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NOTE

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

Subject: **Proposal for the amendment of Frontex Regulation - Presidency's
compromise proposals on LIBE amendments regarding Fundamental Rights
issues and democratic scrutiny**

Following the orientation vote which took place on 17 March 2011, the LIBE Committee has proposed amendments to the proposal for the amendment of Frontex Regulation, some of which refer to Fundamental Rights issues and democratic scrutiny by the EP.

With a view to the meeting of the Working Party on Frontiers/Mixed Committee on 19 May 2011, and for the purpose of further negotiations with the European Parliament at next trilogue on 23 May 2011, the Presidency suggests to deal with those amendments as a package and invites delegations to reflect on the proposals set out in Points I and II below.

I - PACKAGE ON FUNDAMENTAL RIGHTS ISSUES

a-Fundamental Rights Strategy (new Article 26a)

Based on the discussions with the European Parliament, it is clear that the EP amendments regarding fundamental rights issues are of utmost importance for the EP. AM 102, in particular, concerns the establishment of an Advisory Board on Fundamental Rights, with the participation of other Agencies and relevant organizations. During the discussions in the Working Party on Frontiers/Mixed Committee, the majority of delegations was not in favour of this amendment. The Presidency has therefore submitted an alternative text proposal for a new Article 26a on a Fundamental Rights Strategy, providing for an obligation for the Agency to draw up and further develop and implement a Fundamental Rights Strategy, the establishment of a Consultative Forum and the appointment of a Fundamental Rights officer.

Coreper on 11 May 2011 examined the issue of the Fundamental Rights Strategy, based on the revised compromise text of Article 26a proposed by the European Parliament at the trialogue on 3 May 2011, as set out in the Annex to doc. 9766/11.

The majority of delegations had no objections as regards paragraphs 1, 2 and 3 of this text. Some delegations could also support paragraphs 4 and 5. Other delegations expressed concerns regarding the Fundamental Rights officer, in particular as regards the procedures for his/her appointment and the possibility for him/her to propose to terminate an activity of the Agency. Finally, certain delegations favoured the deletion of paragraphs 4 and 5.

In the light of the above, and for the purpose of facilitating the negotiations with the European Parliament also in relation to the other LIBE amendments regarding fundamental rights, the Presidency proposes to further elaborate paragraphs 4 and 5 of Art. 26a, based on the text proposals set out in Annex.

b- Amendment 11 on compliance with Union and international law (Article 1, par.2)

EP Amendment 11 reads as follows:

"The Agency shall fulfil its tasks in full compliance with the relevant Union law, including the Charter of Fundamental Rights of the European Union, international law, including the Convention Relating to the Status of Refugees of 28 July 1951 ("the Geneva Convention"), obligations related to access to international protection, in particular the principle of non-refoulement, and fundamental rights ~~and taking into account the reports and opinions of the Advisory Board on Fundamental Rights referred to in Article 26a.~~"

Based on discussions on 29 March in the Working Party on Frontiers/Mixed Committee, the Presidency proposes to accept this amendment in the context of the negotiations with the European Parliament on the package on Fundamental Rights issues, deleting the reference to the Advisory Board as indicated above.

c-EP Amendment 24 - Code of Conduct (Article 2a)

The JHA Counsellors on 16 May 2011 expressed support for the following compromise text submitted by the EP regarding amendment 24 on the Code of Conduct, with the addition of the last sentence as indicated below:

*"The Agency shall draw up and further develop a Code of Conduct applicable to all operations coordinated by the Agency. The Code of Conduct shall **lay down procedures intended to guarantee the principles of the rule of law and the respect of fundamental rights with particular focus on unaccompanied minors and vulnerable persons, as well as persons seeking international protection**, applicable to all persons participating in Frontex activities.*

The Code of Conduct shall be developed in cooperation with the consultative forum referred to in Article 26a".

The Presidency believes that the flexibility shown in this regard could be an element to be considered in the broader context of the negotiations with the European Parliament.

d- EP Amendment 43 - Reference in the operational plan to international and Union law on interception, rescue at sea and disembarkation (Article 3a par.1 (i))

EP Amendment 43 reads as follows:

Art. 3a par.1 : (i) *regarding sea operations, specific **information on the application of the relevant jurisdiction and legislation in the geographical area where the joint operation takes place, including reference to international and Union law regarding interception, rescue at sea and disembarkation.***

The JHA Counsellors on 29 April 2011 expressed the view that this amendment should be considered in the context of an overall agreement on the Fundamental Rights package. Considering that this amendment simply introduces a reference in the operational plan to international and Union law on interception, rescue at sea and disembarkation, without substantial implications, the Presidency proposes to accept it in the context of the negotiations with the European Parliament on the package on Fundamental Rights issues.

e- EP Amendment 77 - Obligations under international law (new recital 4a)

EP Amendment 77 reads as follows:

Implementation of this Regulation does not affect and fully complies with obligations of Member States under the UN Convention on the Law of the Sea, the International Convention for the Safety of Life at Sea, the International Convention on Maritime Search and Rescue and the Geneva Convention Relating to the Status of Refugees."

The Presidency suggests to have a new recital 4a with the same wording as the EP amendment 77 as suggested by EP as a compromise proposal.

f- EP Amendment 32 - Suspension of Frontex operational activities (Article 3 par.1)

EP Amendment 32 reads as follows:

"The Agency shall suspend joint operations, rapid border intervention missions and pilot projects where fundamental rights or international protection obligations have been violated."

Considering that the majority of delegations is not in favour of this amendment, the Presidency proposes not to accept it in the context of the negotiations with the European Parliament on the package on Fundamental Rights issues.

**g- EP Amendment 35 - Evaluation of Frontex operational activities by Advisory Board
(Article 3 par. 4)**

EP Amendment 35 reads as follows:

4. The Agency shall evaluate the results of the joint operations, *rapid border intervention missions* and pilot projects and transmit the detailed evaluation reports within 60 days following the end of the activity to the Management Board, *together with the observations of the Advisory Board referred to in Article 26a*. The Agency shall make a comprehensive comparative analysis of those results with a view to enhancing the quality, coherence and efficiency of future operations and projects to be included in its general report provided for in Article 20(2)(b). *To ensure that the above-mentioned activities are conducted transparently and evaluated coherently, the observations of the Advisory Board referred to in Article 26a shall also be incorporated in an annual reporting mechanism of the type specified in Article 20(2)(b).*

Considering that an alternative proposal to the amendment regarding the Advisory Board will be submitted to the EP, the Presidency proposes not to accept this amendment in the context of the negotiations with the European Parliament on the package on Fundamental Rights issues.

h- EP Amendment 41 - Reference to independent observers in the operational plan (Article 3a par. 1 (e))

EP Amendment 41 reads as follows:

(e) the composition of the teams of guest officers and of independent observers as referred to in the Code of Conduct;

Considering that the majority of delegations is not in favour of this amendment, the Presidency proposes not to accept it in the context of the negotiations with the European Parliament on the package on Fundamental Rights issues.

i- EP Amendment 44 - Inclusion in the operational plan of guidelines for the identification of persons seeking protection (Article 3a par. 1 (ia))

EP Amendment 44 reads as follows:

(ia) specific measures to ensure respect for fundamental rights, including guidelines for the purpose of identifying persons seeking protection and directing them towards the appropriate facilities.

Considering that there is not sufficient support by delegations is not in favour of this amendment, the Presidency proposes not to accept it in the context of the negotiations with the European Parliament on the package on Fundamental Rights issues.

l- EP Amendment 90 - Cooperation with EU Agencies and bodies and international and other relevant organisations (Article 13)

EP Amendment 90 reads as follows:

*Article 13: Cooperation with European Union agencies and bodies and international **and other relevant** organisations*

The Presidency will ask the European Parliament to clarify the meaning of " and other relevant organisations". If this wording refers to non-governmental organizations (NGOs), the Presidency proposes not to accept this amendment in the context of the negotiations with the European Parliament on the package on Fundamental Rights issues.

m-EP Amendment 91- Obligation for Frontex of cooperation with other organizations (Article 13)

The relevant part of EP Amendment 91 reads as follows:

*"The Agency **shall** cooperate with Europol, the European Asylum Support Office, the Fundamental Rights Agency, other European Union agencies and bodies, and the international **and other** 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.[In every case the Agency shall inform the European Parliament of any such arrangements without delay(..)]*

The majority of delegations is not in favour of the obligation for Frontex to cooperate with other organizations. On this basis, and if the European Parliament clarifies that the wording " and other organisations" refers to non-governmental organizations (NGO), the Presidency proposes not to accept this amendment in the context of the negotiations with the European Parliament on the package on Fundamental Rights issues. Regarding the last sentence, see point q).

II - PACKAGE ON DEMOCRATIC SCRUTINY BY THE EP

n- EP amendment 53- Publication of numbers of border guards (Article 3b par. 6a)

Regarding EP Amendment 53, the EP has proposed the following compromise text which reads as follows:

*"(6a)The Agency shall **inform the EP on an annual basis of the number of border guards that each Member State has committed to the EU Border Guard System in accordance with this Article**".*

The Presidency proposes to accept this amendment in the context of the negotiations with the European Parliament on the package on democratic scrutiny.

o- EP amendment 75- Publication of records of technical equipment (Article 7 par 6a)

Regarding EP Amendment 75, the EP has proposed the following compromise text which reads as follows:

*" 6a The Agency shall **inform the EP on an annual basis on the number of the technical equipment that each Member State has committed to the pool in accordance with this Article**"*

The Presidency proposes to accept this amendment in the context of the negotiations with the European Parliament on the package on democratic scrutiny.

p- EP amendment 64 - submission to the EP of Frontex Risk analysis (Article 4)

EP Amendment 64 reads as follows:

*"It shall prepare both general and tailored risk analyses to be submitted to **the European Parliament, 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 **their** external borders".*

Considering that the majority of delegations is not in favour of this amendment, the Presidency proposes not to accept it in the context of the negotiations with the European Parliament on the package on democratic scrutiny.

q- EP amendment 91 - Information of the EP on working arrangements between Frontex and other EU Agencies and bodies (Article 13)

The relevant part of EP Amendment 91 reads as follows:

"[The Agency shall cooperate with Europol, the European Asylum Support Office, the Fundamental Rights Agency, other European Union agencies and bodies, and the international and other 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.] In every case the Agency shall inform the European Parliament of any such arrangements without delay (.....)

The Presidency proposes to accept the last sentence of this amendment in the context of the negotiations with the European Parliament on the package on democratic scrutiny. See point m) regarding the first part of the text.

r- EP amendment 94 - Information of the EP on bilateral agreements with third countries (Article 14 par. 5)

EP Amendment 94 reads as follows:

*When concluding bilateral agreements with third countries as referred to in Article 2(2) Member States shall, where appropriate, 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. **The provisions of those bilateral agreements shall be compatible with the legal framework governing the Agency. In every case the Agency shall inform the European Parliament of any such provisions without delay.***

As this amendment refers to bilateral agreements concluded by the Member States, the Presidency proposes not to accept this amendment in the context of the negotiations with the European Parliament on the package on democratic scrutiny.

s- EP amendment 96 - Information to the EP on deployment of Frontex ILOs and on working arrangements (Article 14 par. 7)

The relevant part of EP Amendment 96 reads as follows:

*7. [The activities referred to in paragraphs 2 and 6 shall be subject to receiving a prior favourable opinion of the Commission], **and the European Parliament shall be immediately and fully informed.***

The Presidency proposes to accept the relevant part of this amendment in the context of the negotiations with the European Parliament on the package on democratic scrutiny.

"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 mechanism *to monitor* the respect *for* fundamental rights ***in all the activities of the Agency.***

2. A Consultative Forum shall be established by the Agency ***to assist the Director and the Management Board in fundamental rights matters. The Agency shall invite the European Asylum Support Office, the Fundamental Rights Agency, the United Nations High Commissioner for Refugees and other relevant organisation to participate in the Consultative Forum.*** On the proposal of the Executive Director the Management Board shall decide on the composition and the working methods of and the modalities of the transmission of information to 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. *Those* reports shall be made publically available.

3. The Consultative Forum may request the Management Board *to provide* information regarding violations of fundamental rights.

4. A Fundamental Rights Officer shall be appointed by the Management Board ~~from among the candidates identified in an open competition organised by~~ **of** the Agency. He/she shall be ~~functionally~~ independent in the performance of his/her duties **as a Fundamental Rights Officer.** 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 mechanism *for monitoring* fundamental rights.

5. The Fundamental Rights Officer ***and the Consultative Forum*** shall have access to all information concerning respect *for* fundamental rights, in relation to ***all the activities of*** the Agency. ~~***The Fundamental Rights Officer*** shall [...] make proposals to the Agency to terminate an activity conducted by the Agency in cases of violation of fundamental rights and international protection obligations."~~