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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)**

I INTRODUCTION

Coreper on 7 June 2011 examined the outstanding questions regarding the above proposal on the basis of doc. 11017/11. Good progress was made on a number of issues, and it was concluded that further political guidance was needed for certain key issues. The JHA Council on 9 June 2011 took note of the state of affairs regarding the proposal and discussed the key issues of secondment of border guards, monitoring of joint return operations and the creation of a border guard pool on the basis of doc. 11262/11. These discussions were very constructive and gave a good basis for further proceedings.

The Presidency has in the light of these proceedings prepared the revised four columns version of the proposal set out in ADD 1 to the present document.

The Presidency invites Coreper to agree that the Council text set out in ADD 1 should be the basis for the Presidency when negotiating with the EP in the next trilogue, scheduled to take place on 21 June. Coreper is for that purpose invited to examine the specific issues set out under II below.

The Presidency aims at reaching agreement with the EP at the trilogue on 21 June on the draft Regulation and at being able to report to the European Council on 24 June that agreement in principle has been reached on all key issues.

II - ISSUES SUBMITTED TO COREPER

1. Temporary secondment of border guards to the Frontex Joint Support Teams (Article 3b(3) - AM 49)

Based on the proceedings in the Council on 9 June, the Presidency proposes the following approach:

a) Article 3b(3) is worded 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). To that effect Member States **shall** contribute by seconding border guards to the Agency as national experts. **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 and may be the subject of particular requirements.**

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."

b) The EP should be invited to recognize this effort regarding Article 3b(3) on the part of the Council and accept the expression "unforeseen situation" in Article 3b(2);

- c) If it is not possible to reach agreement with the EP on the basis indicated under b) regarding Article 3b(2), an alternative approach could be to retain "unforeseen situation" in combination with a clause providing that the Commission within a period of time following the entry into force of the Regulation will present a specific report on the implementation in practice of Article 3b(2) and (3).

Coreper is invited to give guidance on this issue with a view to further discussions with the EP.

2. Monitoring of joint return operations (Article 9(3) - AM 81)

At the Council on 9 June there was a large degree of support for the following approach:

- Only the first sentences of Article 9(3) is retained.
- In Article 9(3), wording is added to the effect that the code of conduct, in addition to paying attention to the obligations set out in Directive 2008/115/EC, also will pay attention to the fundamental rights strategy referred to in Article 26a(1).
- In Recital 21, wording is added to clarify that joint return operations should be monitored in an effective way in accordance with the best practices and highest standards of the Member States.

The Presidency on this basis proposes the following:

- a) Article 9(3) is worded 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).*"

b) Recital 21 is worded as follows:

"(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. *Joint return operations should be monitored in an effective way in accordance with the best practices and highest standards of the Member States.* 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 **ensure the coordination or the organization of** 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."

Coreper is invited to agree on this text as a basis for further discussions with the EP.

3. Creation of a border guard pool

The Presidency has suggested the following model:

- the introduction of the new Article 2 (1) (ea):
"(ea) set up a [name of the "pool"] to be deployed in the form of Rapid Border Intervention Teams as referred to in Article 1 of Regulation 863/2007 or in the form of Frontex Joint Support Teams as referred to in Article 3(2)."
- the respective procedures for deployment of border guards for joint operations and pilot projects on the one hand, and for Rapid intervention teams on the other hand would remain distinct and unchanged;
- the reference to Frontex Joint Support Teams and Rapid Border Intervention Teams respectively is kept throughout the text in conjunction with an addition reflecting the common name of the pool referred to in Article 2 (1) (ea);
- the necessary changes to the text for this purpose are being examined by the Presidency, the European Parliament and the Commission.

The European Parliament would be willing to consider this approach, provided that the name of the common pool suggested by the EP, "EU Border Guard System", would be accepted by the Council. This would imply the withdrawal by the Parliament of all the amendments relating to the "merging" issue (AM 14, 15, 20, 25-33, 35-40, 42, 47-52, 54-56, 58-63, 66-67, 70, 72-73, 78-79, 99). The withdrawal of these amendments would considerably facilitate the task of reaching agreement within the deadline provided by the European Council. It is therefore of the utmost importance to find a solution on this matter.

At its meeting on 9 June, the Council confirmed that it could agree to the Presidency model.

The Council also discussed which could be the name of the "pool". The Presidency in the light of these discussions believes that the expressions "EU" and "system" should not be part of the name, but that delegations otherwise were flexible.

The Presidency proposes to proceed on the basis of the above model and that the Presidency will seek to establish an appropriate name for the "pool" in its negotiations with the EP, avoiding the inclusion of the expressions "EU" and "system", for example "European border guard pool".

Coreper is invited to agree that the Presidency will proceed on this basis.

4. Participation of third countries, EU Agencies and international organisations in Frontex activities (Articles 13 and 14(6) - AM 91 and 93)

At the trilogue on 30 May, the EP indicated that it could accept in the substance the text proposed by the Presidency, subject to confirmation by the Council, but would prefer to have this text in two different provisions: Article 13 (AM 91), concerning cooperation with EU Agencies and bodies and international organizations and Article 14 (AM 93), concerning the operational cooperation with third countries. On this basis, the part of Article 14(6) regarding observers of EU Agencies and bodies and international organizations would be moved to Article 13, as proposed by the EP.

This matter was discussed in Coreper on 7 June. Three delegations could not join the majority and maintained their reservations (ES/FR/IT).

The Presidency on this basis proposes to read the introductory words of Article 13, fourth subparagraph and Article 14(6) as follows:

"The Agency may also, *in consultation with the Member States concerned*, invite...."

This should in the view of the Presidency give a sufficient guarantee that a Member State will not come in a situation where the Agency invites observers and the Member State concerned then may need to refuse their participation.

Coreper is invited to agree on this approach.

5. Reintroduction of Article 8 and change to Article 8(1) (AM 76)

The Commission in its proposal provides for the deletion of Article 8, as it considers this provision to be superfluous in the light of the other provisions of the draft Regulation. The Council agreed to that deletion. However, the EP has insisted on keeping Article 8 and revising Article 8(1) as proposed in AM 76.

At the trilogue on 30 May, the Commission could support the request of the EP.

In the light of discussions in Coreper on 7 June, and based on a suggestion made in Coreper by the Commission, the Presidency has prepared the slightly revised version of Article 8(1) set out in the fourth column in ADD 1 ("...shall *in accordance with Article 3* organise...")

III CONCLUSION

Coreper is invited to agree that the Presidency will continue discussions with the EP on the basis of the Council text set out in the four columns document in ADD1 to the present document, as appropriate with the amendments resulting from discussion in Coreper on the issues set out under II above.