

The Future of the EU's Integrated Border Management Strategy

Proceedings of an IN:EX Workshop 6 September 2010

Rapporteur: Peter Hobbing, Associate Senior Fellow, CEPS

ABSTRACT

This report presents a summary of the main proceedings and discussions that took place during the workshop on “The Future of the EU’s Integrated Border Management Strategy” held in Brussels on 6 September 2010. Its purpose was to critically examine the current initiatives and proposals shaping the second generation of the EU’s Integrated Border Management strategy for the common external borders.



This event was organised within the framework of INEX - *Converging and conflicting ethical values in the internal/external security continuum in Europe*, a three-year project funded by the Security Programme of DG Enterprise of the European Commission’s Seventh Framework Research Programme. For more information about the project, please visit: www.inexproject.eu

PROGRAMME

09.00 – 09.15 Welcome words

Daniel Gros (CEPS)

09.15 – 10.30 Keynote speeches: The future of the EU's integrated border management strategy

Jean-Louis de Brouwer (European Commission)

Simon Busuttil (European Parliament)

Barbara Lochbihler (European Parliament)

10.45 – 13.00 The next generation of an EU external borders policy: Unfinished elements and challenges ahead

Chair: Elspeth Guild (CEPS)

Henrik Nielsen (European Commission, DG Home Affairs)

Anneliese Baldaccini (Amnesty International)

María Duro (ECRE: European Council on Refugees and Exiles)

Sergio Carrera (CEPS)

Open discussion

14.00 – 16.00 Security technologies, border controls and data protection in the EU

Chair: Angela Liberatore (European Commission)

Peter Burgess (PRIO)

Christiane Bernard (Research Executive Agency)

Katarzyna Cuadrat Grzybowska (EDPS)

Didier Bigo (Sciences Po, Paris)

Open discussion

Rapporteur of the event: Peter Hobbing (CEPS)

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Presentations

Keynote speeches

Jean-Louis de Brouwer (European Commission)

Based on a concise 'tour d'horizon' of border concepts as they have evolved over the past few decades, de Brouwer stressed the need for further refinement of these concepts and their adjustment to new realities. At the end of the current treaty period reaching from Schengen via Amsterdam to The Hague, new challenges would mainly result from the insight/realisation that modern borders could *dematerialise*, i.e. no longer be necessarily bound by geography but defined by the place where fluxes of persons/goods were made subject to control. Border **controls** should be seen as a tool, not as an end in itself.

Particular attention should be paid to a broader concept of integrated border management (IBM) to cover movements of persons as well as goods stated de Brouwer, thus combining the radius of action of both customs and border police/guards, which so far have been assiduously kept apart. In terms of new technologies one could foresee a trade-off between future e-border mechanisms and individual rights, whereas in the area of financial burden-sharing it was time to switch from the current *ex-post* to an *ex-ante* approach, which would be fairer to the parties involved. Finally, with particular reference to current reflections, de Brouwer confirmed that the idea of a European Corps of Border Guards (ECBG) was "not at all dead", and could be revived if other solutions failed.

Simon Busuttil (European Parliament)

Busuttil left no doubt that in his view, the creation of a common European 'home' policy represented a project as important as the Single Market movement 25 years ago.

As one of the centrepieces of the future home affairs landscape, FRONTEX would urgently require a revision of its mandate to meet the challenges of its coordinating role in border matters. The proposed amendment of the FRONTEX regulation met with his full approval so far, notably as it intended to strengthen its own resources in staff and equipment rather than perpetuate its dependence on Member State support in this regard. Further features such as its mission in evaluation matters, third country contacts, joint return operations and the strengthened impact of fundamental rights were equally welcomed. Busuttil was also positive about the

possible need for a European Corps of Border Guards if a high level of staff qualification could not be reached otherwise.

There was less satisfaction with the guidelines for maritime operations as adopted by the Council decision. Although he accepted the need for clear rules in this matter in order to save lives and enhance solidarity between the Member States, Busuttill's view was that such provisions should have been passed by co-decision, as stipulated by the Lisbon Treaty.

Barbara Lochbihler (European Parliament)

Placing some emphasis on the geopolitical background of modern migration, Lochbihler highlighted a specific need for FRONTEX to demonstrate its commitment to fundamental democratic values rather than being seen as part of 'Fortress Europe'.

Full accountability of FRONTEX with regard to all its activities should be a basic requirement: the staff training in fundamental rights as proposed by the Commission could not satisfy; rather there should be close cooperation with human rights and refugee organisations as well as the European Asylum Support Office (EASO). Moreover, FRONTEX should be endowed with a legal assistance mechanism to help people seeking protection.

Open discussion

During the debate that followed, de Brouwer disagreed with the assumption that FRONTEX exercised a sort of "function creep" to widen its competences. All changes in its mandate were based on factual changes and moreover controlled by the institutions. In conclusion, Chairman Daniel Gros (CEPS) saw certain promising similarities with the situation in financial matters during the crisis: while Member States were at first resistant to any transfer of sovereignty, they finally gave in to the overwhelming power of facts.

Panel 1: The next generation of an EU external borders policy: unfinished elements and challenges ahead

Henrik Nielsen (European Commission)

Nielsen also focused his presentation on the future role of FRONTEX as the central hub in EU border coordination. In his eyes, Member States' persistent reluctance to provide sufficient resources in staff and equipment to the central level had been at the origin of the amendments proposed for the FRONTEX regulation. However, other motives, such as modernising return operations, contacts with third countries and most of all ensuring the respect of fundamental rights had also been important. In the latter context, FRONTEX would now be entitled to 1) stop operations in case of fundamental rights violations and 2) withhold funds if such infringements were alleged.

Regarding the aforementioned guidelines for maritime operations, Nielsen considered the solution found to be a pragmatic one as it helped Member States to interpret somewhat diffuse provisions of international law.

In terms of a possible future ECBG, Nielsen joined de Brouwer in considering this a promising option if other solutions were not found to be convincing.

In her capacity as chairperson **Elsbeth Guild** emphasised the unease expressed by NGOs and human rights organisations with regard to border incidents, which might indicate that the problem was far from being resolved.

Anneliese Baldaccini (Amnesty International)

Baldaccini had coordinated her presentation with that of Duro of ECRE, so they could each focus on specific aspects of the border situation. According to Baldaccini, the proposed amendment of the FRONTEX regulation needed improvement in several respects: the Schengen Borders Code¹ already contains various provisions addressing human rights in the context of border checks, which did not prevent incidents happening at the border. Although this deserved appropriate attention, FRONTEX reports, as well as the Commission evaluation of 2008, remained relatively silent in the face of this evidence.

Although FRONTEX has accepted criticism and established contacts with NGOs, human rights organisations and the Fundamental Rights Agency (FRA), there was still a need to secure improvements in the legal framework governing its operations by means of amendments to the new Regulation currently being negotiated. Primarily this would concern the question of whether the proposals were adequate to uphold human rights in practice, secondly that full accountability of the Agency was not addressed, and thirdly how scrutiny of Frontex operations should be exercised and by whom.

María Duro (ECRE)

Duro focused on a number of specific cases involving FRONTEX, which showed how safeguards could be improved.

As regards cooperation between Italy and Libya, FRONTEX simply did not have enough power to duly control/influence the format of bilateral cooperation between the two countries. The case of cooperation between Finland and Turkey showed that minimum standards were not sufficient and that a much more concrete mandate for FRONTEX was needed.

In summary, Duro joined some of the previous speakers in considering the ECBG option as a promising approach to counter such unwanted national approaches.

Sergio Carrera (CEPS)

Building upon a previous publication,² Carrera developed the theme of why such Common European Border Service (CEBS) was needed and how it might look. He left no doubt that the current set-up still suffered from a traditional intergovernmental approach centred on security/insecurity considerations. Taking advantage of the intergovernmental niches left to operational action under the Lisbon Treaty, he expressed considerable concern that things would remain unchanged without a stronger 'European' element in coordinating/supervising the control and surveillance of the common external border.

¹ Regulation establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), EC/562/2006, 15 March 2006, OJ L 105/1, 13.4.2006.

² S. Carrera (2010), Towards a Common European Border Service?, CEPS Working Document No. 331, Centre for European Policy Studies (CEPS), Brussels, June.

Particularly sensitive issues were the considerable number of individual services involved at national level, many of them with a clear law enforcement/crime-combating police background: it was difficult to see how they could ensure a neutral administrative approach in border management and guarantee the consistent application of the Schengen Border Code (SBC) all along the border. A major concern in this context was the coherent application of fundamental rights as laid down in the charter.

In addressing this issue, the first question to be asked should be: "Who is a border guard?" Contrary to current practices, this should not be a member of the security services (police and law enforcement services with a crime-related mandate) but of services that solely control the conformity of border-crossing operations with the SBC provisions. Only where risk elements relating to security threats were discovered should the case be handed over to second-line controls exercised by police/law enforcement staff.

Carrera also pointed to the need to consider the post of a border monitor to exercise scrutiny over the due respect of individual rights.

Open discussion

The following discussion centred on 1) the role of FRONTEX in rescue operations and to what extent this had contributed to the loss of life in the Mediterranean, 2) the role of FRONTEX in future electronic controls, 3) the legal basis in Article 77.2.d TFEU for creating the new CEBS body, 4) the European handicap in managing its patchwork border with 27 Member States currently in charge, and 5) future discrimination risks provoked by the new entry-exit system.

Security technologies, border controls and data protection in the EU

Peter Burgess (PRIO)

Burgess focused on the ethical aspects of security technology and based his findings on the analysis of central EU instruments, such as the Stockholm Programme and the Internal Security Strategy (ISS), which had gained EU-wide acceptance in the Member States.

Although these instruments suggested a certain common understanding of such terms as human dignity, freedom, solidarity in the sense of "everlasting values", Burgess expressed doubts as to the existence of an EU-wide security culture. It would appear that these "shared values" are not so universal after all: so far the European "threat landscape" has been highly uneven. What is considered as a serious threat in one area could appear acceptable in other places. However, time, combined with changes in life-style could serve as a "values machine"; in the sense that a society accustomed to digital communication and technology was more willing to accept privacy-intrusive control measures in terms of comprehensive entry/exit systems, automated gates, etc.

Christiane Bernard (Research Executive Agency)

In her capacity of Security Research Head of Unit, Bernard stressed the fact that technology is essential for human security and should not be completely disregarded. Nevertheless, the protection of human rights and the measure of the impact of the use of technologies on privacy must be part of the research process.

In addition, efficient border technology represents just part of the solution while organisational processes and human intervention equally need to be accommodated in the framework of a well-defined integrated border management.

Katarzyna Cuadrat Grzybowska (EDPS)

Underlining the constructive role of data protection, Cuadrat advised that the latter be seen as a guarantee for effective border management and not as an obstacle to it. One of the most promising means for implementing such a concept would be the “privacy by design” approach which is currently developed for private and public sectors and should therefore play an important role in the area of police cooperation and border management.

Cuadrat also commented on the current amendment proposal for the FRONTEX regulation: she referred to the EDPS Opinion on this issue and mentioned that it was not yet clear what type of personal data FRONTEX was supposed to handle.

Didier Bigo (Sciences Po, Paris)

By pointing to a small feature in current security terminology, the frequent use of ‘smart’, Bigo revealed a characteristic fallacy of argument to make advanced technology appear acceptable to the public. In the way that a ‘smart’ bomb claims to avoid collateral damage in modern warfare, smart border technology seems to be capable of pinpointing cases of non-compliance without affecting the privacy of other travellers.

While some scepticism towards such language would always be advisable, Bigo recommended some further precautions: as he saw it modern society frequently offered voluntary collaboration towards such privacy-intrusive practices, e.g. self-exposure in social networks, comprehensive digitalisation of life, enthusiasm for ‘integrated solutions’, etc.

Most of all, we should be aware that while modern border technology can speed up border control processes, such as in the use of biometrics, this comes at the price of travellers sacrificing their privacy, i.e. in having to register their iris image with the border authorities, which would ultimately be an unfavourable deal for citizens.

Open discussion

There was far-reaching agreement on the view that security technology should be subject to numerous safeguards to protect individual interests, notably through objective/technical devices such as ‘privacy by design,’ or systems that provide privacy protection automatically without the intervention of a human operator. Moreover the principle of proportionality was recalled, which included as a vital feature the requirement of effectiveness and referred to systems that, in the framework of an impact assessment, were not able to point to a sufficiently high probability of resolving the issue at stake and should be regarded with the utmost care. This would *a fortiori* apply to mechanisms that had demonstrably failed elsewhere in the world.