

European Border and Coast Guard system

SUMMARY

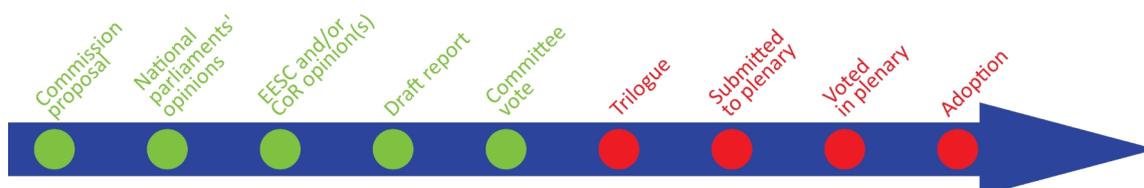
On 15 December 2015, the European Commission put forward a proposal to set up a European Border and Coast Guard System (EBCGS), building on the mandate and experience of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex). The main new elements are: introduction of a supervisory role and a 'right to intervene' in situations at the border requiring urgent action; expansion of Frontex's operational tasks and its prerogatives on processing personal data; and reinforcement of fundamental rights and transparency safeguards.

Commentators and stakeholders have raised concerns on respect of national sovereignty and division of competences, the adequacy of the suggested individual complaint mechanism and the accountability of operational activities at the external borders. Many underline that the reinforcement of the Frontex mandate should be accompanied by a change in the current EU Dublin system and an upgrade of Member States' border management capacities.

Parliament and Council have now started trilogue discussions, with the aim of reaching a first-reading agreement before summer 2016.

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 Decision 2005/267/EC

<i>Committee responsible:</i>	Civil Liberties, Justice and Home Affairs	COM(2015) 0671 of 15.12.2015
<i>Rapporteur:</i>	Artis Pabriks, EPP, Latvia	
<i>Next steps expected:</i>	Trilogue discussions	<i>procedure ref.:</i> 2015/0310(COD)



<p>In this briefing:</p> <ul style="list-style-type: none"> • Introduction • Existing situation • The changes the proposal would bring • Preparation of the proposal • Parliament's starting position • Stakeholders' views 	<ul style="list-style-type: none"> • Advisory committees • Council and European Council • National parliaments • Parliamentary analysis • Legislative process • References
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Introduction

The need to reduce deficiencies in external border management and unpredicted migratory flows undermining the proper functioning of the Schengen area, called for these challenges to be addressed in a coordinated manner as well better harmonising the application of legislation. In this context the idea of pooling resources by setting up a European Border and Coast Guard system was revived.

In 2015, detections of [irregular crossings](#) of the external borders reached 1.82 million, more than six times the number of detections reported in 2014. [Data](#) for 2015 indicate that roughly 1.25 million people applied for asylum in EU Member States. This put border authorities under intense pressure, exposing the difficulties they face in adequately performing border controls. Although Greece and Italy have been under particularly intense pressure as the two main entry points (reporting up to 6 000 arrivals per day), for several other Member States, large inflows of migrants and asylum-seekers was a new experience, revealing the complexity of the challenge of managing sudden large flows.

Some Member States adopted a ['wave-through' approach](#), which led to the creation of a route through the Western Balkans, allowing mixed flows of asylum-seekers and economic migrants to travel across external and internal EU borders. In response, [seven](#) of the 26 Schengen countries have temporarily reintroduced controls on at least some of their borders to manage increasing flows of entrants. In the meantime, Greece has been requested by the [Council](#) to address serious deficiencies in the application of the Schengen *acquis* relating to the management of its external borders, under threat of suspension from Schengen for up to two years, as provided for under Article 26 of the [Schengen Borders Code](#) (SBC). Having assessed that some serious deficiencies in external border control in Greece persist, on 4 May the Commission [proposed](#) that the Council recommends the five countries maintain targeted internal border controls for a further period of six months (Article 29 SBC).

The European Commission's communications on a [European Agenda on Migration](#) and on [Managing the refugee crisis](#) called for the strengthening of the mandate and resources of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union ([Frontex](#)), which currently coordinates and supports national border-management agencies, and the development of a fully operational European Border and Coast Guard system. In December 2015, in line with these guidelines, the Commission came forward with the [proposal for a regulation on the European Border and Coast Guard \(EBCG\)](#) as part of a package of measures aimed at ensuring the protection of the EU's external borders. According to the communication, the purpose of the regulation is twofold: improving the management of migration and ensuring internal security within the Union, while safeguarding freedom of movement within the EU. The Communication ['Back to Schengen: A Roadmap'](#) urged the legislator to prioritise the adoption of this proposal by June at the latest, so that it can become operational during the summer. The Commission also called on Member States and Frontex to start the necessary preparations to set up the new system already, by identifying the necessary human and technical resources.

Existing situation

Frontex became operational on 3 October 2005 on the basis of [Regulation \(EC\) 2007/2004](#). According to its mandate, the agency is tasked with the promotion of an integrated approach to border management, through conducting risk analyses, drawing up training curricula for border guards, and carrying out research. Frontex also coordinates joint border-management operations and organises return operations.

Frontex's role has been strengthened over time, notably in 2007 when the Rapid Border Intervention Teams (RABIT) were [established](#), setting out the responsibilities of guest officers (national border guards deployed outside their own Member State). In a crisis situation, a Member State can request the deployment of RABITs for assistance to its border guards for a limited period of time. The mechanism has rarely been used, however. It was deployed in 2010, for example, on the Greek-Turkish border.

In 2011, Frontex's role was further reinforced by the creation of European Border Guard Teams (EBGT) for joint operations and rapid border interventions ([Regulation No 1168/2011](#)). At the same time, Frontex's surveillance capabilities were enhanced with the creation of a Situational Centre which provides a regularly updated picture of the EU's external borders and migration situation, and through the establishment of a [European Border Surveillance System](#) (Eurosur).

Amid concerns over its capacity to comply with fundamental rights throughout its operations, Frontex endorsed a Fundamental Rights Strategy and a Code of Conduct, which sets out behavioural standards for all persons participating in Frontex activities. The agency also established a Fundamental Rights Officer (FRO) and a consultative forum to contribute to fundamental-rights monitoring. Currently, Frontex is also allowed to process personal data concerning persons suspected of cross-border criminal activities, of facilitating illegal migration activities or of human trafficking activities.

Frontex may conclude working arrangements on the management of *operational cooperation with the authorities of third countries*. Pursuant to the 2011 Regulation, the Agency can send liaison officers to third countries and launch technical assistance projects in third countries.

More recently, Frontex has played a leading role in the creation of '[hotspots](#)', or Migration Management Support Teams. These teams bring together the European Asylum Support Office (EASO), Europol and Frontex – in partnership with national authorities – to identify, screen and register migrants on entry into the EU, and to organise return operations for those who have no right to stay. Frontex is the lead agency in the EU Regional Task Forces, headquartered in Catania for the 'hotspots' in Italy, and in Piraeus for those in Greece.

The changes the proposal would bring

The Commission legislative proposal is based on Article 77(2)(b) and (d) and Article 79(2)(c) of the Treaty on the Functioning of the EU ([TFEU](#)). The proposal put forward by the Commission sets out a number of elements in order to reinforce the role of the European Border and Coast Guard Agency, in comparison to the existing role of Frontex.

1. Introduction of a supervisory role

The Agency will carry out *mandatory vulnerability assessments* to evaluate the capacity of Member States to face challenges at their external borders, including by means of an assessment of the equipment and resources of the Member States.

A *monitoring and risk analysis centre* will be established to monitor migratory flows towards and within the EU, and to carry out risk analysis and mandatory vulnerability assessments to identify and address weaknesses. Liaison officers will be seconded to Member States to ensure proper and effective monitoring, not only through risk analysis, information exchange and Eurosur, but also through their presence on the ground. Liaison officers would be in charge of enhancing cooperation between the agency and the Member States and to support the collection of information necessary to perform the vulnerability assessment and to monitor the

measures taken by Member States at the external borders. Member States would be under an obligation to provide the agency with all necessary information.

2. Introduction of a 'right to intervene'

The Commission proposal provides for a *right to intervene* where a Member State does not follow up on the recommendations from the *vulnerability assessment* or in a situation where *insufficient external border controls* would put the overall functioning of the Schengen area at risk. The Executive Director, on the advice of a supervisory board (created within the agency), will be able to identify the measures that need to be taken by the Member State concerned and set a time-limit within which those measures need to be taken. The decision of the Executive Director will be *binding* on the Member State concerned. If necessary measures are not taken within the set time-limit, the matter will be referred to the Management Board for a further decision. If the Member State then still fails to act, and risks putting in jeopardy the functioning of the Schengen area, the *Commission may adopt an implementing decision for direct intervention by the agency*.

3. Expansion of operational tasks

According to the Commission text, the enhanced tasks of the agency will include: the setting up and deployment of European Border and Coast Guard Teams for *joint operations and rapid border interventions*, the setting up of a *technical equipment pool*, assisting the Commission in coordinating the activities of the migration-management support teams at hotspot areas, and a greater role in return, risk analysis, training and research. The human resources of the agency will be reinforced through the constitution of a rapid reserve pool which will be a standing corps composed of a *small percentage (2%-3%) of the total number of border guards in the Member States on a yearly basis*, amounting to a minimum of 1 500 border guards, corresponding to the profiles identified by the decision of the Management Board. This standing corps will be placed at the disposal of the agency and be deployable from each Member State within *three working days*, on the basis of an operational need agreed upon by the Executive Director and the host Member State.

The agency will have a stronger role on *returns*. It will be tasked with the coordination and organisation of return operations and return interventions from one or more Member States. In addition, it will be able to promote their organisation on its own initiative. To do so, European Return Intervention Teams composed of escorts, monitors and return specialists could be deployed through a new *Return Office* to be set up within the agency. The agency will also provide more efficient and cost-effective multi-purpose services to national authorities carrying out *coastguard functions* in cooperation with the European Fisheries Control Agency and the European Maritime Safety Agency.

However, since the Member States' authorities carrying out coastguard functions [vary considerably](#), including some national (para-)military institutions, questions have been raised over how to ensure mutual trust, effective exchange of information and safeguard the compliance of these actors with key EU rule of law standards during coordinated activities.

4. Processing personal data

The Commission text would also strengthen the mandate of the agency to process personal data in the organisation and coordination of joint operations, pilot projects, rapid border interventions, return operations, return interventions and in the framework of the migration-management support teams, as well as in the exchange of information with Member States, EASO, Europol, Eurojust or other EU agencies.

5. Fundamental rights safeguards

The possibility of individual complaints against human rights abuses are introduced by the proposal. An individual (or someone acting on their behalf) could submit a complaint to the Frontex Fundamental Rights Officer, who would decide on admissibility and then either forward the complaint to the Frontex Executive Director or to a national border force. If the complaint is

well-founded it will be followed up, possibly by disciplinary action. 'Anonymous, malicious, frivolous, vexatious, hypothetical or inaccurate' complaints will be rejected.

Whilst the proposal reiterates that the agency and Member States must comply with norms and standards at least equivalent to those set by EU legislation when cooperating with third countries, it now expressly allows for the involvement of neighbouring third countries in joint operations at the external borders, including on the territory of that third country. This, however, raises questions on the level of human rights and international standards that would apply if third countries are not party to the main refugee law and human-rights law instruments, and on the respective responsibilities of the different actors involved in such operations.

Preparation of the proposal

The [Stockholm programme](#) called for examination of the feasibility of a European System of Border Guards, a call that was repeated five years later in the June 2014 European Council conclusions. A [feasibility study](#) done for the Commission, and presented to the LIBE Committee in 2014, proposed a three-phase approach. Those phases would start with greater interaction between EU Member States and the EU in terms of cooperation and decision-making, then shift decision-making to the EU level, and finally set up an entirely new agency composed of border guards under an EU-level command structure. Furthermore, an external [evaluation](#) of Frontex's activities between July 2008 and July 2014 was published in June 2015, and discussed in the Frontex Management Board. On the basis of the evaluation, [recommendations](#) were made regarding possible modifications to the Frontex Regulation. These included: strengthening Frontex's operational response capacities through increased funding and staffing; expanding Frontex's coordination role on Joint Return Operations, risk analysis, cooperation with third countries; and consideration of a European System of Border Guards.

In 2012, in a [Special Report](#) on an own-initiative inquiry, the European Ombudsman assessed how Frontex implemented its obligations and mechanisms concerning fundamental rights. Although underlining positive developments, the Ombudsman noted the absence of any procedure to deal with complaints on breaches of fundamental rights in Frontex activities. The idea of setting up such a procedure has been supported by the European Parliament.

The 2013 report '[Frontex: human rights responsibilities](#)', by the Parliamentary Assembly of the Council of Europe, found that further steps were needed to enhance democratic scrutiny by the EP as well as public accountability, through an independent monitoring system and an effective complaints mechanism. Human-rights training for those involved in operations was a priority.

In a 2014 [Special Report on the External Borders Fund](#) (EBF), the European Court of Auditors (ECA) recommended that, to support the work of Frontex, the legislator should consider making the assignment of relevant Internal Security Fund (ISF) co-financed assets to Frontex's technical equipment pool obligatory, and the Commission should provide Frontex with relevant, comprehensive and timely information regarding EBF/ISF implementation in Member States.

The European Data Protection Supervisor (EDPS) submitted an [opinion](#) on 18 March 2016, in which he highlighted several data protection concerns and called for further improvements of the proposed text to ensure full compliance with data protection principles. The EDPS considers that a separate assessment of the necessity and proportionality of the processing activities envisaged for each purpose of the proposal (management of migration and ensuring internal security) should be carried out.

Parliament's starting position

The European Parliament has discussed the future of Frontex on several occasions, including during a debate in plenary held on 11 February 2015 and while preparing its resolution of 2 December 2015 on the [Special Report of the European Ombudsman in own-initiative inquiry](#) concerning Frontex. This resolution recommended the inclusion of an individual complaints mechanism in the review of Frontex's mandate.

The EP also [welcomed](#) the plan to provide Frontex with additional resources. However, it called on the Commission to propose a medium and long-term strategy for the agencies in the field of justice and home affairs, including [EASO](#), [Europol](#), [Eurojust](#), and [CEPOL](#). The EP [report on the situation in the Mediterranean and the need for a holistic EU approach to migration](#), underlined the role of Frontex in search and rescue operations and expressed willingness to negotiate with the Council on the proposal.

Council and European Council

The European Council's [conclusions](#) of October 2015 welcomed the Commission's intention to present a package including proposals on a European Border and Coast Guard system. However, they underlined that the distribution of competences under the TFEU and the national competence of Member States should be fully respected. As a follow-up, the Council [conclusions](#) of 9 November 2015 indicated that the existing Frontex [tools](#), including the deployment of [Rapid Border Intervention Teams](#), would be needed to assist Member States concerned by migratory pressures in respecting their 'legal obligation to perform adequate controls ... and increase coordination of actions relating to border management'. At its meeting of [16-18 February 2016](#), the European Council called on the Council and the EP to reach political agreement on the current proposal by July 2016.

Stakeholders' views

According to some [commentators](#), the proposal does not present a revolutionary step forward, as it essentially preserves the premise that the agency would not have its own border guards, and would not have powers of command and control over national border guards. Furthermore, the proposal does not address some fundamental questions as regards accountability of operational activities at the external borders, and does not clarify the current blurred division of responsibilities between Member States and the agency.

According to legal analysts,¹ the provision on the right to intervene may exceed the EU's powers under Article 72 TFEU, which states that the Justice and Home Affairs (JHA) title of the Treaty 'shall not affect the exercises of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security', and Article 4(2) TEU, which requires the EU to respect Member States' 'essential state functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding internal security'. On this interpretation, while the EU can establish rules on border controls and regulate how Member State authorities implement them, it cannot replace Member States' powers of coercion or control, or require a Member State to carry out a particular operation.

Authors² also cast doubt on the adequacy of the fundamental-rights remedies introduced by the proposal. For instance, the Executive Director, who would decide on the merits of admissible claims, is not independent of Frontex. In the original text there was no reference to a second tier remedy, or to damages, or a possible criminal prosecution in the most problematic cases. In addition, they note that the proposed rules are limited, as they do not apply to national border guards, who could be accused in cases of alleged illegal push-backs and assaults upon migrants.

Others³ point out that an increase in Frontex's competences and tasks will not be sufficient to remedy the structural deficiencies in some Member States' external border management systems. Unless Member States' structural and administrative capacities to comply with EU border and asylum standards are strengthened, a 'reinforced' Frontex would not be fully effective on the ground. Many commentators⁴ underline that the reinforcement of the Frontex mandate should be accompanied by a fundamental change in the current EU Dublin system.

Advisory committees

The European Economic and Social Committee (EESC) adopted its [opinion](#) on the European Commission's proposal during its plenary session on 25-26 May 2016.

National parliaments

The subsidiarity deadline passed on 15 March. Chambers of [national parliaments](#) from 18 Member States have considered the proposal, and while none adopted a reasoned opinion on subsidiarity grounds, a number have made substantive comments on the proposal, focused in particular on the procedure for deciding to intervene.

Parliamentary analysis

The study [The proposal for a European Border and Coast Guard: evolution or revolution in external border management?](#), requested by the LIBE Committee, finds that although the Commission proposal does not amend the fundamental premise of operational cooperation at the external borders, reserving executive enforcement powers to the Member States, the concept of shared responsibility (in the absence of shared accountability) increases fundamental rights concerns.

Legislative process

At a joint debate, hosted by the Civil Liberties, Justice and Home Affairs (LIBE) Committee on 29 February 2016, MEPs raised concerns on search and rescue operations, fundamental rights, parliamentary control, the complaints mechanism, exchange of information, the relationship of the new proposal with the existing Schengen evaluation mechanism and the procedure provided for under Article 26 of the Schengen Borders Code, and the procedure for the agency's intervention under Article 18 of the proposal.

Although agreeing with the overall objectives of the proposed regulation, the [draft report](#) (rapporteur: Artis Pabriks, EPP, Latvia) suggested a number of amendments on key features of the Commission's proposal.

According to the [report adopted](#) on 30 May 2016, when a mandate for negotiations with the Council was also adopted, in cases where a Member State is faced with increased pressures on its external border (i.e. cross-border crime or disproportionate migratory pressure) RABITs could be deployed, for a limited period of time, either at the request of a Member State or by Council decision. Upon Member State request, an operational plan would be agreed with the agency, which would deploy, within three working days, the necessary staff and technical equipment. In cases where a Member State does not take up the measures proposed by the agency or migratory pressure is jeopardising the functioning of the Schengen area, the Commission may present the Council with a proposal to act. The Council would then decide by qualified majority on the need to send border intervention teams. The operational plan should be agreed between the Member State concerned and the agency before deployment can take place.

According to the report, the agency should not organise return operations to any third country where there are risks of fundamental rights violations. Agreement was also reached on Member State contributions to the body of 1 500 deployable border guards (based on a ratio of 3% of national border guards for Member States without external land or sea borders, and 2% for those with external land or sea borders). Moreover, the European Border and Coast Guard Agency will be accountable to the Parliament and Council.

In the Council, on 6 April, the Permanent Representatives Committee (Coreper) agreed on the [Council's negotiating position](#), confirming agreement on an overall Presidency compromise, including several points taken on board from the Opinion of the European Data Protection Supervisor, and granted a mandate to the Presidency to start negotiations with the EP as soon as possible.

Coreper curbed the agency's prerogatives on coordination of coast guards (Article 52); it underlined the need to respect Member States' competences on defence, maintenance of law and order and the safeguarding of internal security; and integrated border management (in particular regarding controls, risk management and exchange of information). It also added that a Member State shall not be obliged to supply information the *disclosure* of which it considers

contrary to the essential interests of its security. Decisions to *intervene* in situations at the border requiring urgent action (Article 18), should be taken *by the Council* (rather than by the Commission), upon a proposal from the Commission and following consultation with the agency. In case of lack of compliance, where the overall functioning of the Schengen area is at risk, the Council may recommend (on the basis of a Commission proposal) that one or more Member States decide to reintroduce border control at all or specific parts of their internal borders for a period of up to six months. It introduces Status Agreements to be concluded by the EU with third countries for the deployment of agency teams in actions where executive powers are employed (Article 53). Information to the Parliament, the fundamental rights mechanism and protection of personal data are also partially strengthened.

The [21 April JHA Council](#), endorsed the position agreed in Coreper and stressed the necessity to start preparations for implementation of the future system (before its formal adoption) and tasked Frontex to start working on: '1) the pooling of human and technical resources, 2) the conducting of vulnerability assessments, 3) the new agency's tasks in the return policy, 4) the drafting by the Commission of a model Status Agreement in the context of cooperation with third countries, and 5) the drawing up by the Fundamental Rights Officer of Frontex of a standardised complaint form'. The restructured agency would not have a coordinating role on coast guards or organisation of joint operations. It would focus its activities on the establishment of an operational strategy for European integrated border management and on the assistance of all the Member States concerned as regards its implementation. Coreper also gave mandates to the Presidency to start negotiations on the two related proposals amending the Regulations establishing the European Maritime Safety Agency (EMSA) and the European Fisheries Control Agency (EFCA). With a mandate for negotiations adopted by the LIBE Committee on 30 May, trilogue negotiations were able to start immediately thereafter.

References

[European Border and Coast Guard](#), European Parliament Legislative Observatory (OEIL).

J. Rijpma, [The proposal for a European Border and Coast Guard: evolution or revolution in external border management?](#), EP Policy Department, 2016.

Endnotes

¹ S. Peers, [The Reform of Frontex: Saving Schengen at Refugees' Expense?](#), 16 December 2015; J. Rijpma, [The proposal for a European Border and Coast Guard: evolution or revolution in external border management?](#), EP Policy Department, 2016.

² Ibid.

³ S. Carrera, L. den Hertog, [A European Border and Coast Guard: What's in a name?](#), CEPS Paper No 88, March 2016.

⁴ E Guild, C Costello et al, [Enhancing the Common European Asylum System and Alternatives to Dublin](#), CEPS, September 2015 and Peers, Rijpma, Carrera and den Hertog, Costello. op. cit.

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