



Analysis

Monitoring “secondary movements” and “hotspots”: Frontex is now an internal surveillance agency

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The EU’s border agency, Frontex, now has powers to gather data on “secondary movements” and the “hotspots” within the EU. The intention is to ensure “situational awareness” and produce risk analyses on the migratory situation within the EU, in order to inform possible operational action by national authorities. This brings with it increased risks for the fundamental rights of both non-EU nationals and ethnic minority EU citizens.

The establishment of a new 'standing corps' of 10,000 border guards to be commanded by EU border agency Frontex has generated significant public and press attention in recent months. However, the new rules governing Frontex¹ include a number of other significant developments - including a mandate for the surveillance of migratory movements and migration “hotspots” within the EU.

Previously, the agency’s surveillance role has been restricted to the external borders and the “pre-frontier area” – for example, the high seas or “selected third-country ports.”² New legal provisions mean it will now be able to gather data on the movement of people within the EU. While this is only supposed to deal with “trends, volumes and routes,” rather than personal data, it is intended to inform operational activity within the EU.

This may mean an increase in operations against ‘unauthorised’ migrants, bringing with it risks for fundamental rights such as the possibility of racial profiling, detention, violence and the denial of access to asylum procedures. At the same time, in a context where internal borders have been reintroduced by numerous Schengen states over the last five years due to

¹ The new Regulation was published in the Official Journal of the EU in mid-November: Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624, <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:32019R1896>

² Article 12, ‘Common application of surveillance tools’, Regulation (EU) No 1052/2013 of the European Parliament and of the Council of 22 October 2013 establishing the European Border Surveillance System (Eurosur), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32013R1052>

increased migration, it may be that the agency's new role contributes to a further prolongation of internal border controls.

From external to internal surveillance

Frontex was initially established with the primary goals of assisting in the surveillance and control of the external borders of the EU. Over the years it has obtained increasing powers to conduct surveillance of those borders in order to identify potential 'threats'.

The European Border Surveillance System (EUROSUR) has a key role in this task, taking data from a variety of sources, including satellites, sensors, drones, ships, vehicles and other means operated both by national authorities and the agency itself. EUROSUR was formally established by legislation approved in 2013, although the system was developed and in use long before it was subject to a legal framework.³

The new Frontex Regulation incorporates and updates the provisions of the 2013 EUROSUR Regulation. It maintains existing requirements for the agency to establish a "situational picture" of the EU's external borders and the "pre-frontier area" – for example, the high seas or the ports of non-EU states – which is then distributed to the EU's member states in order to inform operational activities.⁴

The new rules also provide a mandate for reporting on "unauthorised secondary movements" and goings-on in the "hotspots". The Commission's proposal for the new Frontex Regulation was not accompanied by an impact assessment, which would have set out the reasoning and justifications for these new powers. The proposal merely pointed out that the new rules would "evolve" the scope of EUROSUR, to make it possible to "prevent secondary movements".⁵ As the European Data Protection Supervisor remarked, the lack of an impact assessment made it impossible: "to fully assess and verify its attended benefits and impact, notably on fundamental rights and freedoms, including the right to privacy and to the protection of personal data."⁶

The term "secondary movements" is not defined in the Regulation, but is generally used to refer to journeys between EU member states undertaken without permission, in particular by undocumented migrants and applicants for internal protection. Regarding the "hotspots" –

³ According to Frontex, the Eurosur Network first came into use in December 2011 and in March 2012 was first used to "exchange operational information". The Regulation governing the system came into force in October 2013 (see footnote 2). See: Charles Heller and Chris Jones, 'Eurosur: saving lives or reinforcing deadly borders?', *Statewatch Journal*, vol. 23 no. 3/4, February 2014, <http://database.statewatch.org/article.asp?aid=33156>

⁴ Recital 34, 2019 Regulation: "EUROSUR should provide an exhaustive situational picture not only at the external borders but also within the Schengen area and in the pre-frontier area. It should cover land, sea and air border surveillance and border checks."

⁵ European Commission, 'Proposal for a Regulation on the European Border and Coast Guard and repealing Council Joint Action no 98/700/JHA, Regulation (EU) no 1052/2013 and Regulation (EU) no 2016/1624', COM(2018) 631 final, 12 September 2018, <http://www.statewatch.org/news/2018/sep/eu-com-frontex-proposal-regulation-com-18-631.pdf>

⁶ EDPS, 'Formal comments on the Proposal for a Regulation on the European Border and Coast Guard', 30 November 2018, p. p.2, https://edps.europa.eu/sites/edp/files/publication/18-11-30_comments_proposal_regulation_european_border_coast_guard_en.pdf

established and operated by EU and national authorities in Italy and Greece – the Regulation provides a definition,⁷ but little clarity on precisely what information will be gathered.

Legal provisions

A quick glance at Section 3 of the new Regulation, dealing with EUROSUR, gives little indication that the system will now be used for internal surveillance. The formal scope of EUROSUR is concerned with the external borders and border crossing points:

“EUROSUR shall be used for border checks at authorised border crossing points and for external land, sea and air border surveillance, including the monitoring, detection, identification, tracking, prevention and interception of unauthorised border crossings for the purpose of detecting, preventing and combating illegal immigration and cross-border crime and contributing to ensuring the protection and saving the lives of migrants.”

However, the subsequent section of the Regulation (on ‘situational awareness’) makes clear the agency’s new internal role. Article 24 sets out the components of the “situational pictures” that will be visible in EUROSUR. There are three types – national situational pictures, the European situational picture and specific situational pictures. All of these should consist of an events layer, an operational layer and an analysis layer. The first of these layers should contain (emphasis added in all quotes):

*“...events and incidents related to unauthorised border crossings and cross-border crime and, **where available, information on unauthorised secondary movements, for the purpose of understanding migratory trends, volume and routes.**”*

Article 26, dealing with the European situational picture, states:

*“The Agency shall establish and maintain a European situational picture in order to provide the national coordination centres and the Commission with effective, accurate and timely information and analysis, covering the external borders, the pre-frontier area **and unauthorised secondary movements.**”*

The events layer of that picture should include “information relating to... incidents in the operational area of a joint operation or rapid intervention coordinated by the Agency, **or in a hotspot.**”⁸ In a similar vein:

*“The operational layer of the European situational picture shall contain information on the joint operations and rapid interventions coordinated by the Agency **and on hotspots**, and shall include the mission statements, locations, status, duration, information on the Member States and other actors involved, daily and weekly situational reports, statistical data and information packages for the media.”⁹*

⁷ Article 2(23): “‘hotspot area’ means an area created at the request of the host Member State in which the host Member State, the Commission, relevant Union agencies and participating Member States cooperate, with the aim of managing an existing or potential disproportionate migratory challenge characterised by a significant increase in the number of migrants arriving at the external borders”

⁸ Article 26(3)(c), 2019 Regulation

⁹ Article 26(4), 2019 Regulation

Article 28, dealing with ‘EUROSUR Fusion Services’, says that Frontex will provide national authorities with information on the external borders and pre-frontier area that may be derived from, amongst other things, the monitoring of “migratory flows **towards and within** the Union in terms of trends, volume and routes.”

Sources of data

The “situational pictures” compiled by Frontex and distributed via EUROSUR are made up of data gathered from a host of different sources. For the national situational picture, these are:

- national border surveillance systems;
- stationary and mobile sensors operated by national border agencies;
- border surveillance patrols and “other monitoring missions”;
- local, regional and other coordination centres;
- other national authorities and systems, such as immigration liaison officers, operational centres and contact points;
- border checks;
- Frontex;
- other member states’ national coordination centres;
- third countries’ authorities;
- ship reporting systems;
- other relevant European and international organisations; and
- other sources.¹⁰

For the European situational picture, the sources of data are:

- national coordination centres;
- national situational pictures;
- immigration liaison officers;
- Frontex, including reports from its liaison officers;
- Union delegations and EU Common Security and Defence Policy (CSDP) missions;
- other relevant Union bodies, offices and agencies and international organisations; and
- third countries’ authorities.¹¹

The EUROSUR handbook – which will presumably be redrafted to take into account the new legislation – provides more detail about what each of these categories may include.¹²

Exactly how this melange of different data will be used to report on secondary movements is currently unknown. However, in accordance with Article 24 of the new Regulation:

“The Commission shall adopt an implementing act laying down the details of the information layers of the situational pictures and the rules for the establishment of specific situational pictures. The implementing act shall specify the type of information to be provided, the entities responsible for collecting, processing, archiving and

¹⁰ Article 25, 2019 Regulation

¹¹ Article 26, 2019 Regulation

¹² European Commission, ‘Commission Recommendation adopting the Practical Handbook for implementing and managing the European Border Surveillance System (EUROSUR)’, C(2015) 9206 final, 15 December 2015, https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/securing-eu-borders/legal-documents/docs/eurosur_handbook_annex_en.pdf

transmitting specific information, the maximum time limits for reporting, the data security and data protection rules and related quality control mechanisms.”¹³

This implementing act will specify precisely how EUROSUR will report on “secondary movements”.¹⁴ According to a ‘roadmap’ setting out plans for the implementation of the new Regulation, this implementing act should have been drawn up in the last quarter of 2020 by a newly-established European Border and Coast Guard Committee sitting within the Commission. However, that Committee does not yet appear to have held any meetings.¹⁵

Operational activities at the internal borders

Boosting Frontex’s operational role is one of the major purposes of the new Regulation, although it makes clear that the internal surveillance role “should not lead to operational activities of the Agency at the internal borders of the Member States.” Rather, internal surveillance should “contribute to the monitoring by the Agency of migratory flows towards and within the Union for the purpose of risk analysis and situational awareness.” The purpose is to inform operational activity by national authorities.

In recent years Schengen member states have reintroduced border controls for significant periods in the name of ensuring internal security and combating irregular migration. An article in *Deutsche Welle* recently highlighted:

“When increasing numbers of refugees started arriving in the European Union in 2015, Austria, Germany, Slovenia and Hungary quickly reintroduced controls, citing a “continuous big influx of persons seeking international protection.” This was the first time that migration had been mentioned as a reason for reintroducing border controls.

Soon after, six Schengen members reintroduced controls for extended periods. Austria, Germany, Denmark, Sweden and Norway cited migration as a reason. France, as the sixth country, first introduced border checks after the November 2015 attacks in Paris, citing terrorist threats. Now, four years later, all six countries still have controls in place. On November 12, they are scheduled to extend them for another six months.”¹⁶

These long-term extensions of internal border controls are illegal (the upper limit is supposed to be two years; discussions on changes to the rules governing the reintroduction of internal border controls in the Schengen area are ongoing).¹⁷ A European Parliament resolution from May 2018 stated that “many of the prolongations are not in line with the existing rules as to

¹³ Article 24(3), 2019 Regulation

¹⁴ “Roadmap’ for implementing new Frontex Regulation: full steam ahead’, *Statewatch News*, 25 November 2019, <http://www.statewatch.org/news/2019/nov/eu-frontex-roadmap.htm>

¹⁵ Documents related to meetings of committees operating under the auspices of the European Commission can be found in the Comitology Register:

<https://ec.europa.eu/transparency/regcomitology/index.cfm?do=Search.Search&NewSearch=1>

¹⁶ Kira Schacht, ‘Border checks in EU countries challenge Schengen Agreement’, *DW*, 12 November 2019, <https://www.dw.com/en/border-checks-in-eu-countries-challenge-schengen-agreement/a-51033603>

¹⁷ European Parliament, ‘Temporary reintroduction of border control at internal borders’, [https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2017/0245\(COD\)&l=en](https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2017/0245(COD)&l=en)

their extensions, necessity or proportionality and are therefore unlawful.”¹⁸ Yves Pascou, a researcher for the European Policy Centre, told *Deutsche Welle* that: ““We are in an entirely political situation now, not a legal one, and not one grounded in facts.”

A European Parliament study published in 2016 highlighted that:

*“there has been a noticeable lack of detail and evidence given by the concerned EU Member States [those which reintroduced internal border controls]. For example, there have been no statistics on the numbers of people crossing borders and seeking asylum, or assessment of the extent to which reintroducing border checks complies with the principles of proportionality and necessity.”*¹⁹

One purpose of Frontex’s new internal surveillance powers is to provide such evidence (albeit in the ideologically-skewed form of ‘risk analysis’) on the situation within the EU. Whether the information provided will be of interest to national authorities is another question. Nevertheless, it would be a significant irony if the provision of that information were to contribute to the further maintenance of internal borders in the Schengen area.

At the same time, there is a more pressing concern related to these new powers. Many discussions on the reintroduction of internal borders revolve around the fact that it is contrary to the idea, spirit (and in these cases, the law) of the Schengen area. What appears to have been totally overlooked is the effect the reintroduction of internal borders may have on non-EU nationals or ethnic minority citizens of the EU. One does not have to cross an internal Schengen frontier too many times to notice patterns in the appearance of the people who are hauled off trains and buses by border guards, but personal anecdotes are not the same thing as empirical investigation. If Frontex’s new powers are intended to inform operational activity by the member states at the internal borders of the EU, then the potential effects on fundamental rights must be taken into consideration and should be the subject of investigation by journalists, officials, politicians and researchers.

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¹⁸ ‘Report on the annual report on the functioning of the Schengen area’, 3 May 2018, para.9, https://www.europarl.europa.eu/doceo/document/A-8-2018-0160_EN.html

¹⁹ Elpseth Guild et al, ‘Internal border controls in the Schengen area: is Schengen crisis-proof?’, European Parliament, June 2016, p.9, [https://www.europarl.europa.eu/RegData/etudes/STUD/2016/571356/IPOL_STU\(2016\)571356_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2016/571356/IPOL_STU(2016)571356_EN.pdf)



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