is nevertheless worthwhile to reflect upon 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 only concern a limited number of overburdened member states, while those able to implement their own responsibilities with less EU support remain unaffected. In terms of existing legal limits, the CJEU's 'Meroni/Short Selling' criteria are not breached as long as executive discretion does not allow agencies to develop policies on their own.<sup>19</sup> Article 4(2) TEU and Article 72 TFEU could be interpreted as refuting the full substitution of national authorities by an EU agency in the context of external border management, as they affirm that public order remains the responsibility of member states. In addition, Article 78(2)(e) TFEU, which foresees that member states are to be responsible for the examination of asylum applications, excludes the establishment of centralised assessment of claims. This is food for thought in the event that the treaties are revised in the future.

#### **THESE DEVELOPMENTS RAISE THE FOLLOWING QUESTIONS:**

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

#### **INITIAL SUGGESTIONS AND IDEAS:**

17. For integrated border management: establishing a flexible, needs-based model that would allow for differentiation. National authorities would maintain the primary responsibility for integrated border management under EU supervision, except in the case of (overburdened) member states that are willing to rely upon EU agencies to implement parts or the entirety of integrated border management on their territory.

18. For asylum policy: establishing a flexible, needs-based model whereby asylum policy remains in the remit of national administrations that are supervised by the EU, except in the case of member states that are willing to rely upon EU agencies to implement the asylum policy, whether it be wholly or in parts, on their territory.

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- <sup>2</sup> Tsourdi, Evangelia (Lilian) (2016), "[Bottom-up Salvation? From Practical Cooperation towards Joint Implementation through the European Asylum Support Office](#)", *European Papers*, Volume 1, Number 3, pp.997-1031. See also De Bruycker, Philippe (2016), "[The European Border and Coast Guard: A New Model Built on an Old Logic](#)", *European Papers*, Volume 1, Number 2, pp.559-569.
- <sup>3</sup> European Union (2019), [Regulation \(EU\) 2019/1896 of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulations \(EU\) No1052/2013 and \(EU\)2016/1624](#), Brussels, Art.7(1), p.65.
- <sup>4</sup> European Commission (2016), [Proposal for a regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation \(EU\) No 439/2010](#), COM(2016) 271 final, Brussels.
- <sup>5</sup> See *ibid.*, Art.19 and 21, pp.32-34.
- <sup>6</sup> *Ibid.*, Art.13, pp.27-28.
- <sup>7</sup> See e.g. European Parliament and the Council of the European Union (2010), [REGULATION \(EU\) No 439/2010 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 19 May 2010 establishing a European Asylum Support Office](#), Art.2(4), p.14; European Parliament and the Council of the European Union (2018), [REGULATION \(EU\) 2018/1726 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 14 November 2018 on the European Union Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice \(eu-LISA\), and amending Regulation \(EC\) No 1987/2006 and Council Decision 2007/533/JHA and repealing Regulation \(EU\) No 1077/2011](#), Rec.36, p.104; European Parliament (2019), *op.cit.*, Art.93(3), p.389.
- <sup>8</sup> See e.g. European Parliament and the Council of the European Union (2010), *op.cit.*, Art.2(4), p.14; European Parliament (2019), *op.cit.*, Art.93(3), p.389.
- <sup>9</sup> See e.g. European Parliament and the Council of the European Union (2010), *op.cit.*, Arts.25-27, p.20; European Parliament (2019), *op.cit.*, Art.99, p.409.
- <sup>10</sup> Vos, Ellen (2016), "EU Agencies and Independence" in Dominique Ritleg (ed.), *Independence and Legitimacy in the Institutional System of the European Union*, p.218.
- <sup>11</sup> European Parliament (2019), *op.cit.*, Art.7, p.109.
- <sup>12</sup> Ripoll Servent, Ariadna (2018), "[A New Form of Delegation in EU Asylum: Agencies as Proxies of Strong Regulators](#)", *Journal of Common Market Studies*, Volume 56, Issue 1, pp.83-100.
- <sup>13</sup> Tsourdi, Evangelia (Lilian) (2017), "[Solidarity at work? The prevalence of emergency-driven solidarity in the administrative governance of the Common European Asylum System](#)", *Maastricht Journal of European and Comparative Law*, Volume 24, Issue 5, pp.667-686.
- <sup>14</sup> European Parliament (2019), *op.cit.*, Annex I, p.483.
- <sup>15</sup> *Ibid.*, Art.51 and 54, p.247 and 258.
- <sup>16</sup> See European Commission (2016), *op.cit.*, Art.19, p.32-33.
- <sup>17</sup> Fink, Melanie (2018), *Frontex and Human Rights: Responsibility in 'Multi-Actor Situations' Under the ECHR and EU Public Liability Law*, Oxford: Oxford University Press.
- <sup>18</sup> Rijpma, Jorrit (2016), [The Proposal for a European Border and Coast Guard: evolution or revolution in external border management?](#), PE 556.934, Brussels: European Parliament.
- <sup>19</sup> Chamon, Merijn (2016), *EU Agencies: Legal and Political Limits to the Transformation of the EU Administration*, Oxford: Oxford University Press.