

Frontex

An Inside View



By **Gen. Brig. Ilkka Laitinen***

On 24 September, EIPA was honoured with a visit by Frontex' executive director, Gen. Brig. Ilkka Laitinen, as guest speaker in a three-day seminar on European Union migration law and policies.¹ Before his current position, Laitinen was already an often-asked expert in the field of border management. During his career with the Finnish border guards – where he earned his rank – he chaired a host of multinational projects and advised several Council presidencies. In 2003 he became director of the EU Risk Analysis Centre, soon to be followed by his appointment in Warsaw at Frontex. Notwithstanding his frequent involvement in highly sensitive political issues, Laitinen stresses he considers himself a practitioner and has no intention of changing that.²

A brief introduction to Frontex

Frontex was officially established in 2004 with an eye on the efficient implementation of the *acquis* concerning border management.³ The agency currently commands a staff of some 190 persons – many of whom have a law enforcement background – and a budget of €72 million, which makes Frontex an agency of “medium calibre” in comparison with its sister organisations. The Agency's legal bases, Arts. 62(2) (a) & 66 EC, call for the adoption of common policies with regard to the external borders and intra-Community cooperation, respectively. However, whereas the Agency's formal roots lie in the first pillar, it is naturally expected to consult closely with the relevant third pillar institutions and agencies.⁴ It is also interesting to note that roughly 70 members of its staff are seconded national experts, which shows the close contact of the Agency with the Member States. Similarly, a close look at its founding Regulation reveals that the Member States have certainly not loosened their grip on their national prerogative, border management. The Agency was designed to “facilitate and render more effective the application of existing and future Community measures”.⁵ One does not need to be thoroughly acquainted with the workings of the EU to realise the potential for conflicts with the various national border management organisations. The latter concern is underlined by the fact that – notwithstanding a non-obstruction clause⁶ – there is no legal obligation for the participating states to participate actively in joint programmes. Thus, Frontex finds itself in a highly interesting position with many opportunities, as well as challenges.

Frontex' tasks

Frontex' task, in short, is the effective implementation of integrated border management. The concept emerged after the sudden shock of 11 September 2001,⁷ yet it was given a different interpretation by the various institutions involved. The Commission, on the one hand, saw an opportunity for gradually introducing an independent European border guard which was to be funded by the Community budget.⁸ The Member States, on the other, did not hide their scepticism towards the project and launched a more modest and intergovernmental counterproposal. The 2006 JHA Council finally defined integrated border management as a concept consisting of:

- a) border control,
- b) prevention of cross-border crime,
- c) the four-tier access control model,
- d) inter-agency cooperation, and
- e) political and legislative coherence.⁹

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With reference to the cooperation and coordination in the field, Frontex's tasks include the setting up of joint operations, technical support to Member States, return cooperation, and facilitation of cooperation with third countries and international organisations.¹¹ However, the execution of these tasks is made difficult due to the voluntary character of Frontex' projects, including third country cooperation. Yet, there is room for optimism for two reasons. Firstly, the Agency's institutional makeup involves all national border control chiefs,¹² which greatly enhances trust building and information exchange among the Member States and

Frontex. Secondly, it is financially independent, which allows it to provide positive incentives for participating countries. Special emphasis should be given to the Agency's involvement in return operations, which can be classified as "a very important and integral part of the whole chain of border control".¹³ Even though the Agency's role is somewhat limited by its founding Regulation – not the least by the lack of executive power – its budgetary independence provides a powerful tool for coordination.

As for the capacity building aspect of Frontex' activities, its main tasks include risk analysis, training and processing of research and equipment.¹⁴ The Agency's core task, which is to deliver analytical products, goes hand in hand with Mr. Laitinen's qualities as former Director of the EU Risk Analysis Centre. Two main products are delivered on a regular basis: the Annual Risk Assessment (ARA) and the Semi-Annual Risk Assessment (SARA). The former is intended to give a mid-term overview to the Commission of what the specific needs are of the respective border Member States. The latter gives a detailed overview regarding specific target countries. Other risk assessments are tailored to the specifics of, for instance, a joint action.

Additionally, another capacity building activity for Frontex is the training of border guards across Europe. Currently, €6.5 million has been allocated to this sector and a network of nine academies has been set up in order to educate new border guards. An important component of this activity is the Common Core Curriculum, which is part of the endeavour to apply a single unified border management policy to the external borders of the European Union. The latter has already been implemented by all Schengen states. To further promote innovation in process, Frontex maintains regular contacts with developers of relevant technology and attempts to channel practitioners' views.¹⁵

Recent developments

Since Frontex's foundation, its tasks have not changed drastically. Nevertheless, taking into consideration the very broad mission statement, the interpretation of those tasks and the adherence tools are not static. Hence, in July 2007 the Council amended the founding Regulation to include the Rapid Border Intervention Team (RABIT) mechanism.¹⁶ The amendment enlarged the already existing authority to technically support Member States that request so.¹⁷ The Agency may now draw up an expert pool, consisting of national experts which may be deployed upon approval of the Director General. The degree of commitment has also

been stepped up by suggesting an obligation to contribute. "Member States shall make the border guards available for deployment at the request of the Agency, unless they are faced with an exceptional situation".¹⁸ In addition, the executive powers of guest officers are also governed by the amending Regulation, thus preventing overlapping jurisdictions. All the same, joint missions are still governed by the host Member State and consequently Frontex merely contributes to the coordination and the financing of the mission.

A further development, though not as institutionalised as the former, is the continuous contact that Frontex establishes with neighbouring and third countries. The 2006 JHA Council clearly favoured such an approach since it included these activities in the definition of integrated border management.¹⁹ It should be pointed out, however, that Frontex' legal basis falls under the first pillar and thus no solid authorisation can be found in the Treaty for such actions. Alternatively, the founding Regulation 2007/2004 states that "the Agency may cooperate with

the authorities of third countries competent in matters covered by this Regulation".²⁰ When asked what the legal basis for third country interaction is, Mr. Laitinen confirmed that the Regulation is the correct legal basis but added that Frontex policy has to comply with other EU policies, and in particular with external relations. In practice, such cooperation thus consists of "purely technical arrangements" such as exchange of information and experiences as well as training cooperation. Consequently, all references to politics have to be removed when drafting documents for cooperation. The Agency has so far concluded working arrangements with Russia, Ukraine, Switzerland, Croatia and Moldova and an agreement with Georgia is under way.

Challenges

Arguably, Frontex has already achieved more than most critics had anticipated. Yet, a number of concerns remain and some of which may prove to be unsolvable. The most frequently voiced of these is most likely the human rights concern. The post-11 September experience has given a powerful boost to the security camp but privacy concerns remain real. Already at an early stage, the European Parliament and various NGOs expressed their opposition to what they consider to be an extension of "Fortress Europe". Frontex uses financial conditionality towards its partners in order to uphold human rights. However, this

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argument somewhat weakens, when one considers the low degree of transparency towards the European Parliament. Note, for instance, that whereas the European Parliament was involved in the setting up of Frontex, it does not receive any information other than that related to its finances.²¹

In Mr. Laitinen's point of view, there has to be a clear distinction between politics and his tasks as a practitioner, as he described himself. Yet, the Director General's rank with the Finnish border guards suggests a certain degree of servitude to policy-makers. Nevertheless, it cannot be denied that regarding Frontex this is partially true as the Agency possesses an independent financial power over missions, as well as for the deployment of the RABIT

has been pointed out by a range of authors. Additionally, the Agency has been faced until now with linguistic problems. Even if it is English in practice, Frontex' working language is not given by formal legislation, which thus may result in an increased bureaucratic burden.²⁴

Finally, Frontex has not been given any direct operational power: i.e. it must always rely on other parties for the final implementation of its programs. Thus, the question arises whether Frontex has sufficient leverage to trigger these actors in following its lead. "If the Member States are willing to participate in these exercises and to deploy their assets," Mr. Laitinen declared, "there is no need to have this kind of equipment itself".²⁵ If the Member States prefer to allocate



Las Palmas, 11 October 2006 – Ilkka Laitinen visiting HERA.

mechanism. But how can a practitioner retain an amount of power when he comes under political pressure? Whilst Mr. Laitinen's answer naturally included that "the aim is to keep it as practical and non-political as possible", he acknowledged the potential difficulties "in a situation where, for instance, Italy, Germany and France have made it clear that it could be wise to deploy".²² Frontex's great reliance on existing national structures – embodied by the seconded national experts and the Management board – could have a great effect on the Agency's functioning in case of such a conflict. It is clear that such conflicts have already arisen when Member States criticise the good operation of Frontex: "When there are good days, it is Member States' responsibility and when the bad days come, then, the responsibility is with Frontex", said Mr. Laitinen.²³

The Director General's biggest concern, however, seemed to have been of a more pragmatic nature. For, an Agency like his, he argued, it cannot be expected to operate according to the same rules and procedures as all other European Institutions. Even though Frontex is already an Agency that is quite independent from the Commission, Mr. Laitinen asked for more flexibility and autonomy. The risk of bureaucratisation by applying standard rules to Frontex

resources to the EU level, he added, that might pose some legal problems but solve many practical issues. The European Border Surveillance System (EUROSUR), focusing initially on the southern and eastern external borders of the EU,²⁶ though currently in a preliminary phase, has been explained by some as a move in that direction.²⁷

Concluding remarks

How do we proceed? Frontex finds itself in an extremely interesting position with many opportunities, including human rights and democratic concerns. Certainly, the agency has benefited from the ruling public opinion of the post-11 September world, which served as policy window for the securitisation of the EU. Here it is interesting, however, that Frontex' primordial tasks lie with economic migration and not with border security in a more military sense. Will this political climate hold still, or, will we see a return to a more moderate approach, favouring economic interests and human rights? As much as the Director General of Frontex attempts to stay clear of these questions, he is inevitably caught by these questions.

NOTES

- * Gen. Brig. Ilkka Laitinen, Executive Director, Frontex.
- ¹ Seminar on EU Policies and Inter-European Cooperation on Migration, Organised by the European Institute of Public Administration (EIPA) Maastricht (NL), 22-24 September 2008.
- ² Speech held at the Seminar on EU Policies and Inter-European Cooperation on Migration by Ilkka Laitinen in Maastricht at 24 September 2008.
- ³ Council Regulation No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2004] L349/1.
- ⁴ §20, Art. 13; *ibid*.
- ⁵ Art. 1(2), *ibid*.
- ⁶ Art. 2(2), *ibid*.
- ⁷ Jorry, H. (2007). Construction of a European Institutional Model for Managing Operational Cooperation at the EU's External Borders: Is the FRONTEX Agency a decisive step forward? CEPS Challenge Research Paper No. 6. Retrieved on 22 October 2008, from: http://shop.ceps.be/downfree.php?item_id=1483: p. 1.
- ⁸ European Commission. (2002). Communication from the Commission to the Council and the European Parliament towards Integrated Management of the External Borders of the Member States of the European Union. COM(2002) 233: p. 19.
- ⁹ Council of the European Union, 2768th session of JHA Council meeting, Brussels, 4-5 December 2006, 15801/06 (Presse 341): p. 27.
- ¹⁰ Speech held at the Seminar on EU Policies and Inter-European Cooperation on Migration by Ilkka Laitinen in Maastricht at 24 September 2008.
- ¹¹ Respectively, Art. 3, 8, 9, 13 and 14, Council Regulation No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2004] L349/1.
- ¹² Art. 21, *ibid*.
- ¹³ Speech held at the Seminar on EU Policies and Inter-European Cooperation on Migration by Ilkka Laitinen in Maastricht at 24 September 2008.
- ¹⁴ Respectively, Art. 4, 5, 6, and 7, Council Regulation No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2004] L349/1.
- ¹⁵ Art. 6, *ibid*.
- ¹⁶ Council Regulation No 863/2007 of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers [2007] L199/30.
- ¹⁷ Art. 8, Council Regulation No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2004] L349/1.
- ¹⁸ Art. 12: Art. 8(d)(8), *ibid*.
- ¹⁹ Council of the European Union, 2768th session of JHA Council meeting, Brussels, 4-5 December 2006, 15801/06 (Presse 341): p. 27.
- ²⁰ Art. 14, Respectively, Art. 4, 5, 6, and 7, Council Regulation No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2004] L349/1.
- ²¹ Jorry, H. (2007). Construction of a European Institutional Model for Managing Operational Cooperation at the EU's External Borders: Is the FRONTEX Agency a decisive step forward? CEPS Challenge Research Paper No. 6. Retrieved on 22 October 2008, from: http://shop.ceps.be/downfree.php?item_id=1483: p. 21.
- ²² Speech held at the Seminar on EU Policies and Inter-European Cooperation on Migration by Ilkka Laitinen in Maastricht at 24 September 2008.
- ²³ Speech held at the Seminar on EU Policies and Inter-European Cooperation on Migration by Ilkka Laitinen in Maastricht at 24 September 2008.
- ²⁴ Jorry, H. (2007). Construction of a European Institutional Model for Managing Operational Cooperation at the EU's External Borders: Is the FRONTEX Agency a decisive step forward? CEPS Challenge Research Paper No. 6. Retrieved on 22 October 2008, from: http://shop.ceps.be/downfree.php?item_id=1483: p. 20.
- ²⁵ Speech held at the Seminar on EU Policies and Inter-European Cooperation on Migration by Ilkka Laitinen in Maastricht at 24 September 2008.
- ²⁶ European Commission. (2008). Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, examining the creation of a European Border Surveillance System (EUROSUR). COM(2008) 68 final.
- ²⁷ Jeandesboz, J. (2008). Reinforcing the Surveillance of EU Borders: The Future Development of Frontex and EUROSUR. CEPS Challenge Research Paper No. 11. Retrieved on 22 October 2008, from: http://shop.ceps.be/downfree.php?item_id=1693: p. 10.