

Opinion of the European Economic and Social Committee on 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) 61 final — 2010/0039 (COD)

(2011/C 44/28)

Rapporteur: **Mr PEZZINI**

On 18 March 2010 the Council decided to consult the European Economic and Social Committee, under Article 304 of the Treaty on the Functioning of the European Union (TFEU), on 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) 61 final — 2010/0039 (COD).

The Section for Employment, Social Affairs and Citizenship, which was responsible for preparing the Committee’s work on the subject, adopted its opinion on 16 June 2010.

At its 464th plenary session, held on 14 and 15 July 2010 (meeting of 15 July 2010), the European Economic and Social Committee adopted the following opinion by 78 votes to one with one abstention.

1. Conclusions and recommendations

1.1 The European Economic and Social Committee welcomes and endorses the Commission’s work to adapt and update Regulation (EC) No 2007/2004.

1.2 Member States having abolished internal border controls in compliance with the Schengen Convention are entitled to entrust external border control to the authority of their choice.

1.2.1 Nevertheless, following the enlargement of the EU and the gradual extension of the Schengen area to almost all Member States, together with the diversity of national legal systems, differences have been noted between Member States in terms of responsibilities for controlling the European Union’s external borders.

1.3 As a result, at the conclusion of the Laeken European Council of December 2001, Member States committed themselves to establishing a common operational consultation and cooperation mechanism, in order to coordinate the action of national services responsible for controlling the EU’s external borders.

1.3.1 This commitment has become all the more urgent due to the substantial growth in trans-national communication, which has promoted the multiplication of identities and encouraged the emergence of new nation-states.

1.4 Taking a comprehensive approach to border ‘security’ and the fight against ‘illegal migration’, the European

Commission therefore decided to propose the establishment of FRONTEX Joint Support Teams (FJSTs) provided by EU Member States on a voluntary basis.

1.4.1 For this reason, in keeping with the ‘Schengen Borders Code’ and the powers of national authorities, and in order to develop a common policy in the area of fixed and mobile infrastructure, the abovementioned teams should be given responsibility for the ‘surveillance’, and subsequently the ‘integrated control’, of border crossings.

1.4.2 This means being able to check identification documents and question foreign nationals concerning the reason for their stay, always in accordance with Member State guidelines, and to board ships within the territorial waters of a Member State⁽¹⁾.

1.4.3 The EESC believes that the teams should be given the financial and transportation resources (ships, aircraft, helicopters) necessary. The assets used for Frontex operations are to be identified and made known in each EU Member State.

1.5 We nevertheless need to give some thought to the risk of ‘militarising’ the surveillance and control of external borders. As a result, any ‘overlap’ with the investigative, military and customs functions that individual Member States entrust to their own police, land, naval and air forces, and customs authorities needs to be carefully coordinated, ensuring that their control capacities are not diminished but enhanced (European added value).

⁽¹⁾ Under Article 77 of the Treaty on the Functioning of the European Union, Frontex agents may act on the orders of the Member States’ border guards, in compliance, therefore, with the Member States’ sovereignty.

1.5.1 Furthermore, questions concerning international legislation relating to intervention on the high seas, as well as under the UN Convention on the Law of the Sea, i.e. the Montego Bay Convention of 1982 ⁽²⁾ remain 'open'.

1.6 The adoption of the Lisbon Treaty, incorporating, inter alia, the Charter of Fundamental Rights, has significantly increased the responsibilities and powers of the European Union in the area of immigration and asylum. The EESC considers that prerogatives pertaining to apprehending and detaining individuals should continue to be governed by ordinary human rights protection law, and not by so-called 'exorbitant' rules. As an 'agency', Frontex cannot be controlled by an external service or mere budgetary rules, but must remain subject to the same requirements to respect people which apply throughout the European Union, and more specifically through the application of the Council of Europe's penal rules ⁽³⁾.

1.7 The Committee, aware of Europe's social and legal tradition in the area of human rights and asylum rights, recommends that the members of these teams be given clear and sound initial training, with regular updates, on the psychological and behavioural aspects (thus ensuring regular oversight) that allow better relations with those who are more vulnerable, and who are trying to improve their social well-being, as has been the case for many Europeans over the centuries.

1.7.1 The EESC believes that these teams should be of an operational nature rather than a border police force, with operations that allow the implementation of the Schengen Code.

1.7.2 In the Committee's view, Frontex activities should be aimed at the exposure and prosecution of international criminals who are involved in human trafficking and who turn human beings motivated by legitimate aspirations to improve their wellbeing and social conditions into victims of humiliating and degrading exploitation.

1.7.3 Furthermore, Frontex teams should, with GMES support, actively contribute to rescuing migrants in difficulty in the Mediterranean basin, in accordance with Member State guidelines.

1.7.4 In view of the foregoing, the EESC advocates ongoing contact and close cooperation with NGOs.

1.7.5 The EESC believes that given the role and functions of NGOs, their involvement is indispensable in providing support and cultural mediation throughout all phases of procedures laid

⁽²⁾ In addition to disagreements with other Member States regarding the correct application of rules on reception and the illegality of 'push-back' operations, the Italian courts have now charged civil and military officials with harassment for the *refoulement* to Libya of 75 illegal migrants intercepted in international waters in August 2009. The Italian government does not, however, share the views of the Syracuse public prosecutor's office. The UNHCR, for its own part, maintains that the push-back operation jeopardised the migrants' ability to avail themselves of asylum procedures in Italy.

⁽³⁾ Since all Member States have now ratified Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, its Article 17 and the ratified Lisbon Treaty open the way for the EU to accede to the ECHR it is all the more necessary for Frontex not to deviate from this course.

down in EU and national rules, in relation to people in precarious situations.

2. Introduction

2.1 Borders 'juxtapose' and separate two states or geographical regions along lines that restrict reciprocal relations between peoples.

2.1.1 Natural borders (mountains, rivers, expanses of water) are a source of continued rivalry between the populations on either side.

2.1.2 Even political or agreed borders are the outcome of conflict and compromise, spanning long periods of historical change.

2.1.3 In the era of globalisation, strong growth in international communication tends to promote the multiplication of identities and to increase the number of sovereign nations, with the emergence of new nation-states and nation-regions.

2.1.4 As a result, there has been an increase in borders and the 'sanctity' of single states, whose fragile borders are a source of potential and real conflict.

2.2 European states are a significant exception in the global framework because, through the Schengen Agreement, they have abolished internal border controls, thereby diminishing the weight of national sovereignty.

2.2.1 However, ongoing strong migratory pressure on the EU's land and maritime borders creates a need to strengthen and develop new common systems for the surveillance of external borders (EUROSUR).

2.3 EUROSUR

2.3.1 The EU is currently studying the establishment of a European external border surveillance system.

2.3.2 The implementation of the project should reduce the number of illegal migrants and the mortality rate in transit, as well as prevent cross-border crime and increase internal security.

2.3.3 Thus, there are plans to set up a European integrated border management system based on a common network of information and surveillance systems.

2.3.4 A 'protected electronic communication network' is in the pipeline in order to ensure exchange of data and coordination of activities between the various Member State centres, and between them and Frontex⁽⁴⁾.

2.4 The road to FRONTEX

2.4.1 Regulation (EC) No 2007/2004 established a European Agency for the Management of Operational Cooperation at the External Borders of the Member States.

2.4.2 Regulation (EC) No 863/2007 then established a mechanism for the creation of Rapid Border Intervention Teams (RABITs) and amended Council Regulation (EC) No 2007/2004 as regards that mechanism and regulated the tasks and powers of guest officers.

2.4.3 Thus, through the Agency, a Member State can ask for rapid border intervention teams of appropriately trained experts from other Member States to be deployed in their own territory⁽⁵⁾.

2.5 Directive 2008/115/EC sets out common standards and procedures to be applied in Member States for returning illegally staying third country nationals, 'in accordance with fundamental rights ... including refugee protection and human rights obligations'.

2.5.1 On 5 April 2010, following the adoption of the Handbook for the processing of visa applications⁽⁶⁾, available to all the Member States' Consular staff, the Community Code on Visas came into force for the Schengen area, which comprises 22 Member States and three associated states.

2.5.2 The Hague programme⁽⁷⁾ provides for the development of Frontex on the basis of a fixed programme.

2.5.3 The multi-annual Stockholm programme for an area of freedom, security and justice, adopted by the European Council on 10-11 December 2009, decided to build the capacity of Frontex, in part through a review of its legal framework, and specifically provides for the integrated management of EU borders.

3. Gist of the Commission proposal

3.1 The European Commission proposes a review of the legal framework of the Frontex Agency, with the following key points:

⁽⁴⁾ The electronic network must then be coordinated with the Commission Decision of 20 January 2006 laying down detailed rules for the implementation of Council Decision 2005/267/EC establishing a secure web-based Information and Coordination Network for Member States' Migration Management Services (ICONET), mainly through the rapid exchange of information to combat illegal migration.

⁽⁵⁾ The above-mentioned tasks are closely linked to those of the European Law Enforcement Agency (EUROPOL), set up in 1992 for the purpose of providing European level intelligence on crime. This framework also includes the Schengen Information System (SIS), which enables the relevant authorities in Schengen states to share data on the identity of specific categories of persons and goods.

⁽⁶⁾ Adopted by the European Commission on 19.3.2010.

⁽⁷⁾ OJ C 53, 3.3.2005, p. 1.

— Member States remain responsible for controlling their external borders in accordance with the principle of subsidiarity (Article 74 of the Treaty), with their own police force and intelligence services.

— Member States may call on the Agency's assistance, in the form of coordination, when other Member States are involved and greater technical and operational assistance is being requested.

— Current heavy illegal migratory flows of third-country nationals to Member States require Frontex's role in EU immigration policy to be strengthened.

— The impact assessment accompanying the proposal⁽⁸⁾ sets out exceptions to the Frontex Agency's legal framework and situates the amendment to the Regulation as a further development of the Schengen acquis in combating the organisation of illegal immigration.

— The proposal for an amendment aims to increase coordination and operational cooperation among Member States, with more harmonised criteria and procedures for a higher level and more uniform management of surveillance.

— Technical equipment and human resources must be increased. To this end, a pool of border guards on detachment, comprising highly qualified and trained national experts, may be created.

4. General comments

4.1 Strict compliance with the principle of non-refoulement under the Geneva Convention, the UN Convention against 'inhuman and degrading treatment' and the European Convention on Human Rights must be guaranteed in all Frontex operations.

4.2 Frontex missions must be carried out with an unconditional regard for safeguarding human life, protecting women, minors, and the most vulnerable. They must also avoid externalising border control to countries⁽⁹⁾ that do not recognise the right to asylum or the Geneva Convention⁽¹⁰⁾.

⁽⁸⁾ SEC(2010) 149.

⁽⁹⁾ For example, Libya.

⁽¹⁰⁾ Directive 2008/115/EC of the European Parliament and the Council of 6.12.2008 (which will come into force in December 2010) sets out common standards and procedures to be applied in Member States for returning illegally staying third country nationals, 'in accordance with fundamental rights, ... including refugee protection and human rights obligations'.

4.3 Frontex activities should focus mainly on the following priority values:

- pursuing and disempowering international criminal networks engaged in human trafficking;
- making asylum law a reality for victims of injustice, as foreseen in the EU Treaty;
- assisting migrants in difficulty, even in international waters.

4.4 The EESC endorses the Proposal for a Regulation, when it provides that, while respecting the competences of the Agency, Member States can continue to pursue operational cooperation established with other states and/or third countries at external borders if this cooperation complements the Agency's action, while respecting human rights, in accordance with European social-Christian and legal traditions.

4.5 The EESC believes that in order to ensure the best possible cooperation, Frontex should be given the resources (ships, aircraft, helicopters) necessary. The assets used for Frontex operations are to be identified and made known in each EU Member State, and, bearing in mind their budgetary impact, Frontex should be in a position to use them in coordination with all national services that already have such resources.

4.6 The EESC can endorse the possibility given to Frontex to finance and implement technical assistance projects in third countries and to send liaison officers, provided that such projects and assistance involve NGOs with long and significant experience in providing development aid and training, and safeguarding human dignity.

4.7 Frontex should avail itself of the new SIS II⁽¹¹⁾ system (second-generation Schengen Information System) as soon as possible.

4.8 Frontex could be afforded substantial support for rescuing migrants in difficulty in the Mediterranean basin through the use of GMES data provided by the Neustrelitz station⁽¹²⁾.

4.9 The role set out for Frontex in coordinating joint return operations should also, in the Committee's opinion, be carried out in close cooperation with humanitarian NGOs with a recognised awareness and long experience in dealing with people in difficult or vulnerable situations.

4.10 The EESC believes that Frontex can only be given a limited mandate to process personal data related to fighting criminal networks organising illegal immigration, and always in close cooperation with the national prosecution authorities.

⁽¹¹⁾ The SIS (Schengen Information System) should be operational by 31 December 2011 (EP Coelho Report).

⁽¹²⁾ The Neustrelitz station, in Germany, will ensure the planning and production of very high resolution data for Europe and the Mediterranean basin via the Geo Eye-1 and Ikonos optical satellites.

5. Specific comments

5.1 The EESC considers the proposed amendments to be consistent with the objective of strengthening the role and functions of Frontex, in order to improve the control of EU external borders and to ensure, at the same time, the freedom and internal security of Member States.

5.2 The following points may nevertheless be raised.

5.2.1 Recital (10) [*The rapporteur's proposed amendment to the Italian version of this recital, replacing the word 'procurando' with 'assicurando', with a view to making it more legally binding, does not affect the English version, which already uses the word 'ensuring' (= 'assicurando')*].

5.2.2 Recital (13) – the word 'lists' should be replaced with the expression 'dedicated registers', which seems more suited to establishing an obligation to manage resources rigorously.

5.2.3 Recital (14) – the adjectives 'trained and specialised' should be included in the expression 'an appropriate number of skilled border guards'.

5.2.4 Recital (15) – the expression 'on a semi-permanent basis' seems vague and should be substituted with more precise wording.

5.2.5 Recital (23) – rigorous 'limits' should be set to the Agency's ability to 'launch and finance projects of technical assistance' etc.

5.3 Article 1a(a)(2) – the expression 'adjacent to' should be more clearly specified, mainly in order to avoid issues of unwarranted interference in national sovereignty.

5.3.1 Article 2(1)(c) – the Agency's mandate to carry out 'risk analyses' should be extended to the 'costs' involved in dealing with pressure on the external borders of the most exposed Member States. Indeed, it only seems fair that all Member States, and not just the 'border' countries, should bear the burden.

5.3.1.1 The provision should be coordinated with the provisions of Article 4.

5.3.2 Article 2(1)(iii)(h) – it seems appropriate to specify that the Agency can only be given a 'limited mandate' to process personal data related to fighting criminal networks organising illegal immigration. The provision should be appropriately coordinated with the provisions of Articles 11, 11a and 11b.

5.3.3 Article 14(1) – it seems appropriate to clarify the detailed arrangements under which the Agency would ‘facilitate’ operational cooperation between Member States and third countries.

5.3.4 Article 14(2) – the possibility for the Agency to deploy liaison officers in third countries should be better clarified,

insofar as officers seconded as observers and/or consultants can ‘only be deployed to third countries in which border management practices respect minimum human rights standards’, with the added proviso that these third countries must also have formally subscribed to binding international Conventions on human rights, asylum and international protection.

Brussels, 15 July 2010.

The President
of the European Economic and Social Committee
Mario SEPI
