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Status Agreements: Frontex's Novel Cooperation with the Western Balkans

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Impressum

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Introduction

It is a declared objective of the High Representative for Foreign Affairs and Security Policy / Vice-President of the Commission (HR/VP) Federica Mogherini to achieve progress in the Western Balkans' process towards EU membership. In March 2017, she stated that 'it is a shared interest of making peace in the Western Balkans irreversible [...] thus, making progress towards the membership of the European Union will be irreversible too.'

According to the Global Strategy for the EU's Foreign and Security Policy,¹ one way of building a more secure Union is to build more resilient neighbours. A key tool underpinning EU's strategic approach is a differentiated relationship with partners. And there is no other territory where the EU can influence policies more than the region of the Western Balkans. The third progress report on the implementation

of the Global Strategy discussed at the Foreign Affairs Council on 17 June 2019 in Luxembourg reveals that 'the EU now views and acts on the recognition that the Western Balkan countries are an integral part of the EU's own regional space.'²

In view of today's migratory challenges, migration and border management are obvious and straightforward areas for a deepened EU-Western Balkans relation. Such activities require input and backing at a political level, and sustained operational follow-ups by EU agencies and local authorities. In 2016, in only about a year of negotiations, the EU revised the Frontex regulation with a view to establishing a 'European Border and Coast Guard Agency' (referred to as Frontex+). While the new regulation refrained from fully supranationalising the border control competences of member states (Frontex has no hierarchical

¹ EU. Shared Vision, Common Action: A Stronger Europe. A Global Strategy for the European Union's Foreign and Security Policy. June, 2016. https://eeas.europa.eu/sites/eeas/files/eugs_review_web_0.pdf

² EU. The European Union's Global Strategy: Three years on, moving forward. June, 2019 https://eeas.europa.eu/sites/eeas/files/eu_global_strategy_2019.pdf

command over national authorities), the new law provided the Agency with a range of new competences. The Agency also experienced a substantial increase in its staff, scheduled to have 10,000 border guards by 2027.

Frontex and Third Countries

EU's border and migration management rest upon the idea that cooperation with neighbouring countries and/or countries of migrants' transit and origin is needed for a comprehensive approach. Since its creation in 2005, Frontex has therefore worked with border authorities of third countries. It has eighteen working arrangements with non-EU-actors, notably with countries in EU's neighbourhood. Frontex also cooperates with some more distant countries including Nigeria, the

United States and Canada. The working arrangement with Frontex allows only for a limited amount of cooperation, often centred on advisory tasks, information exchange and some operational cooperation. Frontex officials have not had the authority to engage in the detection and prevention of illegal border crossings outside the EU territory.

The EU already expanded the competences of Frontex to work with third countries in 2011. In a revision of the Frontex regulation, a new provision was inserted which allowed Frontex to send liaison officers outside the EU territory. Frontex also became able to launch and pay for its own technical assistance projects in third countries. These new competences have transformed Frontex into an agent for EU policy transfer in the wider European region. Often in conjunction with the European Asylum Support Office (EASO) and the International Organisation for Migration,

Frontex has worked towards bringing candidate and Eastern Partnership countries closer to the EU's 'integrated border management' concept.

NGOs such as the European Council on Refugees and Exiles have demanded that this engagement should take place – if at all – only in third states that are signatories to the Geneva Convention and other international human rights conventions (such as the European Convention on Human Rights). The acceptance of these conventions has not become a formal precondition for Frontex to engage. Yet the EU has included a fundamental rights clause in its new agreements with third countries to mitigate this kind of concerns. The status agreements also introduce a complaint mechanism for individuals to deal with allegations of a breach of fundamental rights.

Frontex and the Western Balkans

Among the innovations has been the possibility for Frontex to conduct and engage in operations in third countries, subject to a prior agreement. However, to carry out such an action, the Agency is required to sign a so-called 'status agreement' with the specific country. This kind of agreements will provide Agency's border guards with executive powers to conduct different types of operations in this south-eastern European region. In essence, status agreements will allow Frontex to duplicate what it is doing inside the EU also in the Union's neighbourhood. The prime region for the Agency's external engagement is the Western Balkans. Why does the EU seek to sign these status agreements and which kind of activities are they likely to trigger?

The new agreements will allow Frontex and EU border officials to carry out all executive powers necessary for border control in a third country. This will no longer be a competence reserved for border authorities of the host third country. These agreements are part of EU's contingency plan to avoid a duplication of the events of late 2015 and early 2016 when an estimated total of around 890,000 migrants crossed the Western Balkans on their way further north. It will provide Frontex border guards with executive powers to conduct different types of operations in this south-eastern European region. In essence, status agreements will allow Frontex to duplicate what it is doing inside the EU also in the Western Balkan region.

A status agreement defines the procedures, scope, civil and criminal liability, tasks and powers of the actions to be taken, which can be a joint operation, a rapid border intervention or a return operation. The Commission developed a model status agreement in November

2016. With the adoption of the Decision on 8 March 2017 to agree on status agreements, the Council paved the way for the Commission to open negotiations with Serbia and North Macedonia. It is not a coincidence that these are the two countries with which an agreement like this was aimed to be signed first. Belgrade and Skopje cooperated closely with member states when the latter embarked on the objective of reducing the number of migrants on the so-called 'Balkan route'. These countries already have a working arrangement with the Agency. In October of the same year, the Commission also launched talks with Albania, Bosnia and Herzegovina and Montenegro. The Council has not given a negotiating mandate for Kosovo. However, on 1 May 2019, Albania became the first country from the region with a fully operational status agreement. 20 days later, the Agency launched its first fully fledged joint operation outside the EU to support Albania in controlling its external borders and fighting cross-border crime.³ Status agreements have already been initialled with North Macedonia (July

³ EU Commission. Press release European Border and Coast Guard: Launch of first ever joint operation outside the EU. 21 May 2019 http://europa.eu/rapid/press-release_IP-19-2591_en.htm.

2018), Serbia (September 2018), Bosnia and Herzegovina (January 2019) and Montenegro (February 2019). They are currently pending finalisation.⁴

It has not become a formal precondition for Frontex to engage, yet the EU has included a fundamental rights clause in its model status agreement to mitigate this kind of concerns. The status agreement also asks the partner country to establish a complaint mechanism for individuals to deal with allegations of a breach of fundamental rights.

While Frontex status agreements cover return operations, return is not likely to be in the centre of the intensified cooperation. Frontex will have no competences to return a rejected asylum seeker or irregular migrant from a third country to another, say from Serbia to Pakistan. Frontex may only conduct return operations from the EU to third countries, for instance from Germany to Serbia. This type of return operations has already been conducted in a regular and smooth manner for some

years. The focus of status agreements will be on joint border operations. The agreement may also allow to dispatch rapid EU border intervention teams to the Balkans in case the EU or a Western Balkan partner detects a need.

One of the most contentious issues during the negotiations has been the question of immunity and liability of EU's border guards. Western Balkan negotiators suggested that EU officials should be treated in the same way as local police officers. The EU has insisted that its team members should enjoy immunity from local jurisdictions when exercising their border control duties. The EU's argument rests upon the fact that it can dispatch border guards to the Balkans only on a voluntary basis. A lack of immunity would make member states reluctant to engage its authorities externally. In fact, the element of voluntariness is what makes the internal and external engagement of Frontex different. Within the EU territory, member states are now legally bound to provide the Agency with border guards. This is not the case for the Agency's external engagement.

⁴ Ibid.

Conclusion

The Western Balkans is an ideal partner for testing novel status agreements. These states are in the Union's immediate vicinity, they accept the international human rights law and are keen to be integrated into the EU. The Western Balkans is also as a unique region of strategic importance for the EU, especially when it comes to security challenges and migratory routes and flows. The status agreements will provide the EU with a tool to surveil critical or porous border zones in EU's south-eastern neighbourhood. The agreement's underlying message is that it will become more difficult for irregular migrants to cross the Balkans, should they long for reaching northern member states. The Western Balkans, by contrast, may gain access to free border control services (Frontex pays for its activities). Their national authorities are also integrated and trained in EU standards and practices of border management.

The application of status agreements in this regional setting will be an important lessons-learning exercise for the EU and the Western Balkans itself. They could potentially pave the way for enhanced cooperation and eventually participation of the Western Balkan countries in other European institutions, agencies and bodies. These will undoubtedly lead towards increased socialisation of authorities and policy-makers of the Western Balkans not only in the realm of security, but also in other policy areas.

Frontex's experience in the Western Balkans may lead the EU to sign these kinds of agreements also in other neighbourhoods mentioned in the Global Strategy. The southern neighbourhood could be one, where Morocco is the most likely partner for an intensified cooperation with the EU's Border and Coast Guard Agency. This is also in line with the agreement reached in April 2019. The Parliament and the Council agreed therein to further reinforce Frontex's mandate and eventually allow the deployment of Frontex guards to any third country.

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Freedom, justice, and solidarity are the basic principles underlying the work of the Konrad Adenauer Foundation (KAS). The KAS is a political foundation, closely associated with the Christian Democratic Union (CDU) of Germany. We conduct education programs for the society and cooperate with governmental institutions, political parties, civil society organizations and handpicked elites, building strong partnerships along the way. Together with our partners, we make a contribution to the creation of an international order that enables every country to develop in freedom and under its own responsibility.

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Information about IDSCS

IDSCS is a civil think-tank organisation researching the development of good governance, rule of law and North Macedonia's European integration. IDSCS has the mission to support citizens' involvement in the decision-making process and strengthen the participatory political culture. By strengthening liberal values, IDSCS contributes towards coexistence of diversities.

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