

Brussels, 29/10/2010
C/2010/7313

Dear President,

The Commission welcomes the opinion issued by the Senate of the Republic of Poland concerning the Commission proposal COM(2010)61.

The Commission takes note of the content of the opinion of the Senate of the Republic of Poland which indicates that the aforementioned Commission proposal is in breach of the subsidiarity principle referred to in Article 5(3) of the Treaty on European Union.

In this context, the Commission would like to clarify that the Commission proposal amends Council Regulation (EC) No 2007/2004 establishing the Frontex Agency, amended in 2007 by Regulation (EC) No 863/2007 of the European Parliament and of the Council establishing a mechanism for the creation of Rapid Border Intervention Teams, which were based on equivalent provisions of the Treaty establishing the European Community, namely, Articles 62(2)(a) and 66.

Article 74 provides that the Council shall adopt measures to ensure administrative cooperation between the relevant departments of the Member States in the areas covered by this Title, as well as between those departments and the Commission.

Article 77(1)(b) and (c) empowers the Union to develop a policy with a view to carrying out checks on persons and efficient monitoring of the crossing of external borders, and the gradual introduction of an integrated management system for external borders.

The Commission firmly believes that the current proposal is within the limits set by these provisions and, in particular, respects the shared competences of the Treaty since Member States remain responsible for controlling their external borders. This proposal notably upholds the principle that, in the context of operations coordinated by the Agency, guest officers may only perform tasks and exercise powers under instructions from and, as a general rule, in the presence of border guards of the host Member State. Decisions to refuse entry in accordance with the Schengen Borders Code shall be taken only by border guards of the host Member State. As a result, no decision-making or executive powers in this regard are transferred to the Frontex Agency.

*Mr Bogdan Borusewicz
Marshal of the Senate
of the Republic of Poland
6 Wiejska str.
00-902 Warsaw*

The objectives of this proposal, while respecting the same fundamental limitations of the existing provisions, are to further develop an integrated management of operational cooperation. These objectives cannot be sufficiently achieved by the Member States.

Finally the Commission would like to provide additional clarifications to the detailed comments raised in the opinion of the Senate of the Polish Republic regarding the amendments proposed to Articles 3, 3a, 3b, 3c and 7, respectively, that:

- the possibility for the Frontex Agency to initiate joint operations already forms part of its current mandate; the launch of a joint operation is always subject to the consent of the host Member State;*
- the operational plan is drawn up by the Executive Director in agreement with the host Member State; without the agreement of the host Member State, the operation cannot be launched;*
- the decision on the profiles and the numbers of the Frontex Joint Support Teams is taken by the Management Board of Frontex in which all Member States are represented; furthermore, a similar provision to this is also found in Regulation (EC) No 863/2007 establishing the Rapid Border Intervention Teams; moreover, a Member State can refuse the deployment of its border guards if the Member State is faced with an exceptional situation affecting the discharge of national tasks; in others words, there is no risk of Frontex operations destabilising the national border protection systems;*
- in case the Agency communicates its views on the instructions given by the host Member States for consideration, the powers of the host Member State remain nevertheless completely intact as it is not obliged to take those views into account; furthermore this provision is similar to the provision which is part of Regulation (EC) No 863/2007 establishing the Rapid Border Intervention Teams;*
- the deployment of technical equipment can only take place after it has been made available by the Member States on mutually agreed terms and conditions; the acquisition or leasing of equipment requires the approval of the Management Board.*

The Commission hopes that these explanations satisfy the expectations of the Senate of the Republic of Poland as expressed in its opinion.

Yours faithfully,

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