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NOTE

from: Presidency
to: Coreper/Mixed Committee
(EU-Iceland/Liechtenstein/Norway/Switzerland)

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 discussions at the JHA Council on 9 June on the basis of doc. 11262/11 and in Coreper on 14 June on the basis of 11475/11 + ADD 1, the outstanding issues on the draft Regulation amending the Frontex Regulation were examined with the European Parliament in a triologue on 16 June 2011.

The outcome of the triologue is set out in the Annex. Both sides undertook to reflect on the basis of the text as it stands following these proceedings.

The Presidency will present this outcome in Coreper on 17 June and invite Coreper to examine how to proceed with a view to finalising negotiations with the European Parliament.

I. Operational capacities of the Agency

1. Seconded border guards, Article 3b(2), contribution in personnel, Article 3b(3) and contribution in equipment: Article 7(3)

Article 3b(3) to read as follows:

"3. 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). [...]. **The contribution by Member States as regards seconding their border guards to the Agency 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 secondment, unless this would seriously affect the discharge of national tasks. In such situations Member States may recall their seconded border guards.

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".

In Article 3b(2), the expression "unforeseen" is changed to "exceptional".

Both sides are reflecting on these proposed changes.

2. Financing of operations, AM 36, Article 3(5) + financing of equipment: AM 71, Article 7(5), + financing of return operations: AM 80, Article 9(1)

The EP could support the Council text if there is agreement on point 1.

3. Co-ownership of technical equipment, Article 7(1)

The EP could support the Council text if there is agreement on point 1.

4. Risk analysis: AM 17, Article 2(c) and AM 65, Article 4

The EP could support the Council text if there is agreement on point 1.

II. Democratic scrutiny

5. **Prior Commission favourable opinion for deployment of liaison officers and working arrangements, AM 96, Article 14(7)**

Article 14(7) reads as follows:

"7. The activities referred to in paragraphs 2 and 6 shall be subject to receiving a prior [...] opinion of the Commission."

The EP can support this text. The EP can withdraw AM 64 and part of AM 94 ("In every case the Agency shall inform the European parliament of any such provisions without delay").

III. Fundamental rights

6. **Fundamental rights strategy, AM 102, Article 26a**

Article 26a(3) to read as follows:

"A Fundamental Rights Officer shall be **designated** by the Management Board of the Agency. He/she shall have the necessary qualifications and experience in the field of fundamental rights. **He/she shall be independent in the performance of his/her duties** as a Fundamental Rights Officer **and** shall report directly [...] to the Management Board and the Consultative Forum. He/she shall report on a regular basis and as such contribute to the mechanism for monitoring fundamental rights."

The EP has indicated it can support this text.

7. **Suspension of joint operations, AM 32, Article 3(1)**

The EP will reflect further on the Presidency text (as set out in doc. 11475/11 ADD 1).

8. Monitoring of return operations, AM 81, Article 9(3)

Article 9(3) to read as follows:

"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 **and to the Fundamental Rights strategy referred to in Article 26a(1)**. The monitoring of joint return operations should be carried out **on the basis of objective and transparent criteria** 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."

The EP has indicated it can support this text.

9. Identifying persons seeking protection in the Article on training, AM 66, Article 5(1)

The EP would withdraw AM 44 on the basis of the solution proposed in the fourth column (doc. 11475/11 ADD 1) in relation to AM 66 and in the context of an overall agreement.

10. Cooperation of the Agency with other relevant organisations, AM 90 and AM 91 ("and other"), Article 13

The EP could withdraw its text on "and other" in the context of an overall agreement.

IV. European Border Guard System

11. European Border Guard System, throughout the text

The EP undertook to reflect on names other than "EU Border Guard System", in particular "European Border Guard Teams" and "European Border Guard Reserve".

There was agreement on the need to examine at technical level how to implement the name in the relevant parts of the text.

The EP could withdraw AM 103 and accept the Council text for Article 33(2a), following an indication from Cion that it would ensure that the feasibility study will be available before the evaluation referred to in Article 33(2a)

V. Other issues

12. **technical and operational assistance, AM 76, Article 8(1)**

The EP could support the Presidency text in doc. 11475/11 ADD 1.

13. **Principles of necessity and proportionality, AM 84 and AM 85, Article 10(6) and (7)**

The EP would reflect on this matter.

14. **Participation of Union agencies and international organisations in Frontex operations, AM 91, Article 13**

15. **Participation of representatives of third countries in Frontex activities, AM 93, Article 14(6)**

In the light of discussions in Coreper on 14 June, the Presidency suggested the following texts:

Article 13:

"The Agency may also, **with the agreement of the Member State(s) concerned**, invite **observers** of European Union agencies and bodies or international organisations to participate in its activities referred to in Articles 3, 4 and 5, **to the extent that their presence is in accordance with the objectives of these activities, may contribute to the improvement of cooperation and the exchange of best practices, and does not affect the overall safety of the activities.** The participation of **those observers** may take place only with the agreement of the Member States concerned regarding the activities referred to in Articles 4 and 5 and only with the agreement of the host Member State regarding those referred to in Article 3. **Detailed rules on the participation of observers shall be included in the operational plan referred to in Article 3a(1)(j). These observers** shall receive the appropriate training from the Agency prior to their participation."

Article 14(6):

6. The Agency may also, **with the agreement of the Member State(s) concerned**, invite **observers** of third countries [...] to participate in its activities referred to in Articles 3, 4 and 5, **to the extent that their presence is in accordance with the objectives of these activities, may contribute to the improvement of cooperation and the exchange of best practices, and does not affect the overall safety of the activities.** The participation of **those observers** may take place only with the agreement of the Member States concerned regarding the activities referred to in Articles 4 and 5 and only with the agreement of the host Member State regarding those referred to in Article 3. **Detailed rules on the participation of observers shall be included in the operational plan referred to in Article 3a(1)(j). These observers** shall receive the appropriate training from the Agency prior to their participation."

The EP could in principle support this text, but invited the Council to consider whether te agreement of member States was needed for each stage of the process.

16. Cooperation with third countries, AM 92, Article 14(1)

The following text was retained:

"The Agency and the Member States shall comply with **EU legislation** also when cooperation with third countries takes place on the territory of those countries."

17. Bilateral agreements, AM 94, Article 14(5)

The EP would reflect on the first two parts of AM 94 ("shall, where appropriate" and "The provisions of those bilateral agreements shall be compatible with the legal framework governing the Agency."). The EP has withdrawn the third part of AM 94 (the last sentence).

VI. Technical issues

18. Legal basis, p. 1

The EP could support change of the legal basis proposed by the Council.

19. Information by Member States for return operations: Article 9(4)

The introductory part of Article 9(4) to read as follows:

"Member States shall **regularly** inform the Agency...."

20. Irregular/illegal

The Presidency referred to Article 79 TFEU and insisted on the expression "illegal immigration" throughout the text. The EP may withdraw its AM on this issue and make a declaration.

21. "Insignia" - AM 83

The EP would reflect on this issue, which is linked with point 11 (the name of the "pool").
