

The reform of the Frontex Agency in the view of the principal-agent model. A case study of an attempt of supranationalisation*

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Abstract

This article is an analysis of the attempt of the European Commission to gain more independence and new competences throughout the process of the Frontex reform. Study of the mechanism of the attempt of supranationalisation and its final results constitute the main research problem of this analysis. The principal-agent model and its assumptions served as an analytical and theoretical framework for this study. Additionally, the explanatory capability and general assumptions of the principal-agent model were verified. Therefore, the article is partly a theoretical research, too. The study showed that the attempt of the European Commission to gain new competences was effectively hindered by the member states. It has been proved that the principal-agent model is useful in the examination of an attempt of supranationalisation.

Keywords: principal-agent, Frontex, reform, supranationalism, migrations, crisis, European Border and Coast Guard Agency, PAT theory

Reforma agencji Frontex w ujęciu modelu mocodawca-agent. Studium przypadku próby supranacjonalizacji

Streszczenie

W niniejszym artykule zbadano, w jaki sposób Komisja Europejska podczas reformy Agencji Frontex próbowała uzyskać niezależność i zdobyć nowe kompetencje. Analiza mechanizmów próby supranacjonalizacji oraz jej końcowy efekt stały się głównym problemem badawczym niniejszego opracowania. Podstawą teoretyczną analizy jest model mocodawca-agent. W artykule dodatkowo zweryfikowano użyteczność eksplanacyjną modelu i jego główne założenia, przez co artykuł posiada również walor badania teoretycznego. Badanie wykazało, że próba uzyskania przez Komisję Europejską nowych kompetencji została efektywnie zablokowana przez państwa członkowskie. Udowodniono użyteczność modelu mocodawca-agent w badaniu prób usamodzielniania się agenta.

Słowa kluczowe: mocodawca-agent, Frontex, reforma, ponadnarodowość, migracje, kryzys, Europejska Agencja Straży Granicznej i Przybrzeżnej, teoria PAT

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In September 2016, the Regulation 2016/1624 was adopted by the Council of the European Union. The Council therefore completed a reform of *the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union*, which lasted less than one year. On the basis of this Regulation, the Agency was renamed the *European Border and Coast Guard Agency*, but it was still referred to as *Frontex* (Regulation 2016/1624). Although the final act introduced quantitative rather than qualitative changes (Szymańska 2016; Mrozek 2016) in the functioning of the Agency, the legislation process unveiled the European Commission's (EC) tendency towards supranationalisation in managing the EU's external border procedures. The EC's attempt to gain more independence and new competencies constitute the main problem of this study. The research problem was analysed through the prism of the principal-agent model which originates from the rational choice institutionalism (Pollack 2009: p. 131–134)².

Methodology: the principal-agent model

The main field of interest of the principal-agent model is the interaction of two entities bound by an agreement. In such model, a *principal* delegates tasks or even functions and competences to an *agent*, who is obliged to achieve a specific result pursuant to the agreement or contract. It should be emphasised that the *principal* and the *agent* are not equal partners. There is a hierarchical relationship between them. The *principal* has several motives to delegate tasks or competences to the *agent*, for instance a need of expert advice or technical information, reduction of transaction costs, facilitating international cooperation or a need to share one's responsibilities and duties (Pollack 2003: p. 20–21; Kassim, Mennon 2003: p. 123–124; Ruskowski 2008: p. 121–122). Multidimensional asymmetry occurs between both entities. Each of them attempts to achieve their own – often divergent – objectives, which may cause conflict. It is the principal's strategy to delegate tasks to the agent, the principal also wants to know how the result was achieved, whereas the agent tries to keep their methods secret and wants to only share the result (Ruskowski 2008: p. 124). Such asymmetric distribution of information makes the agent the only entity aware of their true intentions and may result in the agent becoming more independent of the principal (Kassim, Mennon 2003: p. 122), and “drifting from the principals' [...] preferences”, because of their policy

² The author would like to thank the anonymous reviewers for their valuable and detailed comments and suggestions to improve the quality of the article.

preferences (Pollack 2003: p. 35). Thus, the principal is ready to delegate a task only then, when the costs of control over the agent are not higher than potential benefits related to the result achieved. Moreover, the asymmetric distribution of information gives the agent an opportunity to obtain new competences and more independence at the expense of the principal.

In the field of the European studies, there are two dominant approaches to the principal-agent model. Firstly, the model creates an analytical framework to study how, why and/or under what conditions the member states (MS) delegate the competences to the supranational agents, such as the EC, the European Central Bank or the Court of Justice of the EU. Secondly, due to the fact that the model attaches significance to the relations between actors, it might be used to analyse situations in which the agent does not meet the expectations of the principal, or even tries to obtain new competences (Pollack 2009: p. 132). For the purpose of this article, the principal-agent approach was adopted to the MS-EC relations.

The supranationalisation attempt within the Frontex reform

Both the MS and the EC are unusual types of principal and agent, and this fact makes their relationship unique. The MS are in fact, *multiple principals*. Thus, the delegation of competences might help to overcome the obstacles caused by the cooperation (egoism, conflict of preferences, etc.), (Ruszkowski 2008: p. 123), but at the same time it necessitates a compromise of many principals, which is sometimes hard to achieve. Furthermore, conflicting preferences among *multiple principals* enable the agent “to exploit those conflicts to [...] expand its zone of discretion” (Pollack 2003: p. 44), and its competences. The more the MS are disunited, the easier it is for the EC to autonomise its policy, obtain new competences and enlarge its independence (Ruszkowski 2008: p. 127).

Due to a relatively high level of independence, as well as a supranational character, the EC is a unique type of agent. Furthermore, the EC may delegate tasks to EU agencies by itself. In this case, the EC is of a double nature and becomes both an *agent* and a *principal (supervisor)*, (Tallberg 2003). In terms of the analysed research problem, the exclusive right of a legislative initiative seems to be the most important among all the EC’s competences (TEU: art. 17.2). In the context of the principal-agent model, it should be emphasised that the EC’s competences are limited by the principle of conferral (TEU: art. 5.2). Therefore, the EC is not able to extend its competences by itself. At the same time, the competence that the EC already possesses might be retaken

or limited by the MS. Hence, despite the relatively high level of the EC's independence, the institution remains an agent of the MS.

The debate about the Frontex reform reappeared (Gruszczak 2012; Carrera 2010) on the EU's agenda already in 2013, shortly after the Lampedusa migrant shipwreck in October 2013, also referred as to the "Lampedusa tragedy" (European Council 2013). In the conclusion of the European Council meeting in December 2013, the European Council called "for the reinforcement of the FRONTEX border surveillance operations and actions to fight smuggling and human trafficking, as well as to ensure that appropriate solidarity is shown to all Member States under high migration pressure" (European Council 2013). The European Parliament (EP), in its Resolution of 2 April 2014, also strongly endorsed "the European Council's call for Frontex's role to be reinforced [...] in order to increase its capacity to respond more effectively to changing migration flows" (European Parliament 2014: p. 80). What is more, the EP extended the initiative and emphasised that "the Schengen external borders should in the future be guarded with the support of European border guards" (European Parliament 2014: p. 74). The European Council, which is authorised to "provide the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof" (TEU: art. 15.1), later debated over the Frontex reform several times (European Council 2014: I.9; European Council 2015a: III.16). The Frontex initiatives intensified in 2015. In June, the European Council (EUCO) noted that the EC "has announced its intention to propose to amend the Frontex Regulation to strengthen the role of Frontex" (European Council 2015b: I [5.e]). In October 2015, the EUCO expressed its will to "enhance the mandate of Frontex in the context of discussions over the development of a European Border and Coast Guard System, including as regards the deployment of Rapid Border Intervention Teams in cases where Schengen evaluations or risk analysis demonstrate the need for robust and prompt action, in cooperation with the Member State concerned" (European Council 2015c: [2.h]) and "enlarge the Frontex mandate [...] to organise joint return operations" (European Council 2015c: [2.h]). By doing so, the EUCO mandated the EC to start the legislature procedure over the Frontex Regulation.

There is no doubt that the increasing illegal migration flows, dating back to 2014, initiated and intensified the debate and further legal initiatives to reform the Agency³. According to the data provided by Frontex, detected illegal border-crossing along the

³ In cited above documents, the EU's institutions invoke to the migration crisis, whenever discussing the need of the Frontex reform.

EU external border in 2014 was more than two and a half times larger than in 2013⁴. The migration crisis, however, culminated in 2015, when 1,822,337 illegal border-crossings were reported (Frontex 2016: p. 17). It is also worth to note that the EUCO initiated the Frontex reform process while the migration flow was peaking. In the fourth quarter of 2015, almost one million illegal border-crossings were detected (Frontex 2015: p. 8). In October only, 221,454 migrants reached the EU border through the Mediterranean (so-called sea arrivals) (UNHCR WWW). The fact that the MS – the multiple principals – have been highly pressured by the migration crisis is of a great importance. One should bear in mind that according to the principal-agent model, the more the MS (principal) are disunited, the easier it is for the EC (agent) to autonomise its policy. There is no doubt that the migration crisis politically divided the EU MS (See e.g. Vimont 2016). Therefore, the EC had perfect conditions to gain new competences.

In December 2015, in direct response to the call of the EUCO, the EC came up with a proposal for a new Frontex Regulation on the European Border and Coast Guard (European Commission 2015). In April 2016, the Council – or to be more concrete COREPER – worked out a compromise and presented its stance by modifying the propositions of the EC (Coreper 2016)⁵. In May 2016, the EP published the report (LIBE 2016) and initiated interinstitutional negotiations. In June 2016, the compromise was finally achieved. In July 2016, the EP adopted the Regulation via ordinary legislation. The Regulation was later adopted by the Council in September 2016 and came into force in October 2016⁶. (More about the Frontex reform in: Parol 2016; Letta et al. 2017: p. 43–49).

It has already been mentioned that the EC's competences are limited by the principle of conferral. Thus, the only means – aside from further lobbying – by which the

⁴ 282,962 in 2014, while 107,365 in 2013 (Frontex 2016: p. 17).

⁵ It is also worth to note that the MS's position (the Principal's position) could be complemented by the national parliaments' positions. Since the national parliaments are involved in the legislative process, on the basis of the principle of subsidiarity (TEU: art. 12), governments are also democratically accountable to their national parliaments (TEU: art. 10). What is more, this case study could be supplemented with a detailed analysis of the position of individual governments or national parliaments. This, however, would exceed the aims of the analysis and would require a separate article, including in-depth interviews. (More about the national parliaments' role and position in: Ipex 2015).

⁶ However, one should bear in mind that since the “Lampedusa tragedy” until October 2016 (the date when the Regulation came into force), there were two significant reforms related to Frontex, which included the Regulation establishing the European Border Surveillance System (Eurosur) (Regulation 1052/2013) and the Regulation establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Regulation 656/2014).

EC may influence the final act of regulation and gain new competences is via the right of a legislative initiative. There are three crucial phases of the Frontex reform that should be analysed while investigating the supranationalisation attempt of the agent. The initial proposal of the EC is the first one. In the proposal, one should find the provisions which, if they were established, would extend the EC's competences. The second element which is important for the analysis phase is the Council's negotiating position. In this phase, a reaction of the MS on all EC's proposals – which have been evaluated as *supranationalisation attempts* – should be analysed. Thirdly, the final act should be studied, in order to investigate how the original proposal was modified in the course of the negotiation process and what is the result of the supranationalisation attempt.

In its proposal, the EC included provisions that would have autonomised the institution. The most far-reaching proposal was related to the management of the MS borders. Due to the fact that the border controls – as well as territorial integrity and control over the territory related to them – are perceived as one of the most important attributes of a sovereign state, the attempt to transfer such competency at a supranational level is extraordinary. In the draft of the Regulation, the EC proposed an extended mechanism of a vulnerability assessment. On the basis of this mechanism, the MS “shall, at the request of the Agency, provide information as regards technical equipment, staff and to the extent possible, the financial resources available at a national level to carry out border control. The MS shall also provide information on their contingency plans on border management at the Agency's request. The aim of the vulnerability assessment is for the Agency to assess the capacity and readiness of the MS to face upcoming challenges, including present and future threats and challenges at the external borders” (Regulation 2016/1624: art. 13.3, 13.4). As for the research problem, however, consequences of vulnerability mechanism are more crucial. According to the EC's proposal, “the results of the vulnerability assessment shall be submitted to the Supervisory Board, which shall advise the Executive Director on the measures to be taken by the Member States” (European Commission 2015: art. 12(4)). Then, the Executive Director shall adopt a decision binding to the MS which will set out the necessary corrective measures to be taken by the MS concerned (European Commission 2015: art. 12(5)). If any of the MS did not follow the Executive Director's guidelines, the Management Board (MB) would have to adopt another decision (European Commission 2015: art. 12(6)). If any of the MS does not take the necessary corrective measures in accordance with the decision of the MB, the EC could order Frontex to:

- organise and coordinate rapid border interventions and deploy European Border and Coast Guard Teams from the rapid reserve pool, and additional European Border and Coast Guards Teams as appropriate;
- deploy European Border and Coast Guard Teams in the framework of the migration management support teams in hotspot areas;
- coordinate activities for one or more Member States and third countries at the external borders, including joint operations with neighbouring third countries;
- deploy technical equipment;
- organise return interventions. (European Commission 2015: art. 18(1;2))

By doing so, the EC tried to colligate the mechanism of vulnerability assessment with the management of the external borders in the situation when urgent action is required. However, before the issue of external border management – which would have significantly extended the EC competences – is analysed, the reaction of the principal on the proposal of the mechanism of vulnerability assessment shall be examined. In its mandate for negotiations, the COREPER strongly limited the competences of the executive director, as well as reinforced the role of the MS in the procedure. According to the principal's proposal, the results of the vulnerability assessment shall be submitted to the MS concerned (and not to the Supervisory Board), who may comment on that assessment (Coreper 2016: art. 12(4)). These comments shall be taken into account in further proceedings. The COREPER demanded that the Executive Director adopt only the recommendations (not the decisions binding to the MS) and prepare them in consultation with the MS concerned (Coreper 2016: art. 12(6)). The binding force of the decisions adopted by the MB was maintained. Thus, the Principal has limited only the competences of the Executive Director, that is the one-man, supranational body appointed by the MB, but at the same time unilaterally proposed by the EC (Regulation 2016/1624: art. 69.1, 69.2). By doing so, the Principal limited the Agent indirectly. All the above mentioned modifications, which have been demanded by the MS, were incorporated into the final act.

In its proposal, the EC wanted to gain competences, which, if they were established, would authorise the EC to exercise control – via Frontex's means⁷ – over the external borders of the MS, as has already been mentioned. The most controversial was the

⁷ It shall be emphasised that the Agency shall be independent in implementing its technical and operational mandate (Regulation 2016/1624: art 56.3). Even though, the EC wanted to become decision-maker and obtain right to order Frontex to take actions at the EU external borders. Such a reform would strengthen the EC position towards the Agency.

proposal which granted the EC exclusive right to order the Frontex to organise and coordinate rapid border interventions and deploy European Border and Coast Guard Teams. The EC could make a decision to use the Frontex's resources if the MS did not follow the requirements included in vulnerability assessment "or in the event of disproportionate migratory pressure at the external border, rendering the control of the external borders ineffective to such an extent that it risks putting in jeopardy the functioning of the Schengen area" (European Commission 2015: art. 18(1)). What is more, "on duly justified imperative grounds of urgency relating to the functioning of the Schengen area, the Commission shall adopt immediately applicable implementing acts" (European Commission 2015: Art. 18(1)) – according to the proposal. Thus, the Agency could intervene on the external border of the MS, not only when urged by the MS, but also on the basis of a decision adopted unilaterally by the EC. Furthermore, the EC's proposal has not included the option to refuse the Frontex intervention. It means that the intervention could be conducted even without the will and acceptance of the MS. The EC assumed that it should be authorised to adopt a decision "in order to ensure uniform conditions for the implementation of this Regulation" (European Commission 2015: Preamble (31)).

The principal, however, did not wish to get rid of its competence. The MS have stressed that Frontex should be reformed "in full respect of the national authority of the Member States" (European Council 2015c: MIGRATION (2.h)), already back in October 2015. Thus, the COREPER significantly modified the proposal of the EC related to the situation at the external borders which required urgent action to be taken. First of all, the principal transferred the right to adopt a decision to the Council, based on a proposal from the EC (Coreper 2016: art. 18(1)). Therefore, the decision was kept on the level of the principal. Nevertheless, it should be emphasised that the decision shall be adopted by the qualified majority. Secondly, while the EC's proposal did not include the possibility to refuse an intervention, the COREPER extended the proposal with an extra paragraph. According to the modification, any of the MS which "does not comply within 30 days with the Council's decision and does not cooperate with the Agency [...] shall without delay inform the Commission and Council in writing of its reasons" (Coreper 2016: art. 18(8)). Additionally, in such a case, the Council may "recommend that one or more Member States decide to reintroduce border control at all or specific parts of their internal borders" (Coreper 2016: art. 18(8)). The modifications recommended by the COREPER were applied to the final act of the Resolution. What is more,

the COREPER included in the proposal special justification of such modifications. “The implementing power to adopt such a decision should be conferred on the Council because of the potential politically-sensitive nature of the measures to be decided, often touching on national executive and enforcement powers” (Coreper 2016: Preamble (17)). It should be noted that the EP’s rapporteur on the proposal of regulation agreed with the COREPER. “The rapporteur, however, believes that decisions to act should be taken by the Council to strengthen the decision-making process and further emphasise the sovereignty of the Member States. There also has to be a realistic procedure for action in case a Member States does not follow a decision of the Council. In such cases it is not optional to wait for the outcome of a court procedure. Instead, as a last resort in certain well described circumstances reintroducing control at certain internal borders might be necessary in order to protect the Schengen area as such” (LIBE 2016).

Conclusions

The EC tried to attain new competences at the expense of the MS, in the course of the Frontex reform. Throughout this analysis, it has been proved that the EC does not hesitate to suggest far-reaching proposals which could even give it the authority to exercise control over the external border of the EU. Thus, the tendency to transfer mechanisms on supranational level and obtain exclusive competences by the Agent seems to be constantly present within the EU’s institutions. The EC’s attempt was, however, withheld by the MS that wish to keep control of the borders, which is perceived to be a traditional attribute of a state. Such a bold proposal by the Agent, however, should induce the Principal to be particularly cautious. Furthermore, it was proved that the principal-agent model – adopted for this case study – is appropriate to analyse supranationalisation attempts of the EC. Additionally, this case study could be further expanded with interviews, to unveil motives of the EC, as well as to explore more closely the negotiation process within the Council or the COREPER. It is noteworthy, that the discussion on the Frontex reform is still ongoing, as another proposal by the EC appeared at the end of 2018 (European Commission 2018).

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