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NOTE

from: Presidency

to: Working Party on Frontiers/Mixed Committee
(EU-Iceland/Liechtenstein/Norway/Switzerland)

No. prev. doc.: 14914/10 FRONT 138 CODEC 1032 COMIX 657

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

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)**

Following the outcome of the SCIFA meeting on 22 October 2010, and with a view to further discussions at the meeting of the Working Party on Frontiers/Mixed Committee on 30 November 2010, the Presidency submits a compromise proposal on Article 4 (Risk analysis), Articles 11 and 13 (Personal data) and Article 33 (2)(a) (Evaluation), as set out in the Annex. 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)

(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 sections of the external borders of the European Union. These studies are without prejudice to the Schengen Evaluation Mechanism.¹

~~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."

¹ The Presidency believes that these provisions need further reflection in parallel with discussions in Sch-Eval WP on the proposal regarding the Sch-Eval mechanism (16664/10 SCH- EVAL 139 SCHENGEN 62 COMIX 771). Article 6 of this proposal (Risk analysis) reads as follows:

1. *By not later than 30 September each year, Frontex shall submit to the Commission a risk analysis taking into account migratory pressure and making recommendations for priorities for evaluations in the next year. The recommendations shall refer to specific sections of the external borders and to specific border crossing-points to be evaluated in the next year under the multiannual programme. The Commission shall make this risk analysis available to the Member States.*
2. *By the same deadline as stated in paragraph 1, Frontex shall submit to the Commission a separate risk analysis making recommendations for priorities for evaluations to be implemented in the form of unannounced on-site visits in the next year. These recommendations may concern any region or specific area and shall contain a list of at least ten specific sections of the external borders and ten specific border crossing-points.*

(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 45/2001¹ 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

"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. It shall develop and operate an information system capable of exchanging classified information with these actors.

¹ OJ L 8, 12.1.2001, p. 1.

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

"Article 11a
Data protection

Regulation (EC) No 45/2001¹ 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 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.

Article 11b)
Processing of personal data in the context of joint return operations

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 to the carrier and the third country to which the person shall be returned.

¹ OJ L 8, 12.1.2001, p. 1.

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 in order to contribute to the security of the external borders of the Member States of the European Union.

2. Such further processing of personal data by the Agency shall be limited to personal data regarding persons who are suspected, 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/EC1.

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

a) they shall be, subject to Article 13 of this Regulation, transmitted to Europol or other European Agencies;

b) they shall be used for the preparation of risk analyses referred to in Article 4.

4. The personal data shall be deleted as soon as it has 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.

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.

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, Euratom¹. 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."

Article 13

Cooperation with European Union agencies and bodies and international organisations

The Agency may cooperate with Europol, the European Asylum Support Office, the Fundamental Rights Agency, other European Union agencies and bodies, and the international organisations competent in matters covered by this Regulation in the framework of working arrangements concluded with those bodies, in accordance with the relevant provisions of the Treaty and the provisions on the competence of those bodies.

Onward transmission or other communication of personal data processed by the Agency to other European Union agencies or bodies shall be subject to specific working agreements regarding the exchange of personal data and subject to the prior approval of the European Data Protection Supervisor.

(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."

¹ OJ L 317, 3.12.2001, p. 1.