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*****I**
REPORT

on the proposal for a regulation of the European Parliament and of 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) (COM(2010)0061 – C7-0045/2010 – 2010/0039(COD))

Committee on Civil Liberties, Justice and Home Affairs

Rapporteur: Simon Busuttil

Symbols for procedures

- * Consultation procedure
- *** Consent procedure
- ***I Ordinary legislative procedure (first reading)
- ***II Ordinary legislative procedure (second reading)
- ***III Ordinary legislative procedure (third reading)

(The type of procedure depends on the legal basis proposed by the draft act.)

Amendments to a draft act

In amendments by Parliament, amendments to draft acts are highlighted in ***bold italics***. Highlighting in *normal italics* is an indication for the relevant departments showing parts of the draft act which may require correction when the final text is prepared – for instance, obvious errors or omissions in a language version. Suggested corrections of this kind are subject to the agreement of the departments concerned.

The heading for any amendment to an existing act that the draft act seeks to amend includes a third line identifying the existing act and a fourth line identifying the provision in that act that Parliament wishes to amend. Passages in an existing act that Parliament wishes to amend, but that the draft act has left unchanged, are highlighted in **bold**. Any deletions that Parliament wishes to make in such passages are indicated thus: [...].

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DRAFT EUROPEAN PARLIAMENT LEGISLATIVE RESOLUTION

**on the proposal for a regulation of the European Parliament and of 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)
(COM(2010)0061 – C7-0045/2010 – 2010/0039(COD))**

(Ordinary legislative procedure: first reading)

The European Parliament,

- having regard to the Commission proposal to Parliament and the Council (COM(2010)0061),
 - having regard to Article 294(2) and Articles 74 and 77(1)(b) and (c) of the Treaty on the Functioning of the European Union, pursuant to which the Commission submitted the proposal to Parliament (C7-0045/2010),
 - having regard to the opinion of the Committee on Legal Affairs on the proposed legal basis,
 - having regard to Article 294(3) of the Treaty on the Functioning of the European Union,
 - having regard to the reasoned opinion submitted, within the framework of the Protocol (No 2) on the application of the principles of subsidiarity and proportionality, by the Polish Senate, asserting that the draft legislative act does not comply with the principle of subsidiarity,
 - having regard to the opinion of the European Economic and Social Committee of 15 July 2010¹,
 - having regard to the undertaking given by the Council representative by letter of 7 July 2011 to approve Parliament's position, in accordance with Article 294(4) of the Treaty on the Functioning of the European Union,
 - having regard to Rule 55 of its Rules of Procedure,
 - having regard to the report of the Committee on Civil Liberties, Justice and Home Affairs and the opinion of the Committee on Foreign Affairs (A7-0278/2011),
1. Adopts its position at first reading hereinafter set out;
 2. Approves its statement annexed to this resolution;
 3. Calls on the Commission to refer the matter to Parliament again if it intends to amend its proposal substantially or replace it with another text;

¹ Not yet published in the Official Journal.

4. Instructs its President to forward its position to the Council, the Commission and the national parliaments.

AMENDMENTS BY PARLIAMENT*

to the Commission proposal

Regulation of the European Parliament and of 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)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Articles 74 and 77(2)(b) *and* (d) thereof,

Having regard to the proposal from the European Commission,

Having regard to the Opinion of the European Economic and Social Committee,

After transmission of the draft legislative act to the national parliaments,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) The development of a forward-looking and comprehensive European migration policy, based on *human rights*, solidarity and responsibility, *especially for those Member States facing specific or disproportionate pressures*, remains a key policy objective for the Union.
- (2) Union policy in the field of the external borders aims at an integrated management ensuring a uniform and high level of control and surveillance, which is a necessary corollary to the free movement of persons within the Union and a fundamental component of an Area of Freedom, Security and Justice. To this end, the establishment of common rules on standards and procedures for the control of the external borders is contemplated.

* Amendments: new or amended text is highlighted in bold italics; deletions are indicated by the symbol **■**.

- (3) The efficient implementation of the common rules calls for increased coordination of the operational cooperation between the Member States.
- (4) This Regulation respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union, notably the right to human dignity, the prohibition of torture and of inhuman or degrading treatment or punishment, the right to liberty and security, the right to the protection of personal data, right to asylum, non-refoulement, non discrimination, the rights of the child and right to an effective remedy. This Regulation should be applied by the Member States in accordance with those rights and principles. ***Any use of force should be in accordance with the national law of the host Member State, including the principles of necessity and proportionality.***
- (4a) The implementation of this Regulation should not affect the rights or 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 or the Geneva Convention Relating to the Status of Refugees.***
- (5) In 2004 the Council adopted Regulation (EC) No 2007/2004 establishing the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex)¹ (hereinafter referred to as the "Agency") which became operational in May 2005.
- (6) Regulation (EC) No 2007/2004 was amended in 2007 by Regulation (EC) No 863/2007 establishing a mechanism for the creation of Rapid Border Intervention Teams².
- (7) Efficient management of the external borders through checks and surveillance contributes to combat illegal immigration and trafficking in human beings and to reduce the threats to the internal security, public policy, public health and international relations of the Member States.
- (8) Border control at the external borders is in the interests not only of the Member State at whose external borders it is carried out, but also of all Member States which have abolished internal border controls.
- (8a) A further enhancement of the role of the Agency is in line with the Union's objective to develop a policy with a view to the gradual introduction of the concept of Integrated Border Management. The Agency should, within the limits of its mandate, support the Member States in implementing this concept as defined in the Council conclusions on Integrated Border Management of 4 December 2006.***
- (9) The Multiannual Programme for an area of Freedom, Security and Justice serving the citizen adopted by the European Council on 10/11 December 2009 (the Stockholm Programme) calls for a clarification and enhancement of the role of ***the Agency*** regarding the management of the external borders of the European Union.

¹ OJ L 349, 25.11.2004, p. 1.

² OJ L 199, 31.7.2007, p. 30.

- (10) The mandate of the Agency should therefore be revised in order to strengthen in particular its operational capabilities while ensuring that all measures taken are proportionate to the objectives pursued, *are effective* and fully respect fundamental rights and the rights of refugees and asylum seekers, including in particular the prohibition of *refoulement*.
- (11) Current possibilities for providing effective assistance to the Member States regarding the operational aspects of external border management should be reinforced in terms of the available technical resources; the Agency must be able to plan with sufficient accuracy the coordination of joint operations or pilot projects.
- (12) Minimum levels of necessary technical equipment provided on a compulsory basis by the Member States *on the basis of annual bilateral negotiations and agreements* and/or the Agency will largely contribute to a better planning and implementation of the envisaged operations coordinated by the Agency.
- (13) The Agency should manage lists of technical equipment *owned either* by the Member States *or* by the Agency *and equipment co-owned by the Member States and the Agency, by setting up and keeping centralised records in a technical equipment pool. This pool* should contain the minimum numbers of categories of technical equipment necessary to enable the Agency to conduct its activities.
- (14) To ensure effective operations, *teams of border guards should be set up by the Agency. Member States should contribute to these teams with* an appropriate number of skilled border guards *and make them available for deployment, unless they are faced with exceptional situations substantially affecting the discharge of national tasks.*
- (15) The Agency should be able to contribute to those teams with *the* border guards *that are* seconded by Member States to the Agency on a semi-permanent basis, which shall be subject, in the exercise of their tasks and powers, to the same legal framework as the guest officers contributed directly to the teams by Member States. The Agency should adapt its internal rules on seconded national experts to allow for direct instructions by the host Member State to the border guards during joint operations and pilot projects.
- (16) A well-defined operational plan, including an evaluation and an obligation to report incidents, agreed prior to the start of the operations amongst *the Agency and the host Member State, in consultation with the* participating Member States and the Agency, will largely contribute to the objectives of this Regulation with a more harmonised modus operandi regarding the coordination of operations.
- (17) The incident reporting scheme should be used by the Agency to transmit to the relevant public authorities and to the Management Board any information concerning credible allegations of breaches of, in particular, Regulation (EC) No 2007/2004 or the Schengen Borders Code¹, including fundamental rights, during joint operations, pilot projects *and rapid interventions.*

¹ OJ L 105, 13.4.2006, p. 1.

- (18) Risk analysis has been demonstrated to be a key element for conducting operations at the external borders. Its quality should be improved by adding a method for *assessing the capacity of Member States to face upcoming challenges, including present and future threats and pressures at the external borders of the Member States. However, these assessments should be without prejudice to the Schengen Evaluation Mechanism.*
- (19) The Agency should provide training, including on fundamental rights, *international protection and access to asylum procedures*, at European level for national instructors of border guards and additional training and seminars related to control and surveillance at the external borders and removal of third-country nationals illegally present in the Member States for officers of the competent national services. The Agency may organise training activities, *including an exchange programme*, in cooperation with Member States on their territory. Member States should integrate the results of the Agency's work in that perspective in the national training programmes of their border guards.
- (20) The Agency should monitor and contribute to the developments in scientific research relevant to its field of activity and disseminate that information to the Commission and the Member States.
- (21) In most Member States, the operational aspects of the return of third-country nationals illegally present in the Member States fall within the competence of the authorities responsible for controlling the external borders. 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 organisation of* the 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 or operations that are not carried out in conformity with the Charter of Fundamental Rights.
- (22) For the purpose of fulfilling its mission and to the extent required for the accomplishment of its tasks, the Agency may cooperate with Europol, the European Asylum Support Office, the Fundamental Rights Agency and other European Union agencies and bodies, the competent authorities of third countries and the international organisations competent in matters covered by Regulation (EC) No 2007/2004 within the framework of working arrangements concluded in accordance with the relevant provisions of the Treaty. The Agency should facilitate operational cooperation between Member States and third countries within the framework of the external relations policy of the Union.
- (23) Cooperation with third countries regarding matters covered by Regulation (EC) No 2007/2004 is increasingly important. To establish a solid cooperation model with relevant third countries, the Agency should be able to launch and finance projects of technical assistance and to deploy liaison officers in third countries *in cooperation with the competent authorities of those countries*. The Agency should be able to invite representatives of third countries to participate in its activities, after having provided the

necessary training. Establishing cooperation with third countries is also relevant with regard to promoting Union standards of border management, including respect for fundamental rights and human dignity.

- (24) In order to ensure open and transparent employment conditions and equal treatment of staff, the Staff Regulations of Officials of the European Communities and the Conditions of Employment of Other Servants of the European Communities ("the Staff Regulations") should apply to the staff and to the Executive Director of the Agency, including the rules of professional secrecy or other equivalent duties of confidentiality.
- (24a) Furthermore, specific provisions should be adopted by the Management Board of the Agency to allow national experts from Member States to be seconded to the Agency. Such provisions should, among others, specify that seconded national border guards to be deployed during joint operations, pilot projects and rapid interventions should be considered as guest officers with the corresponding tasks and powers.**
- (25) Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data¹ applies to the processing of personal data by the Agency. The European Data Protection Supervisor should therefore monitor the processing of personal data by the Agency and have the power to obtain from the Agency access to all information necessary for his or her enquiries.
- (26) In so far as the Member States are processing personal data, Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data² applies in full.
- (27) When ensuring the operational management of IT systems, the Agency should follow European and international standards, **including on data protection**, taking into account the highest professional requirements.
- (28) Since the **objective** of this Regulation, namely **to contribute to the creation of** an integrated management of operational cooperation at the external borders of the Member States of the European Union, cannot be sufficiently achieved by the Member States and can therefore be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve **that objective**.
- (29) As regards Iceland and Norway, this Regulation constitutes a development of the Schengen acquis within the meaning of the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the association of those two States with the implementation, application and

¹ OJ L 8, 12.1.2001, p. 1.

² OJ L 281, 23.11.1995, p. 31.

development of the Schengen acquis, which fall within the area referred to in Article 1, point A of Council Decision 1999/437/EC¹ on certain arrangements for the application of that Agreement. Consequently, delegations of the Republic of Iceland and the Kingdom of Norway should participate as members of the Management Board of the Agency, albeit with limited voting rights.

- (30) As regards Switzerland, this Regulation constitutes a development of the provisions of the Schengen acquis within the meaning of the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen acquis², which fall within the area referred to in Article 1, points A, B and G of Decision 1999/437/EC read in conjunction with Article 3 of Council Decision 2008/146/EC on the conclusion, on behalf of the European Community, of the Agreement. ***Consequently, delegations of the Swiss Confederation should participate as members of the Management Board of the Agency, albeit with limited voting rights.***
- (31) As regards Liechtenstein, this Regulation constitutes a development of the provisions of the Schengen acquis within the meaning of the Protocol between the European Union, the European Community, the Swiss Confederation and the Principality of Liechtenstein on the accession of the Principality of Liechtenstein to the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen acquis which fall within the area referred to in Article 1, points A, B and G of Council Decision 1999/437/EC of 17 May 1999 read in conjunction with Article 3 of Council Decision 2011/350/EU³ ***on the conclusion, on behalf of the Union, of the Protocol. Consequently, delegations of the Principality of Liechtenstein should participate as members of the Management Board of the Agency, albeit with limited voting rights.***
- (32) Under the Protocol on the position of Denmark, annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union, Denmark does not take part in the adoption by the Council of the measures pursuant to Title V of Part Three of the Treaty on the Functioning of the European Union, with the exception of “measures determining the third countries whose nationals must be in possession of a visa when crossing the external borders of the Member States, or measures relating to a uniform format for visas”. This proposal builds on the Schengen acquis, and under Article 4 of the Protocol on the position of Denmark, Denmark shall decide within a period of six months after the Council has decided on a proposal or initiative to build upon the Schengen acquis under the provisions of Title V of Part Three of the Treaty on the Functioning of the European Union whether it will implement this decision in its national law.
- (33) This Regulation constitutes a development of provisions of the Schengen acquis in which the United Kingdom does not take part, in accordance with Council Decision

¹ OJ L 176, 10.7.1999, p. 31.

² OJ L 53, 27.2.2008, p. 52.

³ OJ L 160, 18.6.2011, p. 19.

2000/365/EC of 29 May 2000 concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen acquis¹. The United Kingdom is therefore not taking part in its adoption and is not bound by it or subject to its application.

- (34) This Regulation constitutes a development of provisions of the Schengen acquis in which Ireland does not take part, in accordance with Council Decision 2002/192/EC of 28 February 2002 concerning Ireland's request to take part in some of the provisions of the Schengen acquis². Ireland is therefore not taking part in its adoption and is not bound by it or subject to its application.
- (35) The Agency should facilitate the organisation of operational actions in which the Member States may avail themselves of the expertise and facilities which Ireland and the United Kingdom may be willing to offer, in accordance with modalities to be decided on a case-by-case basis by the Management Board. To that end, representatives of Ireland and the United Kingdom should be invited to attend all the meetings of the Management Board in order to allow them to participate fully in the deliberations for the preparation of such operational actions.
- (36) A controversy exists between the Kingdom of Spain and the United Kingdom on the demarcation of the borders of Gibraltar.
- (37) The suspension of the applicability of this Regulation to the borders of Gibraltar does not imply any change in the respective positions of the States concerned,

HAVE ADOPTED THIS REGULATION:

Article 1
Amendment

Regulation (EC) No 2007/2004 is amended as follows:

- (1) In Article 1, paragraph 2 is replaced by the following:

"2. While considering that the responsibility for the control and surveillance of external borders lies with the Member States, the Agency, ***as a body of the Union as defined in Article 15 and in accordance with Article 19***, shall facilitate and render more effective the application of existing and future Union measures relating to the management of external borders, in particular the Schengen Borders Code³. It shall do so by ensuring the coordination of Member States' actions in the implementation of those measures, thereby contributing to an efficient, high and uniform level of control on persons and surveillance of the external borders of the Member States.

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

¹ OJ L 131, 1.6.2000, p. 43.

² OJ L 64, 7.3.2002, p. 20.

³ OJ L 105 13.4.2006, p. 1.

("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 of the Consultative Forum referred to in Article 26a."

(1a) *In Article 1, paragraph 3 is replaced by the following:*

"3. The Agency shall also provide the Commission and the Member States with the necessary technical support and expertise in the management of the external borders and promote solidarity between Member States, especially those facing specific and disproportionate pressures."

(2) Article 1a is amended as follows:

(a) *the following point is inserted:*

"1a. "European Border Guard Teams" means for the purpose of Article 3, Article 3b, Article 3c, Article 8 and Article 17 teams to be deployed during joint operations and pilot projects; for the purpose of Articles 8a to 8g teams to be deployed for rapid border interventions (hereinafter referred to as "rapid interventions") within the meaning of Regulation (EC) No 863/2007 and for the purpose of points (ea) and (g) of Article 2(1) and Article 5 teams to be deployed during joint operations, pilot projects and rapid interventions;"

(aa) point 2 is replaced by the following:

"2. "host Member State" means a Member State in which a rapid intervention, a joint operation or a pilot project takes place or from which it is launched;"

(b) point 4 is replaced by the following:

*"4. "members of the teams" means border guards of Member States serving with the **European Border Guard Teams** other than those of the host Member State;"*

(c) *point 5 is replaced by the following:*

"5. "requesting Member State" means a Member State whose competent authorities request the Agency to deploy rapid interventions on its territory;"

(3) Article 2 is amended as follows:

(a) paragraph 1 is amended as follows:

(i) points (c) and (d) are replaced by the following:

*"(c) carry out risk analyses, including the **assessment** of the capacity of Member States to face threats and pressure at the external borders;*

(d) participate in the development of research relevant for the control and surveillance of external borders;"

(ia) *the following point is inserted:*

"(da) assist Member States in circumstances requiring increased technical and operational assistance at the external borders, taking into account that some situations may involve humanitarian emergencies and rescue at sea;"

(ib) *point (e) is replaced by the following:*

"(e) assist Member States in circumstances requiring increased technical and operational assistance at external borders, especially those Member States facing specific and disproportionate pressures;"

(ic) *the following point is inserted:*

"(ea) set up European Border Guard Teams that are to be deployed during joint operations, pilot projects and rapid interventions;"

(ii) point (f) is replaced by the following:

"(f) provide Member States with the necessary support, including, upon request, coordination *or organisation of* joint return operations;"

(iia) *point (g) is replaced by the following:*

"(g) deploy border guards from the European Border Guard Teams to Member States in joint operations, pilot projects or in rapid interventions in accordance with Regulation (EC) No 863/2007;"

(iii) the following points **■** are added:

"(h) develop and operate, *in accordance with Regulation (EC) No 45/2001*, information systems that enable swift and reliable exchanges of information regarding emerging risks at the external borders, including the Information and Coordination Network established by Council Decision 2005/267/EC*;

(i) provide the necessary assistance to the development and operation of a European border surveillance system and, as appropriate, to the development of a common information sharing environment, including interoperability of systems.

OJ L 83, 1.4.2005, p. 48."

(b) the following paragraph **■** is inserted:

"1a. In accordance with Union and international law, no person shall be disembarked in, or otherwise handed over to the authorities of, a country in contravention of the principle of non-refoulement, or from which there is a risk of expulsion or return to another country in contravention of that principle. The special needs of children, victims of trafficking, persons in need of medical assistance, persons in need of international protection and other vulnerable persons shall be addressed in accordance with Union and international law."

(c) in paragraph 2 the last subparagraph is replaced by the following:

"Member States shall report to the Agency on these operational matters at the external borders outside the framework of the Agency. The Executive Director shall inform the Management Board on these matters on a regular basis and at least once a year."

(3a) **The following article is inserted:**

"Article 2a

Code of Conduct

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 respect for fundamental rights with particular focus on unaccompanied minors and vulnerable persons, as well as persons seeking international protection, applicable to all persons participating in the activities of the Agency.

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

(4) Article 3 is replaced by the following:

"Article 3

Joint operations and pilot projects at the external borders

1. The Agency shall evaluate, approve and coordinate proposals for joint operations and pilot projects made by Member States, including the requests of Member States related to circumstances requiring increased technical and operational assistance, **especially in cases of specific and disproportionate pressures.**

The Agency may itself initiate **and carry out** joint operations and pilot projects in cooperation with **the** Member States **concerned and in agreement with the host Member States.**

It may also decide to put its technical equipment at the disposal of Member States participating in the joint operations or pilot projects.

Joint operations and pilot projects should be preceded by a thorough risk analysis.

1a. The Agency may also terminate, *after informing the Member State concerned*, joint operations and pilot projects if the conditions to conduct these initiatives are no longer fulfilled.

Participating Member States may request the Agency to terminate a joint operation or pilot project.

The home Member State shall provide for appropriate disciplinary or other measures in accordance with their law in case of violations of fundamental rights or international protection obligations in the course of such activities.

The Executive Director of the Agency shall suspend or terminate, in whole or in part, joint operations and pilot projects if he/she considers that violations concerned are of a serious nature or are likely to persist.

2. The Agency shall constitute a pool of border guards called ***European Border Guard Teams*** in accordance with the provisions of Article 3b, for possible deployment during joint operations and pilot projects referred to in paragraph 1. It shall decide on the deployment of human resources and technical equipment in accordance with Articles 3a and 7.

3. The Agency may operate through its specialised branches provided for in Article 16 for the practical organisation of joint operations and pilot projects.

4. The Agency shall evaluate the results of the joint operations 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 Fundamental Rights Officer 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 ***effectiveness*** of future operations and projects to be included in its general report provided for in Article 20(2)(b).

5. The Agency ***shall*** finance or co-finance the joint operations and pilot projects referred to in paragraph 1, with grants from its budget in accordance with the financial rules applicable to the Agency.

5a. Paragraphs 1a and 5 shall apply also to rapid interventions."

(5) The following Articles are inserted:

"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;
- (ga) *detailed provisions on immediate incident reporting by the Agency to the Management Board and to relevant national public authorities*;
- (h) 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, 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*;
- (j) *modalities of cooperation with third countries, other 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 *during the* joint operations and pilot projects referred to in this Article.

Article 3b

Composition and deployment of *European Border Guard Teams*

1. On a proposal by the Executive Director, the Management Board shall decide by an absolute majority of its members with a right to vote on the profiles and the overall number of border guards to be made available for the *European Border Guard Teams*. The same procedure shall apply with regard to any subsequent changes in the profiles and the overall numbers. Member States shall contribute to the *European Border Guard Teams* via a national pool on the basis of the various defined profiles by nominating border guards corresponding to the required profiles.

2. *The contribution by Member States as regards their border guards to specific operations 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 deployment at the request of the Agency, unless they are faced with an exceptional situation substantially affecting the discharge of national tasks. Such a request shall be made at least **45** days before the intended deployment. The autonomy of the home Member State in relation to the selection of staff and the duration of their deployment shall remain unaffected.

3. The Agency shall also contribute to the *European Border Guard 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 the secondment of 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 the "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.

4. Members of the *European Border Guard Teams* shall, in the performance of their tasks and in the exercise of their powers, fully respect fundamental rights, *including access to asylum procedures*, and human dignity. Any measures taken in the performance of their tasks and in the exercise of their powers shall be proportionate to

the objectives pursued by such measures. While performing their tasks and exercising their powers, **they** shall not discriminate against persons on grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

5. In accordance with Article 8g, the Agency **shall** nominate a coordinating officer for each joint operation or pilot project where members **of the European Border Guard Teams** will be deployed.

The role of the coordinating officer shall be to foster cooperation and coordination amongst host and participating Member States.

6. The Agency shall meet the costs incurred by the Member States in making their border guards available pursuant to paragraph 1 for the **European Border Guard Teams** in accordance with Article 8h.

6a. The Agency shall inform the European Parliament on an annual basis of the number of border guards that each Member State has committed to the European Border Guard Teams in accordance with this Article.

Article 3c

Instructions to the **European Border Guard Teams**

1. During deployment of **European Border Guard Teams**, instructions to the teams shall be issued by the host Member State in accordance with the operational plan referred to in Article 3a (1).

2. The Agency, via its coordinating officer as referred to in Article 3b (5), may communicate its views on those instructions to the host Member State. If it does so, the host Member State shall take those views into consideration.

3. In accordance with Article 8g, the host Member State shall give the coordinating officer all necessary assistance, including full access to the **European Border Guard Teams** at all times throughout the deployment.

4. Members of the **European Border Guard Teams** shall, while performing their tasks and exercising their powers, remain subject to the disciplinary measures of their home Member State."

(6) Article 4 is replaced by the following:

"Article 4

Risk analysis

The Agency shall develop and apply a common integrated risk analysis model.

It shall prepare both general and tailored risk analyses to be submitted to the Council and the Commission.

█

For the purpose of risk analysis, the Agency may assess, after prior consultation with the Member State(s) concerned, their capacity █ to face upcoming challenges, including present and future threats and pressures at the external borders of the Member States, especially for those Member States facing specific and disproportionate pressures. To this end the Agency may assess the equipment and the resources of the Member States regarding border control. The assessment shall be based on information given by the Member State(s) concerned, and on the reports and results of joint operations, pilot projects, rapid interventions and other activities of the Agency. Those assessments are without prejudice to the Schengen Evaluation Mechanism.

The results of those *assessments* shall be presented █ to the Management Board of the Agency.

For those purposes Member States shall provide the Agency with all necessary information regarding the situation and possible threats at the external borders.

The Agency shall incorporate the results of a common integrated risk analysis model in its development of the common core curricula for the border guards' training referred to in Article 5."

(7) Article 5 is amended as follows:

(a) *the following paragraphs are inserted before the first paragraph:*

"The Agency shall provide border guards who are members of the European Border Guard Teams with advanced training relevant to their tasks and powers and shall conduct regular exercises with those border guards in accordance with the advanced training and exercise schedule referred to in the annual work programme of the Agency.

The Agency shall also take the necessary initiatives to ensure that all border guards and other personnel of the Member States who participate in the European Border Guard Teams, as well as the staff of the Agency, shall, prior to their participation in operational activities organised by the Agency, have received training in relevant Union and international law, including fundamental rights and access to international protection and guidelines for the purpose of identifying persons seeking protection and directing them towards the appropriate facilities."

(b) the first paragraph is replaced by the following:

"The Agency shall establish and further develop common core curricula for border guards' training and provide training at European level for instructors of the national border guards of Member States, including with regard to fundamental rights and access to international protection and relevant maritime law.

The common core curricula shall be drawn up after consultation of the Consultative Forum referred to in Article 26a.

Member States shall integrate the common core curricula in the training of their national border guards."

(c) *the following paragraph is inserted after the last paragraph:*

"The Agency shall establish an exchange programme enabling national border guards participating in the European Border Guard Teams to acquire knowledge or specific know-how from experiences and good practices abroad by working with border guards in a Member State other than their own."

(8) Articles 6 and 7 are replaced by the following:

"Article 6

Monitor and contribution to research

The Agency shall **proactively** monitor and contribute to the developments in research relevant for the control and surveillance of the external borders and disseminate this information to the Commission and the Member States.

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 interventions**, 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)**. Where the Agency acquires or leases major 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.

On the basis of a model agreement drawn up by the Agency, the Member State of registration and the Agency shall agree on modalities ensuring the periods of full availability of the co-owned assets for the Agency, as well as 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 *either* by *the* Member States or by the Agency *and equipment co-owned by the Member States and 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 those 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 exceptional situation substantially affecting the discharge of national tasks. *Such requests 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, other);
- (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, *taking into account the particular circumstances of the Member States deploying such equipment.*

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 that 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, *rapid interventions* 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 interventions or return operations, it shall be revised by the Agency on the basis of justified needs and of an agreement between the Agency and the Member States.

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. Where 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 *shall* subsequently inform the European Parliament and the Council, together with its own assessment.

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

(9) Article 8 is *amended as follows:*

(a) *paragraph 1 is replaced by the following:*

"1. Without prejudice to Article 78(3) of the Treaty on the Functioning of the European Union, one or more Member States facing specific and disproportionate pressures and confronted with circumstances requiring increased technical and operational assistance when implementing their obligations with regard to control and surveillance of external borders may request the Agency for assistance. The Agency shall in accordance with Article 3 organise the appropriate technical and operational assistance for the requesting Member State(s)."

(b) *in paragraph 2 the following point is added:*

“(ba) deploy border guards from the European Border Guard Teams.”

(c) *paragraph 3 is replaced by the following:*

"3. The Agency may acquire technical equipment for checks and surveillance of external borders to be used by its experts and within the framework of rapid interventions for their duration."

(9a) *Article 8a is replaced by the following:*

"Article 8a

Rapid Interventions

At the request of a Member State faced with a situation of urgent and exceptional pressure, especially the arrival at points of the external borders of large numbers of third-country nationals trying to enter the territory of that Member State illegally, the Agency may deploy for a limited period one or more European Border Guard Teams (hereinafter referred to as "team(s)") on the territory of the requesting Member State for the appropriate duration in accordance with Article 4 of Regulation (EC) No 863/2007."

(9b) *In Article 8d, paragraph 5 is replaced by the following:*

"5. If the Executive Director decides to deploy one or more teams, an operational plan shall immediately, and in any event no later than 5 working days of the date of the decision, be drawn up by the Agency and the requesting Member State in accordance with Article 8e."

(10) In Article 8e, paragraph 1 is amended as follows:

(a) points (e), (f) and (g) are replaced by the following:

"(e) composition of the teams, 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 *teams* in particular those of the border guards who are in command of the teams during the period of deployment, and the place of the teams in the chain of command;

(g) the technical equipment to be deployed together with the teams, including specific requirements such as conditions for use, requested crew, transport and other logistics, and financial provisions."

(b) the following points *are* added:

"(h) detailed provisions on immediate incident reporting by the Agency to the Management Board and to relevant national public authorities;

(i) 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).

(j) regarding sea operations, *information on the application of the relevant jurisdiction and legislation in the geographical area where the joint operation takes place including references to international and Union law regarding interception, rescue at sea and disembarkation;*

(k) *modalities of cooperation with third countries, other Union agencies and bodies or international organisations.*"

(11) In Article 8h(1), *the introductory part* is replaced by the following:

"1. The Agency shall fully meet the following costs incurred by Member States in making available their border guards for the purposes mentioned in Article 3(2), Article 8a and Article 8c:"

(12) Article 9 is replaced by the following:

"Article 9

Return cooperation

1. Subject to the return policy of the Union, and in particular Directive 2008/115/EC*, *and without entering into the merits of return decisions*, the Agency shall provide the necessary assistance, and at the request of the participating Member States ensure the coordination *or the organisation of* joint return operations of Member States, *including through the chartering of aircraft for the purpose of such operations*. The Agency *shall* finance or co-finance the operations and projects referred to in this paragraph with grants from its budget in accordance with the financial rules applicable to the Agency. The Agency may also use ■ financial means *of the Union* available in the field of return. The Agency shall ensure that in its grant agreements with Member States any financial support is conditional upon the full respect for the Charter of Fundamental Rights.

2. The Agency shall develop a Code of Conduct for the return of illegally present third-country nationals ■ which shall apply during all joint return operations coordinated by the Agency, describing common standardized procedures which should simplify the organisation of joint return *operations* and assure return in a humane manner and with full respect for fundamental rights, in particular the principles of human dignity, prohibition of torture and of inhuman or degrading treatment or punishment, right to liberty and security, the rights to the protection of personal data and non discrimination.

3. The Code of Conduct shall 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 shall be carried out *on the basis of objective and transparent criteria* and cover the whole joint return operation from the pre-departure phase until the hand-over of the returnees in the country of return. ■

4. Member States shall *regularly* inform the Agency *of their needs for* assistance or coordination *by* the Agency ■. The Agency shall draw up a rolling operational plan to provide the requesting Member States with the necessary operational support, including technical equipment referred to in Article 7(1). The Management Board shall

*OJ L 348, 24.12. 2008, p. 98"

decide in accordance with Article 24 on a proposal of the Executive Director, on the content and modus operandi of the rolling operational plan.

5. The Agency shall cooperate with the competent authorities of the relevant third countries referred to in Article 14, identify best practices on the acquisition of travel documents and the return of illegally present third-country nationals.

(13) In Article 10, paragraph 2 is replaced by the following:

"2. While performing their tasks and exercising their powers, guest officers shall comply with Union **and international** law, in accordance with fundamental rights and the national law of the host Member State."

(14) Article 11 is replaced by the following:

"Article 11

Information exchange systems

The Agency may take all necessary measures to facilitate the exchange of information relevant to its tasks with the Commission and the Member States **and, where appropriate, the Union agencies referred to in Article 13**. It shall develop and operate an information system capable of exchanging classified information with **those actors, including personal data referred to in Articles 11a, 11b and 11c**.

The Agency may take all necessary measures to facilitate the exchange of information relevant for its tasks with the United Kingdom and Ireland if it relates to the activities in which they participate in accordance with Articles 12 and 20(5)."

(15) The following Articles **█** are inserted:

"Article 11a

Data protection

Regulation (EC) No 45/2001 shall apply to the processing of personal data by the Agency.

The Management Board shall establish measures for the application of Regulation (EC) No 45/2001 by the Agency, including those concerning the Data Protection Officer of the Agency. ***Those measures shall be established after consultation of the European Data Protection Supervisor. Without prejudice to Articles 11b and 11c, the Agency may process personal data for administrative purposes.***

Article 11b

Processing of personal data in the context of joint return operations

In accordance with the measures referred to in Article 11a:

- 1. In performing its tasks of organising and coordinating the joint return operations of Member States referred to in Article 9, the Agency may process personal data of persons who are subject to such joint return operations.*
- 2. The processing of such personal data shall respect the principles of necessity and proportionality. In particular, it shall be strictly limited to those personal data which are required for the purposes of the joint return operation.*
- 3. The personal data shall be deleted as soon as the purpose for which they have been collected has been achieved and no later than 10 days after the joint return operation.*
- 4. Where the personal data are not transferred to the carrier by a Member State, the Agency may transfer such data.*

Article 11c

Processing of personal data collected during joint operations, pilot projects and rapid interventions

In accordance with the measures referred to in Article 11a:

- 1. Without prejudice to the competence of Member States to collect personal data in the context of joint operations, pilot projects and rapid interventions, and subject to the limitations set out in paragraphs 2 and 3, the Agency may further process personal data collected by the Member States during such operational activities and transmitted to the Agency in order to contribute to the security of the external borders of the Member States of the Union.*
- 2. Such further processing of personal data by the Agency shall be limited to personal data regarding persons who are suspected, by the relevant authorities of Member States, on reasonable grounds of involvement in cross-border criminal activities, in facilitating illegal migration activities or in human trafficking activities as defined in Article 1(1)(a) and (b) of Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence*.*
- 3. Personal data referred to in paragraph 2 shall be further processed by the Agency only for the following purposes:*
 - (a) transmission, on a case by case basis, to Europol or other Union law enforcement agencies, subject to Article 13.*
 - (b) use for the preparation of risk analyses referred to in Article 4. In the result of the risk-analyses, data shall be depersonalized.*
- 4. The personal data shall be deleted as soon as they have been transmitted to*

Europol or other Union agencies or used for the preparation of risk analyses referred to in Article 4. The term of storage shall in any event not exceed three months after the date of the collection of those data.

5. *The processing of such personal data shall respect the principles of necessity and proportionality. The personal data shall not be used by the Agency for the purpose of investigations, which remain under the responsibility of the competent national authorities.*

In particular, it shall be strictly limited to those personal data which are required for the purposes referred to in paragraph 3.

6. *Without prejudice to Regulation (EC) No 1049/2001, onward transmission or other communication of such personal data processed by the Agency to third countries or other third parties shall be prohibited.*

Article 11d

Security rules on the protection of classified information and non-classified sensitive information

1. The Agency shall apply the Commission's rules on security as set out in the Annex to Commission Decision 2001/844/EC, ECSC, Euratom**. This shall cover, inter alia, provisions for the exchange, processing and storage of classified information.

2. The Agency shall apply the security principles relating to the processing of non-classified sensitive information as adopted and implemented by the Commission. *The Management Board shall establish measures for the application of those security principles.*

* OJ L 328, 5.12.2002, p. 17.

** OJ L 317, 3.12.2001, p. 1."

(16) Articles 13 and 14 are replaced by the following:

"Article 13

Cooperation with Union agencies and bodies and international organisations

The Agency may cooperate with Europol, the European Asylum Support Office, the Fundamental Rights Agency, other Union agencies and bodies, and the international organisations competent in matters covered by this Regulation within 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.*

Onward transmission or other communication of personal data processed by the

Agency to other Union agencies or bodies shall be subject to specific working arrangements regarding the exchange of personal data and subject to the prior approval of the European Data Protection Supervisor.

The Agency may also, with the agreement of the Member State(s) concerned, invite observers of 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). Those observers shall receive the appropriate training from the Agency prior to their participation.

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 operational cooperation between Member States and third countries, within the framework of the Union's external relations policy, including with regard to human rights.

The Agency and the Member States shall comply with norms and standards at least equivalent to those set by Union legislation also when cooperation with third countries takes place on the territory of those countries.

The establishment of cooperation with third countries shall serve to promote European border management standards, also covering respect for fundamental rights and human dignity.

2. The Agency may cooperate with the authorities of third countries competent in matters covered by this Regulation within the framework of working arrangements concluded with those authorities, in accordance with the relevant provisions of the Treaty. *Those working arrangements shall be purely related to the management of operational cooperation*

3. The Agency may deploy *its* liaison officers, who 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 377/2004 of 19 February 2004 on the creation of an immigration liaison officers network*. Liaison officers shall only be deployed to third countries in which border management practices comply with minimum human rights standards. *Their deployment shall be approved by the Management Board. Within the framework of the Union's 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 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 contributing 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 Member State(s) concerned* invite *observers from* 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 those activities, may contribute to improving 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). Those observers* shall receive the appropriate training from the Agency prior to their participation.

7. When concluding bilateral agreements with third countries as referred to in Article 2(2), Member States *may* include provisions concerning the role and competence 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. The activities referred to in paragraphs 2 and 3 shall be subject to receiving a prior **o**pinion of the Commission, *and the European Parliament shall be fully informed as soon as possible.*

OJ L 64, 2.3.2004, p. 1."

(16a) *In Article 15, the first paragraph is replaced by the following:*

"The Agency shall be a body of the Union. It shall have legal personality."

(17) The following Article **1** is inserted:

"Article 15a

Headquarters Agreement

The necessary arrangements concerning the accommodation to be provided for the Agency in the Member State in which the Agency has its seat and the facilities to be made available by that State, as well as the specific rules applicable to the Executive Director, the Deputy Executive Director, the members of the Management Board, the staff of the Agency and members of their families, in that State shall be laid down in a Headquarters Agreement between the Agency and the Member State in which the Agency has its seat. The Headquarters Agreement shall be concluded after obtaining the approval of the Management Board. The Member State in which the Agency has its seat should provide the best possible conditions to ensure proper functioning of the Agency, including multilingual, European-oriented schooling and appropriate transport connections."

(18) Article 17 is modified as follows:

(a) paragraph 3 is replaced by the following:

"3. For the purpose of implementing Article 3b(5) only an Agency's staff member subject to the Staff Regulations of Officials and to Title II of the Conditions of employment of other servants of the European Communities employed by the Agency may be designated as coordinating officer in accordance with Article 8g. For the purpose of implementing *Article 3b(3)*, only national experts seconded by a Member State to the Agency may be designated to be attached to the *European Border Guard Teams*. The Agency shall designate those national experts who shall be attached to the *European Border Guard Teams* in accordance with that Article."

(b) the following paragraphs are added:

"4. The Management Board shall adopt the necessary implementing measures in agreement with the Commission pursuant to the arrangements provided for in Article 110 of the Staff Regulations of Officials of the Union.

5. The Management Board may adopt provisions to allow national experts from Member States to be seconded to the Agency. Those provisions shall take into account the requirements of *Article 3b(3)*, in particular the fact that they are considered as guest officers and have the tasks and powers referred to in Article 10. *They shall include provisions on the conditions of deployment.*"

■

(20) Article 20 is amended as follows:

(a) paragraph 2 is amended as follows:

(i) point (h) is replaced by the following:

"(h) establish the organisational structure of the Agency and adopt the Agency's staff policy, in particular the multi-annual staff policy plan

■ . In accordance with the relevant provisions of the framework Financial Regulation for the bodies referred to in Article 185 of *Council Regulation (EC, Euratom) No 1605/2002 the multi-annual staff policy plan shall be submitted* to the Commission and the budgetary authority after receiving a favourable opinion of the Commission;"

(ii) the following point is added:

"(i) adopt the Agency's Multi Annual Plan aiming at outlining the future long term strategy regarding the activities of the Agency."

(b) paragraph 4 is replaced by the following:

"4. The Management Board may advise the Executive Director on any matter strictly related to the development of operational management of the external borders, including activities related to research as defined in Article 6."

(21) Article 21 is amended as follows:

(a) in paragraph 1, the last sentence is replaced by the following:

"This term of office shall be extendable."

(b) paragraph 3 is replaced by the following:

"3. Countries associated with the implementation, application and development of the Schengen acquis shall participate in the Agency. They shall have one representative and one alternate each in the Management Board. Under the relevant provisions of their association agreements, arrangements have been developed that specify the nature and extent of, and the detailed rules for, the participation by these countries in the work of the Agency, including provisions on financial contributions and staff."

:

(22) Article 25 is modified as follows:

(a) paragraph 2 is replaced by the following:

"2. The European Parliament or the Council may invite the Executive Director of the Agency to report on the carrying out of his/her tasks, in particular on the implementation and monitoring of the Fundamental Rights Strategy, the general report of the Agency for the previous year, the work programme for the coming year and the Agency's multi-annual plan referred to in Article 20(i)."

(b) in paragraph 3, the following point is added:

"(g) **Ensure the implementation of** the operational plan referred to in Articles 3a and 8g."

(22a) *The following Article is inserted:*

"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 a proposal by 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 curricula.

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

3. 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.

4. 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."

(23) In Article 33, the following paragraphs are inserted:

"2a. The next evaluation shall also analyse the needs for further increased coordination of the management of the external borders of the Member States, including the feasibility of the creation of a European system of border guards.

2b. The evaluation shall include a specific analysis on the way the Charter of Fundamental Rights was respected pursuant to the application of the Regulation."

Article 2

Entry into force

This regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaties.

Done at ...,

For the European Parliament
The President

For the Council
The President

Statement by the European Parliament

The European Parliament stresses that the EU institutions should endeavour to use appropriate and neutral terminology in legislative texts when addressing the issue of third country nationals whose presence on the territory of the Member States has not been authorised by the Member States authorities or is not longer authorised. In such cases, EU institutions should not refer to "illegal immigration" or "illegal migrants" but rather to "irregular immigration" or "irregular migrants".

EXPLANATORY STATEMENT

One of the attributes of a common EU area of freedom, security and justice is that of the removal of internal borders, especially within the Schengen area. In turn, this has rendered the external borders of EU Member States a matter of common concern and has made the need for an integrated management of external borders ever more compelling.

With 42 672 km of external sea borders and 8 826 km of land borders, the Schengen free-movement area comprises 25 countries (including three non-EU states) enabling free internal travel for nearly half a billion people across the continent. The abolition of internal borders has facilitated freedom of movement for citizens in an unprecedented manner.

But this calls for a coordinated approach in securing external borders. And whereas external borders remain open and efficient for *bona fide* travellers and for people who need protection, they must be closed for cross-border crime and for other illicit activities.

An integrated management ensuring a uniform and high level of control and surveillance is therefore necessary. This calls for an adoption and implementation of common rules and also calls for increased cooperation between Member States in securing their external borders. More combined effort is needed and more pooling of resources.

Crucially, cooperation must be based on solidarity among Member States, especially with frontier Member States that, owing to their geographic or demographic situation, face severe migratory pressures at their borders. The deployment in October 2010 of the first Frontex Rapid Border Intervention Teams (RABITS), at the request of Greece in the light of its emergency situation at its border with Turkey, is a case in point.

It is in the light of this need for more coordination and solidarity that the Frontex agency plays an important role.

The Agency was set up in 2004 and became operational in 2005. Over the past five years, the Agency has faced a rapidly changing scenario in migratory flows at the Union's external borders. It has grown into a complement of more than 200 staff and has been active in several land, air and sea joint operations. But its effectiveness has not reached expected levels.

We must learn from these first years of experience and give the Agency a renewed mandate with more resources and more tools to become more effective.

As requested by the Hague programme, the Commission presented a Communication on the evaluation and future development of the FRONTEX Agency adopted on 13 February 2008. The situation of the Frontex agency was addressed in European Parliament resolutions concerning immigration, the Pact on Immigration and Asylum and in the Stockholm Programme. The general message in each of these documents was that a number of aspects of the Agency needed to be improved.

A recurring problem was that Frontex was too dependent on Member States for the deployment of personnel and equipment in missions coordinated by the Agency. The

participation of the Member States had been patchy and pledges for equipment have been low. These shortcomings have seriously hampered the efficiency of the Agency. Another problem was the lack of cooperation from third countries.

On its part, the European Parliament has consistently supported the Agency, notably through significant budget increases over the years to support Frontex operations. Parliament has also repeatedly called for improvements in the Agency's enabling legislation in order to address its shortcomings and improve its efficiency.

The proposal presented by the Commission is a step towards improving the agency in the light of the experience of its first years of operation. It provides amendments that are necessary to ensure a better defined mandate and an improved functioning of the Agency in the coming years.

The rapporteur welcomes the Commission proposals and hopes to improve them through a series of amendments that are contained in this report.

The future of the Frontex agency

The rapporteur believes that we have to clearly determine what we want from Frontex and what shape we want it to take in the coming years. The Treaty of Lisbon, the Stockholm Programme and the proposed Single Market Act all confirm that Europe is aiming to achieve a single area of freedom, security and justice for the benefit of its citizens. In this regard we have to make sure that the mechanisms concerned with this area live up to these ambitions. Frontex is no exception and its enabling law must be changed to ensure that it is better equipped to play its role.

Frontex should therefore be the European external border agency that coordinates common EU action in relation to the external borders of EU Member States. In particular, Frontex should be ready to assist Member States in circumstances requiring increased technical and operational assistance at external borders, especially those Member States facing specific and disproportionate pressures. In so doing, the Agency should embody European solidarity whereby pooled resources from different Member States should be brought together to support Member States in difficulties or particular points at the Union's external border which are vulnerable or which require concerted action.

Frontex should work hand-in-hand with other European agencies, notably Europol and Eurojust in the fight against cross-border crime. And it should also work hand-in-hand with the European Asylum Support Office in order to ensure that third-country nationals who seek protection in the EU manage to access Europe's asylum system through proper, legitimate means.

Frontex also has to be available at all times when needed, including in situations of emergency. Europe can no longer look on powerless at emergency situations because it is unable to muster resources or pool assets. Frontex must therefore have the necessary means and equipment to deliver in a timely and efficient manner and that its legislation is up to date for it to deliver this purpose.

Your rapporteur believes that Frontex should therefore be able to bring together national

border guards from different EU Member States in a pool of EU border guards or indeed, an EU Border Guard System. This pool should be drawn up for the purposes of joint operations, rapid border intervention missions and pilot projects involving the Agency and all Member States should be required to participate. The Agency must also support this pool through specialised training and other initiatives. The system could be an embryonic structure which could, in future, be developed into a fully-fledged EU Border Guard Agency.

Fundamental Rights

Like all other EU agencies and bodies, Frontex has the duty to observe and uphold fundamental rights in all realms of its affairs. Your rapporteur welcomes the numerous elements in the Commission proposal which underline the importance of fundamental rights and which strengthen the ability and obligation of Frontex to ensure that respect for such rights is an integral part of border management.

Proposed Amendments

In the light of the above, your rapporteur is proposing amendments to the Frontex regulation in order to achieve the following:

1. Strengthen the provisions on **fundamental human rights**.
2. Merge the articles providing for the setting up of Frontex Joint Support Teams and Rapid Border Intervention teams into one article providing for an **EU Border Guard System** which will consist of a pool of national border guards that can be tapped by the Agency for the purposes of its joint operations, rapid border intervention missions and pilot projects. This will streamline the provisions of the regulation, increase transparency, avoid duplication and confusion of roles and most importantly, give a clearer European identity to the Agency's missions.
3. Support the Commission's proposal to require Member State to participate in the EU Border Guard System through national border guards of their own, the compulsory-solidarity clause - and to equip the Agency with the means to purchase or lease its own equipment.
4. Mandate the Agency to pay special attention to **Member States which are facing specific and disproportionate burdens** on their national asylum systems.
5. **Tighten the timeframes** within which rapid border intervention missions should be deployed. All deadlines for action are reduced so that rapid border interventions can truly cater for emergency situations.
6. Introduce a role for Frontex in assisting with **voluntary returns** over and above the role of the agency for other returns.
7. Introduce a reference to **regional operational offices** based on the recent experience of the opening of the first regional operational office in Greece.

8. Grant the Agency the power to **process personal data** in order to enable it to play a greater role in combating cross-border crime and irregular migration. At the same time, provide for due safeguards on the protection of personal data. Thus, data should be processed for limited purposes, namely for situations regarding persons whom there are reasonable grounds to suspect involvement in cross-border criminal activities, in irregular migration activities or in human trafficking activities, persons who are victims of such activities and whose data may lead to the perpetrators of such illegal activities as well as persons who are subject to return operations in which the Agency is involved. There should be strict criteria as to how this data should be handled.
9. Increase the **democratic scrutiny** of the Agency by giving the European Parliament a greater role to monitor the work of the Agency, including on its working arrangements with third countries.
10. Require the review of the Agency's mandate, in five years, to analyse the further development of the **EU Border Guard System**.

OPINION OF THE COMMITTEE ON LEGAL AFFAIRS ON THE LEGAL BASIS

25.5.2011

Mr Juan Fernando López Aguilar,
Chair
Committee on Civil Liberties, Justice and Home Affairs
BRUSSELS

Subject: Opinion on legal basis of the 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)
[COM(2010)0061] - C7-0045/2010 – 2010/0039(COD))

Dear Mr Chair,

By letter of 14 April 2011, you asked the Committee on Legal Affairs, pursuant to Rule 37 of the Rules of Procedure to consider the modification of the legal basis of the above proposal for a regulation.

The legal bases proposed by the Commission are Articles 74 and 77(1)(b) and (c) TFEU, both of which fall under Title V, entitled "Area of freedom, security and justice".

In the context of negotiations with the Council and the Commission and with a view to reaching a compromise in first reading, it has been proposed that the second legal basis be changed to Article 77(2)(b) and (d) TFEU.

I - Background

The Commission presented the above proposal in February 2010 with the objective of strengthening the Frontex Agency so as to clarify its mandate and to address identified shortcomings by adapting Council Regulation (EC) No 2007/2004 in the light of evaluations carried out and practical experience.

Council Regulation (EC) No 2007/2004 was 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 was based on the equivalent provisions of the EC Treaty, that is, Articles 62(2)(a) and 66 TEC.

As we know, the Lisbon Treaty did away with the pillar structure and now virtually all legislation coming within the area of freedom, security and justice has to be adopted under the ordinary legislative procedure. For the proposal at hand the Commission therefore indicated Articles 74 and 77(1)(b) and (c) TFEU as legal bases.

II - Relevant Articles of the Treaties

The following Articles of the TFEU are presented as the legal bases in the Commission proposal (emphasis added):

Article 74

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. It shall act on a Commission proposal, subject to Article 76, and after consulting the European Parliament.

Article 76

The acts referred to in Chapters 4 and 5, together with the measures referred to in Article 74 which ensure administrative cooperation in the areas covered by these Chapters, shall be adopted:

- (a) on a proposal from the Commission, or*
- (b) on the initiative of a quarter of the Member States.*

Article 77

1. The Union shall develop a policy with a view to:

- (a) ensuring the absence of any controls on persons, whatever their nationality, when crossing internal borders;*

(b) carrying out checks on persons and efficient monitoring of the crossing of external borders;

(c) the gradual introduction of an integrated management system for external borders.

2. ...

(a) ...

(b) ...

(c) ...

(d) ...

(e) ...

3. ...

4. ...

The following Article of the TFEU is proposed to be used as legal basis instead of the second one suggested by the Commission:

Article 77

1. ...

2. *For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures concerning:*

(a) the common policy on visas and other short-stay residence permits;

(b) the checks to which persons crossing external borders are subject;

(c) the conditions under which nationals of third countries shall have the freedom to travel within the Union for a short period;

(d) any measure necessary for the gradual establishment of an integrated management system for external borders;

(e) the absence of any controls on persons, whatever their nationality, when crossing internal borders.

3. ...

4. ...

The following articles were the legal bases for the amendment in 2007 by Regulation (EC) No 863/2007:

Article 62 TEC

The Council, acting in accordance with the procedure referred to in Article 67, shall, within a period of five years after the entry into force of the Treaty of Amsterdam, adopt:

1. *measures with a view to ensuring, in compliance with Article 14, the absence of any controls on persons, be they citizens of the Union or nationals of third countries, when crossing internal borders;*

2. measures on the crossing of the external borders of the Member States which shall establish:

(a) standards and procedures to be followed by Member States in carrying out checks on persons at such borders;

(b) ...

(i) ...

(ii) ...

(iii) ...

(iv) ...

3. ...

Article 66 TEC

The Council, acting in accordance with the procedure referred to in Article 67, shall take measures to ensure cooperation between the relevant departments of the administrations of the Member States in the areas covered by this title, as well as between those departments and the Commission.

Article 67 TEC

1. *During a transitional period of five years following the entry into force of the Treaty of Amsterdam, the Council shall act unanimously on a proposal from the Commission or on the initiative of a Member State and after consulting the European Parliament.*

2. After this period of five years:

— the Council shall act on proposals from the Commission; the Commission shall examine any request made by a Member State that it submit a proposal to the Council,

— the Council, acting unanimously after consulting the European Parliament, shall take a decision with a view to providing for all or parts of the areas covered by this title to be governed by the procedure referred to in Article 251 and adapting the provisions relating to the powers of the Court of Justice.

3. By derogation from paragraphs 1 and 2, measures referred to in Article 62(2)(b) (i) and (iii) shall, from the entry into force of the Treaty of Amsterdam, be adopted by the Council acting by a qualified majority on a proposal from the Commission and after consulting the European Parliament.

4. By derogation from paragraph 2, measures referred to in Article 62(2)(b) (ii) and (iv) shall, after a period of five years following the entry into force of the Treaty of Amsterdam, be adopted by the Council acting in accordance with the procedure referred to in Article 251.

5. By derogation from paragraph 1, the Council shall adopt, in accordance with the procedure referred to in Article 251:

— the measures provided for in Article 63(1) and (2)(a) provided that the Council has previously adopted, in accordance with paragraph 1 of this Article, Community legislation defining the common rules and basic principles governing these issues,

— the measures provided for in Article 65 with the exception of aspects relating to family law.

III - The proposed legal bases

Article 74 TFEU, which refers to the procedure set forth in Article 76 TFEU for the areas of judicial cooperation in criminal matters and of police cooperation, sets out the general rule on administrative cooperation between the relevant departments of the Member States. According to these two articles, the Council alone adopts measures, and the Parliament is merely consulted. It is however important to note that by virtue of Article 16(3) TEU the Council acts by a qualified majority given that Article 76 TFEU does not provide otherwise.

Article 77(1)(b) and (c) provides that the Union shall 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.

Article 77(2) empowers the Parliament and the Council to adopt measures, for the purposes of the development of a policy set out in the first paragraph, in accordance with the ordinary legislative procedure. This article furthermore enumerates the specific tasks and areas for which measures shall be adopted, with sub-paragraphs (b) and (c) specifying checks on persons and an integrated management system for external borders, respectively.

IV - Case-law on legal basis

It is settled case law of the Court of Justice that "the choice of legal basis for a Community measure must rest on objective factors amenable to judicial review, which include in particular the aim and content of the measure"¹. The choice of an incorrect legal basis may therefore justify the annulment of the act at stake.

In the case *Melki*² in relation to the adoption of measures concerning the absence of any controls on persons when crossing internal borders, the Court of Justice referred to Article 77(2) TFEU as being the legal basis which replaces Article 62 TEC rather than Article 77(1) TFEU.

V. Aim and content of the proposed regulation

The recitals to the proposed regulation set out its aim as follows:

(a) Union policy in the field of the external borders aims at an integrated management ensuring a uniform and high level of control and surveillance, and to this end the establishment of common rules on standards and procedures for the control of the external borders is foreseen. The efficient implementation of the common rules calls for increased coordination of the operational cooperation between the Member States;

(b) The Stockholm Programme calls for a clarification and enhancement of the role of Frontex regarding the management of the external borders of the European Union and the mandate of the Agency should therefore be revised in order to strengthen in particular the operational capabilities;

(c) Teams of border guards for deployment by the Agency should be set up to participate in joint operations and pilot projects and the Agency should provide training, including on fundamental rights, at European level for national instructors of border guards and additional training and seminars relating to control and surveillance at the external borders and removal of third-country nationals illegally present in the Member States for officers of the competent national services.

¹ Case C-45/86, *Commission v. Council* (Generalised Tariff Preferences) [1987] ECR 1439, para. 5; Case C-440/05 *Commission v. Council* [2007] E.C.R. I-9097; Case C-411/06 *Commission v. Parliament and Council* (8 September 2009) ([OJ C 267 of 07.11.2009, p.8](#)).

² Judgment of the Court of Justice of 22 June 2010 in Joined Cases C-188/10 *Aziz Melki* and C-189/10 *Sélim Abdeli* (not yet published in the European Court reports), at paragraph 65.

(d) To fulfil its mission the Agency should cooperate with Europol, the European Asylum Support Office, the Fundamental Rights Agency and other European Union Agencies and bodies, the competent authorities of third countries and competent international organisations and also facilitate the operational cooperation between Member States and third countries in the framework of the external relations policy of the European Union.

(e) Establishing cooperation with third countries is relevant also with regard to promoting the European standards of border management, including respect for fundamental rights and human dignity.

The enacting terms are as follows:

Article 1 sets out the proposed amendments to the regulation. The following articles are new:

- Article 3 on joint operations and pilot projects at the external borders;
- Article 3a on organisational aspects of joint operations and pilot projects;
- Articles 3b and 3e on composition and deployment of Frontex Joint Support Teams and instructions;
- Article 4 on risk analysis;
- Article 6 on the monitoring of and the contribution to research;
- Article 7 on technical equipment;
- Article 9 on return cooperation regarding the return of illegally present third-country nationals;
- Articles 11-11b on information exchange systems, data protection and security rules concerning classified information;
- Article 13 on cooperation with EU agencies and bodies and international organisations
- Article 14 on cooperation with third countries
- Article 15a on headquarters agreement.

Article 2 deals with entry into force.

VI - Determination of the appropriate legal basis

It is clear from the aim and content of the proposal that the amendments put forward concern the same questions as the aim and content of the amended regulation. That regulation and subsequent amendments to it were however based on Articles 62(2)(a), 66 and 67 TEC.

While the second legal basis proposed by the Commission for this proposal, Article 77(1)(b) and (c) TFEU, does concern the carrying out of checks on persons and efficient monitoring of

the crossing of external borders, together with the gradual introduction of an integrated management system for external borders, it only provides that the EU is to develop a policy in this respect. It does therefore not constitute a legal basis on which legislative acts could be enacted.

The proposed alternative legal basis, Article 77(2)(b) and (d) TFEU, concerns the same questions but also explicitly provides for the adoption of measures by the use of the co-decision procedure for the purpose of the development of the policy in Article 77(1) TFEU. Furthermore, the Court of Justice has referred in its case-law to Article 77(2) TFEU as being the legal basis which replaces Article 62 TEC rather than Article 77(1) TFEU. The proposed alternative legal basis therefore clearly constitutes the appropriate legal basis in this case.

Although Articles 74 and 76 TFEU, unlike Article 77(2) TFEU, do not provide for the application of the ordinary legislative procedure, they provide that the Council is to act by a qualified majority. Consequently, these articles are not procedurally incompatible.

VII - Conclusion and recommendation

The committee considered the above question at its meeting of 24 May 2011.

At its meeting of 24 May 2011, the Committee on Legal Affairs accordingly decided unanimously¹, to recommend to you as follows: Article 77(1)(b) and (c) TFEU must be changed to Article 77(2)(b) and (d) TFEU to form, together with Article 74 TFEU, the legal basis 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) [COM(2010)0061].

Yours sincerely,

Klaus-Heiner LEHNE

¹ The following were present for the final vote: Klaus-Heiner Lehne, Raffaele Baldassarre, Sebastian Valentin Bodu, Pablo Arias Echeverría, Alajos Mészáros, Rainer Wieland, Tadeusz Zwiefka, Luigi Berlinguer, Françoise Castex, Lidia Joanna Geringer de Oedenberg, Antonio Masip Hidalgo, Bernhard Rapkay, Evelyn Regner, Alexandra Thein, Diana Wallis, Cecilia Wikström, Christian Engström, Syed Kamall, Zbigniew Ziobro, Jiří Maštálka, Francesco Enrico Speroni, Dimitar Stoyanov, Piotr Borys, Kurt Lechner, József Szájer, Eva Lichtenberger.

18.1.2011

OPINION OF THE COMMITTEE ON FOREIGN AFFAIRS

for the Committee on Civil Liberties, Justice and Home Affairs

on the proposal for a regulation of the European Parliament and of 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)
(COM(2010)0061 – C7-0045/2010 – 2010/0039(COD))

Rapporteur: Barbara Lochbihler

SHORT JUSTIFICATION

On 24 February 2010, the Commission adopted a legislative proposal which proposes amendments to 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).

The objective of this legislative proposal is to adapt the Regulation, in the light of the 2008 Communication of the Commission on the evaluation and future development of Frontex and of the Management Board recommendations, with the view of strengthening the operational capabilities of the Agency. More precisely, this proposal would provide the Agency with a reinforced role in preparing, coordinating and implementing operations with special regard to the sharing of tasks with EU Member States, namely in terms of deployment of human resources and technical equipment. Besides, with this proposal, Frontex's internal and external mandate and powers would be significantly enhanced. The Agency would be able to co-lead border patrol operation with EU Member States, deploy liaison officers in third countries, coordinate joint return operations, launch and finance pilot projects.

The revision of Frontex's mandate takes place after a substantial and progressive increase of its budget. The Agency which started in 2004 with an amount of 6,2 million has now risen to the amount of 83 million in 2009

The entry into force of the Lisbon Treaty creates a new legal framework which has to be taken into consideration in this opinion since it communitarises the area of freedom, security and justice, expands the jurisdiction of the Court of Justice of the European Union in this field,

extends the power of the European Parliament in conferring it a legislative role on equal footing with the Council and strengthens fundamental rights principles in making the Charter of Fundamental Rights binding and engaging the EU in an accession process to the ECHR.

The opinion drafted by the Subcommittee on Human Rights for the Foreign Affairs Committee aims therefore to scrutinize how the Agency, in the light of the revision and extension of its mandate, can guarantee, protect and promote the respect for fundamental rights pursuant to its obligation as EU Agency. It aims at the same time to address the question of responsibility and accountability as well as the lack of transparency of the Agency in order to adapt it to the provisions and spirit of the Lisbon Treaty. The overall question of responsibilities between Member States' officers, the host Member State border officers and Frontex's personnel remains unclear and ambiguous in the Commission's proposal and should be treated by the lead committee of Parliament together with open questions with regard to the competent body for complaints in case of violations of human rights of migrants.

The amendments proposed by the Commission constitute welcome developments and tend to formalise the commitment and obligation of the Agency to respect fundamental rights in the following areas by:

- clarifying the legal framework of Frontex operations by confirming that the Agency's activities are subject to the Schengen Borders Code and should be conducted in accordance with relevant Union law, international law, obligations related to access to international protection and fundamental rights,
- providing trainings in fundamental rights as an obligation for the personnel taking part in joint operations,
- creating an incident reporting and evaluation scheme,
- making financial support to joint return operations conditional upon the full respect of the Charter of Fundamental Rights,
- developing a code of conduct for the return of irregular third countries' nationals, including the establishment of an effective system for the monitoring of forced returns which is carried out independently and reports back to the Commission by an independent monitor,
- requesting in the evaluation carried out by the Management board every five years a specific analysis "of the way the Charter of Fundamental Rights was respected",

However, these proposals still remain limited and non-systematic. The proposed measures have to be implemented on a systematic and binding manner for becoming effective mechanisms. Besides, an independent and highly qualified expertise with regard to fundamental rights and access to international protection is to be considered as essential at all levels and stages of the operations conducted by Frontex.

The evaluation process of the Agency's activities, which is carried out every five years by the Management Board, has proved so far that the human rights impact of its activities have never been assessed in detail in spite of the call by the European Parliament in its resolution of 18 December 2008 "to fully evaluate Frontex's activities with regard to their impact on fundamental freedoms and rights, including the responsibility to protect". Therefore, a comprehensive and independent evaluation involving Frontex's partners such as the Fundamental Rights Agency and the UNHCR as well as non-governmental organisations with relevant expertise is indispensable in view of the proposed strengthening of its internal and

external mandate. In addition to it, the rapporteur would recommend that new Article 33(2b) be amended to require that the evaluation focus on how the rights under the Charter of Fundamental Rights were guaranteed rather than the way in which the Charter was respected. It would be even appropriate to annex such evaluation to the general annual report of Frontex.

Besides this five-years evaluation, Frontex' own assessment as regards joint operations as well as pilot projects require systematic and independent monitoring and assessment of how fundamental rights obligations have been fulfilled in practice and not be limited to examining the fulfilment of operational objectives . This independent account has to become a matter of principle in the revised regulation. An evaluation of compliance with fundamental rights would also create a real opportunity for the Commission to react to any shortcoming resulting from Frontex's operations in relation to the application of EU law. The current cooperation with UNHCR should be extended so as to allow the UN Agency to participate in the preparation and implementation of joint operations notably when it comes to asylum related aspects.

The inclusion in the legislative proposal of a reporting and evaluation scheme containing provisions on incident reporting goes in the right direction but still lacks of concrete procedures to guarantee compliance with the Charter of Fundamental Rights and to monitor accountability and responsibility, the latter remaining extremely imprecise in the Commission proposal. In line with the monitoring requirements introduced for joint return operations, the revised Regulation should include a mandatory requirement for all Frontex operations to be independently observed and reported on to EU Institutions from the perspective of compliance with EU law and fundamental rights.

The new provision of the legislative proposal which stipulates that adequate training should become an obligation for all those involved in joint operations has to be welcomed. A cooperation agreement has been recently signed between Frontex and the Agency for Fundamental Rights which notably foresees an assessment of training needs of Frontex staff and an evaluation of the implementation of training in fundamental rights. An exchange of letters between Frontex and the UNHCR also formalised their cooperation in this field since 2008.

Nevertheless, the Commission must give access to information related to trainings to the Parliament, including to the assessments to be provided by the FRA. An enhanced cooperation in capacity building initiatives such as trainings with both the Fundamental Rights Agency and the UNHCR could be considered as a clear added value. The involvement of civil society organisations in the development and implementation of training programmes should be at the same time ensured by Frontex.

The rapporteur is of the opinion that the legal advice dimension within Frontex has to be substantially reinforced through the setting up of a pool of experts on the rights of aliens and international protection, including asylum related aspects. Such a pool, which would have as its main task to advise asylum seekers and other persons who are particularly vulnerable such as pregnant women, children and victims of trafficking, should be deployed on a systematic basis in the conduct of Frontex's operations and work in connection with relevant national asylum services as well as non-governmental organisations with relevant expertise.

The expanded external mandate of Frontex is a matter of concern from a human rights perspective and should require a series of safeguards in order to ensure compliance with EU fundamental rights obligations. The rapporteur highly recommends that a clear reference be included in the legislative proposal to the respect for the principle of non-refoulement according to Article 19 of the Charter of Fundamental Rights and for the right for everyone to leave any country, including his own according to Article 12(2) of the ICCPR and Article 2(2) of the protocol 4 of the ECHR. The proposal of the Commission ensures that liaison officers (ILOs) have to perform their tasks in compliance with EU law and fundamental rights and be deployed "to third countries in which border management practices respect minimum human rights standards". However, these safeguards should definitely apply to these Liaison Officers (ILOs). In this respect, the rapporteur underlines the necessity to clarify their function which can't be assimilated to advisory functions which sometimes are carried out by national ILOs and to assure them high qualified training in fundamental rights and access to international protection. Moreover, the enhanced cooperation with third countries which is formalised by bilateral working arrangements between Frontex and third countries requires a human rights assessment in the third country concerned prior to the conclusion of such arrangements.

According to the opinion of the European Data Protection Supervisor, "a specific legal basis addressing the issue of the processing of personal data by Frontex and providing for clarification of the circumstances under which such processing by the Agency could take place, subject to strong data protection safeguards (...) is needed". The inclusion of both adequate legal basis and safeguards into this legislative proposal is therefore considered as essential for the rapporteur taking account of the extended internal and external roles and responsibilities of the Agency and notably in terms of respect for the non-refoulement principle.

With regard to working arrangements between FRONTEX and third countries' authorities, the Commission proposal only refers to the prior approval by the Commission without any democratic scrutiny by the European Parliament. As FRONTEX is a Union body subject to the principles of full democratic scrutiny and transparency it will be appropriate and legitimate that the European Parliament be fully informed about such working arrangements. Besides, greater transparency and access to documents such as reports on risks analysis, evaluations of joint operations and requested human rights assessments prior to conclusion of agreements should be shared with Parliament.

AMENDMENTS

The Committee on Foreign Affairs calls on the Committee on Civil Liberties, Justice and Home Affairs, as the committee responsible, to incorporate the following amendments in its report:

Amendment 1

Proposal for a regulation – amending act Recital 4

Text proposed by the Commission

(4) This Regulation respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union, notably human dignity, prohibition of torture and of inhuman or degrading treatment or punishment, right to liberty and security, the rights to the protection of personal data, right to asylum, non-refoulement, non discrimination, the rights of the child and right to an effective remedy. This Regulation should be applied by the Member States in accordance with these rights and principles.

Amendment

(4) This Regulation respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union (*the "Charter"*), notably human dignity, prohibition of torture and of inhuman or degrading treatment or punishment, right to liberty and security, the rights to the protection of personal data, right to asylum, non-refoulement, non discrimination, the rights of the child and right to an effective remedy. This Regulation *endorses the provisions of Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted¹, of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals², as well as of Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status³ and of Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers⁴. This Regulation* should be applied by the Member States in accordance with these rights and principles.

¹ OJ L 304, 30.9.2004, p. 12–23

² OJ L 348, 24.12.2008, p. 98–107

³ OJ L 326, 13.12.2005, p. 13–34

⁴ OJ L 31, 6.2.2003, p. 18–25

Justification

Frontex shall respect the provisions of the directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted in the frame of its management border activities in line with its international protection obligations.

Amendment 2

Proposal for a regulation

Recital 4 a (new)

Text proposed by the Commission

Amendment

(4a) The Agency should fully enforce both the provisions of the Charter with due regard to respect for, and the protection of, the human rights of migrants and the Geneva Convention Relating to the Status of Refugees of 1951. All the Agency's actions should comply with relevant international law and obligations relating to access to international protection.

Amendment 3

Proposal for a regulation – amending act

Recital 7

Text proposed by the Commission

Amendment

(7) Efficient management of the external borders through checks and surveillance contributes to combat ***illegal*** immigration and trafficking in human beings and to reduce the threats to the internal security, public policy, public health and international relations of the Member States.

(7) Efficient management of the external borders through ***effective*** checks and ***efficient*** surveillance contributes to combat ***irregular*** immigration and trafficking in human beings and to reduce the threats to the internal security, public policy, public health and international relations of the Member States.

(This amendment applies throughout the text. Adopting it will necessitate

corresponding changes throughout.)

Justification

The rapporteur proposes to replace the word "illegal" by "irregular" when it refers to "illegal" immigration and migrants in order to adapt the wording of this regulation with the wording used in the other relevant legislation relating to this subject.

Amendment 4

Proposal for a regulation – amending act Recital 10

Text proposed by the Commission

(10) The mandate of the Agency should **therefore** be revised in order to strengthen in particular the operational capabilities of the Agency while ensuring that all measures taken are proportionate to the objectives pursued and fully respect fundamental rights and the rights of refugees and asylum seekers, including in particular the prohibition of refoulement.

Amendment

(10) The **challenges described above, including the increasing complexity and diversity of migration channels, mean that the** mandate of the Agency should be revised in order to strengthen in particular the operational capabilities of the Agency while ensuring that all measures taken are proportionate to the objectives pursued and fully respect fundamental rights and the rights of refugees and asylum seekers, including in particular the prohibition of refoulement.

Amendment 5

Proposal for a regulation – amending act Recital 19

Text proposed by the Commission

(19) The Agency should provide training, including on fundamental rights, at European level for national instructors of border guards and additional training and seminars related to control and surveillance at the external borders and removal of third-country nationals **illegally** present in the Member States for officers of the competent national services. The Agency may organise training activities in cooperation with Member States on their

Amendment

(19) The Agency should provide training on fundamental rights, **international law and the structure of national asylum authorities** at European level for national instructors of border guards and additional training and seminars related to control and surveillance at the external borders and removal of third-country nationals **irregularly** present in the Member States for officers of the competent national services. The Agency may organise

territory. Member States should integrate the results of the Agency's work in this perspective in the national training programs of their border guards.

training activities in cooperation with Member States on their territory. Member States should integrate the results of the Agency's work in this perspective in the national training programs of their border guards.

Amendment 6

Proposal for a regulation – amending act Recital 21

Text proposed by the Commission

(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. 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 provide the necessary assistance and coordination for organising 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.**

Amendment

(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. 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 provide the necessary assistance and coordination for organising 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 activities *or* operations that are not in conformity with the Charter of Fundamental Rights *should be carried out or financed by the Union. In the event of a violation of the Charter of Fundamental Rights, return operations should be suspended and the violation investigated.***

Amendment 7

Proposal for a regulation – amending act Recital 23

Text proposed by the Commission

(23) Cooperation with third countries regarding matters covered by Regulation (EC) No 2007/2004 is increasingly important. To establish a solid cooperation model with relevant third countries the Agency should have the possibility to launch and finance projects of technical assistance and to deploy liaison officers in third countries. The Agency should have the possibility to invite representatives of third countries to participate in its activities, after having provided the necessary training. Establishing cooperation with third countries is relevant also with regards to promoting the European standards of border management, including the respect of fundamental rights and human dignity.

Amendment

(23) Cooperation with third countries regarding matters covered by Regulation (EC) No 2007/2004 is increasingly important. To establish a solid cooperation model with relevant third countries the Agency should have the possibility to launch and finance projects of technical assistance and to deploy liaison officers in third countries. The Agency should **also** have the possibility to invite representatives of third countries to participate in its activities, after having provided the necessary training. Establishing cooperation with third countries is relevant also with regards to promoting the European standards of border management, including the respect of fundamental rights and human dignity.

Amendment 8

Proposal for a regulation – amending act Article 1 – point 1 Regulation (EC) No 2007/2004 Article 1 – paragraph 2

Text proposed by the Commission

2. While considering that the responsibility for the control and surveillance of external borders lies with the Member States, the Agency shall facilitate and render more effective the application of existing and future European Union measures relating to the management of external borders, in particular the Schengen Borders Code, and in accordance with relevant Union law, International law, obligations related to access to international protection, and fundamental rights. It shall do so by

Amendment

2. While considering that the responsibility for the control and surveillance of external borders lies with the Member States, the Agency shall facilitate and render more effective the application of existing and future European Union measures relating to the management of external borders, in particular the Schengen Borders Code, **as well as of the Charter of Fundamental Rights and the Geneva Convention Relating to the Status of Refugees of 1951**, and in accordance with relevant

ensuring the coordination of Member States' actions in the implementation of those measures, thereby contributing to an efficient, high and uniform level of control on persons and surveillance of the external borders of the Member States.

Union law, International law, obligations related to access to international protection, and fundamental rights. It shall do so by ensuring the coordination of Member States' actions in the implementation of those measures, thereby contributing to an efficient, high and uniform level of control on persons and surveillance of the external borders of the Member States *while applying the provisions of the Charter of Fundamental Rights with due regard to respect for and the protection of the human rights of migrants. In the event of a breach of international law or the Charter of Fundamental Rights, in particular Articles 1, 4, 6, 18 and 19 thereof, the suspension of the operation where the breach was detected shall be mandatory.*

Justification

In the framework of its obligations as EU Agency, Frontex must equally implement EU measures relating to the management of external borders and the principles enshrined in the Charter of Fundamental Rights.

Amendment 9

Proposal for a regulation – amending act

Article 1 – point 3 - point a

Regulation (EC) No 2007/2004

Article 2 – paragraph 1 – point c

Text proposed by the Commission

(c) carry out risk analyses, including the evaluation of the capacity of Member States to face threats and pressure at the external borders;

Amendment

(c) carry out risk analyses, including the evaluation of the capacity of Member States to face threats and pressure at the external borders *and incorporate the findings of the UN High Commissioner for Refugees (UNHCR) and the UN High Commissioner for Human Rights, especially with regard to the situation of persons in need of international protection, and regularly report to the European Parliament, the Commission and the Member States;*

Justification

It is important that Frontex includes independent and comprehensive findings on the human rights situation of migrants in countries of transit in its risk analysis process.

Amendment 10

Proposal for a regulation – amending act

Article 1 – point 3 - point b

Regulation (EC) No 2007/2004

Article 2 – paragraph 1a

Text proposed by the Commission

Ia. All border guards and other personnel of the Member States, as well as the staff of the Agency shall, prior to their participation in operational activities organised by the Agency, have received training in relevant EU and international law, including fundamental rights and access to international protection.

Amendment

Ia. All border guards and other personnel of the Member States, as well as the staff of the Agency ***and its liaison officers,*** shall, prior to their participation in operational activities organised by the Agency ***or, in the case of liaison officers, to their deployment in a third country,*** have received training in relevant EU and international law, including fundamental rights and access to international protection.

Justification

There should be an explicit requirement for Frontex liaison officers deployed in third countries to receive training in EU and international law, including fundamental rights and access to international protection

Amendment 11

Proposal for a regulation – amending act

Article 1 – point 4

Regulation (EC) No 2007/2004

Article 3 – paragraph 1 – subparagraph 2

Text proposed by the Commission

The Agency may itself initiate joint operations and pilot projects in cooperation with Member States.

Amendment

The Agency may itself initiate joint operations and pilot projects in cooperation with ***the*** Member States ***involved and in agreement with the host Member State and inform the European Parliament via the Agency's general report in accordance***

with Article 20(2)b.

Justification

The Agency may initiate joint operations only after obtaining the agreement of the host Member State.

Amendment 12

Proposal for a regulation – amending act

Article 1 – point 4

Regulation (EC) No 2007/2004

Article 3 – paragraph 1 – subparagraph 5

Text proposed by the Commission

The Agency may also terminate joint operations and pilot projects if the conditions to conduct these initiatives are no longer fulfilled.

Amendment

The Agency may also terminate, ***after obtaining the agreement of the host Member State***, joint operations and pilot projects if the conditions to conduct these initiatives are no longer fulfilled. ***The Member States involved may ask the Agency for a joint operation or pilot programme to be terminated.***

Justification

The host Member State must have a decisive say and role in the termination of operations.

Amendment 13

Proposal for a regulation – amending act

Article 1 – point 4

Regulation (EC) No 2007/2004

Article 3 – paragraph 4

Text proposed by the Commission

4. The Agency shall evaluate the results of the joint operations and pilot projects and transmit the detailed evaluation reports within 60 days following the end of the activity to the Management Board. The Agency shall make a comprehensive comparative analysis of those results with a view to enhancing the quality, coherence

Amendment

4. The Agency shall evaluate the results of the joint operations and pilot projects and transmit the detailed evaluation reports within 60 days following the end of the activity to the Management Board ***and the European Parliament***. The Agency shall make a comprehensive comparative analysis of those results with a view to

and efficiency of future operations and projects to be included in its general report provided for in Article 20(2)(b).

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). ***The evaluation reports shall cover compliance with fundamental rights of the joint operations and pilot projects, including on the basis of the monitoring carried out by independent observers.***

Justification

Evaluations should not be confined to the question of whether a specific operation has met its operational objectives but include an independent assessment of compliance with fundamental rights, which is part of the legal framework governing Frontex operations.

Amendment 14

Proposal for a regulation – amending act

Article 1 – point 5

Regulation (EC) No 2007/2004

Article 3a – paragraph 1 – subparagraph 2 - introductory part

Text proposed by the Commission

The operational plan shall ***include*** the following:

Amendment

The operational plan shall ***cover all aspects considered necessary for conducting joint operations and pilot projects, including*** the following:

Justification

The operational plan must refer specifically to all essential elements for conducting joint operations and pilot projects.

Amendment 15

Proposal for a regulation – amending act

Article 1 – point 5

Regulation (EC) No 2007/2004

Article 3a – paragraph 1 – subparagraph 2 – point e

Text proposed by the Commission

(e) the composition of the teams of guest officers;

Amendment

(e) the composition of the teams of guest officers ***and the deployment of other***

personnel;

Justification

The operational plan must contain a detailed reference to the way in which the teams of guest officers and other personnel will be deployed.

Amendment 16

Proposal for a regulation – amending act

Article 1 – point 5

Regulation (EC) No 2007/2004

Article 3a – paragraph 1 – subparagraph 2 – point h

Text proposed by the Commission

(h) a reporting and evaluation scheme containing detailed provisions on incident reporting, benchmarks for the evaluation report and final date of submission of the final evaluation report in accordance with Article 3(4).

Amendment

(h) a reporting and evaluation scheme containing detailed provisions on incident reporting, benchmarks for the evaluation report and final date of submission of the final evaluation report in accordance with Article 3(4). ***The incident reporting scheme shall include information concerning credible allegations of breaches of, in particular, this Regulation or the Schengen Borders Code, including fundamental rights, during joint operations and pilot projects and shall be transmitted immediately by the Agency to the relevant national public authorities and to the Management Board.***

Justification

Incident reporting and evaluation is crucial to the proper enforcement of the applicable legal framework for Frontex operations. It must be clarified that incidents include allegations of breaches of the SBC and fundamental rights, as currently set out in proposed recital 17.

Amendment 17

Proposal for a regulation – amending act

Article 1 – point 5

Regulation (EC) No 2007/2004

Article 3a – paragraph 1 – subparagraph 2 - point i

Text proposed by the Commission

(i) regarding sea operations, specific requirements regarding the applicable jurisdiction and ***maritime law provisions*** concerning the geographical area where the joint operation takes place.

Amendment

(i) regarding sea operations, specific requirements regarding the applicable jurisdiction and ***relevant legislation*** concerning the geographical area where the joint operation takes place.

Justification

Maritime operations must be based on the relevant legislation applicable.

Amendment 18

Proposal for a regulation – amending act

Article 1 – point 5

Regulation (EC) No 2007/2004

Article 3a – paragraph 1 – subparagraph 2 - point i a (new)

Text proposed by the Commission

Amendment

(ia) provisions regarding cooperation with third countries, where necessary, and within the framework of the provisions laid down in the relevant operational cooperation agreements.

Justification

The manner of cooperation with the third countries in each case must be included in the operational plan and be in line with the relevant operational cooperation agreements.

Amendment 19

Proposal for a regulation – amending act

Article 1 – point 5

Regulation (EC) No 2007/2004

Article 3b – paragraph 3

Text proposed by the Commission

Amendment

3. Member States shall make the border guards available for deployment at the request of the Agency, unless they are faced with an exceptional situation substantially affecting the discharge of

3. Member States shall make the border guards available for deployment at the request of the Agency, unless they are faced with an exceptional situation substantially affecting the discharge of

national tasks. Such a request shall be made at least thirty days before the intended deployment. The autonomy of the home Member State in relation to the selection of staff and the duration of their deployment shall remain unaffected.

national tasks. Such a request shall be made at least thirty days before the intended deployment. The autonomy of the home Member State in relation to the selection of staff and the duration of their deployment shall remain unaffected. ***The contribution of each Member State in terms of border guards for each operation shall be determined by annual bilateral agreements between the Agency and the Member State concerned.***

Justification

The precise modalities concerning the contribution of each Member State to each operation must be determined by annual bilateral agreements between the Agency and the Member State in question.

Amendment 20

Proposal for a regulation – amending act

Article 1 – point 7

Regulation (EC) No 2007/2004

Article 5 - paragraph 1

Text proposed by the Commission

The Agency shall establish and further develop common core curricula for border guards' training and provide training at European level for instructors of the national border guards of Member States, including with regard to fundamental rights and access to international protection. Member States shall integrate the common core curricula in the training of their national border guards.

Amendment

The Agency shall establish and further develop common core curricula for border guards' training and provide training at European level for instructors of the national border guards of Member States, including with regard to fundamental rights and access to international protection. ***The European Parliament shall be informed of the contents of the common core curricula.*** Member States shall integrate the common core curricula in the training of their national border guards. ***In developing, implementing and evaluating the common core curricula, the Agency should work closely with the Fundamental Rights Agency, as well as with UNHCR.***

Justification

The European Parliament should have access to information related to trainings. An enhanced cooperation in capacity building initiatives such as trainings with the Fundamental Rights Agency and the UNHCR could be considered as a clear added value.

Amendment 21

Proposal for a regulation – amending act

Article 1 – point 8

Regulation (EC) No 2007/2004

Article 7 – paragraph 1 – subparagraph 1 - indent 1

Text proposed by the Commission

– in case of acquisition, the Agency agrees formally with one Member State that the latter will provide for the registration of the equipment;

Amendment

– in case of acquisition, the Agency agrees formally with one Member State that the latter will provide for the registration of the equipment ***in accordance with the legislation in force of that Member State;***

Justification

National legislation in each case must be respected for the registration of new equipment.

Amendment 22

Proposal for a regulation – amending act

Article 1 – point 8

Regulation (EC) No 2007/2004

Article 7 – paragraph 5 – subparagraph 1

Text proposed by the Commission

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 60% of the eligible expenses.

Amendment

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 60% of the eligible expenses. ***The operational cost of the equipment shall be met by the Agency.***

Justification

It is important for all Member States that the operational cost of the equipment should be covered by the Agency.

Amendment 23

Proposal for a regulation – amending act

Article 1 – point 10 – point a a (new)

Regulation (EC) No 2007/2004

Article 8e – paragraph 1 – point – g a (new)

Text proposed by the Commission

Amendment

(aa) The following point shall be added:

“(ga) provision for the immediate reporting of incidents by the Agency to the Management Board and the relevant national public authorities.”

Justification

The Agency must immediately inform the Management Board and the relevant national public authorities when an incident occurs.

Amendment 24

Proposal for a regulation – amending act

Article 1 – point 10 – point b

Regulation (EC) No 2007/2004

Article 8e – paragraph 1 – point h

Text proposed by the Commission

Amendment

(h) a reporting and evaluation scheme containing ***detailed provisions on incident reporting***, benchmarks for the evaluation report and final date of submission of the final evaluation report in accordance with Article 3(4).

(h) 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).

Justification

Incident reporting is mentioned separately in the previous point.

Amendment 25

Proposal for a regulation – amending act

Article 1 – point 10 – point b

Regulation (EC) No 2007/2004

Article 8e – paragraph 1 – point i

Text proposed by the Commission

(i) regarding sea operations, specific requirements regarding the applicable jurisdiction and **maritime law provisions** concerning the geographical area where the joint operation takes place.

Amendment

(i) regarding sea operations, specific requirements regarding the applicable jurisdiction and **relevant legislation** concerning the geographical area where the joint operation takes place.

Justification

Sea operations must be based on the applicable legislation in this area.

Amendment 26

Proposal for a regulation – amending act

Article 1 – point 12

Regulation (EC) No 2007/2004

Article 9 – paragraph 2

Text proposed by the Commission

2. The Agency shall develop a Code of Conduct for the return of illegally present third country nationals by air which shall apply during all joint return operations coordinated by the Agency, describing common standardized procedures which should simplify the organisation of joint return flights and assure return in a humane manner and in full respect for fundamental rights, in particular the principles of human dignity, prohibition of torture and of inhuman or degrading treatment or punishment, right to liberty and security, the rights to the protection of personal data and non discrimination.

Amendment

2. The Agency shall develop a Code of Conduct for the return of illegally present third country nationals by air which shall apply during all joint return operations coordinated by the Agency, describing common standardized procedures which should simplify the organisation of joint return flights and assure return in a humane manner and in full respect for fundamental rights, in particular the principles of human dignity, prohibition of torture and of inhuman or degrading treatment or punishment, right to liberty and security, the rights to the protection of personal data and non discrimination. ***The Code of Conduct should allow for the suspension of a return where there are clear grounds for believing that the return would lead to a violation of fundamental rights.***

Justification

The possibility to suspend a removal where this would violate fundamental rights constitutes an essential procedural guarantee.

Amendment 27

Proposal for a regulation – amending act

Article 1 – point 12

Regulation (EC) No 2007/2004

Article 9 – paragraph 3

Text proposed by the Commission

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. The monitoring of joint return operations should be carried out independently and should cover the whole joint return operation from the predeparture phase until the hand-over of the returnees in the country of return. Furthermore, observations of the monitor, which shall cover the compliance with the Code of Conduct and in particular fundamental rights, shall be made available to the Commission and form part of the internal Final Return Operation Report. In order to ensure transparency and a coherent evaluation of the forced-return operations, reports of the monitor shall be included in an annual reporting mechanism.

Amendment

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. The monitoring of joint return operations should be carried out independently and should cover the whole joint return operation from the predeparture phase until the hand-over of the returnees in the country of return. ***Monitors should have access to all relevant facilities, including detention centres and aircraft, and receive the necessary training to perform their duties.*** Furthermore, observations of the monitor, which shall cover the compliance with the Code of Conduct and in particular fundamental rights, shall be made available to the Commission and form part of the internal Final Return Operation Report. In order to ensure transparency and a coherent evaluation of the forced-return operations, reports of the monitor shall be included in an annual ***public*** reporting mechanism.

Justification

In order to be able to comprehensively and effectively monitor forced returns, monitors should have unimpeded access to all relevant facilities. The quality and effectiveness of monitoring is also dependent on the ability of monitors to receive appropriate training.

Amendment 28

Proposal for a regulation – amending act

Article 1 – point 16

Regulation (EC) No 2007/2004

Article 13

Text proposed by the Commission

The Agency may cooperate with Europol, the European Asylum Support Office, the Fundamental Rights Agency, other European Union agencies and bodies, and the international 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.

Amendment

The Agency may cooperate with Europol, the European Asylum Support Office, the Fundamental Rights Agency, other European Union agencies and bodies, and the international 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. ***The European Parliament shall be informed of any such arrangements concluded by the Agency.***

Amendment 29

Proposal for a regulation – amending act

Article 1 – point 16

Regulation (EC) No 2007/2004

Article 14 – paragraph 1

Text proposed by the Commission

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.*

Amendment

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, *within the framework of the European Union external relations policy, in particular through the European Neighbourhood Policy and within the framework of the Union for the Mediterranean, including with regard to human rights.*

Amendment 30

Proposal for a regulation – amending act

Article 1 – point 16

Regulation (EC) No 2007/2004

Article 14 – paragraph 2

Text proposed by the Commission

2. The Agency may deploy 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' liaison officers set up pursuant to Council Regulation No 377/2004. Liaison officers shall only be deployed to third countries in which border management practices respect **minimum human rights standards**. **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.

Amendment

2. The Agency may deploy 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' liaison officers set up pursuant to Council Regulation No 377/2004. Liaison officers shall only be deployed, **following the approval of the Management Board**, to third countries in which border management practices respect **fundamental rights and international protection obligations**. **Within the framework of the EU's external 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.

Amendment 31

Proposal for a regulation – amending act

Article 1 – point 16

Regulation (EC) No 2007/2004

Article 14 – paragraph 3

Text proposed by the Commission

3. The tasks of the liaison officers shall include, in compliance with European

Amendment

3. The tasks of the 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.

Union law and in accordance with fundamental rights, ***with special regard to the right of everyone to leave a country, including his or her own***, the establishment and maintaining of contacts with the competent authorities of the third country to which they are assigned with a view to contribute to the prevention of and fight against illegal immigration and the return of illegal migrants.

Justification

Regarding the activities of liaison officers (ILOs) deployed in third countries, the Regulation should include a clear reference to the right for everyone to leave any country, including his own according to Article 12(2) of the ICCPR and Article 2(2) of the protocol 4 of the ECHR.

Amendment 32

Proposal for a regulation – amending act

Article 1 – point 16

Regulation (EC) No 2007/2004

Article 14 – paragraph 4

Text proposed by the Commission

4. 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. The Agency may also invite representatives 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. These representatives shall receive the appropriate training from the Agency prior to their participation.

Amendment

4. 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 ***with a view to improving their capacities, inter alia in the field of human rights. The Agency shall ensure that assistance to operations within the framework of these projects is not provided to third countries where there are clear grounds for believing that such operations would lead to violations of fundamental rights.*** The Agency may also invite representatives 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 ***following an understanding with the host Member***

State. These representatives shall receive the appropriate training from the Agency prior to their participation, ***in particular in relation to fundamental rights.***

Justification

EU funding should not be granted to third countries when it can be foreseen that joint operations could lead to breaches of fundamental rights, to reflect the principle stated in the Impact Assessment accompanying the European Commission proposal.

Amendment 33

Proposal for a regulation – amending act

Article 1 – point 16

Regulation (EC) No 2007/2004

Article 14 – paragraph 5

Text proposed by the Commission

5. 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.

Amendment

5. When concluding bilateral agreements with third countries ***on cooperation at an operational level*** 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 text of those bilateral agreements shall be transmitted to the European Parliament and the Commission.***

Justification

Member States' bilateral agreements with third countries including provisions concerning the role and competencies of Frontex should be open to scrutiny by the European Parliament and be made available to the European Commission in order to ensure that they are in line with Member States' obligations under EU law and fundamental rights as established in this Regulation.

Amendment 34

Proposal for a regulation – amending act

Article 1 – point 16

Regulation (EC) No 2007/2004

Article 14 – paragraph 6

Text proposed by the Commission

6. 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.

Amendment

6. 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, ***and in particular of the Charter of Fundamental Rights and international law, with special regard to respect for the non-refoulement principle. Those arrangements shall guarantee compliance with international human rights and humanitarian law by third countries.***

Justification

As an EU Agency, Frontex has the obligation to fully respect and promote fundamental rights in the conduct of its activities (Article 51 of the Charter of Fundamental Rights). These fundamental principles shall equally apply to when concluding cooperation agreements with third countries.

Amendment 35

Proposal for a regulation – amending act

Article 1 – point 16

Regulation (EC) No 2007/2004

Article 14 – paragraph 7

Text proposed by the Commission

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

Amendment

7. The activities referred to in paragraphs 2 and 6 shall be subject to receiving a prior favourable opinion of the Commission. ***The European Parliament shall be informed about cooperation agreements between the Agency and the authorities of***

third countries.

Justification

Frontex is an EU body subject to the principles of full democratic scrutiny and transparency. These working arrangements have to be consistent with the EU external policy and the Commission has to justify the reasons for giving a favourable opinion.

Amendment 36

Proposal for a regulation – amending act

Article 1 – point 23

Regulation (EC) No 2007/200404

Article 33 – paragraph 2b

Text proposed by the Commission

2b. The evaluation shall include a specific analysis *on* the way the Charter of Fundamental Rights *was respected* pursuant to the application of *the* Regulation.

Amendment

2b. The evaluation shall include a specific analysis *of* the way *in which the rights enshrined in* the Charter of Fundamental Rights *were guaranteed* pursuant to the application of *this* Regulation. *An annual evaluation of that analysis shall be annexed to the Agency's general report.*

PROCEDURE

Title	Amendment of 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)
References	COM(2010)0061 – C7-0045/2010 – 2010/0039(COD)
Committee responsible	LIBE
Opinion by Date announced in plenary	AFET 11.3.2010
Rapporteur Date appointed	Barbara Lochbihler 30.3.2010
Discussed in committee	14.10.2010 10.1.2011
Date adopted	13.1.2011
Result of final vote	+: 43 -: 5 0: 0
Members present for the final vote	Gabriele Albertini, Michael Gahler, Marietta Giannakou, Ana Gomes, Heidi Hautala, Richard Howitt, Anna Ibrisagic, Ioannis Kasoulides, Tunne Kelam, Maria Eleni Koppa, Andrey Kovatchev, Eduard Kukan, Krzysztof Lisek, Sabine Lösing, Ulrike Lunacek, Barry Madlener, Mario Mauro, Kyriakos Mavronikolas, Francisco José Millán Mon, Alexander Mirsky, Andreas Mölzer, María Muñoz De Urquiza, Annemie Neyts-Uyttebroeck, Norica Nicolai, Justas Vincas Paleckis, Ioan Mircea Pașcu, Vincent Peillon, Alojz Peterle, Cristian Dan Preda, Libor Rouček, José Ignacio Salafranca Sánchez-Neyra, Jacek Saryusz-Wolski, Werner Schulz, Ernst Strasser, Charles Tannock, Zoran Thaler, Kristian Vigenin, Graham Watson
Substitute(s) present for the final vote	Kinga Gál, Liisa Jaakonsaari, Georgios Koumoutsakos, Barbara Lochbihler, Norbert Neuser, Jacek Protasiewicz, Judith Sargentini, Marietje Schaake, Indrek Tarand, Janusz Władysław Zemke

PROCEDURE

Title	Amendment of 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)			
References	COM(2010)0061 – C7-0045/2010 – 2010/0039(COD)			
Date submitted to Parliament	24.2.2010			
Committee responsible Date announced in plenary	LIBE 11.3.2010			
Committee(s) asked for opinion(s) Date announced in plenary	AFET 11.3.2010	DEVE 11.3.2010		
Not delivering opinions Date of decision	DEVE 17.3.2010			
Rapporteur(s) Date appointed	Simon Busuttil 21.4.2010			
Legal basis disputed Date of JURI opinion	JURI 24.5.2011			
Discussed in committee	11.10.2010	26.10.2010	15.11.2010	26.1.2011
	24.5.2011	12.7.2011		
Date adopted	12.7.2011			
Result of final vote	+: -: 0:	42 5 7		
Members present for the final vote	Jan Philipp Albrecht, Sonia Alfano, Alexander Alvaro, Roberta Angelilli, Gerard Batten, Vilija Blinkevičiūtė, Mario Borghezio, Rita Borsellino, Emine Bozkurt, Simon Busuttil, Philip Claeys, Carlos Coelho, Rosario Crocetta, Agustín Díaz de Mera García Consuegra, Cornelia Ernst, Tanja Fajon, Hélène Flautre, Kinga Göncz, Nathalie Griesbeck, Sylvie Guillaume, Ágnes Hankiss, Anna Hedh, Salvatore Iacolino, Sophia in 't Veld, Teresa Jiménez-Becerril Barrio, Timothy Kirkhope, Juan Fernando López Aguilar, Baroness Sarah Ludford, Monica Luisa Macovei, Véronique Mathieu, Nuno Melo, Jan Mulder, Antigoni Papadopoulou, Georgios Papanikolaou, Carmen Romero López, Birgit Sippel, Csaba Sógor, Renate Sommer, Rui Tavares, Wim van de Camp, Daniël van der Stoep, Renate Weber, Tatjana Ždanoka			
Substitute(s) present for the final vote	Edit Bauer, Anna Maria Corazza Bildt, Luis de Grandes Pascual, Ioan Enciu, Monika Hohlmeier, Jean Lambert, Antonio Masip Hidalgo, Mariya Nedelcheva, Hubert Pirker, Michèle Striffler, Kyriacos Triantaphyllides, Cecilia Wikström			
Date tabled	15.7.2011			