

Meijers Committee

standing committee of experts on international immigration,
refugee and criminal law



CM1817 Comments on the draft for a new Regulation on a European Border and Coast Guard, (COM (2018) 631 final) and the amended proposal for a Regulation on a European Union Asylum Agency (COM(2018) 633 final)

27 November 2018

General observations

The Meijers Committee would like to take the opportunity to comment on the drafts for a new Regulation on a European Border and Coast Guard, incorporating also the EUROSUR system (COM (2018) 631 final) and the amended proposal for a Regulation on a European Union Asylum Agency (COM(2018) 633 final).

In 2016, the European Commission put forward a proposal on the establishment of a European Union Asylum Agency (EU Asylum Agency) as part of a wider CEAS package. On 28 June 2017 the Council and the European Parliament reached a provisional inter-institutional agreement. Negotiations are still ongoing with respect to Chapter 1 (The European Union Agency for Asylum), Chapter 3 (Country of Origin Information and guidance), Chapter 5 (Monitoring) and Chapter 9 (Organisation).

The proposal on the EU Asylum Agency is limited to four provisions, of which three aim to expand the scope of the Agency's operational activities, especially with regard to providing direct support to the processing of individual asylum claims: article 16, new article 16a and article 21. The Meijers Committee considers the objective of strengthening the role for the EU Asylum Agency in providing operational and technical assistance to improve the EU-wide effective functioning of asylum systems a positive development. The Meijers Committee also welcomes a greater convergence in the application of the Common European Asylum System (CEAS) by Member States. However, the closer involvement of the Agency with decision-making by Member States raises a number of issues relating to the competences and accountability of the EU Asylum Agency. The Meijers Committee address those issues in this note.

As regards the European Border and Coast Guard (EBCG) proposal, the Meijers Committee takes note of the fact that this entity was established a mere two years ago. For the European Border and Coast Guard Agency (EBCG Agency or EBCGA), also known as Frontex, this would be the fourth comprehensive amendment to its legal framework. In the view of the Meijers Committee, the rapid successive amendments to the EBCG Agency's mandate are symptomatic of a lack of strategic thinking on the future of border management at EU level. Political imperatives have resulted in a consistent expansion of the EBCG Agency's resources and powers, a stretching of the EU constitutional framework, and a lack of concomitant safeguards.

The new proposal does not respond to the main criticism on the existing legal framework, in particular as regards the lack of a solid data protection regime and means of individual redress.¹ Instead it reintroduces some of the more controversial elements from the 2016 proposal.

¹ See for instance: European Ombudsman, Opinion from Frontex on the European Ombudsman's own-initiative inquiry into the implementation by Frontex of its fundamental rights obligations, decision 12 November 2013; Opinion 02/2016, EDPS recommendations on the proposed European Border and Coast Guard Regulation; Study carried out for the LIBE Committee on the establishment of a European Border and Coast Guard (PE 556.934).

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Comments on the draft for a new Regulation on a European Border and Coast Guard, incorporating also the EUROSUR system (COM (2018) 631 final)

1. Search and Rescue

The Meijers Committee is conscious of the existence of a regime for search and rescue under public international law. Nonetheless, it believes this does not exclude an implied competence for the European Union to take more proactive action to save lives at sea. The current proposal would retain SAR operations as one of the Agency's tasks, but still only to the extent that they arise within border management activities. The provisions on EUROSUR maintain the saving of lives at sea as one of the system's main objectives, but do not attach further consequences to this, e.g. by imposing clear obligations on the Member States to engage in SAR, including where they become aware of a SAR situation through the use of EUROSUR.

2. Political Choices

The Meijers Committee recalls that under the case law of the Court of Justice of the European Union political choices falling within the responsibilities of the EU legislator cannot be delegated.² As such, it has difficulty understanding the use of a delegated act foreseen in article 8 of the proposal that would empower the European Commission to adopt a multi-annual strategic policy for European Integrated Border Management. First, because of the choice of instrument, considering that the use of delegated act is limited to amend non-essential elements of Union legislation (article 290 TFEU). Second, because even under an implementing act (article 291 TFEU), the adoption of a multi-annual strategic policy cycle for European Integrated Border Management is likely to require political choices to be made, which calls in any case for parliamentary oversight.

3. Respect for Fundamental Rights

The proposal does not solve the question of responsibility for fundamental rights violations in the course of joint operational activity that have been raised since the establishment of the EBCG Agency.³ In a multi-actor context, it has proven almost impossible to hold the EBCGA accountable for potential fundamental rights violations, even if such responsibility for the EBCGA – in addition to that of the Member States - may well be established on the basis of European and international fundamental rights law. In fact, by endowing new tasks and powers on the EBCGA, this problem is exacerbated, as the EBCG Agency is increasingly likely to have knowledge of and influence over Member States' activities in the course of joint operational cooperation.

Although the individual complaints mechanism established in 2016 meant as an important step forward, it does not constitute a judicial remedy in the sense of article 47 of the Charter of

² Case C-355/10, European Council v Parliament and Council, ECLI:EU:C:2012:516.

³ R. Mungianu, *Frontex and Non-Refoulement, The international Responsibility of the EU*, Cambridge University Press, 2016; M. Fink, *Frontex and human rights: responsibility in 'multi-actor situations' under the ECHR and EU public liability law*, Oxford University Press, forthcoming 2018).

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Fundamental Rights. It acts mainly as a clearing house sending complaints on to the Member States' competent authorities.

The Agency's Fundamental Rights Officer has played an important role in monitoring the compliance with fundamental rights by the Agency. The Agency's Consultative Forum has consistently raised concerns as to an underfunding and understaffing, an issue that is not addressed by this proposal.⁴ Whilst recital 48 of the current Regulation refers to the need for adequate resources and staff for the Fundamental Rights Officer's Office, corresponding to its mandate and size, such provision has proven incapable of addressing the problem identified by the Consultative Forum, and has even been omitted in the current proposal. The Meijers Committee therefore recommends to include a clear provision in the operational part of the Regulation ensuring adequate funding and staffing for the EBCG Agency's Fundamental Rights Office.

In view of the important monitoring obligations of the Fundamental Rights Officer, the Meijers Committee believes that the officer should be able to make use of the information gathered by liaison officers in the Member States (under article 32 of the proposal) and in third countries (article 78 of the proposal). Such role for liaison officers should be made explicit in the Regulation. Similarly, the Meijers Committee would like to see a similar information gathering role as regards the fundamental rights situation in third countries to be entrusted to migration liaison officers in general, which should be included in the currently pending proposal for a recast of the Regulation on the creation of a European network of immigration liaison officers.⁵

4. Third Country Cooperation

The proposal does away with the obligation that operational cooperation on third country territory can only take place in neighboring countries with the approval of the neighboring Member State. Currently, most neighboring countries, with the exception of Belarus, are members of the Council of Europe and parties to the European Convention on Human Rights. The expansion of the possibility to cooperate with countries further afield, including at airports, underscores the need for a fundamental rights assessment to be carried out prior to the conclusion of working arrangements and status agreements under article 74 of the proposal, as well as prior to specific joint operational activity, in order to assess the potential fundamental rights implications of cooperation with third countries. The work of liaison officers posted in third countries should be able to feed into such assessment.

The Meijers Committee would support the introduction of a clear obligation to carry out a fundamental rights assessment prior to engaging in cooperation with third countries. A provision that could serve as an example can be found in article 4(2) of Regulation (EU) No 656/2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the EBCG Agency, which requires that the fundamental rights situation in a third country is assessed prior to disembarkation of intercepted people takes place.⁶ Such assessment shall be based on information derived from a broad range of sources, which may include other Member States, Union bodies, offices and agencies, and relevant international organisations and it may take into account the existence of

⁴ Frontex Consultative Forum on Fundamental Rights, Program of Work for 2018 as adopted by the Frontex Consultative Forum on 31 October 2017 and presented to the Frontex Management Board on 22 November 2017.

⁵ COM(2018) 303 final.

⁶ Regulation (EU) No 656/2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated, OJ 2014, L189/93.

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agreements and projects on migration and asylum carried out in accordance with Union law and through Union funds.

5. Endowing EU Staff with Executive Powers

The proposal's main innovation is no doubt the conferral of executive powers on the EBCG Agency's own staff in article 56, who shall be endowed with all the powers that national members of the European Border and Coast Guard Teams dispose of (article 83). The Meijers Committee notes that this stretches the boundaries of the Agency's legal basis in article 77(2)(c) TFEU to a maximum, short of conferring command and control powers on the EBCGA itself. The latter, although not foreseen in the current proposal, would in the opinion of the Meijers Committee violate the Treaties' provisions on Member States' ultimate responsibility in matter of internal security as laid down in article 4(2) TEU.

It is the conferral of executive powers on EU staff, that underscores the need for judicial remedies and rules on responsibility in case of fundamental rights violations in the context of EBCGA coordinated joint operational activity. It also raises the question to what extent the operational EU staff members remain covered by Protocol (No 7) on the privileges and immunities of the European Union, which grants EU officials immunity from Member State jurisdiction when acting in an official capacity.

The Meijers Committee is particularly concerned as regards the deployment of statutory staff members on third country territory and the absence of means to hold such officers to account. The current Model Status Agreement covering such deployment provides for immunity of members of the European Border and Coast Guard teams from the jurisdiction of the host third country.⁷ Contrary to the national team members, who remain criminally and civilly liable under the laws of their home Member State, EU operational staff would escape such liability.

Likewise, article 44(5) of the proposal provides that members of the teams which are not statutory staff members of the Agency, shall remain subject to disciplinary *and other* measures of their home Member State. Although the EBCG Agency could provide for appropriate disciplinary measures for its statutory staff, it would lack the possibility to impose any meaningful other measures in the absence of EU rules to this effect. The EU legislator should therefore either provide for such rules or subject its statutory staff to the jurisdiction of (one of) the Member States.

6. Return

The Proposal reinforces the EBCG Agency's powers in the field of return. Although the EBCGA is not to enter into the validity of the Member State's return decision under article 51 of the proposal, it has at the same time an obligation to respect the principle of *non-refoulement* at all times. By imposing a presumption of validity of the return decision issued by the Member States, the principle of mutual trust is applied by analogy in the relation between the Agency and the Member States. It would however be good to make clear that this presumption may be rebutted in case of systemic flaws in a Member State's judiciary or administration responsible for issuing a return decision, affecting an

⁷ COM(2016) 747 final.

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individual's fundamental rights or in case return would result in the *refoulement* of the individual in question.⁸

Under article 54(2) of the proposal, the EBCGA would be granted the power to launch return interventions in third countries, consisting of the deployment of return teams for the purpose of providing technical and operational assistance. Simultaneously the concept of "mixed return operations", previously proposed in 2016, is reintroduced in article 75(4). In contrast to the original EBCG Proposal, cooperation in mixed return operations would not be limited to countries that are party to the ECHR and would include purely national third country return operations. The Meijers Committee has serious doubts about this proposal. In the absence of common standards as regards the issuing of return decisions and a common fundamental rights framework as provided by EU law, there is no ground on which to trust in the fundamental rights compliance of return decisions issued in third countries. This type of return operations would therefore increase the risk of the Agency contributing to a return operation in contravention of the principle of *non-refoulement*.

7. Data Protection

The current proposal has missed the opportunity to reform the widely criticized and imprecisely formulated provisions on data protection.⁹ The lack of a clear distinction of the EBCG Agency's tasks that fall under migration and border management and those that relate to cross-border crime, makes it difficult to see which of the data that will be processed by the Agency will fall under the notion of personal data and those that will fall under the notion of operational personal data under the new Regulation (EU) 2018/1725 on the protection of personal data by the Union institutions, bodies, offices and agencies.¹⁰

As regards the transfer of personal data to third countries, the new rules follow the GDPR and Police Directive's framework. In principle, the transfer of personal data is only possible if there is an adequacy decision, attesting that a third country adheres to comparable standards of data protection as the EU, or if there are appropriate safeguards, for instance laid down in a legally binding agreement between public authorities.¹¹ In the absence thereof, it is still possible to transfer data in 'specific situations', for instance if the transfer is necessary for important reasons of public interest.¹² The question is whether migration control could be considered such public interest.

As regards return, the Commission, in Recital 47 of its proposal for the recast of the Return Directive,¹³ as well as in recital 86 of the current proposal for a new EBCG seems to adopt this approach. It explicitly refers to the absence of adequacy decisions or readmission agreements with the most countries relevant for return and the use of the 'public interest' criterion, without even making a distinction between the GDPR and the Police Directive. Under this approach, any exchange of personal data with

⁸ See by analogy: Joined Cases C-411/10 and C-493/10 *N. S. and M. E. and Others*, ECLI:EU:C:2011:865; Case C-578/16 *PPU C.K. and Others*, ECLI:EU:C:2017:127; Case C-216/18 *PPU L.M.*, ECLI:EU:C:2018:586.

⁹ See Opinion 02/2016, EDPS' recommendations on the proposed European Border and Coast Guard Regulation.

¹⁰ Regulation (EU) 2018/1725 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC, OJ L295/39.

¹¹ Arts 47 and 48, Regulation (EU) 2018/1725.

¹² Art. 50(1)(d), Regulation (EU) 2018/1725.

¹³ COM(2018) 634 final.

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a third country for the purpose of return could be considered a ‘special situation’, removing important fundamental rights safeguards and increasing the risk that sensitive personal data are exchanged, resulting in possible situations of *refoulement*.

The Meijers Committee is particularly concerned by the further interference with the fundamental right to the protection of personal data, as also laid down in the Charter. The mere need for speedy return and the risk that data protection rights are exercised to hinder or prevent return cannot justify the limitation of the right to access and rectification of data, even if abuse is likely to take place. Such interferences cannot be considered as strictly necessary and are disproportionate to counter such abuse. Likewise the further limitations to the right to the protection of personal data under art. 87(3) of the proposal as regards automated processing for as long as the data subjects have not been effectively returned lacks the required substantiation and safeguards.

8. Notion of Controlled Centers

The Meijers Committee would like to express its concern about the introduction of the still very opaque notion of controlled centers in the EBCG proposal, as well as the proposal for a European Union Asylum Agency. First, the Meijers Committee considers that this notion is still subject to much debate and insufficiently crystallized to be included in legislative instruments, providing merely a definition, whilst leaving the role and function of the centers to be defined in practice. Second, the Meijers Committee would like to emphasize that any processing and detention of claimants for international protection in such centers can only take place in full compliance with European and international human rights standards, including a clear legal basis in national or EU legislation. The Meijers Committee would like to express its more general concern about the idea of closed centers based in view of the experience with the hotspots (in the proposals referred to as “hotspot areas”) and the insufficient reception conditions in these centers as reported by numerous human rights organisations.¹⁴

Comments on the amended proposal for a Regulation on a European Union Asylum Agency (COM(2018) 633 final)

1. Scope

Broadening the scope of the EU Asylum Agency mandate will mean that its operational assistance can include identification and registration of applications, taking bio-metric data, assistance with carrying out admissibility, substantive and/or Dublin interviews, assistance with information provision to applicants and activities regarding allocation or transfers under the Dublin Regulation. These amendments will indeed codify current practice of EASO officers in, for example, Greece. This is to be welcomed as thus far, a clear legal basis for this type of activities was not present, meaning that officers were operating in a legal vacuum which raises serious questions of judicial accountability.

¹⁴ Human Rights Watch, “Greece: 13,000 Still Trapped on Islands As EU-Turkey Anniversary Nears, Move Asylum Seekers to Mainland Safety,” 6 March 2018; Amnesty International, Hotspot Italy: how EU ’s flagship approach leads to violations of refugees and migrant rights,” October 2016; ECRE, New updates on the refugee hotspots in Italy and Greece, 7 July 2017; Médecins Sans Frontiers, Confronting the mental health emergency on Samos and Lesbos, June 2018.

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However, the Meijers Committee has some concerns about the ambiguity in the new Article 16a on EU Asylum Agency's role in assisting the assessment of claims for international protection. It states that experts from the asylum support teams can *prepare* decisions on applications and *provide* those decisions to the competent national authorities responsible for taking individual decisions. Although the text of the proposals explicitly reiterates the exclusive responsibility of Member States to *decide* on the asylum applications, the expanded mandate provides a large scope for *de facto* decision making by officers of the EU Asylum Agency. There will be a thin line in practice, which may raise the question of whether or not there is indeed sufficient legal basis for certain activities, as there is doubt whether article 78(2) TFEU leaves room for conferring, even *de facto*, power of decision making on asylum claims to an EU Agency. The Meijers Committee therefore suggests to further specify or clarify the implications of 'preparation and provision of decisions' or delete these ambiguous provisions.

Furthermore, efficiency arguments notwithstanding, the proposal to enable the EU Asylum Agency to coordinate a continuum between the asylum procedure and the return procedure in case of a negative decision (Article 16(2)(l)) may also sort risks. Being involved in return does not only lead to a possible overlap in mandates of the EU Asylum Agency and EBCGA (which may result in less efficiency), it may also undermine the role and the credibility of the EU Asylum Agency as independent center of expertise in the area of protection. Therefore, the Meijers Committee advises to clarify that operational tasks regarding effective return do not fall within the mandate of EU Asylum Agency and suggest the deletion of article 16(2)(l).

2. The role of EU Asylum Agency in appeals

The Meijers Committee would like to highlight that the actual scope of the mandate and the undertaking of operational activities is so much interlinked with the actual legal framework in which those tasks should be carried out, that it would be unwise for the Council to move forward with these proposals separately from the CEAS package, especially with regard to the intra EU solidarity mechanisms.

Finally, the Meijers Committee is worried about the possibility given to the EU Asylum Agency by article 16(2)(n) to assist with handling appeals by, among others, performing legal research, analysis and other legal support. These broadly framed activities may interfere with the principle of judicial independence. This is in particular the case if the EU Asylum Agency is also involved in the first instance decision-making procedure. On this basis, the Meijers Committee advises to delete Article 16(2)(n) and Article 16a(1)(c) and (4).

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