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of.                    Working Party on Frontiers/Mixed Committee  
                          (EU-Iceland/Liechtenstein/Norway/Switzerland)

dated:                17 January 2011

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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)**

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At its meeting on 17 January 2011, the Working Party on Frontiers/Mixed Committee examined Articles 1, 1a, 2, 3, 3a, 3b, 3c, 11, 11a, 11b, 11c and 11d of the draft Regulation amending Council Regulation (EC) No 2007/2004 establishing FRONTEX as set out in doc. 5099/11 FRONT 1 CODEC 13 COMIX 4.

The text of the examined Articles, as revised, with remarks of delegations in footnotes, is set out in the Annex. Proposed changes to the text are underlined or marked for deletion, where applicable. The changes that have already been agreed are set in bold.

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)<sup>1</sup>**

*Article 1*  
*Amendment*

Regulation (EC) No 2007/2004 is amended as follows:

(1) In Article 1 paragraph 2 is replaced by the following:

"2. While considering that the responsibility for the control and surveillance of external borders lies with the Member States, the Agency shall facilitate and render more effective the application of existing and future European Union measures relating to the management of external borders, in particular the Schengen Borders Code, and in accordance with relevant Union law, International law, obligations related to access to international protection, and fundamental rights. It shall do so by ensuring the coordination of Member States' actions in the implementation of those measures, thereby contributing to an efficient, high and uniform level of control on persons and surveillance of the external borders of the Member States."

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<sup>1</sup> **Cion** confirmed its general reservation on the entire text.

(2) Article 1a is amended as follows:

(a) point 2 is replaced by the following:

"2. "host Member State" means a Member State **in which** a deployment of a Rapid Border Intervention Team or a joint operation or a pilot project takes place **or from which it is launched**;"

(b) point 4 is replaced by the following:

"4. "members of the teams" means border guards of Member States serving with the Rapid Border Intervention Team or the Frontex Joint Support Team other than those of the host Member State;"

**Point 7 has been deleted**

(3) Article 2 is amended as follows:

(a) paragraph 1 is amended as follows:

(i) points (c) and (d) are replaced by the following:

"(c) carry out risk analyses, including studies of the preparedness ~~the evaluation of the capacity~~ of Member States to face threats and pressure at the external borders;

(d) participate in the development of research relevant for the control and surveillance of external borders;"

(ii) point (f) is replaced by the following:

"(f) provide Member States with the necessary support including, upon request, coordination or organization of joint return operations;"

(iii) the following points (h) and (i) are added:

- "(h) develop and operate information systems that enable swift and reliable exchanges of information regarding emerging risks at the external borders, including the Information and Coordination Network established by Council Decision 2005/267/EC<sup>1</sup>;
- (i) provide the necessary assistance to the development and operation of a European border surveillance system and, as appropriate, to the development of a common information sharing environment, including interoperability of systems."

(b) the following paragraph 1a is inserted:

"All border guards and other personnel of the Member States, as well as the staff of the Agency shall, prior to their participation in operational activities organised by the Agency, have received training in relevant EU and international law, including fundamental rights and access to international protection."

(c) In paragraph 2 the last subparagraph is replaced by the following:

"Member States shall report to the Agency on these operational matters at the external borders outside the framework of the Agency. The Executive Director shall inform the Management Board on these matters on a regular basis and at least once a year."

(4) Article 3 is replaced by the following:

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<sup>1</sup> OJ L 83, 1.4.2005, p. 48.

"Article 3

*Joint operations and pilot projects at the external borders*

1. The Agency shall evaluate, approve and coordinate proposals for joint operations and pilot projects made by Member States, including the requests of Member States related to circumstances requiring increased technical and operational assistance.

The Agency may itself initiate joint operations and pilot projects.. " in cooperation with the Member States **concerned<sup>1</sup> and in agreement with the host Member States**".

It may also decide to put its technical equipment at the disposal of Member States participating in the joint operations or pilot projects.

Joint operations and pilot projects should be preceded by a thorough risk analysis.

The Agency may also terminate, after informing the Member State concerned,<sup>2</sup> joint operations and pilot projects if the conditions to conduct these initiatives are no longer fulfilled. Participating Member States may request the Agency to terminate a joint operation or pilot project.<sup>4</sup>

2. The Agency shall constitute a pool of border guards called Frontex Joint Support Teams in accordance with the provisions of Article 3b, for possible deployment during joint operations and pilot projects referred to in paragraph 1. It shall decide on the deployment of human resources and technical equipment in accordance with Articles 3a and 7.
3. The Agency may operate through its specialised branches provided for in Article 16, for the practical organisation of joint operations and pilot projects.

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<sup>1</sup> **EL, IT** and **MT** insisted on keeping the word "concerned", whereas **NL** and **RO** would prefer to delete it. **FI** could accept the text with the word "concerned". **The Presidency** concluded that "concerned" would remain in the text.

<sup>2</sup> **The Presidency** concluded that the **EL** suggestion of including a reference to the consultation of the host Member State regarding the termination of an operation was supported by the WP.

<sup>3</sup> **The Presidency** concluded that there was not sufficient support for providing also for the possibility for the Agency to suspend a joint operation or a pilot project.

<sup>4</sup> The possibility for the participating Member States to request the Agency to terminate a joint operation or a pilot project was only supported by **RO** and **NL**. **NL** however did not insist in this regard. **The Presidency** therefore proposed not to include this text in the draft Regulation.

4. The Agency shall evaluate the results of the joint operations and pilot projects and transmit the detailed evaluation reports within 60 days following the end of the activity to the Management Board. <sup>1</sup>The Agency shall make a comprehensive comparative analysis of those results with a view to enhancing the quality, coherence, efficiency **and effectiveness** of future operations and projects to be included in its general report provided for in Article 20(2)(b)
  5. The Agency may decide to finance or co-finance the joint operations and pilot projects referred to in paragraph 1, with grants from its budget in accordance with the financial rules applicable to the Agency."
- (5) The following Articles 3a, 3b and 3c are inserted:

"Article 3a

*Organisational aspects of joint operations and pilot projects*

1. The Executive Director shall draw up an operational plan for activities referred to in Article 3(1). The Executive Director and the host Member State, **in consultation with participating Member States**, shall agree on the operational plan detailing the organisational aspects in due time before the envisaged beginning of the activity.

The operational plan shall cover all aspects considered necessary for carrying out the joint operation or the pilot project, including the following: <sup>2</sup>

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<sup>1</sup> **PL** reiterated its suggestion to add that in case of reported incidents during the operations, the EU delegation should provide the Member State(s) concerned with the necessary support. **Cion** could not accept this provision as this could be covered by the normal diplomatic channels. **NL** is not in favour of the Polish proposal stressing that is a matter of competence of the Member State to deal with those incidents through their bilateral relations with third countries. **The Presidency** concluded that there was not sufficient support for including such provision and indicated that Article 3a paragraph 1 (h1) could meet at least partially the Polish concerns.

<sup>2</sup> **IT** reiterated its request that the operational plan should also contain provisions on logistics, organization and modalities regarding the management of illegal migration but this suggestion was not supported by the Working Party. **FR** reiterated its suggestion that the operation plan should contain specific provisions on the conditions of deployment and a reference to the area of disembarkation, as the recently adopted guidelines are not binding. **The Presidency** concluded that there was not sufficient support for including such references and stressed that the list in Article 3a paragraph 1 is not exhaustive.

- (a) a description of the situation, with modus operandi and objectives of the deployment, including the operational aim;
- (b) the foreseeable duration of the joint operation or pilot projects;
- (c) the geographical area where the joint operation or pilot project will take place;
- (d) description of the tasks and special instructions for the guest officers, including on permissible consultation of databases and permissible service weapons, ammunition and equipment in the host Member State;
- (e) the composition of the teams of guest officers as well as the deployment of other relevant staff;
- (f) command and control provisions, including the names and ranks of the host Member State's border guards responsible for cooperating with the guest officers and the Agency, in particular those of the border guards who are in command during the period of deployment, and the place of the guest officers in the chain of command;
- (g) the technical equipment to be deployed during the joint operation or pilot project, including specific requirements such as conditions for use, requested crew, transport and other logistics, and financial provisions;

**(h1) provisions on immediate incident reporting by the Agency to the Management Board and to relevant national public authorities.**

- (h2) 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~~ information on the application of the relevant jurisdiction<sup>1</sup> and legislation in the geographical area where the joint operation takes place.
- (j) modalities of cooperation with third countries, if relevant.**

2. Any amendments to or adaptations of the operational plan shall require the agreement of the Executive Director and the host Member State. A copy of the amended or adapted operational plan shall immediately be sent by the Agency to the participating Member States.

3. The Agency shall, as part of its coordinating tasks, ensure the operational implementation of all the organisational aspects, including the presence of a staff member of the Agency, of joint operations and pilot projects referred to in this Article.

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<sup>1</sup> **EL** insisted on deleting the "applicable jurisdiction". **BE** expressed the view that it would be preferable to keep this wording in the text. **The Presidency** therefore concluded that this wording would remain in the text.

Article 3b

*Composition and deployment of Frontex Joint Support Teams*

1. On a proposal by the Executive Director, the Management Board shall decide by an absolute majority of its members with a right to vote on the profiles and the overall number of border guards to be made available for the Frontex Joint Support Teams. The same procedure shall apply with regard to any subsequent changes in the profiles and the overall numbers. Member States shall contribute to the Frontex Joint Support Teams via a national pool on the basis of the various defined profiles by nominating border guards corresponding to the required profiles.
  
- ~~2.~~ ~~3.~~ **The contribution by Member States as regards their border guards to specific operations for the coming year shall be planned on the basis of annual bilateral negotiations and agreements between the Agency and Member States. In accordance with these agreements,** Member States shall make the border guards available for deployment at the request of the Agency, unless they are faced with **an unforeseen** ~~exceptional~~ situation substantially affecting the discharge of national tasks. Such a request shall be made at least ~~thirty~~ **forty five** days before the intended deployment. The autonomy of the home Member State in relation to the selection of staff and the duration<sup>1</sup> of their deployment shall remain unaffected.
  
- ~~3.~~ ~~2.~~ The Agency shall also contribute to the Frontex Joint Support Teams with competent border guards seconded by the Member States as national experts pursuant to Article 17(5). To that effect Member States ~~shall~~ may contribute by seconding border guards to the Agency as national experts. The maximum duration of such secondments shall not exceed six months in a twelve month period. They shall, for the purpose of this Regulation, be considered as guest officers and have the tasks and powers referred to in Article 10. The Member State having seconded the border guards in question shall be considered as "home Member State" as defined in Article 1a(3) for the purpose of applying Articles 3c, 10, and 10b. Other staff employed by the Agency on a temporary basis who are not qualified to perform border control functions shall only be deployed during joint operations and pilot projects for coordination tasks.<sup>2</sup>
  
4. Members of the Frontex Joint Support Teams shall, in the performance of their tasks and in the exercise of their powers, fully respect fundamental rights and human dignity. Any measures taken in the performance of their tasks and in the exercise of their powers shall be proportionate to the objectives pursued by such measures. While performing their tasks and exercising their powers, members of the teams shall not discriminate against persons on grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

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<sup>1</sup> **FR** supported by **NO**, suggested replacing "duration" with "conditions". **The Presidency** concluded that as this was not supported by other delegations "duration" will be maintained in the text.

<sup>2</sup> **DE** and **SI** confirmed their reservations on point b) of the current text, but **DE** informed that it might be flexible.



5. In accordance with Article 8g the Agency will nominate a coordinating officer for each joint operation or pilot project where Frontex Joint Support Team members will be deployed.
6. The Agency shall meet the costs incurred by the Member States in making their border guards available pursuant to paragraph 1 for the Frontex Joint Support Teams in accordance with Article 8h.

Article 3c

*Instructions to the Frontex Joint Support Teams*

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. 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 take those views into consideration.
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 deployment.
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."

.....

(14) Article 11 is replaced by the following:<sup>1</sup>

"Article 11

*Information exchange systems*

~~1. The Agency may take all necessary measures to facilitate the exchange of information relevant for its tasks, with the Commission and the Member States. It shall develop and operate an information system capable of exchanging classified information with the Commission and the Member States. The exchange of information to be covered by this system shall not include the exchange of personal data. Without prejudice to the competence of Member States to process personal data collected in the context of joint operations and pilot projects, the exchange of information to be covered by this system shall not include the exchange of such personal data.~~

(15) ~~The following Articles 11a and 11b are inserted:~~

"Article 11a

*Data protection*

**Regulation (EC) No 45/2001 shall apply to the Agency.**

~~The Management Board shall establish measures for the application of that Regulation (EC) No 45/2001 by the Agency, including those concerning the Data Protection Officer of the Agency.~~

Article 11b

**moved to Article 11d**

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<sup>1</sup> **PL** maintained its reservation on all the new provisions regarding processing of personal data by Frontex.

**EL** supported the general principle of allowing Frontex to process personal data but suggested clarifying which type of personal data would be exchanged and by whom and to limit this exchange to what is strictly necessary.

"Article 11

*Information exchange systems*

1. The Agency may take all necessary measures to facilitate the exchange of information relevant for its tasks, with the Commission and the Member States and, where appropriate, European Agencies<sup>1</sup>. It shall develop and operate an information system capable of exchanging classified information with these actors<sup>23</sup>.

(15) The following Articles 11a) to 11c) are inserted:

"Article 11a  
*Data protection*

Regulation (EC) No 45/2001<sup>4</sup> shall apply to the Agency.

The Management Board shall establish measures for the application of Regulation (EC) No 45/2001 by the Agency, including those concerning the Data Protection Officer of the Agency. These measures shall be subject to the approval<sup>5</sup> of the European Data Protection Supervisor.

Without prejudice to Articles 11b) and 11 c), the Agency may process personal data for administrative purposes, such as personal data for recruitment purposes and for the management of its staff.<sup>6</sup>

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<sup>1</sup> **FR** suggested to delete "where appropriate" and include "Europol or other European Agencies in charge of law enforcement" so as to make clear that the purpose of this provision is allowing Frontex to transmit personal data to relevant bodies tasked with fighting against illegal immigration networks and illegal trafficking. **Cion** suggested to keep in the text "European Agencies" as this Article does not only concern personal data.

<sup>2</sup> **Cion** suggested to link Article 11 with the following provisions to make clear which type of personal data may be processed in information exchange systems by including the words "subject to Articles 11a to 11c" at the end of the second sentence.

<sup>3</sup> **UK** expressed the view pointed out that the exchange of information between the UK officials and Frontex in the context of different activities in which the UK participates should be covered by this Article.

<sup>4</sup> OJ L 8, 12.1.2001, p. 1.

<sup>5</sup> **Cion** suggested reflecting on whether these internal rules on protection of personal data should be submitted for approval or consultation to the European Data Protection Supervisor according to Regulation (EC) 45/2001.

<sup>6</sup> **The WP** agreed to delete those two examples.

Article 11b)

Processing of personal data in the context of joint return operations<sup>1</sup>

In accordance with the measures referred to in the second paragraph of Article 11 a):

1. In performing its task of the organization and coordination of joint return operations of Member States referred to in Article 9, the Agency may process personal data of persons who are subject to such joint return operations.

2. The processing of such personal data shall respect the principles of necessity and proportionality. In particular, it shall be strictly limited to those personal data which are required for the purposes of the joint return operation.

3. The personal data shall be deleted as soon as the purpose for which they have been collected has been achieved and no later than 10 days after the joint return operation.

4. The Agency may transfer the processed personal data<sup>2</sup> to the carrier and the third country to which the person shall be returned<sup>3</sup>.

Article 11c)

Processing of personal data collected during joint operations, pilot projects and the deployment of rapid border intervention teams

In accordance with the measures referred to in Articles 11 a):

1. Without prejudice to the competence of Member States to collect personal data in the context of joint operations, pilot projects and the deployment of rapid border intervention teams, the Agency may further process personal data collected by the Member States during such operations<sup>4</sup> in order to contribute to the security of the external borders of the Member States of the European Union.

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<sup>1</sup> **NL** expressed doubts on the added value of this Article and stressed that transmission of personal data to third countries should be done by Member States, whereas **CH** and **IT** suggested to keep it as it might be sometimes necessary that Frontex transmits personal data to air carriers and third countries in the context of joint return operations.

<sup>2</sup> **FR** suggested to include the words "in accordance with applicable law"

<sup>3</sup> **The Presidency** concluded that it would propose a new wording of this Article taking into account the following criteria: 1) avoiding duplication of work; 2) the fact that the return of third-country nationals is not a main task of Frontex, and 3) Frontex should only be allowed to transfer the personal data to third countries in case that this has not been done by a Member State.

<sup>4</sup> **Cion** suggested to define in more precise terms which type of personal data would be processed.

2. Such further processing of personal data by the Agency shall be limited to personal data regarding persons who are suspected,<sup>1</sup> by the relevant authorities of Member States, on reasonable grounds of involvement in cross-border criminal activities, in illegal migration activities or in human trafficking activities as defined in Article 1 (1) (a) and (b) of Council Directive 2002/90/EC.<sup>2</sup>

3<sup>3</sup>. Personal data referred to in paragraph 2 shall be processed by the Agency only for the following purposes:

- a) transmission to Europol or other European Agencies;<sup>4</sup> e, subject to Article 13 of this Regulation.
- b) use for the preparation of risk analyses referred to in Article 4.

4. The personal data shall be deleted as soon as they have been transmitted to Europol or other European Agencies or used for the preparation of risk analyses referred to in article 4. The term of storage shall in any event not exceed three months after the date of the collection of those data.<sup>5</sup>

5. The processing of such personal data shall respect the principles of necessity and proportionality.

6. Onward transmission or other communication of such personal data processed by the Agency to third countries or other third parties is prohibited.<sup>6,7</sup>

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<sup>1</sup> **FI** suggested to define better who are the "suspected" persons.

<sup>2</sup> **Cion** supported by **NO** suggested an explicit reference to the facilitation of illegal migration.

<sup>3</sup> **DE** suggested deleting par 3 of Article 11 (c) stressing that it would be preferable that Member State deal directly with Europol because Frontex mandate does not give it a role on law enforcement. Furthermore, **DE** asked why does Frontex need to process personal data for its risk analysis. According to **NL**, this Article is a crucial part of this draft Regulation and should be based on a solid legal basis. **The CLS** confirmed that Article 11c was covered by the legal basis of the proposed Regulation as far as the collection of personal data remained a competence of Member States and Frontex would only act as a "box office", receiving personal data from the Member State and transmitting them to Europol, **Cion** expressed the view that Frontex mandate for assisting Member States with implementing the operational aspects of external border management also includes assisting Member States in the fight against illegal immigration networks and facilitation of illegal immigration into the EU.

<sup>4</sup> **FR** suggested to include "Europol or other European Agencies in charge of law enforcement"  
**Cion** proposed providing mutual exchange of information between Frontex and Europol.

<sup>5</sup> **FI** would prefer deleting the data after the end of the operation and **NL** suggested to delete personal data 10 days after the end of the joint operation as in Article 11b para 3.

<sup>6</sup> In respect of the issue raised by **SE** at last meeting regarding possible conflict between par.6 and Reg. 1049/2001, the **CLS** expressed the view that it is doubtful whether Reg. 1049/2001 is at all applicable in these situations. If yes, a formulation could be found clarifying that both this Regulation and the prohibition laid down in paragraph 6 apply at the same time in order to allow for a case by case assessment of the requests for access to the data.

<sup>7</sup> **The Presidency** concluded that most delegations agree that personal data collected in the context of joint operations could be transferred by Frontex but it has still to be defined how far this provisions should go. **The Presidency** will redraft this article.

Article 11d (previous Article 11b)

*Security rules on the protection of classified information and non-classified sensitive information*

1. The Agency shall apply the Commission's rules on security as set out in the Annex to Commission Decision 2001/844/EC, ECSC, Euratom<sup>1</sup>. This shall cover, inter alia, provisions for the exchange, processing and storage of classified information.
2. The Agency shall apply the security principles relating to the processing of non-classified sensitive information as adopted and implemented by the European Commission. The Management Board shall establish measures for the application of these security principles."

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<sup>1</sup> OJ L 317, 3.12.2001, p. 1.