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**NOTE**

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from: Presidency  
to: Strategic Committee on Immigration, Frontiers and Asylum/Mixed Committee  
(EU-Iceland/Liechtenstein/Norway/Switzerland)

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No. Cion prop.: 6898/10 FRONT 22 CODEC 222 COMIX 151

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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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**I - INTRODUCTION**

On 24 February 2010 the Commission submitted a 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), as set out in doc. 6898/10 FRONT 22 CODEC 222 COMIX 151.

The Working Party on Frontiers/Mixed Committee discussed the proposal at several meetings and has completed its third reading. Negotiations with the European Parliament on the proposal have not yet started.

A number of questions need further examination. At the meeting of the Working Party on Frontiers/Mixed Committee on 20-21 September 2010, it was concluded that three questions concerning risk analysis, personal data and evaluation would be submitted to SCIFA. The questions are set out in point II below. The revised text of the relevant Articles as proposed by the Presidency as a basis for discussions is set out in the Annex.

## **II - QUESTIONS PUT TO SCIFA**

The Presidency invites therefore the Strategic Committee on Immigration, Frontiers and Asylum/Mixed (SCIFA) Committee to address the following outstanding questions:

### **A - Risk analysis (Art.4)**

The original text of the proposal contains in the second paragraph of Article 4 a reference to an evaluation of the capacity of Member States to face upcoming challenges at the external borders. Some delegations expressed concerns that this might lead to an overlap with the Schengen Evaluation mechanism. The Presidency has proposed a compromise text that attempts to meet these concerns, by indicating, "inter alia", that the studies carried out by the Agency in this context would be without prejudice of the Schengen Evaluation mechanism. However, the issue has not been resolved by the Working Party.

In light of the above, which of the following options do delegations prefer as regards the second paragraph of Article 4?

- the text as contained in the original Commission proposal (doc. 6898/10 ), or
- the text as contained in the latest Presidency compromise (see Annex), or
- the text as contained in the original Commission proposal and a recital clarifying that the text is without prejudice to the Schengen evaluation mechanism, or
- the text as contained in the latest Presidency compromise, without the clarification that risk analysis is without prejudice to the Schengen Evaluation mechanism, but with the inclusion of this clarification in a recital.

## **B - Processing of personal data (Art. 11 and 11a)**

Regulation (EC) No 2007/2004 (FRONTEX Regulation) does not contain any specific provisions regarding the collection and processing of personal data by the FRONTEX Agency. It mentions in Recital 19) that "Regulation (EC) No 45/2001 of the European Parliament and the Council on the protection of individuals with regard to the processing of personal data by Community institutions and bodies and on the free movement of such data applies to the processing of personal data by the Agency".

Regulation (EC) No 45/2001 defines the general principles and criteria on data protection applying to the processing of personal data carried out by EU institutions and bodies in the exercise of activities falling within the scope of Community law, including the condition that such processing shall be lawful, necessary and proportionate for the performance of their tasks.

The proposal for the amendment of FRONTEX Regulation refers to the application of Regulation (EC) No 45/2001 both in the Preamble (Recitals 4 and 25) and in the text (Article 11 a). In addition, the issue of personal data is also addressed in Article 11, indicating that, as regards the information exchange systems, the exchange of information shall not include the exchange of personal data. The proposal does not contain any further specific provisions on the processing of personal data by the Agency.

During the discussions in the Working Party, the Presidency has proposed a revised text as regards Article 11, indicating that the exchange of information concerned would be without prejudice to Member States' competence to process personal data collected in the context of joint operations and pilot projects.

However divergent views persist in the Working Party, a number of delegations being in favour of the current text of the proposed Regulation, whereas others support the view that the Regulation should include specific provisions regarding the collection and processing of personal data by the FRONTEX Agency, including in the context of operational activities.

The European Data Protection Supervisor (EDPS) has issued an opinion on the proposed Regulation which is contained in doc. 10127/10 FRONT 83 CODEC 475 COMIX 391.

The FRONTEX Agency has to date processed personal data in the exercise of its administrative tasks, in particular personal data for recruitment purposes and for the management of its staff. It also processes personal data in the context of joint return operations, in particular personal data on returnees for the purpose of providing them with appropriate medical care as well as for the safety and the security of the operations.

FRONTEX does not, however, currently process personal data that becomes available during joint operations (i.e. data on probable facilitators and/or members of criminal networks involved in the smuggling of migrants and in trafficking of human beings, data linked to suspicious and/or detected transportation means, data collected during interviews of apprehended persons, data on false documents used for illegal border crossing data on persons that become available during search and rescue operations) for risk analysis or other purposes. These data are currently processed by the (host) Member State(s) according to their national data protection legislation.

In light of the above, delegations are invited to answer the following questions:

- As mentioned above, FRONTEX is currently processing personal data collected in the context of joint return operations. Should specific provisions addressing the collection and processing of such personal data by the Agency be included in the text of the proposed Regulation?
- Should the FRONTEX Agency be allowed to process personal data also in relation to other tasks and responsibilities?
- If so:
  - for which other tasks and responsibilities?
  - for which purposes?
  - under which conditions and limitations, and subject to which safeguards?
  - to what extent and under which conditions could such personal data possibly be shared by the FRONTEX Agency with other EU institutions and bodies (i.e. Europol, Eurojust), with the Member States and with third countries or parties?

## **C - Evaluation (Art.33(2)(a))**

The text of Article 33(2)(a) of the original proposal regarding, foresees that the evaluation shall analyse the needs for the Agency to employ independent border guards acting under the instructions of the Agency, including a detailed description of the legal framework that would need to be put in place for that purpose.

In order to meet the concerns expressed by delegations during the discussions at technical level in the Working Party, the Presidency has submitted a compromise text that, with regard to the next evaluation of the Agency, refers to the feasibility of the creation of a European system of border guards.

This text is in line with the Stockholm Program which at point 5.1, calls for a debate on the long-term development of FRONTEX, including on the feasibility of the creation of a European system of border guards.

Divergent views on this issue also persist at Working Party level. A number of delegations supported the Presidency's text. Certain other delegations did not support the Presidency's text or proposed deleting the paragraph.

In light of the above, which of the following options do Member States prefer as regards the text of Article. 33(2)(a)?

- the text as contained in the original Commission proposal (6898/10), or
- the text as contained in the latest Presidency compromise (see Annex), or
- a deletion of the paragraph.

**III- CONCLUSION**

SCIFA is invited to examine the above questions with a view to giving guidelines for the further work on the proposal at technical level.

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)**

(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. For 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 carry out studies on the preparedness ~~regularly evaluate the capacity~~ of the Member States to face upcoming challenges, including present and future threats and pressures at certain sectors of the external borders of the European Union. These studies are without prejudice to the Schengen Evaluation Mechanism.

~~Therefore the Agency shall evaluate the national structures, the equipment and the resources of the Member States regarding border control.~~ The results of these studies ~~evaluations~~ shall be presented at least once per year to the Management Board of the Agency.

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."

(14) Article 11 is replaced by the following:

*"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<sup>1</sup> 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*

*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>2</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."**

(23) In Article 33, the following paragraphs 2a and 2b are inserted:

~~"2a. The evaluation shall analyse the needs for the Agency to employ independent border guards acting under the instructions of the Agency, including a detailed description of the legal framework that would need to be set in place for that purpose.~~

2a. The first evaluation after [2010] shall also analyse the needs for further increased coordination of the management of the external borders of the Member States, including the feasibility of the creation of a European system of border guards."

"2b. The evaluation shall include a specific analysis on the way the Charter of Fundamental Rights was respected pursuant to the application of the Regulation."

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

<sup>2</sup> OJ L 317, 3.12.2001, p. 1.