



**COUNCIL OF  
THE EUROPEAN UNION**

**Brussels, 28 October 2010**

**15261/10**

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**Interinstitutional File:  
2010/0039 (COD)**

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**LIMITE**

**FRONT 141  
CODEC 1105  
COMIX 680**

**NOTE**

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from: Presidency  
to: Working Party on Frontiers/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) - Recitals**

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Following discussions at the meeting of Working Party on Frontiers/Mixed Committee on 20-21 September 2010, the Presidency has revised the text of the recitals as set out in the Annex, with a view to continue discussions at the meeting of Working Party on Frontiers/Mixed Committee on 29 October 2010. The new changes suggested by the Presidency are underlined.

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)**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Articles 74 and 77 (4~~2~~) (b) and (e~~d~~) thereof,

Having regard to the proposal from the European Commission,

Having regard to the Opinion of the European Economic and Social Committee

After transmission of the proposal to the national Parliaments,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) The development of a forward-looking and comprehensive European migration policy, based on solidarity and responsibility, remains a key policy objective for the European Union.
- (2) Union policy in the field of the external borders aims at an integrated management ensuring a uniform and high level of control and surveillance, which is a necessary corollary to the free movement of persons within the European Union and a fundamental component of an Area of Freedom, Security and Justice. To this end, the establishment of common rules on standards and procedures for the control of the external borders is foreseen.
- (3) The efficient implementation of the common rules calls for increased coordination of the operational cooperation between the Member States.
- (4) This Regulation respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union, notably 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, right to asylum, non-refoulement, non discrimination, the rights of the child and right to an effective remedy. This Regulation should be applied by the Member States in accordance with these rights and principles.

- (5) In 2004 the Council adopted Regulation (EC) No 2007/2004 establishing the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex)<sup>1</sup> hereinafter referred to as the "Agency" which became operational in May 2005.
- (6) Regulation (EC) No 2007/2004 was amended in 2007 by Regulation (EC) No 863/2007 establishing a mechanism for the creation of Rapid Border Intervention Teams<sup>2</sup>.
- (7) Efficient management of the external borders through checks and surveillance contributes to combat illegal immigration and trafficking in human beings and to reduce the threats to the internal security, public policy, public health and international relations of the Member States.
- (8) Border control at the external borders is in the interest not only of the Member State at whose external borders it is carried out but of all Member States which have abolished internal border control.
- (8a) A further enhancement of the role of Frontex is in line with the Union's objective to develop a policy with a view to the gradual introduction of the concept of Integrated Border Management. The Agency should, within the limits of its mandate, support the Member States in implementing this concept as defined in the Council conclusions on Integrated Border Management of 4 December 2006.
- (9) The Multiannual programme for an area of Freedom, Security and Justice serving the citizen adopted by the European Council on 10/11 December 2009 (the Stockholm Programme) calls upon a clarification and enhancement of the role of Frontex regarding the management of the external borders of the European Union.
- (10) The mandate of the Agency should therefore be revised in order to strengthen in particular the operational capabilities of the Agency while ensuring that all measures taken are proportionate to the objectives pursued, are cost effective and fully respect fundamental rights and the rights of refugees and asylum seekers, including in particular the prohibition of *refoulement*.
- (11) Current possibilities for providing effective assistance to the Member States regarding the operational aspects of external border management should be reinforced as concerns the available technical resources; the Agency must be able to plan with sufficient accuracy the coordination of joint operations or pilot projects.
- (12) Minimum levels of necessary technical equipment provided on a compulsory basis by the Member States on the basis of annual bilateral negotiations and agreements and/or the Agency will largely contribute to a better planning and implementation of the envisaged operations coordinated by the Agency.

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<sup>1</sup> OJ L 349, 25.11.2004, p. 1.

<sup>2</sup> OJ L 199, 31.7.2007, p. 30.

- (13) The Agency should manage lists of technical equipment provided by the Member States and by the Agency, by setting up and keeping centralised records in a technical equipment pool. This pool thereby contributing to the "pooling" of material resources. These lists should contain the minimum numbers of categories of technical equipment necessary to enable the Agency to conduct its activities.
- (14) To ensure effective operations, teams of border guards should be set up by the Agency. Member States should contribute to these teams with an appropriate number of skilled border guards and make them available for deployment, unless they are faced with unforeseen situations which prohibit them from doing so.
- (15) The Agency should be able to contribute to those teams with the border guards that are seconded by Member States to the Agency on a semi-permanent basis, which shall be subject, in the exercise of their tasks and powers, to the same legal framework as the guest officers contributed directly to the Teams by Member States. The Agency should adapt its internal rules on seconded national experts to allow for direct instructions by the host state to the border guards during joint operations and pilot projects.
- (16) A well defined operational plan, including an evaluation and an obligation to report incidents, agreed prior to the start of the operations amongst the Agency and the host Member State, in consultation with the participating Member States will largely contribute to the objectives of this Regulation with a more harmonised modus operandi regarding the coordination of operations.
- (17) The incident reporting scheme shall be used by the Agency to transmit, to the relevant public authorities and the Management Board, any information concerning credible allegations of breaches of, in particular, Regulation (EC) No 2007/2004 or the Schengen Borders Code, including fundamental rights, during joint operations and pilot projects.
- [(18) Risk analysis has demonstrated to be a key element for conducting operations at the external borders. Its quality should be improved by adding a method for evaluating the national structures, equipment and resources that Member States have at their disposal.]
- (19) The Agency should provide training, including on fundamental rights, at European level for national instructors of border guards and additional training and seminars related to control and surveillance at the external borders and removal of third-country nationals illegally present in the Member States for officers of the competent national services. The Agency may organise training activities, including an exchange program, in cooperation with Member States on their territory. Member States should integrate the results of the Agency's work in this perspective in the national training programs of their border guards.
- (20) The Agency should monitor and contribute to the developments in scientific research relevant for its field and disseminate this information to the Commission and the Member States.

- (21) In most Member States, the operational aspects of return of third-country nationals illegally present in the Member States fall within the competencies of the authorities responsible for controlling the external borders. As there is a clear added value in performing these tasks at Union level, the Agency should, in full compliance with the Union's return policy, accordingly provide the necessary assistance and coordination for organising joint return operations of Member States and identify best practices on the acquisition of travel documents and define a Code of Conduct to be followed during the removal of third-country nationals illegally present in the territories of the Member States. No Union financial means should be made available for activities and operations that are not carried out in conformity with the Charter of Fundamental Rights.
- (22) For the purpose of fulfilling its mission and to the extent required for the accomplishment of its tasks, the Agency may cooperate with Europol, the European Asylum Support Office, the Fundamental Rights Agency and other European Union Agencies and bodies, the competent authorities of third countries and the international organisations competent in matters covered by Regulation (EC) No 2007/2004 in the framework of working arrangements concluded in accordance with the relevant provisions of the Treaty. The Agency should facilitate the operational cooperation between Member States and third countries in the framework of the external relations policy of the European Union.
- (23) Cooperation with third countries regarding matters covered by Regulation (EC) No 2007/2004 is increasingly important. To establish a solid cooperation model with the relevant competent authorities of third countries the Agency should have the possibility to launch and finance projects of technical assistance and to deploy liaison officers in third countries in full cooperation with the competent authorities of these countries, hereby keeping the Management Board informed of this cooperation. The Agency should have the possibility to invite representatives of third countries to participate in its activities, after having provided the necessary training. Establishing cooperation with third countries is relevant also with regards to promoting the European standards of border management, including the respect of fundamental rights and human dignity.
- (24) In order to ensure open and transparent employment conditions and equal treatment of staff, the Staff Regulations of Officials of the European Communities and the Conditions of Employment of Other Servants of the European Communities ("the Staff Regulations") should apply to the staff and to the Executive Director of the Agency, including the rules of professional secrecy or other equivalent duties of confidentiality.
- (24a) Furthermore, specific provisions should be adopted by the Management Board of the Agency to allow national experts from Member States to be seconded to the Agency. Such provisions should, among others, specify that seconded national border guards to be deployed during joint operations and pilot projects should be considered as guest officers with the tasks and powers set out in Article 10 of Regulation (EC) No 2007/2004.

- (25) Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data<sup>1</sup> applies to the processing of personal data by the Agency. The European Data Protection Supervisor should therefore monitor the processing of personal data by the Agency and have the power to obtain from the Agency access to all information necessary for his or her enquiries.
- (26) As far as the Member States are processing personal data, Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data<sup>2</sup> fully applies.
- (27) When ensuring the operational management of IT systems, the Agency should follow European and international standards taking into account the highest professional requirements.
- (28) Since the objectives of this Regulation, namely the need for creating an integrated management of operational cooperation at the external borders of the Member States of the European Union, cannot be sufficiently achieved by the Member States and can therefore be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve those objectives.
- (29) As regards Iceland and Norway, this Regulation constitutes a development of the Schengen acquis within the meaning of the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the association of those two States with the implementation, application and development of the Schengen acquis, which fall within the area referred to in Article 1, point A of Council Decision 1999/437/EC<sup>3</sup> on certain arrangements for the application of that Agreement. Consequently, delegations of the Republic of Iceland and the Kingdom of Norway should participate as members of the Management Board of the Agency, albeit with limited voting rights.
- (30) As regards Switzerland, this Regulation constitutes a development of the provisions of the Schengen acquis within the meaning of the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen acquis<sup>4</sup>, which fall within the area referred to in Article 1, points A, B and G of Decision 1999/437/EC read in conjunction with Article 3 of Council Decision 2008/146/EC on the conclusion, on behalf of the European Community, of the Agreement. Consequently, delegations of the Swiss Confederation should participate as members of the Management Board of the Agency, albeit with limited voting rights.

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

<sup>2</sup> OJ L 281, 23.11.1995, p. 31.

<sup>3</sup> OJ L 176, 10.7.1999, p. 31.

<sup>4</sup> OJ L 53, 27.2.2008, p. 52.

- (31) As regards Liechtenstein, this Regulation constitutes a development of the provisions of the Schengen acquis within the meaning of the Protocol between the European Union, the European Community, the Swiss Confederation and the Principality of Liechtenstein on the accession of the Principality of Liechtenstein to the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen acquis which fall within the area referred to in Article 1, points A, B and G of Council Decision 1999/437/EC of 17 May 1999 read in conjunction with Article 3 of Council Decision 2008/261/EC<sup>1</sup>.
- (32) Under the Protocol on the position of Denmark, annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union, Denmark does not take part in the adoption by the Council of the measures pursuant to Title V of Part Three of the Treaty on the Functioning of the European Union, with the exception of "measures determining the third countries whose nationals must be in possession of a visa when crossing the external borders of the Member States, or measures relating to a uniform format for visas". This proposal builds on the Schengen acquis, and under Article 4 of the Protocol on the position of Denmark, Denmark shall decide within a period of six months after the Council has decided on a proposal or initiative to build upon the Schengen acquis under the provisions of Title V of Part Three of the Treaty on the Functioning of the European Union whether it will implement this decision in its national law".
- (33) This Regulation constitutes a development of provisions of the Schengen acquis in which the United Kingdom does not take part, in accordance with Council Decision 2000/365/EC of 29 May 2000 concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen acquis<sup>2</sup>. The United Kingdom is therefore not taking part in its adoption and is not bound by it or subject to its application.
- (34) This Regulation constitutes a development of provisions of the Schengen acquis in which Ireland does not take part, in accordance with Council Decision 2002/192/EC of 28 February 2002 concerning Ireland's request to take part in some of the provisions of the Schengen acquis<sup>3</sup>. Ireland is therefore not taking part in its adoption and is not bound by it or subject to its application.
- (35) The Agency should facilitate the organisation of operational actions in which the Member States may avail themselves of the expertise and facilities which Ireland and the United Kingdom may be willing to offer, in accordance with modalities to be decided on a case-by-case basis by the Management Board. To that end, representatives of Ireland and the United Kingdom should be invited to attend all the meetings of the Management Board in order to allow them to participate fully in the deliberations for the preparation of such operational actions.

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<sup>1</sup> OJ L 83, 26.3.2008, p. 3.

<sup>2</sup> OJ L 131, 1.6.2000, p. 43.

<sup>3</sup> OJ L 64, 7.3.2002, p. 20.

- (36) A controversy exists between the Kingdom of Spain and the United Kingdom on the demarcation of the borders of Gibraltar.
- (37) The suspension of the applicability of this Regulation to the borders of Gibraltar does not imply any change in the respective positions of the States concerned,
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