
ADiM BLOG
November 2021
EDITORIAL

*Are the new EU Agencies in the Freedom Security and Justice Area
Becoming the New Sorcerer's Apprentices?*

Emilio De Capitani & Giulia Del Turco

Agencification is a relatively recent and yet highly relevant phenomenon at EU level: developed over the past two decades, it can be seen as a compromise between the functional needs to provide Brussels with more regulatory capacity and the reluctance of the Member States to transfer executive authority to the European Commission. Agencies have been rapidly mushrooming, being empowered with a wide range of regulatory tasks and resources. According to the [2020 European Court of Auditors report](#), the existing 42 agencies can count on a total budget of €3.7 billion, their staff amounting to 12,881 officials (about 18% of the total number of staff members employed by the EU).

Since the entry into force of the Amsterdam Treaty (1999), agencies have increased their role notably in the Area of Freedom Security and Justice (AFSJ), to such an extent that they are now implementing (if not, in some cases, designing) some essential policies: protection and promotion of Fundamental Rights (FRA), management of large Information systems (EU-LISA), strengthening of the police cooperation (EUROPOL, CEPOL, EMCDDA, ENISA), judicial cooperation in criminal matters (EUROJUST, EPPO), establishment of a Common European Asylum System (EASO, now becoming EUAA) and, last but not least, shaping the EU Integrated Border management (Frontex/EBCG).

This process is not without controversies and has indeed raised many issues in the scientific debate. What is particularly striking is that, apart from Europol and Eurojust, there is no explicit legal basis in the Treaties, nor a clear reference to the possibility of delegating to the EU Agencies a discretionary power, even if the EU Court of Justice (ECJ) has recently updated its old "[Meroni doctrine](#)" (according to which the EU institution cannot delegate their discretionary powers to other bodies and this to preserve the institutional balance between the

institutions themselves and in a more general perspective the democratic accountability of the EU construction as such).

Following the 2014 [“ESMA” ruling](#) – where the ECJ considered that Agencies may exercise some discretionary powers, although circumscribed by various conditions and criteria – the situation has radically changed. The EU legislator is creating new agencies by conferring them a vast set of powers, ranging from strategic to regulatory and operational powers with also a treaty-making and budgetary competence (as clearly written in the new founding regulations of Frontex and of the European Agency for Asylum).

Such trend may be understood as a consequence of the expansion of EU competencies and powers since the entry into force of the Lisbon Treaty. But it is taking place in a questionable way because the tools are created before defining in clear terms the legal and political framework of the policy which the new agency should serve. Quite paradoxically, being it difficult to agree on a common policy (e.g., a common migratory policy), the EU legislator is turning to the creation of a “technical” tool, which could pave the way for the establishment of the common EU policy.

Accordingly, Europol defines the objective of the EU Internal Security policy that it should implement; Frontex defines the content of the integrated border management it is deemed to implement; the EU Agency on Asylum has been reshaped before the definition of the Common European Asylum System and has been charged of the definition of a Fundamental Rights Strategy in this domain. Unfortunately, these apparent “pragmatic” shortcuts are only delaying the hard choices which should be made.

Moreover, the principles of legal certainty and of the EU institutional balance risk to be shattered: formally, Agencies are set up as “independent” supranational bodies, but in fact they are driven by Member States representatives, while the European Commission has a very limited control on the Management Board. Similarly, both the European and the National Parliaments have no real means of controlling the Agencies directors and, notably, what is happening on the ground.

Freed from adequate external control, some Agencies are operating outside the scope of their mandate, as it patently happens in the case of Frontex, which is de facto becoming an EU-wide Law Enforcement Authority. To make things even more worrisome, these Agencies now enjoy operational powers which may infringe on individual fundamental rights, whereas the corresponding administrative or judicial mechanisms of accountability are, to say the least, difficult to trigger, notably by vulnerable categories such as migrants and asylum seekers.

It would be sensible that the Parliamentary Committee in charge of controlling those Agencies establish as soon as possible an inquiry on the real impact of these Agencies and of their interaction by fixing the main shortcomings such as the lack of a binding strategic framework and a true accountability system for their Directors as it is the case for other pre-federal

parliamentary systems such as the US Congress.

Against this background, the Academy of Law and Migration devoted its **Fourth annual Conference** ([recording available here](#)) to the complex issues surrounding the agencies operating in the AFSJ. In particular, it addressed the question as whether and to what extent the expansion of their mandates provides adequate solutions to the implementation needs and shortcomings of the EU migration governance. But also, whether and to what extent this expansion of powers has been accompanied by an equally increased level of accountability with regard to the agencies' operational and administrative tasks.

In particular, **Jacopo Alberti** (see at min. 7:38) provides an overview of the topic of decentralized implementation through agencies, highlighting the institutional and normative issues that arise from the lack of a legal basis in the Treaty for the creation of such agencies. Attention is especially devoted to the negative implications of the use of soft law instruments by the agencies, mostly in terms of judicial review. Such issue is also dealt with by reflecting on the opportunity to extend to the AFSJ the experience of the Board of Appeal, an internal but independent administrative review mechanism, which is already available in 9 EU agencies, allowing individuals to review the validity of the actions of agents.

Valsamis Mitsilegas (see at min. 28:57) questions whether the experimentalist governance, which denotes a certain excess on the extension of the exercise of power, acts as a flexible means to achieve a more effective management of migration or as a threat to the rule of law. His analysis focuses on Frontex and Europol, whose instances of experimentalist governance are intertwined with the well-known process of securitization that has characterized European migration policies for years. It then addresses the interagency cooperation (e.g., Operation Sofia), where the deficit of rule of law appears even more exacerbated.

Marco Stefan (see at min. 1:12:34) analyzes the Frontex's fundamental rights administrative complaint mechanism. He notes, in particular, that, although the 2019 reform of the mechanism has significantly increased the chance for individuals to hold Frontex accountable, the mechanism still suffers from significant shortcomings: notably in terms of independence, as it remains an internal procedure, as well as in terms of effectiveness of the performed control.

An overall assessment of the new European Asylum Agency is conducted by **Lilian Tsourdi** (see at min. 1:32:53), highlighting the complex compromises behind the adoption of the [new regulation](#), which indeed appears to be particularly limited when compared to the proposal put forward by the European Commission. In particular, the operational involvement of the agency in asylum procedures, is still defined in terms of "facilitation" or "assistance" to Member States, but this does not reflect the current administrative reality where instead we have many more models of joint implementation, in which agency staff conduct part of the

procedures independently. Also, part of the compromise is the new monitoring mechanism to control the operational and technical implementation of the CEAS, the full application of which has been blocked by Mediterranean States until the current Dublin Regulation is replaced.

The role of Frontex also recurs in the presentation by **Roberto Cortinovis** (see at min. 2:18:00), who analyzes the approach and initiatives that have been established in the New Pact on Migration and Asylum in the field of search and rescue. Cortinovis, in particular, observes how the [Common european approach to SAR](#), while on the one hand confirms and strengthens the role of Frontex in the so-called “disembarkation crisis”, on the other fails to provide any element to address the long-standing ambiguities concerning it, such as the absence of any specific mandate to engage in proactive SAR, or the multiple accusations of human rights violations for directly or indirectly pushbacks practices.

Tamás Molnár (see at min. 2:37:30) closes the conference with a presentation investigating the role of the EU Fundamental Rights Agency in monitoring respect for fundamental rights at the EU's external borders. He also offers a comprehensive assessment of the new independent monitoring mechanism foreseen in [Article 7 of the Proposal for a Screening Regulation](#), which provides for the involvement of the FRA but only as a guidance for Member States, highlighting the presence of some aspects that raise serious concerns and need a rethink in the sense of a more effective safeguarding of fundamental rights.

Suggested citation: E. DE CAPITANI, G. DEL TURCO, *Are the New EU Agencies in the Freedom Security and Justice Area Becoming the New Sorcerer's Apprentices?*, ADiM Blog, Editorial, November 2021.