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NOTE

From: Presidency
To: Permanent Representatives Committee/Council
Subject: Frontex
- Exchange of views

Courtesy translation

Regulation 2019/1896 reforming Frontex' mandate introduced many innovations, including a permanent contingent of a theoretical 10,000 officers, who can carry weapons, a strategic multi-annual policy cycle for integrated European border management, the ability to support Member States in the field of return and border management and the possibility to intervene in any third state within the framework of a status agreement.

The implementation of this new mandate was a challenge in at least two respects: on the one hand, the agency had to adapt to the requirement of a very rapid increase in power; on the other hand, this increase in power occurred in a difficult context, marked by crises and new circumstances (COVID 19 pandemic, instrumentalisation of migration by certain third countries, etc.).

An evaluation by the Commission is planned for the first semester of 2023, as foreseen by Regulation 2019/1896. Moreover, Article 59 of the Regulation provides for a review of the permanent quota in relation to existing and potential operational needs.

On the occasion of the "Schengen Council" on 10 June, the Presidency is proposing a first political exchange of views to the Ministers. The aim is to take stock of how the well-resourced agency can respond effectively to the needs of Member States at the EU's external border. With a new Executive Director to be chosen shortly by the Management Board, it is appropriate to start reflecting now on the main policy objectives to be assigned to him/her, within the framework of the current mandate and respecting the responsibilities of each of the competent bodies.

Constitution of the permanent body

The Regulation provides for a gradual increase in the size of the permanent quota until 2027, distinguishing between several categories:

- own recruitment (category 1);
- Long-term provisions (category 2);
- Short-term provisions (category 3);
- a rapid response reserve (category 4) has been set up, which will disappear when the objectives of categories 1 and 2 will be achieved.

The target for the end of 2021 was 6,500 for all categories. A capacity of 5 900 has been reached. By 11 May 2022, 835 permanent staff (category 1) have been recruited, against a target of 1,000, which represents an improvement. The agency's first own staff were deployed to the European borders as early as February 2021; to date, deployments to the external borders include 616 category 1, 421 category 2 and 666 category 3 staff, as well as other staff categories (interpreters, technical staff, etc.). Frontex is deploying everyday an average of 2 000 agents.

The creation of the permanent contingent requires the Member States and the Agency to identify and retain a large pool of staff. It also requires the development of many new tools to ensure the management of the staff, making up the permanent corps (work cycles, on-call duty and leave) as well as to ensure the training and deployment of the agents, both from a logistical (transport and accommodation) and from a legal point of view (carrying of weapons for example).

In parallel, Frontex is currently conducting 20 joint operations. In conjunction with the Member States, it was able to rapidly adapt its operational response in the context of the war in Ukraine, deploying 364 agents, including in Moldova, with which a status agreement was concluded in a very reactive manner.

The needs remain considerable: in addition to the flows of people displaced by the war in Ukraine, the pressure on pre-existing migration routes could increase again, in particular through the effect of the conflict on world food markets; Frontex must provide an essential and much-awaited contribution by the Member States to the progress of the European return policy. Finally, the forthcoming implementation of border information systems, such as EES and ETIAS, also requires support from the agency.

Ministers are invited to present their analysis of the trajectory pursued on the deployment of the permanent corps, based on the available pool and the identified needs.

Governance

The Management Board is responsible for strategic decisions relating to the operation of the Agency (Article 100 of Regulation 2019/1896). In 2020, it set up an Executive Committee to better prepare its meetings and focus on key issues.

As regards the management of the agency, a new organisation chart was adopted in December 2021. In accordance with the 2019 regulation, three Deputy Executive Directors are now responsible for the management of the permanent staff, operations and return, and information and methods management.

As Frontex is an agency that is indispensable for the proper functioning of the Schengen area, with very significant resources, the strategic aspects of its governance must be closely linked to the political debates taking place in the Council and the European Council. At the informal ministerial meeting in Lille on 3 February, the Commission indicated that discussions at ministerial level would be necessary. More generally, Member States' level of representation and commitment in the management board is an issue of utmost importance.

Beyond the functioning of the Management Board, the Presidency considers that the executive directors of the agencies should be regularly invited to COREPER for a general exchange of views, as was the case for the executive director of Europol on 20 January, the director of EASO on 2 March and the executive director of EU-LISA on 13 May. At the political level, the regular holding of concrete and strategic discussions in the framework of the "Schengen Council" should help to give political guidance to the agency.

Ministers are invited to express their views on how the Management Board should steer the agency in line with the policy guidelines.

Support to Member States

Since its creation, Frontex's tasks have been greatly expanded:

- its officers can now perform virtually any border management or return task, according to the operational plan agreed with the host Member State;
- With regard to return in particular, a new division has been created and Frontex is now starting its activities in the field of voluntary return and reintegration support;
- Frontex is responsible for developing and operating the ETIAS national unit;
- the agency has a key role in risk analysis, assessment of Member States' vulnerabilities and integrated border management (the Commission is due to adopt the first multi-annual strategic policy in this area by the end of the year): it is thus at the heart of the quantitative and qualitative increase in national and European capacities and the synergies between them.

The effectiveness of the support provided to Member States depends, inter alia, on operational and technical aspects, including, for example, the length of public procurement procedures after which certain operational means can be deployed.

More fundamentally, Frontex operates within the framework of EU law and the law of the host Member State which exercises its sovereignty. Under EU law, Member States have an obligation to protect external borders and prevent illegal crossings. Member States may take measures to safeguard border security and public order, including in situations where third-country nationals violently force their way into the territory of a Member State. These measures must be proportionate, respect fundamental rights and allow real and effective access to regular entry opportunities and in particular to border procedures.

It is therefore up to the agency to train its staff and to prepare and organise its activities according to this legal framework. In particular, the 2019 Regulation established monitors to support the Fundamental Rights Officer (33 out of 40 have been recruited).

The Commission presented on 24 May 2022 a policy document on integrated border management, which is also a useful contribution to the discussion. The document is now submitted for reflection, before the adoption by the Commission, by the end of this year, of a communication establishing a multiannual strategic policy on this issue. The Schengen Council will thus have the opportunity to clarify, if needed, the conditions under which Frontex should support Member States.

Ministers are invited to confirm whether the rules applicable to the agency form a legal framework appropriate to the tasks it is to perform.

Frontex external action

The establishment of Frontex's cooperation with the authorities of third countries contributes to the achievement of the agency's objectives.

This cooperation can take various forms: deployment of liaison officers (some of whom are specialised in return), technical cooperation financed from EU funds, working arrangements between Frontex and the border management authorities of a third country or, but the most successful form of Frontex cooperation with third countries is based on status agreements. Previously reserved for third countries "*neighbouring at least one [...] Member State*" with common land borders¹, such agreements are now open to any third country: they allow for the deployment of border management teams from the agency's permanent staff to third countries, with the possibility of exercising enforcement powers at the land, sea and air borders of countries that do not have common land borders with the EU. As legally binding international agreements, they are negotiated and concluded by the Commission, on behalf of the EU, on the basis of a mandate from the Council and with the consent of the European Parliament.

In addition to the priority of strengthening the network of liaison officers supervised by the agency, particularly in order to facilitate cooperation on return, it would seem desirable to develop status agreements or working arrangements. This would involve concluding the agreements still under discussion concerning the Western Balkans, but also exploring new possibilities: at this stage, the authorities of Senegal and Mauritania have been approached by the Commission with a view to opening negotiations on a status agreement, and by Frontex regarding a possible working arrangement; they have expressed a certain openness. The Agency is also currently exploring the possibility of a working arrangement with Niger.

Ministers are invited to express their expectations for the development of the Agency's external action.

¹ Article 54(3) of Regulation (EU) 2016/1624 of 14 September 2016 - Such agreements have been offered to several Western Balkan countries and three have entered into force with Albania, Montenegro and Serbia. Negotiations have been completed with Bosnia and Herzegovina and with Northern Macedonia, but have not been formally concluded at this stage.