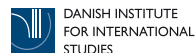


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# The Contribution of 14 European Think Tanks to the Spanish, Belgian and Hungarian Trio Presidency of the European Union

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## MIGRATIONS

# Strengthening EU Borders at the Expense of the Fundamental Right to Asylum? The Externalisation of EU's Asylum Policy

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**T**he EU's Area of Freedom, Security and Justice (AFSJ) is at the crossroads. The next Multi-annual programme on "An open and secure Europe serving the citizen" (the Stockholm Programme) – which outlines the EU's political priorities to guide EU policy between 2010-2015 on issues such as asylum and borders – has been adopted by the Council on 10-11 December. It has placed the construction of a 'Europe of asylum' and the commitment to further develop the Common European Asylum System (CEAS) amongst its key priorities, while at the same time moving ahead with the implementation of the integrated management of EU's common external borders. During the last five years the EU has often asserted that "the strengthening of European border controls should not prevent access to protection systems by those people entitled to benefit from them". Nevertheless, the progressive development of EU's border management strategy has created a difficult relationship between the respect of international human rights obligations and the control-oriented logic pursued by the EU along its common external border. On the basis of Article 33.1 of the UN Refugee Convention of 1951 and Article 3.1 of the UN Convention against Torture – the latter consolidated by the European Court of Justice (ECJ) case law and incorporated in Article 19.2 of the EU Charter of Fundamental Rights – member states are obliged to accept and examine applications for international protection at their borders.

The Europeanisation of border control related policies launched by the Schengen Agreement has nonetheless justified the implementation of certain external border policies, mainly targeted at preventing irregular migration and which disregards 'the mixed nature' of human flows taking place on the edge of the EU. Notwithstanding the progressive emergence of a CEAS, the EU border management strategy has prompted a securitisation and externalisation of the asylum procedures at the expense of member states' human rights engagements.

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The legislative proposals currently under discussion in this field and the relevant measures of the Stockholm Programme, such as the Asylum Support Office, seem unlikely to resolve this dilemma which puts EU's fundamental rights obligations at stake.

## Asylum and border controls in Europe

The establishment of a European Agency for the Management of Operational Cooperation at the External Borders of the member states of the EU (Frontex) was the first institutional initiative formalising the call made by the second multi-annual programme on an AFSJ – the 2004 Hague Programme – for an Integrated Border Management (IBM) Strategy in the EU. Frontex's main tasks consist in coordinating operational cooperation of the common EU external border, while the main responsibility and equipment for managing the external borders remain entrusted to member states. The formalisation of IBM was subsequently reinforced by the adoption of the Schengen Borders Code (SBC) which now regulates in a uniform legal layout the crossing by any individual of the internal and the external borders of the EU. While the SBC contains human rights obligations – such as the principle of 'non-refoulement', the right to non discrimination, the right to be treated with dignity, the right to be informed of the reason for refusal by a substantiated decision and the right to appeal such decisions – these are not explicitly binding for Frontex as the SBC was adopted after the establishment of the agency. Furthermore, notwithstanding the theoretical application of these administrative guarantees at all borders of the EU, the fact that their enforcement sometimes takes place at the boundaries of (and even outside) the Schengen area, undermines the possibilities for scrutinising the ways in which border controls actually take place in Europe.

The Europeanisation of external border control policies does not relieve member states from their international obligations and more particularly from the principle of 'non-refoulement', whereby, member states are obliged to accept and examine applications for international protection at the EU border. The first multi-annual programme on an AFSJ – the 1999 Tampere Programme – provided that the CEAS would be "based on the full and inclusive application of the Geneva Convention, thus ensuring that nobody is sent back to persecution". The first steps in the development of the CEAS consisted in the establishment of the Dublin system, which provided that asylum seekers would have their claim examined in the first European country of arrival. The subsequent asylum measures which were proposed, described common procedures and rights. Nevertheless, their nature as minimal legislative standards – prompted by the reluctance of certain member states towards a Europeanisation of this right – has resulted in uneven results across the Union. The Dublin logic basically implies that a member state which lets a potential asylum seeker enter its territory is then obliged to examine his / her claim for protection in the absence of other linking criteria. Logically, another consequence of the Dublin system has been to concentrate asylum claims at the external borders of the EU – especially those close to geographical areas where tensions

exist. In particular, since the establishment of the system, the Mediterranean border of the EU has seen a significant rise in arrivals, including high proportions of asylum seekers.

In 2008, two thirds of Frontex operational budget were allocated to joint operations in the Mediterranean. Its activities are mainly concentrated in this region, which has been constantly considered to be a priority area for the EU from the perspective of border controls. Based upon bilateral agreements concluded between EU member states and third countries (which all too often remain non-public and therefore not subject to proper parliamentary scrutiny), enforcement operations for detecting and arresting boats prior to their arrival (pre-border control) in European waters are conducted under the coordination of Frontex. For instance, according to Frontex figures, during 2008 the ‘Hera operation’ enabled the diversion of 5,596 migrants back to the African coasts in collaboration with Mauritanian and Senegalese officers who took responsibility for their ‘refoulement’. These preventive border control processes have relocated the management of human mobility beyond the external borders of the EU without due account of the fact that, as highlighted by the United Nations High Commissioner for Refugees (UNHCR), asylum seekers may be on board such small ships. This is indicative of the increasingly important external dimension of the EU’s border policies in the context of the so-called EU global approach to migration, which calls for responding to irregular immigration through enhanced cooperation with third countries. The compatibility of the EU external border management strategy with the upholding of the right to asylum in the EU is thus jeopardised – because of the non-transparent ways in which Frontex operates, because of the lack of democratic accountability of the bilateral agreements upon which joint-operations are taking place, and due to the human rights tensions emerging as a consequence of pre-border surveillance measures.

## **Human rights implications of the increase in controls at EU’s external borders**

In spite of the open questions in relation to the ways in which the control of common EU external borders is taking place, no substantial modification to the way Frontex operates has yet taken place. In the Stockholm Programme, the European Council asked the Commission to put forward proposals in early 2010 in order “to clarify the mandate and enhance the role of Frontex,[...] elements of these proposals could contain preparation of clear common operational procedures containing clear rules of engagement for joint operations at sea, with due regard to ensuring protection for those in need who travel in mixed flows, in accordance with international law”. The clarification of the mandate from this perspective would be indeed most welcome. However, the enhancement of its ‘border control’-related powers together with the increase of its financial and operational resources (to include regular chartering of joint return flights) continue being the main political priorities.

Indeed, in February 2008, the European Commission submitted a ‘border package’ presenting the future developments in border management in the European Union. The Communication

aimed to give substance to the “comprehensive vision for an integrated European border management system” and consisted of three specific proposals for new (large-scale) computerised databases, as well as two documents proposing substantial modifications to Frontex competences. In particular, the Commission proposed the implementation of pilot projects (which usually precede further joint operations) with non-EU countries previously identified as problematic through the joint operations and risk analysis carried out by Frontex. A new satellite-based border surveillance system, EUROSUR, would enable member states to be fully aware of the situation at their borders and beyond. It would be managed by Frontex which would become a border-management situation center so as to “increase the reaction capability of law enforcement authorities” in particular for monitoring all movements at the external border. The implementation of the border package has been confirmed by the Stockholm Programme.

In the meantime, the situation at the southern maritime border has over the past year increasingly come under the spotlight, something which has led to an increase in calls for European solidarity. In fact, the unilateral responses by some member states to human flows tensions prompted the French delegation to submit a discussion paper within the Council in order to further develop Frontex capacities. The French political desire to “enhance member states’ joint maritime operations and find innovative solutions for access to asylum procedures” emerged as a reaction to a succession of tragic deaths which took place in the Mediterranean Sea over the summer 2009 culminating on 20 August 2009 with the disembarking of only five out of 78 potential refugees from Eritrea in Italy. While they had already been spotted by other boats, none had provided the necessary help for fear of sanctions for contributing to the irregular entry of migrants. In May 2009, the Italians had already been singled out by the UNHCR, for escorting a boat full of migrants back to Libya, a country which has not ratified the Geneva Convention and where human rights violations are often reported by human rights NGOs. The Italians justified their actions on the basis of an agreement concluded with Libya which they argued was necessary for safeguarding their own security as the EU had so far failed to address the critical situation they were facing and which the EU had itself created. The lack of willingness by Malta and Italy to take responsibility over those migrants blocked by Frontex in the Mediterranean Sea has thus led to them entering bilateral agreements with third countries to ensure that the migrants’ journey is stopped at an ever earlier stage (and thus before entering EU’s territory).

The French paper aimed at further strengthening practical cooperation with neighbouring countries (in particular Turkey and Libya) for monitoring the EU’s external borders. Frontex activities could evolve to intervene as early as the coastal state of departure, off-shore and just before reaching the coast of destination, to ensure migrants are unable to disembark. Looking at the practical implications of such an initiative, this would imply modifying Frontex rules of procedures as well as increasing its financial means. From the perspective of potential refugees, this means that access by sea to European territory will be prevented, thus jeopardising the possibility to file an asylum application. It is striking to see the way in which this

is fully acknowledged by the French delegation: the third part of the proposal is dedicated to ‘innovative solutions concerning asylum,’ which involve ensuring that migrants have access to the procedure outside the EU. The French initiative seems to disregard the fact that a few days earlier, the European Commission had proposed paths for the reallocation and resettlement of refugees to relieve member states along the external border. While these demonstrate the desire to re-examine the CEAS, ‘the burden-sharing rhetoric’ that has been used further moves away from a humanitarian tradition towards considering the granting of asylum as a chore requiring financial compensation. This, together with the voluntary dimension of such a scheme, further undermines the binding nature of the obligation to grant asylum (as enshrined by the EU Charter of Fundamental Rights).

## Policy recommendations for the next phase of the AFSJ

The processes described above are taking shape in two different policy fields of the AFSJ – borders and asylum – but they are so closely intertwined that developments in one should necessarily take into account their implications over the other. While the Stockholm Programme and the Council Conclusions of October 2009 suggest rules of engagement for Frontex joint operations at sea “with due regard to ensuring protection for those in need”, the increasing securitisation of the European external borders is already having severe consequences in terms of European respect for the principle of asylum. This Human Rights Principle, to which all member states have in the past committed themselves, has progressively lost its sacrosanct nature and is now considered to be the subject of abuse as well as a barrier or threat to internal security.

It is therefore recommended for the next phase of the EU’s AFSJ:

- An EU border and migration monitor should be created to ensure that EU border controls, wherever they take place, are consistent with EU law (the Schengen Border Code) and the Charter of Fundamental Rights – in particular its Article 18 on the right to asylum and Article 21 on the prohibition of discrimination. Its activities could comprise overseeing the respect by member states of the provisions contained in the returns directive.
- Before expanding its capacities and competences, Frontex activities must be subject to an objective and impartial evaluation as well as to the principles of transparency and democratic accountability, in particular when its border control activities take place outside the EU.
- Collaboration between the EU and third countries should be transparently developed with clear guarantees for human rights and in particular with commitments to guarantee the fundamental right to asylum.
- Member states and countries wishing to join the EU need to guarantee their capacity to ensure respect for the fundamental rights of all migrants in all circumstances, including in detention centres, and to guarantee the conditions for full compliance with fundamental rights obligations.