Briefing

EU Legislation in Progress

October 2016

European Parliament

European Border and Coast Guard system

SUMMARY

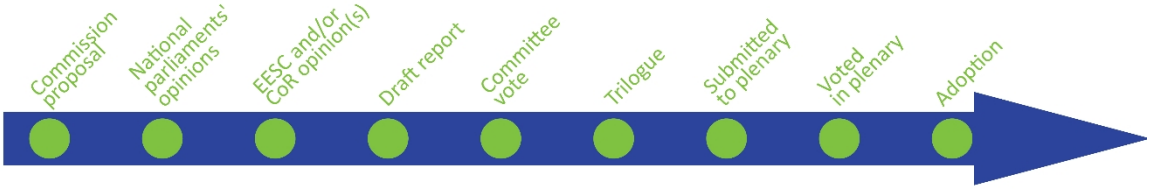
In December 2015, the European Commission proposed setting up a European Border and Coast Guard System (EBCGS), building on the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the EU (Frontex). The proposal would introduce a supervisory role and a 'right to intervene' in situations at the border requiring urgent action; expand Frontex's operational tasks and its prerogatives on processing personal data; and reinforce fundamental rights and transparency safeguards.

Commentators and stakeholders had raised concerns on respect for fundamental rights, division of competences between the EU and Member States and the adequacy of the suggested individual complaint mechanism. The text agreed by the EP and Council expands the Agency's prerogatives on return operations, on migration management, the fight against cross-border crimes, and search and rescue operations. Fundamental rights safeguards and the Agency's accountability vis-à-vis the EP and Council have been strengthened. If a Member State opposes a Council decision to provide assistance, putting the Schengen area at risk, other EU countries may temporarily reintroduce internal border controls.

With the regulation signed on 14 September, the new European Border and Coast Guard was launched on 6 October 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

Committee responsible:	Civil Liberties, Justice and Home Affairs	COM(2015) 671 *of* 15.12.2015
Rapporteur:	Artis Pabriks, EPP, Latvia	*procedure ref.*: 2015/0310(COD)
Procedure completed	Regulation (EU) 2016/1624 OJ L 251, 16.9.2016, pp. 1-76	



This updates an earlier edition, of 30 August 2016: PE 586.647.

EPRS | European Parliamentary Research Service

Author: Alexandra Gatto and Jesús Carmona

Members' Research Service

PE 589.845

EN

In this briefing:

- Introduction
- Existing situation
- The changes the proposal brings
- Preparation of the proposal
- Parliament's starting position
- Council and European Council
- Stakeholders' views
- Advisory committees
- National parliaments
- Parliamentary analysis
- Legislative process
- References

Introduction

The need to reduce deficiencies in external border management and unpredicted migratory flows contributed to reviving the idea of setting up a European Border and Coast Guard system.

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 five countries to 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, 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' and 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 brings

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 set out a number of elements in order to reinforce the role of the new European Border and Coast Guard Agency (hereinafter the Agency), in comparison to the current role of Frontex. The main new elements of the proposal were: 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.

According to the final text agreed in trilogue, the Agency's activities will include support to Member States in the field of **migration management, the fight against cross-border crimes and search and rescue operations**. It stipulates that the Agency shall implement the European integrated border management as a shared responsibility.

While maintaining the same legal personality as Frontex, the new agency would see its **mandate expanded**. Its tasks will include: supporting Member States in the field of migration management, the fight against cross-border crimes (such as migrant smuggling, trafficking in human beings and terrorism), and search and rescue operations; establishing an operational and technical strategy for the implementation of integrated border management at EU level; overseeing the functioning of border control at the external borders; providing increased operational and technical assistance to Member States through joint operations and rapid border interventions; ensuring

the practical execution of measures in situations requiring urgent action at the external borders; and providing technical and operational assistance in support of search and rescue operations for persons in distress at sea.

Experts from the staff of the Agency will be deployed as **liaison officers** to monitor all EU Member States with external borders. Each liaison officer may cover up to four geographically close countries, to ensure greater cooperation between the Agency and the Member States concerned.

Fundamental rights accountability has been reinforced through introducing specific reference to the rights of children and of people with disabilities.

In comparison with the initial Commission proposal, the Agency will have a greater role in **returning migrants** to their country of origin. The Agency will assist Member States in organising joint return operations and returns of third-country nationals who are the subject of return decisions issued by a Member State, without entering into the merits of return decisions issued by the Member States, and in full respect of fundamental rights. In addition, the Agency will assist Member States in the acquisition of travel documents for return, in cooperation with the authorities of the relevant third countries. The Agency, however, will not be involved in the provision of information to Member States on third countries of return.

In the final text, if a Member State faces disproportionate migratory challenges, at particular areas on its external border, characterised by large influxes of mixed migratory flows, the Agency shall, at the request of a Member State or on its own initiative, organise and coordinate **rapid border interventions** and deploy European Border and Coast Guard Teams, from a rapid-reaction pool, as well as technical equipment. Rapid border-intervention teams will support national authorities for a limited period of time, when immediate response is required and where such an intervention would provide an effective response.

Throughout the legislative procedure, the conditions for the Agency's **right to intervene,** which was a key feature of the Commission proposal, have progressively been clarified. When a Member State does not comply (within a set time limit) with a **binding decision** of the Management Board of the Agency to address vulnerabilities in its border management, or in the event of specific and disproportionate pressure at the external border that would put the functioning of the Schengen area at risk, the Council, on the basis of a proposal from the Commission, may rapidly adopt a decision requiring the Agency to provide assistance, and the Member State concerned to cooperate with the Agency. The Commission must consult the Agency before making such a proposal and inform the European Parliament, without delay. Furthermore, if a Member State opposes a Council decision to provide assistance, the other EU countries may temporarily reintroduce internal border checks (so that the current regulation amends the relevant provisions of the Schengen Borders Code).

Regarding the Agency's staff and equipment, a rapid-reaction pool of border guards and other relevant staff in the Member States, amounting to a minimum of 1 500 persons will be set up. The deployment of teams from the rapid-reaction pool will be complemented by additional European Border and Coast Guard Teams where necessary. The Agency shall make available **forced return monitors**, upon request, to participating Member States to monitor the correct implementation throughout return operations and interventions.

Member States shall ensure that authorities likely to receive applications for international protection have the relevant information, and that their personnel receive the necessary level of training appropriate to their tasks and responsibilities, and instructions to inform applicants as to where and how applications for international protection may be lodged. The Agency is requested to develop specific **training tools**, including specific training in the protection of children.

Transparency, **accountability** and adherence to the principle of ***non-refoulement*** have been reinforced throughout the legislative process. According to the final text, the Agency shall be as transparent as possible about its activities, without jeopardising the attainment of the objective of its operations. It shall make public information on all of its activities, and should ensure that

the public and any interested party are rapidly given information with regard to its work. The European Parliament will be kept informed through regular reporting. Parliament's role has also been strengthened in the procedure for selecting the **Agency's Executive Director**. It is also clarified that the possible existence of an arrangement between a Member State and a third country does not absolve the Agency or the Member States from their obligations under Union or international law, in particular as regards compliance with the principle of *non-refoulement.*

The individual complaint mechanism in case of fundamental rights violations has been strengthened. Complainants shall be informed in writing about the admissibility and merits of a complaint. In case of non-admissibility decisions, the reasons for the decision and the suggestion of further options for addressing their concerns, shall be provided to the complainant. The relevant Member State shall report back to the Fundamental Rights Officer as to the findings and follow-up to a complaint within a determined time period, and if necessary, at regular intervals thereafter. The Agency shall follow up on the matter if no report has been received from the relevant Member State. The Agency shall also include in its annual report information on the complaints mechanism.

The Agency will cooperate with the European External Action Service, EASO, Europol, the European Union Agency for Fundamental Rights, and Eurojust. The European Fisheries Control Agency (EFCA) and the European Maritime Safety Agency (EMSA) shall coordinate their operations at sea and share information.

An independent external evaluation of the results achieved by the Agency will be launched three years after the date of entry into force of the Regulation, and will be repeated every four years thereafter.

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 shifting decision-making to the EU level, and finally setting 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 Members 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

In a joint briefing on the Commission's proposal, the International Commission of Jurists, the European Council on Refugees and Exiles, and Amnesty International, advocated a clearer division of competence. They warned that a blurring of competences may have stronger implications for the Agency's and Member States' accountability for human rights violations, given the Agency's extended mandate (as compared to Frontex). The three organisations also suggested that the individual complaint mechanism against fundamental-rights violations, should have been more independent and effective at the admissibility, merits and reparation stages.

Similarly, the UNHCR recommended that the draft regulation should include a clearer, more coherent and pragmatic distribution of responsibilities between the EU and Member States; the strengthening of fundamental rights safeguards and respect of the principle of *non-refoulement*. It also welcomed a stronger focus on preparedness and an enhanced response capacity to address situations requiring urgent action.

Other commentators noted that expectations for the new agency appeared overestimated in contrast to Member States' limited willingness to contribute. It was also noted that the agency's resources, though increased, remain limited as compared with its mandate and powers, while some aspects of its operations and division of tasks remained unclear in the compromise text.

A protest organised by the Collective for another migratory policy (Collectif pour une autre politique migratoire), against the adoption of the regulation, was staged outside the EP on 5 July 2016, during the discussion of the text in plenary.

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. Although the EESC supported the setting up of a European Border Guard, it suggested omitting the term 'coast' and retaining a civilian police force (rather than military) character. The Committee was also in favour of strengthening the Agency's human-rights guarantees. For instance, it suggested that the Fundamental Rights offer greater protection for unaccompanied minors. The EESC also suggested that a representative of the Committee should become a member of the Consultative Forum.

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 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

In the Council, on 6 April 2016, 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.

The 21 April JHA Council, endorsed the position agreed in Coreper and stressed the necessity to start preparations for implementation of the future system even before its formal adoption. 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.

The LIBE report (rapporteur: Artis Pabrik, EPP, Latvia), adopted on 30 May 2016, suggested a number of amendments on key features of the Commission's proposal, which were retained in the final text, such as the revision of the right to intervene

According to the report, the Agency should not organise return operations to any third country where there are risks of fundamental-rights violations. The need for increased accountability and transparency of the future agency, vis-à-vis Parliament and the general public was also underlined, and the establishment of fundamental-rights safeguards urged.

The European Parliament adopted its position at first reading on 6 July 2016. As the outcome of the vote reflected the compromise agreement reached between the institutions, the Council was able to adopt the text without amendment. The Presidency proposed to Coreper to use the written procedure for the adoption of the Regulation, thus enabling the act to be signed during Parliament's September plenary session.

Following signature on 14 September, Regulation (EU) 2016/1624 entered into force on 6 October, and a formal launch event took place that day on the EU's external border at a crossing point between Bulgaria and Turkey.

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

Disclaimer and Copyright

The content of this document is the sole responsibility of the author and any opinions expressed therein do not necessarily represent the official position of the European Parliament. It is addressed to the Members and staff of the EP for their parliamentary work. Reproduction and translation for non-commercial purposes are authorised, provided the source is acknowledged and the European Parliament is given prior notice and sent a copy.

© European Union, 2016.

eprs@ep.europa.eu
http://www.eprs.ep.parl.union.eu (intranet)
http://www.europarl.europa.eu/thinktank (internet)
http://epthinktank.eu (blog)