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NOTE

from: Presidency

to: JHA Counsellors /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

The JHA Council/Mixed Committee at its meeting on 11 and 12 April 2011 took note of the state of play regarding the negotiations on the proposal for amending the FRONTEX Regulation.¹ It instructed the relevant bodies of the Council to continue the examination of the proposal with a view to reaching agreement on it by June 2011 in accordance with the Declaration of 11 March 2011 and the Conclusions of 24 and 25 March 2011 of the European Council.

¹ Doc. 8518/11.

As indicated in the state of play, a number of key questions were submitted to SCIFA/Mixed Committee at its meeting on 1 April 2011. An indication was given by delegations regarding temporary secondment of border guards to Frontex as national experts. Regarding financing of technical equipment, it was made clear that all eligible cost of all types of technical equipment used in operations may be financed by the Agency, and it was concluded that the Presidency would prepare a compromise text on that basis.

Coreper/Mixed Committee on 15 April 2011 discussed on the basis of doc. 8861/11 the questions of monitoring in the context of return cooperation, processing of personal data, the involvement of third countries, EU agencies and international organisations in Frontex activities, and certain aspects of financing of technical equipment. The Presidency concluded that there was a high level of convergence as a basis for further work. It was, however, necessary to further develop the text, in particular with regard to Articles 11c and 14(6).

The LIBE Committee of the European Parliament had an orientation vote on 17 March 2011, and endorsed the draft report of the rapporteur, as amended by the vote. This is now the basis for the European Parliament for its negotiations with the Council. The Presidency, the Commission representatives and the EP started discussions on the proposal on 19 April and will continue these discussions on 3 May 2011.

The Working Party on Frontiers, at its meeting on 29 March and 13 and 14 April 2011, discussed all issues related to the draft amendments by the European Parliament resulting from the orientation vote in the LIBE Committee, with a view to establishing the basis for the Presidency for conducting negotiations on the file with the European Parliament. At the meeting on 13 and 14 April most delegations agreed on the approach suggested by the Presidency regarding the introduction of a new Article 26a on the Fundamental Rights Strategy of the Agency. This new provision could serve as a basis in the course of negotiations with the EP as regards Amendment 102 of the EP orientation vote, which refers to the establishment of a Fundamental Rights Advisory Board.

The Presidency hereby submits the questions set out under II below to JHA Counsellors for examination. The relevant provisions of the draft Regulation are set out in the Annex. Proposed changes are set in bold.

II - OUTSTANDING ISSUES SUBMITTED TO JHA COUNSELLORS

The Presidency invites JHA Counsellors to address the following outstanding questions:

A - Financing of technical equipment (Article 7)

Article 7(5) of the original proposal provides that the deployment of the technical equipment which forms part of the minimum number provided by a given Member State for a given year shall be financed by the Agency, whereas the deployment of equipment which does not form part of the minimum number shall be co-financed by the Agency up to a maximum of 60% of the eligible costs.

Several delegations did not support this text of the above provision and claimed that Frontex should finance 100% of the costs of all types of technical equipment, using the argument that full financing would be an incentive for Member States to provide equipment exceeding the minimum number.

The LIBE Committee has voted in favour of an amendment to subparagraph 1 of Article 7(5), aimed at providing for the financing of all types of equipment, without distinction between equipment within and beyond the minimum number.

At the meeting of SCIFA/Mixed Committee on 1 April 2011 most delegations agreed that all eligible costs of technical equipment used in operations may be financed by the Agency including those exceeding the minimum number.

The Presidency calls the attention of delegations to the fact that in the current general EU financial and budgetary framework, technical equipment exceeding the minimum number could in any case only be financed up to a certain level if the budgetary means for the operations concerned would be available. Therefore, 100% financial coverage cannot always be guaranteed. The Presidency would like to highlight that the minimum number should always be established with due care, so that exceeding the minimum number only becomes necessary in exceptional cases. Justified and reasonable planning of the minimum number would facilitate calculating the financial resources needed to operate the dedicated equipment, as well.

In light of the above, the Presidency suggests that the Agency shall finance the deployment of the equipment which forms part of the minimum number of equipment. The eligible costs of the technical equipment exceeding the minimum number may also be financed up to 100%, depending on the budgetary means available regarding the operations concerned.

The Presidency on that basis invites delegations to agree on Article 7 as set out in the Annex.

B - Participation of third countries, EU Agencies and international organizations in Frontex activities (Article 14(6)):

Article 14(6) of the draft Regulation foresees that the Agency may also invite representatives of third countries, other EU agencies and bodies or international organizations to participate in the activities of Frontex, such as joint operations and pilot projects, risk analysis and training (referred to in Articles 3, 4 and 5). Some delegations entered reservations and suggested that the decision to invite other parties should be taken by the Agency in consultation with or with the agreement of the host Member State, or that the scope for such participation should be limited to certain activities. It has also been suggested to provide that the decision to invite third countries should be approved by the Management Board.

In this regard, the Presidency believes that the issues raised by delegations might be addressed in the Operational Plan. The Presidency has therefore suggested to include in Article 14(6) of the draft Regulation a reference to Article 3a(1)(j), which should be amended accordingly.

The LIBE Committee has voted in favour of an amendment providing that the participation of representatives of international organisations in risk analysis activities (referred to in Article 4) and training activities (referred to in Article 5) may take place only with the agreement of the Member States concerned, and in joint operations and pilot projects at external borders (referred to in Article 3) only with the agreement of the host Member State.

At the meeting of Coreper/Mixed Committee on 15 April, most of the delegations agreed with the proposal of the Presidency that the invitation of observers of third countries, other EU agencies and bodies or international organizations to participate in the activities of Frontex might be addressed in the Operational Plan. This was in particular based on the consideration that the Executive Director of the Agency and the host Member State, in consultation with participating Member States, shall agree on the Operational Plan. However, some delegations maintained their reservations insisting that the presence of such observers in joint operations could affect the realisation of the objectives and the overall safety of these activities.

The Presidency, in light of the above, and in order to reach a prompt agreement with the European Parliament, suggests to move towards the line suggested by the European Parliament and state explicitly that the involvement of international organisations, observers of third countries etc. can take place only in agreement with the host Member State. In this way, without the agreement of the Member State on which territory the operation takes place, the third party concerned cannot be involved in the operation. The Presidency also suggests that the text should provide for two additional conditions in order to further guarantee the prerogatives of the host Member State: the participation of a “third party” should contribute to the realisation of the objectives of the operation concerned and should not affect the overall safety of these activities.

The Presidency invites delegations to agree on Articles 3a(1)(j) and 14(6) as set out in the Annex.

C - Fundamental Rights Strategy (new Article 26a)

The LIBE Committee of the EP has suggested a new Article 26a on the establishing of an Advisory Board on Fundamental Rights. In the opinion of the EP, such an Advisory Board should consist of several actors having tasks concerning the monitoring of human rights issues, and should be positioned above the Agency. In the course of the informal contacts with the EP it was confirmed that the creation of such a Board and a mechanism concerning fundamental rights is a key issue for the EP.

At the Working Party on Frontiers meeting on 29 March no delegation could accept the proposal of the EP on the establishment of an Advisory Board on Fundamental Rights. Therefore, the Presidency suggested an approach which to a large extent could meet the concerns of the EP, but which would be based on the Fundamental Rights Strategy of the Agency. This approach would imply an obligation for the Agency to further develop its Fundamental Rights Strategy, to establish a Consultative Forum having competence on advising the Agency in fundamental rights matters, and to appoint a Fundamental Rights Officer. The Working Party expressed its support for these key points, and the Presidency therefore suggested a new Article 26a on Fundamental Rights Strategy.

At the meeting of the Working Party on 14 April, most delegations were in favour of the Presidency's proposal. A few delegations questioned the added value of the appointment of a fundamental right officer.

The LIBE Committee on the other hand informally has insisted on an appointed specialist whose independence should be provided by a selection mechanism.

The Presidency carefully examined the written suggestions made by delegations following the meeting on 14 April, and suggests the revised Article 26a set out in the Annex. The revised Article contains additional text providing that information should be given to the Consultative Forum on decision by the Management Board, and that the Consultative Forum may request information from the Management Board if it is aware of any violation of the fundamental rights.

Since only three delegations opposed the appointment of a Fundamental Rights Officer, the Presidency suggests to keep this in text, with the addition of the new element that this Officer should be selected by an open competition.

Delegations are invited to agree on Article 26a as set out in the Annex.

III - CONCLUSION

The Presidency, in the light of the above, invites JHA Counsellors to examine the questions listed in point II above at its meeting on 29 April 2011. The Presidency aims at reaching a compromise acceptable to both the Council and the European Parliament for the purpose of reaching agreement at first reading by June 2011 in line with the request by the European Council.

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)

"Article 3a

Organisational aspects of joint operations and pilot projects

1. The Executive Director shall draw up an operational plan for activities referred to in Article 3(1). The Executive Director and the host Member State, in consultation with participating Member States, shall agree on the operational plan detailing the organisational aspects in due time before the envisaged beginning of the activity.
The operational plan shall cover all aspects considered necessary for carrying out the joint operation or the pilot project, including the following:
 - (a) a description of the situation, with modus operandi and objectives of the deployment, including the operational aim;
 - (b) the foreseeable duration of the joint operation or pilot projects;
 - (c) the geographical area where the joint operation or pilot project will take place;
 - (d) description of the tasks and special instructions for the guest officers, including on permissible consultation of databases and permissible service weapons, ammunition and equipment in the host Member State;
 - (e) the composition of the teams of guest officers as well as the deployment of other relevant staff;
 - (f) command and control provisions, including the names and ranks of the host Member State's border guards responsible for cooperating with the guest officers and the Agency, in particular those of the border guards who are in command during the period of deployment, and the place of the guest officers in the chain of command;
 - (g) the technical equipment to be deployed during the joint operation or pilot project, including specific requirements such as conditions for use, requested crew, transport and other logistics, and financial provisions;
 - (h1) provisions on immediate incident reporting by the Agency to the Management Board and to relevant national public authorities.

- (h2) a reporting and evaluation scheme containing, benchmarks for the evaluation report and final date of submission of the final evaluation report in accordance with Article 3(4).
 - (i) regarding sea operations, information on the application of the relevant jurisdiction and legislation in the geographical area where the joint operation takes place.
 - (j) **modalities of cooperation with representatives of third countries, other European Union agencies and bodies or international organisations.**
2. Any amendments to or adaptations of the operational plan shall require the agreement of the Executive Director and the host Member State. A copy of the amended or adapted operational plan shall immediately be sent by the Agency to the participating Member States.
3. The Agency shall, as part of its coordinating tasks, ensure the operational implementation of all the organisational aspects, including the presence of a staff member of the Agency, of joint operations and pilot projects referred to in this Article.

Article 7

Technical equipment

1. The Agency may acquire **itself or in co-ownership with a Member State**, or lease technical equipment for external border control to be deployed during joint operations, pilot projects, Rapid Border Intervention Teams, return operations or technical assistance projects in accordance with the financial rules applicable to the Agency. Any acquisition **or leasing** of equipment entailing significant costs to the Agency shall be preceded by a thorough needs and cost/benefit analysis. **Any such expenditure shall be provided for in the Agency's budget as adopted by the Management Board in accordance with Article 29(9).** In case the Agency acquires or leases important technical equipment such as open sea and coastal patrol vessels or vehicles, to be used in joint operations, the following provisions shall apply:

- in case of acquisition **and co-ownership**, the Agency agrees formally with one Member State that the latter will provide for the registration of the equipment **in accordance with the applicable legislation of that Member State.;**
- In case of leasing, the equipment must be registered in a Member State.

Based on a model agreement drawn up by the Agency, the Member State of registration and the Agency shall agree on the terms of use of the equipment. The Member State of registration or the supplier of technical equipment shall provide the necessary experts and technical crew to operate the technical equipment in a legally sound and safe manner.

2. The Agency shall set up and keep centralised records of equipment in a technical equipment pool composed of equipment owned by Member States or by the Agency for external border control purposes. The technical equipment pool shall contain a minimum number per type of technical equipment defined in accordance with paragraph 5 of this Article. The equipment listed in the technical equipment pool shall be deployed during the activities referred to in Articles 3, 8a and 9.

3. Member States shall contribute to the technical equipment pool referred to in paragraph 2. The contribution by Member States to the pool and deployment of the technical equipment for specific operations shall be planned on the basis of annual bilateral negotiations and agreements between the Agency and Member States.

In accordance with these agreements and to the extent that it forms part of the minimum number of equipment for a given year, Member States shall make their technical equipment available for deployment at the request of the Agency, unless they are faced with an unforeseen situation substantially affecting the discharge of national tasks. Such request shall be made at least 45 days before the intended deployment. The contributions to the technical equipment pool shall be reviewed annually.

4. The Agency shall manage the records of the technical equipment pool as follows:

- a) classification by type of equipment and by type of operation;
- b) classification by owner (Member State, Agency, others);
- c) overall numbers of required equipment;
- d) crew requirements if applicable;
- e) other information such registration details, transportation and maintenance requirements, national applicable export regimes, technical instructions, or other relevant information to handle the equipment correctly.

5. The Agency shall finance the deployment of the equipment which forms part of the minimum number of equipment provided by a given Member State for a given year. The deployment of equipment which does not form part of the minimum number of equipment shall be co-financed by the Agency **up to a maximum of 100% of the eligible expenses.**

The rules including the required overall minimum numbers per type of equipment, the conditions for deployment and reimbursement of costs shall be decided in accordance with Article 24 on a yearly basis by the Management Board on a proposal by the Executive Director. For budgetary purposes this decision should be taken by the Management Board by 31 March.

The minimum number of equipment shall be proposed by the Agency in accordance with its needs, notably be able to carry out joint operations, pilot projects and return operations, in accordance with the work programme of the Agency for the year in question.

If the minimum number of equipment proves to be insufficient to carry out the operational plan agreed for joint operations, pilot projects, Rapid Border Intervention Teams or return operations, it shall be revised by the Agency.

6. The Agency shall report on the composition and the deployment of equipment, which is part of the technical equipment pool, to the Management Board on a monthly basis. In case the minimum number of equipment referred to in paragraph 5 is not reached, the Executive Director shall inform the Management Board without delay. The Management Board shall take a decision on the prioritisation of the deployment of the technical equipment urgently and take the appropriate steps to remedy the identified shortcomings. It shall inform the Commission of the identified shortcomings and the steps taken. The Commission may subsequently inform the European Parliament and the Council, together with its own assessment."

Article 14

Facilitation of operational cooperation with third countries and cooperation with competent authorities of third countries

1. In matters covered by its activities and to the extent required for the fulfilment of its tasks, the Agency shall facilitate the operational cooperation between Member States and third countries, in the framework of the European Union external relations policy, including with regard to human rights.
2. The Agency may cooperate with the authorities of third countries competent in matters covered by this Regulation in the framework of working arrangements concluded with these authorities, in accordance with the relevant provisions of the Treaty.
3. The Agency may deploy its liaison officers, which should enjoy the highest possible protection to carry out their duties in third countries. They shall form part of the local or regional cooperation networks of Member States' immigration liaison officers set up pursuant to Council Regulation No 377/2004¹. Liaison officers shall only be deployed to third countries in which border management practices respect minimum human rights standards. Their deployment shall be approved by the Management Board. Within the framework of the European Union external relations policy, priority for deployment should be given to those third countries, which on the basis of risk analysis constitute a country of origin or transit regarding illegal migration. On a reciprocal basis the Agency may receive liaison officers posted by those third countries also, for a limited period of time. The Management Board shall adopt, on a proposal of the Executive Director, the list of priorities on a yearly basis in accordance with the provisions of Article 24.
4. The tasks of the Agency's liaison officers shall include, in compliance with European Union law and in accordance with fundamental rights, the establishment and maintaining of contacts with the competent authorities of the third country to which they are assigned to with a view to contribute to the prevention of and fight against illegal immigration and the return of illegal migrants.
5. The Agency may benefit from Union funding in accordance with the provisions of the relevant instruments supporting the Union's external relations policy. It may launch and finance technical assistance projects in third countries regarding matters covered by this Regulation.
6. The Agency may also **with the agreement of the host Member State** invite observers of third countries, other 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 may contribute to the realisation of the objectives of these activities and does not affect the overall safety of the activities. 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.

¹ OJ L 64, 2.3.2004, p. 1.

7. When concluding bilateral agreements with third countries as referred to in Article 2 (2) Member States may include provisions concerning the role and competencies of the Agency, in particular regarding the exercise of executive powers by members of the teams deployed by the Agency during the activities referred to in Article 3.
8. deleted

Article 26a.

Fundamental Rights Strategy

"1. The Agency shall draw up and further develop and implement its Fundamental Rights Strategy. The Agency shall put in place an effective monitoring mechanism of the respect of fundamental rights during joint operation, rapid border intervention operations and pilot projects.

2. A Consultative Forum shall be established by the Agency with relevant external partners with expertise in fundamental rights. On the proposal of the Executive Director the Management Board shall decide on the composition and the working methods of the Consultative Forum.

The Consultative Forum shall be consulted on the further development and implementation of the Fundamental Rights Strategy, Code of conduct and Common Core Curriculum.

The Consultative Forum shall prepare an annual report of its activities. These reports shall be made publically available.

3. Transmission of information on fundamental rights to the Consultative Forum shall be decided by the Management Board.

4. The Consultative Forum may request the Management Board information regarding case of violation of the fundamental rights.

5. A Fundamental Rights Officer shall be appointed by the Management Board from among the candidates identified in an open competition organised by the Agency. He/she shall be functionally independent in the performance of his/her duties. He/she shall have the necessary qualifications and experience in the field of fundamental rights. He/she 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 monitoring mechanism regarding fundamental rights.

The Fundamental Rights Officer shall have access to all information concerning the respect of fundamental rights, in relation to joint operations, rapid border intervention operations and pilot projects carried out by the Agency. He/she shall be entitled to make proposals to the Agency to terminate an activity conducted by the Agency in cases of violation of fundamental rights and international protection obligations".