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on : 24 March 2010

No. Cion prop.: 6898/10 FRONT 22 COMIX 151 (COM(2010) 61 final)

Subject: **Proposal for a Regulation of the European Parliament and 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)**

At its meeting on 24 March 2010, the Working Party on Frontiers/Mixed Committee continued the first reading of the above proposal (Articles 3.c to 9.5 .) The text of Articles 3.c to 9.5 is reproduced in the Annex. Member States' comments are set out in footnotes.

Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND THE COUNCIL

amending Council Regulation 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)

Article 3c

Instructions to the Frontex Joint Support Teams¹

1. During deployment of Frontex Joint Support Teams, instructions to the teams shall be issued by the host Member State in accordance with the operational plan referred to in Article 3a (1).²
2. The Agency, via its coordinating officer as referred to in Article 3b (5), may communicate its views on those instructions to the host Member State. If it does so, the host Member State shall ³take those views into consideration⁴.
3. In accordance with Article 8g the host Member State shall give the coordinating officer all necessary assistance, including full access to the Frontex Joint Support Teams at all times throughout the deployment⁵.
4. Members of the Frontex Joint Support Teams shall, while performing their tasks and exercising their powers, remain subject to the disciplinary measures of their home Member State."

¹ **FR** suggested adding a reference to the use of force and arms. **Cion** clarified that these issues are already covered by Article 10.

² **NL** expressed the view that participating Member States should be involved in the drawing up and in any changes to the operational plan, including instructions to the teams. **Cion** clarified that the role of the host State for issuing instructions to the teams is coherent with the responsibility for border control and surveillance remaining with the Member States.

³ **MT**, supported by **RO** and **PT** suggesting changing "shall" into "may"

⁴ **LU, NL, FR** and **NO** suggested replacing "into consideration" with a more binding wording. **NL**, supported by **BE** suggested providing for a stronger role for the coordination officer as regards the coordination and termination of operations. **BE** also suggested that the decision to terminate a joint operation should be endorsed by the Management Board.

⁵ Following a request by **SI**, **Cion** clarified that full access to the FJST involves the possibility for the coordinating officer to follow-up the operation

(6) Article 4 is replaced by the following:

"Article 4

Risk analysis

The Agency shall develop and apply a common integrated risk analysis model. It shall prepare both general and tailored risk analyses to be submitted to the Council and the Commission. ⁶For these purposes Member States shall provide the Agency with all necessary information regarding the situation and possible threats at the external borders.

The Agency shall regularly evaluate the capacity of the Member States to face upcoming challenges, including present and future threats and pressures at the external borders of the European Union. Therefore the Agency shall evaluate the national structures, the equipment and the resources of the Member States regarding border control. . The results of these evaluations shall be presented at least once per year to the Management Board of the Agency.⁷⁸

The Agency shall incorporate the results of a common integrated risk analysis model in its development of the common core curriculum for border guards' training referred to in Article 5."

⁶ **AT** suggested that risk analysis be submitted also to Frontex Management Board.

⁷ **SE, DE** and **NO** asked to have more detailed explanations about the implementation of the proposed evaluation. **PL** suggested clarifying scope and consequences of the proposed evaluation and referring to the possibility for the Agency being present at the borders to prevent risks. **IT** suggested a more precise wording as regards the criteria and consequences of the proposed evaluation. **EL** expressed the view that the proposed mechanism has no added value and suggested deleting this provision. **LT, PT, SI, RO, NL, BE** and **EE** expressed the view that the evaluation of Member States' capacity carried out by Frontex could result in a duplication of the Schengen evaluation mechanism. **SE** pointed out that even if the objectives are different, the two mechanisms could result in a duplication as regards the measures to be taken. **CZ, FI** and **AT** suggested that Frontex role in evaluating Member States' capacity be foreseen as complementary to the Schengen evaluation mechanism. In this regard, **FI** supported by **EE** suggested adding after the first sentence the following wording " This evaluation is a supporting and complementary element to the Schengene evaluation mechanism". **Cion** would reflect on this suggestion. **CZ, NL** and **HU** and **EE** suggested Frontex playing a role in the existing Schengen evaluation mechanism. **NL** supported by **UK** suggested replacing "shall evaluate" with "shall analyse". **LU** supported keeping this provision unchanged. **LT** suggested adding that the proposed evaluation is linked to planning and organization of joint operations.

Cion clarified that the proposed evaluation, which aims at assessing threats and at evaluating Member States' performances serves a different purpose than the Schengen evaluation mechanism which aims at evaluating the correct application of the Schengen acquis.

⁸ **AT** suggested ~~providing that Frontex Risk analysis should also be submitted to the Agency's Management Board and~~ adding a reference to the Common Integrated Risk Analysis Model (CIRAM).

(7) In Article 5 the first paragraph is replaced by the following:

"The Agency shall establish and further develop common core curricula for border guards' training and provide training at European level for instructors of the national border guards of Member States, including with regard to fundamental rights and access to international protection. Member States shall integrate the common core curricula in the training of their national border guards.⁹"

(8) Articles 6 and 7 are replaced by the following:

"Article 6

Monitor and contribute to research

The Agency shall monitor and contribute to the developments in research relevant for the control and surveillance of the external borders and disseminate this information to the Commission and the Member States.¹⁰

⁹ **EL** suggested a transitional period for the gradual introduction of the Common Core Curriculum being foreseen. **Cion** prefers not to have precise time indications in this regard. Following a request by **CZ**, **Cion** clarified that Frontex develops the CCC at different levels and for all types of borders to be implemented by Member States based on their specific needs.

¹⁰ **EL** suggested considering the establishment of a network of development centres in the Member States. **AT** suggested reinforcing further the role of the Agency as regards Research and Development. **Cion** will reflect on these suggestions.

Article 7

Technical equipment

1. The Agency may acquire or lease technical equipment for external border control to be deployed during joint operations, pilot projects, Rapid Border Intervention Teams, return operations or technical assistance projects in accordance with the financial rules applicable to the Agency. ¹¹Any acquisition of equipment entailing significant costs to the Agency shall be preceded by a thorough needs and cost/benefit analysis. ¹²In case the Agency acquires or leases important technical equipment such as open sea and coastal patrol vessels or vehicles, to be used in joint operations, ¹³ the following provisions shall apply:
 - in case of acquisition, the Agency agrees formally with one Member State that the latter will provide for the registration of the equipment;¹⁴
 - in case of leasing, the equipment must be registered in a Member State.

The Member State of registration or the supplier of technical equipment shall provide the necessary experts and technical crew to operate the technical equipment in a legally sound and safe manner.

¹¹ **LU** suggested covering also the possibility for the Agency to rent equipment. **RO** suggested clarifying in the text if it would be for Frontex or the Member States to buy the equipment and provide training for the staff. **FI** expressed support for the current text of Article 7. **FR** suggested providing also that Frontex could contribute for the acquisition of equipment by the Member States. **Cion** will reflect on this suggestion. **NL** suggested considering if it would be possible for Frontex vessels to fly a European flag and requested the opinion of the Council Legal Service in this regard. **BE** suggested clarifying the share of responsibility and the impact on national law regarding the use of equipment. **EL** suggested including in the text more details on which flag vessels would fly and on guarantees regarding civil liability. **CZ** questioned whether each individual acquisition would have to be approved by the Management Board.

¹² **DE, RO** and **PL** suggested clarifying how the costs benefits analysis would be carried out. **PL** also questioned about the possibility to finance the acquisition of equipment with the External Borders Fund. **Cion** confirmed that the proposed text does not prevent from using this possibility. **DE, PL** and **SE** drew the attention on the possible difficulties linked to Frontex budget for the acquisition of equipment. **Cion** pointed out that budgetary implications are difficult to predict.

¹³ **LT** questioned if it would be possible for Frontex also to acquire or lease aircrafts as this is not expressly mentioned in the text. **Cion** confirmed that all types of equipment would be covered.

¹⁴ **SE** suggested that the agreement could also cover others aspects, such as costs, share of equipment with the Member States, maintenance, damages, etc. **Cion** clarified that the agreement would have to define how to share the periods and costs of the acquisition between Frontex and the Member State, whereas other aspects would be left to the practical implementation. It will reflect on whether more details on bilateral negotiations could be included in the text. **MT** suggested adding the following provisions: "Frontex and the Member State of registration will agree to a specific region where the asset will be deployed for the assets' life-time or for the duration of lease"; "The Member State of registration will be responsible for the asset during the course of Frontex joint operations and will, therefore determine the modus operandi of the deployed asset throughout its lifetime

2. The Agency shall set up and keep centralised records of equipment in a technical equipment pool composed of equipment owned by Member States or by the Agency for external border control purposes. The technical equipment pool shall contain a minimum number per type of technical equipment defined in accordance with paragraph 5 of this article. ¹⁵The equipment listed in the technical equipment pool shall be deployed during the activities referred to in Articles 3, 8a and 9. ¹⁶
3. Member States shall contribute to the technical equipment pool referred to in paragraph 2. To the extent that it forms part of the minimum number of equipment for a given year, Member States shall¹⁷ make their technical equipment available within 30 days for deployment ¹⁸at the request of the Agency, unless they are faced with an exceptional situation substantially affecting the discharge of national tasks. Their contributions to the technical equipment pool shall be reviewed annually.¹⁹²⁰²¹
4. The Agency shall manage the records of the technical equipment pool as follows:
 - (a) classification by type of equipment and by type of operation;
 - (b) classification by owner (Member State, Agency, others);
 - (c) overall numbers of required equipment;

¹⁵ **SI** suggested clarifying how the minimum equipment would have to be defined. **LU** suggested clarifying how the choice would be made following this decision.

¹⁶ **NL** expressed some doubts regarding the current text of par.1.

¹⁷ **MT** suggesting replacing "shall" with "may". It entered a scrutiny reservation on par.3

¹⁸ **DE, NL, FI, HU, FR, SE, PL, SI, EE** expressed the view that the "thirty days" period for deployment is too short. **Cion** supported keeping this time indication stressing that also Member States would have to engage in operational planning.

¹⁹ **NL**, supported by **EE**, suggested linking the supply of equipment to Frontex annual programme. **FI**, supported by **LT** suggested that the text should reflect the commitment of Member States on the availability of equipment on the basis of negotiations with Frontex. **Cion** will reflect on the possibility of a more detailed wording in this respect. **FI** entered a reservation on the current text of par.3. **HU** expressed the view that the obligation for Member States to make equipment available should not affect their ability to carry out national tasks. **FR** suggested making this provision more flexible regarding possible emergency situations in the Member States. **Cion** would prefer to keep the current text. **SE** suggested to reword par 3 in order to clarify that the obligation of providing the equipment arises once the Member States have volunteered to contribute to the pool. **PL** expressed the view that the equipment should be provided on a voluntary basis based on the annual decision and if necessary withdrawn. **Cion** clarified that Member States would have fulfilled their obligation to contribute to the pool with just one piece of equipment, but can offer more on a voluntary basis.

²⁰ **EL** referred to the need to make the minimum equipment available in case of urgency. In this regard, **Cion** clarified that the pool would not be an emergency instrument for unforeseen events.

²¹ **FR** questioned whether there would be a distinction between equipment owned by the Member States and owned by Frontex, stressing that the latter could be available in a shortest delay. **Cion** clarified that the differences between the two systems would be visible in the long-term, once Frontex would have acquired its own equipment. It also clarified that in any case equipment that Member States would put at disposal of Frontex would be exclusively managed by the Agency.

- (d) crew requirements if applicable;
- (e) other information such registration details, transportation and maintenance requirements, national applicable export regimes, technical instructions, or other relevant information to handle the equipment correctly.

5. The Agency shall finance the deployment of the equipment which forms part of the minimum number of equipment provided by a given Member State for a given year. The deployment of equipment which does not form part of the minimum number of equipment shall be co-financed by the Agency up to a maximum of 60% of the eligible expenses.²²

The rules including the required overall minimum numbers per type of equipment, the conditions for deployment and reimbursement of costs shall be decided in accordance with Article 24 on a yearly basis by the Management Board on a proposal by the Executive Director. For budgetary purposes this decision should be taken by the Management Board by 31 March.

The minimum number of equipment shall be proposed by the Agency in accordance with its needs, notably be able to carry out joint operations, pilot projects and return operations, in accordance with the work programme of the Agency for the year in question.

6. The Agency shall report on the composition and the deployment of equipment, which is part of the technical equipment pool, to the Management Board on a monthly basis. In case the minimum number of equipment referred to in paragraph 5 is not reached, the Executive Director shall inform the Management Board without delay. The Management Board shall take a decision on the prioritisation of the deployment of the technical equipment urgently and take the appropriate steps to remedy the identified shortcomings. It shall inform the Commission of the identified shortcomings and the steps taken. The Commission may subsequently inform the European Parliament and the Council, together with its own assessment."²³

(9) Article 8 is deleted.

²² **RO** suggested drafting a Handbook of eligible costs for equipment to be made available. **AT** suggested the equipment to be fully financed without distinction. Following questions raised by **SE, HU, SI, LU, Cion** clarified that the equipment that Member States would commit themselves to provide will be financed 100% by Frontex, whereas equipment that Member States offer without committing themselves will have a 60% co-financing.

²³ **AT** expressed the view that there is no need to provide that the Commission should be informed on shortcomings and steps taken as it participates in Frontex Management Board. **Cion** clarified that par 6 aims at reinforcing the actual use of the minimum equipment by providing for the possibility to trigger where necessary a political discussion. It also clarified that in case minimum equipment needs would be redefined, the Agency's budget might need to be revised.

(10) In Article 8e paragraph 1 is amended as follows:

(a) points (f) and (g) are replaced by the following:

"(f) command and control provisions, including the names and ranks of the host Member State's border guards responsible for cooperating with the Rapid Border Interventions teams, in particular those of the border guards who are in command of the teams during the period of deployment, and the place of the teams in the chain of command;

(g) the technical equipment to be deployed together with the teams, including specific requirements such as conditions for use, requested crew, transport and other logistics, and financial provisions."

(b) the following points (h) and (i) shall be added:

"(h) a reporting and evaluation scheme containing detailed provisions on incident reporting, benchmarks for the evaluation report and final date of submission of the final evaluation report in accordance with Article 3(4).

(i) regarding sea operations, specific requirements regarding the applicable jurisdiction and maritime law provisions concerning the geographical area where the joint operation takes place."

(11) In Article 8h paragraph 1 is replaced by the following:

"1. The Agency shall fully meet the following costs incurred by Member States in making available their border guards for the purposes mentioned in Article 3(2), Article 8a and Article 8c:"

(12) Article 9 is replaced by the following:

"Article 9

Return cooperation

1. Subject to the return policy of the Union, and in particular Directive 2008/115/EC²⁴, the Agency shall provide the necessary assistance, and upon request of the participating Member States ensure the coordination for organising joint return operations of Member States. ²⁵²⁶The Agency may decide to finance or co-finance the operations and projects referred to in this paragraph, with grants from its budget in accordance with the financial rules applicable to the Agency.²⁷ The Agency may also use Union financial means available in the field of return. The Agency shall ensure that in its grant agreements with Member States any financial support is conditional upon the full respect of the Charter of Fundamental Rights.²⁸
2. The Agency shall develop a Code of Conduct for the return of illegally present third-country nationals by air which shall apply during all joint return operations coordinated by the Agency, describing common standardized procedures which should simplify the organisation of joint return flights and assure return in a humane manner and in full respect for fundamental rights, in particular the principles of human dignity, prohibition of torture and of inhuman or degrading treatment or punishment, right to liberty and security, the rights to the protection of personal data and non discrimination.²⁹

²⁴ OJ L 348, 24.12. 2008, p.

²⁵ **LU**, suggested the role of the Agency not being limited to coordination, but extended to the organization of joint return operations. **FR** supported this view suggesting that Frontex should "co-organize" joint return operations. **Cion** clarified that a coordinating role for Frontex is based on the responsibility for return lying with the Member States.

²⁶ Following a question raised by **DE**, **Cion** clarified that when coordinating joint return operations Frontex already processes personal data in accordance with the relevant EU legislation.

²⁷ Following a question raised by **SI**, **Cion** clarified that based on the current practice, the Agency would have the possibility to choose whether to finance or co-finance a return operation.

²⁸ **DE**, supported by **FR**, suggested deleting the last sentence of par 1 as the Charter of Fundamental Rights is covered by the Treaties. **NL**, though sharing this consideration, would prefer keeping the current text. **EL** supported the view that Frontex should be given the possibility to stop funding in case of violations of human rights during a joint return operation. **Cion** pointed out that this provision aims at providing that the Agency may suspend financing in cases of investigations carried out by independent authorities as regards the respect of fundamental rights during joint return operations..

²⁹ **NO**, **NL**, **FR**, **DE** supported the idea of defining a Code of conduct. **DE** questioned about the legal status of such a Code and the relation with Directive (???) . **NL** suggested that the Code of conduct could also include indications on how to deal with request to third countries regarding persons to be returned. **HU** suggested that the Code of conduct should cover also land return operations. **SI** supported this view referring also to the sea borders. **Cion** will reflect on whether to enlarge the scope of joint return operations to the land borders.

3. The Code of Conduct will in particular pay attention to the obligation set out in Article 8(6) of Directive 2008/115/EC to provide for an effective forced-return monitoring system. The monitoring of joint return operations should be carried out independently and should cover the whole joint return operation from the pre-departure phase until the hand-over of the returnees in the country of return. Furthermore, observations of the monitor, which shall cover the compliance with the Code of Conduct and in particular fundamental rights, shall be made available to the Commission and form part of the internal Final Return Operation Report. In order to ensure transparency and a coherent evaluation of the forced-return operations, reports of the monitor shall be included in an annual reporting mechanism.³⁰³¹
4. Member States shall once a month inform the Agency of their situation with regard to return and indicate to what extent the assistance or coordination of the Agency is required.³² The Agency shall draw up a rolling operational plan to provide the requesting Member States with the necessary operational support, including technical equipment referred to in Article 7(1). The Management Board shall decide in accordance with Article 24 on a proposal of the Executive Director, on the content and modus operandi of the rolling operational plan.
5. The Agency shall cooperate with competent authorities of the relevant third countries referred to in Article 14, identify best practices on the acquisition of travel documents and the return of illegally present third-country nationals."

³⁰ Following questions raised by **SE, SI, CZ and BE**, **Cion** clarified that it would be for Member States to decide how to carry out independent monitoring, the costs of which could be co-financed by Frontex.

³¹ **SI** entered a linguistic reservation on par.3

³² **LT** expressed the view that there is no added value in providing that Member States have to provide information to Frontex on a monthly basis. **NL** also expressed the view that this provision is not necessary. **BE** suggested that Member States could provide information to Frontex on an "ad hoc" basis rather than on a monthly basis. **Cion** clarified that this provision aims at providing Frontex with an overview of the needs in order to be able to plan its return activities. Following a question by **DE**, **Cion** clarified that the rolling operational plan would respond to the need to update the planning continuously. Following a question by **NL**; **Cion** clarified that Frontex role as regards cooperation with third countries would be limited to supporting negotiations carried out by the Member States.