



**COUNCIL OF
THE EUROPEAN UNION**

**Brussels, 1 June 2010 (08.06)
(OR. en,pt)**

10530/10

**Interinstitutional file:
2010/0039 (COD)**

**FRONT 88
CODEC 509
INST 185
PARLNAT 20
COMIX 404**

COVER NOTE

from: Jaime Gama, President of the Portuguese Parliament

dated of receipt: 6 May 2010

to: José Luis Rodríguez Zapatero, President of the Council of the European Union

Subject: **Proposal for a Regulation of the European Parliament and the Council
amending Council Regulation (EC) No 2007/2004 establishing a European
Agency for the Management of Operational Cooperation at the External
Borders of the Member States of the European Union (Frontex)**

– **Reasoned opinion in accordance with Article 6 of the Protocol (No 2) on
the application of the principles of subsidiarity and proportionality**

Delegations will find attached a translation of a letter on the above subject.

Portuguese Parliament

Mr José Luis Rodríguez Zapatero
President of the Council of the European Union
Brussels

Subject: Parliamentary scrutiny procedure for European initiatives
– Opinion on COM(2010) 61 final

Sir,

I enclose the opinion drawn up by the Portuguese Parliament's European Affairs Committee and the opinion produced by the relevant specialist standing committee (the Committee on Constitutional Affairs, Rights, Freedoms and Safeguards), under the procedure for parliamentary scrutiny of European initiatives, on:

- **COM(2010) 61 final: proposal for a Regulation of the European Parliament and the Council amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex).**

I would also inform you that this completes the Portuguese Parliament's scrutiny procedure for that initiative.

The documents in question have today also been brought to the attention of the President of the European Parliament and the President of the European Commission.

(Complimentary close).

(s.) JAIME GAMA

PRESIDENT OF THE PORTUGUESE PARLIAMENT

Lisbon, 29 April 2010
Letter 151/PAR/10/hr

OPINION

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]

I. Preliminary note

In compliance with Law No 43/2006 of 25 August 2006 on parliamentary oversight, appraisal and comment under the European Union integration process, the Committee on Constitutional Affairs, Rights, Freedoms and Safeguards has drawn up a report 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].

II. Analysis of the report

The findings to emerge from analysis of that report are as follows:

1. The purpose of the proposal is to adjust 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), in the light of assessments carried out and experience gained. The proposal also sets out to clarify the Agency's remit and to remedy shortcomings identified. This is designed to ensure Frontex's smooth, proper operation.
2. The proposal reflects all of the recommendations made by the Commission in 2008¹, which were welcomed by both the Council and the European Parliament, as well as in a number of European Council conclusions, while account has also been taken of the Frontex Management Board's recommendations, following an independent evaluation carried out in 2008, in accordance with Article 33 of the Frontex Regulation.

¹ COM(2008) 67.

3. The impact assessment ² sees the preferred option as a combination of the following sub-options in particular: (i) compulsory contribution of equipment by Member States, along with Frontex's gradual acquisition or leasing of its own equipment; (ii) compulsory contribution of human resources by Member States, along with a pool of border guards on semi-permanent secondment to Frontex from Member States, with national expert status; (iii) assignment to the Agency of a co-leading role in implementation of joint operations, with detailed rules for operational planning, evaluation and incident reporting, to be enforced by Frontex; (iv) giving Frontex a limited remit to process personal data in combating illegal immigration networks, provided such personal data processing by Frontex is lawful, necessary and proportionate in relation to the Agency's tasks; (v) giving Frontex a remit to assess operational risks and requirements in Member States.
4. The preferred option emerging from the impact assessment is fully reflected in the proposed Regulation, apart from giving Frontex a limited remit to process personal data in combating illegal immigration networks. The Commission does consider that all possible ways of better combating facilitation of illegal immigration and trafficking in human beings should be explored. However, it would prefer to address the issue of personal data under an overall information-sharing strategy, so as to develop inter-agency cooperation in justice and home affairs, as called for by the Stockholm programme.
5. The proposed initiative, amending an existing Regulation, constitutes a further development of the Schengen *acquis* in combating illegal immigration networks, by ensuring cooperation among relevant departments of Member States' authorities, as well as between those departments and the Commission.
6. As regards checking on compliance with the principle of subsidiarity, the proposal takes the view, with particular reference to shared competence under the Treaty, that Member States remain responsible for policing their external borders. Most notably, it establishes the principle that, in operations coordinated by the Agency, guest officers may perform tasks and exercise powers only under instructions from and in the presence of border guards from the host Member State. Decisions to refuse entry, in accordance with the Schengen Borders

² SEC(2010) 149.

Code, may also be taken only by border guards from the host Member State. There is thus no transfer of decision-making power to the Agency.

The proposal's objective of developing integrated management of operational cooperation is better pursued by Community bodies, given the inadequacy of action by Member States to achieve that aim. There is thus no breach of the principle of subsidiarity.

III. Conclusions

1. As the matters in question do not come within the sphere of legislative competence set aside for the Portuguese Parliament alone, Article 2 of Law No 43/2006 of 25 August 2006 is not applicable.
2. The proposed Regulation is in keeping with the principle of subsidiarity.

IV. Opinion

The European Affairs Committee is therefore of the opinion that, with the above report, the scrutiny procedure under Law No 43/2006 of 25 August 2006 has been completed.

Portuguese Parliament, 27 February 2010

(s.) Ana Catarina Mendes
Rapporteur

(s.) Vitalino Canas
Committee Chairman

PORTUGUESE PARLIAMENT
COMMITTEE ON CONSTITUTIONAL AFFAIRS,
RIGHTS, FREEDOMS AND SAFEGUARDS

REPORT AND OPINION

**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)**

1. Procedure

In accordance with Law No 43/2006 of 25 August 2006 on parliamentary oversight, appraisal and comment under the European Union integration process, the European Affairs Committee has referred 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)*", together with the relevant working documents, to the Committee on Constitutional Affairs, Rights, Freedoms and Safeguards, in order for it to comment on matters within its purview.

It is thus for the Committee on Constitutional Affairs, Rights, Freedoms and Safeguards to analyse the proposal, with particular reference to the principles of subsidiarity and proportionality, and to issue its opinion, for submission to the European Affairs Committee.

2. Proposal

Explanation

(a) Grounds for and objectives of the proposal

The purpose of the proposal is to adjust 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), in the light of assessments made and practical experience, while also spelling out the limits to and aims of the Agency's remit.

(b) General context

On 13 February 2008 the Commission issued a communication on the evaluation and future development of the Frontex Agency [COM(2008) 67 final], together with an impact assessment, which was welcomed by the Council and the European Parliament. That communication pointed to the need to give the Agency a greater role in integrated management of the Union's borders, as well as considering the overall direction of such management in future.

There was also an independent evaluation carried out in 2008, as required by Article 33 of the Frontex Regulation, prompting the Frontex Management Board to make a number of recommendations to the Commission concerning changes to the Agency's legal basis.

(c) Impact assessment

The impact assessment sees the preferred option as a combination of the following sub-options:

- compulsory contribution of equipment by Member States, along with Frontex's gradual acquisition or leasing of its own equipment;
- compulsory contribution of human resources by Member States, along with a pool of border guards on semi-permanent secondment to Frontex from Member States, with national expert status;
- assignment to the Agency of a co-leading role in implementation of joint operations;
- financing and implementation by Frontex of technical assistance projects in non-member countries, with liaison officers being deployed in such countries;
- giving Frontex a remit to process personal data in combating illegal immigration networks;
- giving Frontex a coordinating role in implementing joint return operations;

- giving Frontex a remit to assess operational risks and requirements in Member States.

The preferred option is reflected in this legislative proposal.

One exception here, however, is giving Frontex a remit to process personal data in combating criminal networks organising illegal immigration. The Commission would prefer to address the issue of personal data under an overall information-sharing strategy, as a way of developing inter-agency cooperation in justice and home affairs.

3. Analysis of the proposal

Legal basis

The legal basis for the proposal is to be found in Articles 74 and 77(1)(b) and (c) of the Treaty on the Functioning of the European Union.

Principle of subsidiarity

In accordance with the proposed Regulation, Member States remain responsible for policing their external borders. In operations coordinated by the Agency, in particular, guest officers may perform tasks and exercise powers only under instructions from and in the presence of border guards from the host Member State.

Decisions to refuse entry, in accordance with the Schengen Borders Code, may be taken only by border guards from the host Member State; there is thus no transfer of decision-making power to the Agency under the proposed Regulation.

The objective of the proposed Regulation, while complying with the same fundamental limits as the existing provisions, is to develop integrated management of operational cooperation, which cannot be sufficiently ensured by Member States.

In view of the above considerations, then, the proposal must be found to comply with the principle of subsidiarity.

Principle of proportionality

The proposed initiative, amending the Regulation, constitutes a further development of the Schengen *acquis*, in combating illegal immigration networks, and ensures cooperation among the relevant departments of Member States' authorities, as well as between those departments and the Commission.

The proposal can thus be found also to observe the principle of proportionality, under Article 5(4) of the Treaty on European Union.

Legislative instrument

The legal instrument proposed is a Regulation.

That being so, as the intention of the proposal is to amend a pre-existing Regulation, it must be concluded that use of any other instrument would be inappropriate.

4. Conclusions

- (1) The European Affairs Committee referred this proposal to the Committee on Constitutional Affairs, Rights, Freedoms and Safeguards for it to comment with more particular regard to the principles of subsidiarity and proportionality.
- (2) The purpose of the proposal is to adjust 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), in the light of assessments made and practical experience, while also spelling out the limits to and aims of the Agency's remit.
- (3) More specifically, the proposal is designed to ensure compulsory contribution of equipment and human resources by Member States, along with Frontex's gradual acquisition or leasing of

equipment and establishment of a pool of border guards on semi-permanent secondment to Frontex from Member States, assignment to the Agency of a co-leading role in implementation of joint operations, along with financing and implementation by Frontex of technical assistance projects in non member countries, a coordinating role for Frontex in implementing joint return operations and a remit to assess operational risks and requirements in Member States.

- (4) The proposal's objectives cannot be sufficiently achieved by Member States alone and can be achieved more effectively at European Union level; there is thus no detectable breach of the principle of subsidiarity.
- (5) Nor does the proposal go beyond what is strictly necessary in order to achieve those objectives; it thus does not seem to entail any breach of the principle of proportionality either.
- (6) Lastly, for a proposal to amend a pre-existing Regulation, there can be no doubt that another Regulation will here be the most suitable legislative means of achieving that purpose.

In view of the foregoing, the Committee on Constitutional Affairs, Rights, Freedoms and Safeguards is of the:

OPINION:

that, in the light of the above considerations and conclusions, under Law No 43/2006 of 25 August 2006, this report should be submitted to the European Affairs Committee for its appraisal.

São Bento Palace, 13 April 2010

(s.) Nuno Magalhães
Rapporteur

(s.) Osvaldo de Castro
Committee Chairman

=====