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EXECUTIVE SUMMARY OF THE IMPACT ASSESSMENT

accompanying the

Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX)

{COM(2010) 61 final}
{SEC(2010) 149}

The Frontex Agency was set up in 2004 and became operational in 2005.

As requested by the Hague programme the Commission adopted on 13 February 2008 a Communication on the evaluation and future development of the FRONTEX Agency (COM(2008) 67 final) (hereafter "Communication").

This IA builds on the 2008 Communication' impact assessment; the external evaluation contracted by the Frontex Management Board as requested by Article 33 of the Frontex Regulation and the ensuing recommendations of the Management Board, and the conclusions of the European Council.

1. PROBLEM DEFINITION

Even though Frontex proved to be very useful in providing a framework for MS to cooperate with each other subject to particular pressures, **the operational cooperation is still inefficient and insufficient**, especially for operational solidarity. Also, Frontex is not using its potential in the best possible way, due to unclear or insufficient existing legal provisions.

The problems to be addressed are of a punctual nature on specific points where Frontex has not been able to deliver according to the expectations of the institutions or where the legal framework has proven inadequate.

Insufficient technical equipment put at the disposal by MS

While MS are ready to list a large number of equipment in CRATE a very small share of that equipment is made available.

Secondly, a majority of the vessels deployed come from the host state and not from other MS.

Thirdly, based on the estimates for the future and leaving any budgetary constraints aside, the current availability of equipment will not come close to meeting the needs.

Insufficient human resources put at the disposal for joint operations by MS; lack of uniform standards

The exact competencies of the Agency to organise "Frontex Joint Support Teams" (FJST) are unclear as the current legal basis is silent on this issue.

A second problem is that the Agency needs to make ad hoc requests to MS to contribute with border guards for each individual operation.

Inefficient coordination and follow up of joint operations

The current Regulation contains no rules on how Frontex operations should be prepared, conducted and evaluated.

Insufficient and inefficient cooperation with third countries

There is no possibility for the Agency to assist third countries in a pro-active manner, on the basis of its working arrangements..

Collection, storage and processing of personal data

As noted by the evaluation, the risk analysis carried out by the Agency could be substantially enriched if it could collect and process certain types of personal data, which could allow for a better operational support from the Agency to the MS.

Return

A first objective in this area must be to adapt the legal basis to reality: while the legal basis only talks about Frontex "assisting" MS and that the Agency has already taken on a "coordinating" role.

There is a strong call from MS for Frontex to provide more support in this area.

No use of the expertise of the Agency to evaluate MS' performance in the area of border management

Firstly, the risk analysis of the Agency remains weak when it comes to assessing the capacity of MS' border management systems to manage the threats.

Secondly, Frontex has no mandate to evaluate or react on any shortcomings in the application of EC law, including with regard to fundamental rights.

Subsidiarity and proportionality

All suboptions respect the following principles and limits of the current legal basis and are in line with the subsidiarity and proportionality principles:

- Border management is a shared competence between the EU and its MS; MS are responsible for controlling their part of the external border of the Schengen area;
- Frontex cannot impose any activity on the territory or at the border of a MS without the consent of that MS;
- Any border guard operating in another MS is subject to instructions by the authorities of that MS;
- Any decision on refusal of entry of a person shall be taken only by border guards of the MS whose territory the person is seeking to enter; Any decisions related to the return of an individual can only be taken by a national authority of a MS; Frontex cannot be the sole registered owner ("flag state") of equipment such as vessels or aircraft nor provide the crew (out of its own staff) for such equipment.

2. OBJECTIVES

General objectives (see Article 1 of Regulation (EC) No 2007/2004)

Specific objectives (see Article 2 of Regulation(EC) No 2007/2004)

Operational objectives

- Ensure the availability of technical equipment for joint operations
- Ensure the availability of qualified border guards for joint operations
- Ensure efficient coordination, implementation and evaluation of joint operations
- Ensure efficient cooperation between Frontex and third countries on border management
- Improve the Frontex risk analysis by giving access to new sources of data
- Improve efficiency of joint return operations
- Improve the evaluation of the performance of MS in the area of border management

3. DESCRIPTION OF SUBOPTIONS AND ANALYSIS OF IMPACTS

The following "building blocks" correspond each to one operational objective; for each building block two or more policy suboptions are assessed as alternatives to each other:

3.1. Revising existing provisions on the use of technical equipment in joint operations, including the mechanisms for contributions from the MS of such equipment

Suboption 1: A technical equipment pool with compulsory contributions of equipment by MS

Suboption 2: Acquisition or leasing of equipment by Frontex

Suboption 3: A combination of suboptions 1 and 2

Can the involved costs be (or become) part of the FRONTEX budget and how high are they?

Drawing up a scenario of the cost impact on the Frontex budget is virtually impossible as too many uncertainties exist and taking also into account that an increase in the availability of equipment will need to be phased in gradually for administrative and operational reasons. However, as a hypothetical scenario an additional 3 patrol vessels and 3 aircraft put at the disposal of the MS would entail a total annual budget impact for Frontex of +/- 6 million€

What are the possible impacts on fundamental rights?

An increase in the availability of equipment does not impact on fundamental rights.

Comparison of the suboptions

The preferred option is suboption 3. Thus, a compulsory mechanism for MS's contributions should be set up to guarantee the availability of a minimum number of equipment each year. This should be combined with the possibility for Frontex to purchase or lease its own equipment.

3.2. Mechanisms to improve the availability of border guards in joint operations

Suboption 1: Establish "Frontex Joint Support Teams" (FJST) to participate in joint operations and pilot projects based on a compulsory mechanism for MS to contribute with guest officers to those teams, in the form of a pool of human resources to be used by the Agency.

Suboption 2: Lower the threshold for the deployment of Rabbit teams. The current Rabbit teams could thereby be used to reinforce joint operations.

Suboption 3: Foresee the gradual creation of a pool of border guards on semi-permanent detachment from MS to Frontex for a period of six months.

Can the involved costs be (or become) part of the FRONTEX budget and how high are they?

The unit costs for the first two suboptions would not be different compared to the status quo.

As for the third suboption, in 2009 the allowance for a Frontex national detached expert amount to 4 127,- €per month. Guest officers of the MS deployed during joint operations cost on average 180,- €per day (+/- 3 960 per month). These figures indicate that the difference is minimal.

What are the possible impacts on fundamental rights?

An increase in the availability of border guards does not as such impact on fundamental rights. However, the risks of having an EU body and its staff exposed to situations of possible violations of fundamental rights could increase.

Comparison of the suboptions

The second suboption brings the negative impact of depriving the EU of a true emergency response mechanism. That suboption should therefore be discarded.

Suboption 1 and 3 will have to be combined: the setting up of a pool of human resources made up of guest officers from the MS seconded to individual operations as well as guest officers employed as national experts by the Agency on a short-term basis.

3.3. Revising the role of the Agency in preparing, coordinating and implementing operations, including with regard to the sharing of tasks between the Agency and the MS

Suboption 1: Frontex is awarded the sole lead for the implementation of joint operations, the establishment of the operational plan, and the sole right of initiative for the launch of operations.

Suboption 2: Frontex is awarded a co-leading role together with the host state for the implementation of joint operations. Frontex is responsible for drawing up the operational plan but subject to the final agreement of the host state.

Can the involved costs be (or become) part of the FRONTEX budget and how high are they?

These changes will clarify and reduce the current diverging practices of the Agency and the competent authorities of MS. No further extra costs are foreseen through optimisation of the working practices.

What are the possible impacts on fundamental rights?

The risks of having an EU body and its staff exposed to situations of possible violations of fundamental rights would increase, due to the fact that the Agency would be more involved in concrete operations than they are currently and because of the possible co-lead role in operations.

As concerns suboption 1, the legal obligation to comply with fundamental rights would weigh more on the Agency compared to the current situation, where this legal obligation weighs mainly on national authorities when implementing Community law.

The impact described above would be mitigated in suboption 2 under the assumption of a clear legal framework for border guards semi-detached to Frontex.

Comparison of the options

The preferred suboption is to award the Agency a co-leading role with clearly defined modalities on who does what and who is responsible for what. This suboption provides for detailed provisions on the operational plan and on the evaluation of operations, including with regard to incident reporting.

3.4. Expanding the mandate of the Agency in cooperating with third countries on border management

Suboption 1: Allowing Frontex to carry out technical assistance projects in third countries, using either its own budget or that of the EU's external financial programmes.

Suboption 2: Allowing Frontex to deploy liaison officers in third countries.

Suboption 3: Mandating Frontex to carry out border control missions at the borders between third countries.

Does the option have an impact on external countries/partners?

All suboptions will have an impact on relations with third countries. Overall the most positive impact will come from the increased capacity of the EU to meet requests for assistance from these third countries, as part of an overall reinforced cooperation between the EU and third countries on migration.

Can the involved costs be (or become) part of the FRONTEX budget and how high are they?

Given that the number of projects should be limited to priority countries, an assumption could be that Frontex would implement 1-2 projects per year with a budget of up to two million euro each. A gradual posting of up to 5 liaison officers could be envisaged, which would involve a limited cost impact. The costs for the third suboption would be substantial: as a comparison the costs for the EUBAM mission from 2005 to 2009 was around 44 million euro.

What are the possible impacts on fundamental rights?

Technical assistance to operations, which could lead to violations of fundamental rights should not be offered to third countries.,

For the second suboption, due regard should be taken regarding the prevention of potential ethnic profiling in the collection of data on the migration flows.

For the third suboption the legal framework is in part set by the third countries in question; these operations should take place under a framework fully respecting fundamental rights.

Comparison of the suboptions

The preferred option is clearly to carry out technical assistance projects and to deploy its own liaison officers in third countries.

The taking over of border control missions concerning the borders between third countries contributes would have a substantial cost impact and would raise concerns with regard to fundamental rights. This suboption should therefore be discarded.

3.5. Mandating the Agency to collect and process personal data

Suboption 1: Allow the Agency to process, store, collect and transfer (including to third countries) all personal data gathered during Frontex joint operations and to use that data for the purpose of risk analysis and operational coordination.

Suboption 2: Enable the Agency to collect, process and store personal data for the purpose of risk analysis and to contribute to the security at the EU external borders.

Can the involved costs be (or become) part of the Frontex budget and how high are they?

The costs for both options are not estimated to be significant.

What are the possible impacts on fundamental rights?

Potentially substantial impact which would need to be mitigated through a stringent data protection regime

Comparison of the options

Suboption 2 is proportionate and has a clear positive impact on the operational objective. The impact of suboption 1 is only marginally bigger than for suboption 2 while it raises important question marks concerning proportionality and necessity. Therefore only suboption 2 should be retained.

3.6. Revising the mandate of the Agency as concerns return operations

Suboption 1: involve Frontex taking over a coordinating role together with the leading Member State.

Suboption 2: Frontex to take over from the leading Member State the responsibility and the bulk of organisational tasks for the whole joint return operation.

Can the involved costs be (or become) part of the Frontex budget and how high are they?

The involved costs are already covered by the Frontex budget. The increase in the number of operations resulting from a stronger role for Frontex is impossible to predict as the preconditions will remain the same.

What are the possible impacts on fundamental rights?

No impact as long as the limits on the powers awarded to the Agency as described above are respected.

Comparison of the options

The second suboption entails certain additional positive impacts which however are mainly theoretical, having regard to the significant negative impacts. The preferred option is clearly to foresee a coordinating role for the Agency, but not to shift the responsibility and the main burden from the leading Member State to the Agency.

3.7. Mandating the Agency to evaluate MS' performance in the area of border management

Suboption 1: Mandating Frontex to carry out inspections in MS, to evaluate MS' capacity to face threats and pressure at the external borders, more particularly their capacity in terms of national structures, equipment and resources.

Suboption 2: Giving Frontex an explicit role with regard to MS' compliance with EC law during joint operations, thus giving Frontex a role in observing and reporting in this respect.

Can the involved costs be (or become) part of the FRONTEX budget and how high are they?

The first suboption would involve certain staff costs the second suboption would not have any significant cost impact.

What are the possible impacts on fundamental rights?

No direct impact, recalling as concerns the second suboption that MS obligations to comply with EC law are absolute.

Comparison of the options

For the second suboption the negative impacts clearly cancel out the positive impacts, while for the first suboption, assuming that a careful definition of the concrete purpose is done, there are clear positive impacts on the core objectives of Frontex, ie coordinating operations and carrying out risk analysis.

4. SUMMARY OF THE PREFERRED OPTION

The preferred option would therefore consist in providing new provisions in the Frontex Regulation on:

- (1) A revised mechanism with compulsory contributions of equipment from MS combined with the gradual acquisition/leasing by Frontex of its own equipment, based on further analyses of needs and costs

- (2) A revised mechanism with compulsory contributions of human resources from MS combined with a pool of border guards on semi-permanent detachment from MS to Frontex, with the status of national experts
- (3) Awarding the Agency a co-leading role for the implementation of joint operations, with detailed rules for the operational plan, evaluation, and incident reporting
- (4) Allowing Frontex to finance and implement technical assistance projects in third countries and to deploy liaison officers in third countries
- (5) Giving Frontex a limited mandate to process personal data related to facilitation of illegal immigration
- (6) Giving Frontex a coordinating role in implementing joint return operations
- (7) Giving Frontex a mandate to analyse operational risks and requirements in the MS
