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van deskundigen in
internationaal vreemdelingen-,
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To Member of the European Parliament,
Committee on Civil Liberties, Justice and Home Affairs (LIBE)
European Parliament

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Reference CM06-14

Regarding Proposal for a Regulation establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism (COM (2006) 401 final)

Date 24 October 2006

Dear Sir/Madam,

The Standing Committee of experts on international immigration, refugees and criminal law ('the Standing Committee') has a number of concerns regarding the proposal for a regulation establishing Rapid Border Intervention Teams. While the Standing Committee agrees with the Commission that guarding the EU's external borders is a common responsibility for the EU Member States, the Committee is worried about current practices employed by a number of Member States regarding pre-border checks and the processing of illegal immigrants intercepted at sea. These practices include the categorical refusal of entry into EU territory of third country nationals, without granting access to a determination procedure or the possibility to lodge an appeal against the refusal of entry. As outlined in attached Comment, such practices run counter to international law and principles of Community law. The Standing Committee is worried that the adoption of the proposed regulation will result in EU mandated teams of border guards being engaged in these practices. Therefore, amendment of the proposal is necessary, as will be explained hereunder.

Pre-border control and surveillance
The Standing Committee is of the opinion that access to durable solutions for asylum seekers is a fundamental principle of International Human Rights Law, Refugee Law and Community Law and that this principle should be adhered to in legislation relating to external border controls of the EU. The present proposal provides for an extremely speedy decision-making procedure with regard to the deployment of Rapid Border Intervention Teams, without prior approval for individual operations by either the European Parliament or Member States who make border guards available to the teams. While the management of external borders has been proclaimed a common Union activity as a principal means to prevent illegal immigration and human trafficking, which should, according to the Council, include the 'stepping up of pre-border checks and joint processing of illegal immigrants intercepted at sea', at present there is no Community framework laying down individual rights of migrants subject to these policies, since the instrument of pre-border controls falls outside the scope of the Schengen border code (EC Regulation 562/2006) which entered into force on 13 October 2006.

The risk of EU mandated teams of border guards being engaged in practices of pre-border controls which run counter to international and Community law is not mere academic, as evidenced by the current border guard operation coordinated by the EU external border guard agency FRONTEX under the header of operation Hera-II. In this operation, in accordance with agreements concluded between Spain and Mauritania, Senegal and the Cape Verde, border guards from various Member States patrol the territorial waters of these West-African countries in order to intercept illegal migrants and send them back to shore without any form of screening procedure. Only if the vessels are intercepted outside the 24-miles zone, are the migrants being escorted to the Canary Islands and allowed to lodge a claim for asylum. Currently, talks are under way between the European Commission, Italy and Libya, in order to set up a similar operation off the coast of Libya.

Amendment of proposal
The Standing Committee is deeply concerned about the proliferation of practices of pre-border controls and the supporting role played by the EU in this regard without the existence of a set of Community rules applicable to these controls. The Standing Committee considers amendment of the current proposal necessary, in order to explicitly guarantee that teams of EU border guards will not participate in border policies employed by individual Member States which amount to categorically refusing entry to third country nationals without allowing them to lodge a claim for asylum or an appeal against the refusal of entry.

This amendment should preferably take the form of insertion of an additional subsection in Article 6 of the proposal:

Article 6:
5. When the tasks referred to in Articles 7 and 8 are carried out in operations of pre-border control and surveillance, guest officers and members of the teams shall comply with provisions applicable to regular external border controls, in particular special provisions on refusal of entry and the right of asylum. Guest officers and members of the teams shall under all circumstances guarantee international protection in accordance with the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Geneva Convention relating to the Status of Refugees.

Additionally, the European Parliament could consider inserting a provision explicitly requiring prior approval for an individual operation agreed upon by FRONTEX and the host Member State by the European Parliament and/or the home Member State of guest officers.

Community framework regarding pre-border controls
Moreover, the Standing Committee would highly recommend the drafting of new EC legislation, and/or amendment of the Schengen border code in order to lay down the conditions under which the instrument of pre-border controls may be used by Member States. These conditions should prevent Member States from using the instrument of pre-border controls to circumvent obligations applicable to regular border controls and include the guaranteeing of access to a determination procedure in accordance with provisions as laid down in the Common European Asylum System and legal safeguards as already applicable to persons who are refused entry at the EU's external borders (see especially Article 13 Schengen border code).

The Standing Committee is prepared to provide you with further information on this subject.

Yours sincerely,

On behalf of the Standing Committee,

Prof. Mr. C.A. Groenendijk
Chairman

Comment on Proposal for a Regulation establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism (COM (2006) 401 final)

1. Introduction

Although worded in terms of general applicability, the proposal for a regulation establishing Rapid Border Intervention Teams has clearly been prompted by the humanitarian crisis which is currently going on along the Westafrican migration route. From January -September 2006 approximately 23.000 Africans have reached the Spanish Canary Islands with an estimated number of 3.000 who have died during the journey. Back in 2003, the Civipol research institute concluded that the Westafrican migration route became increasingly popular due to the increased deterrent effect of improved surveillance mechanisms of the Spanish authorities in the Strait of Gibraltar.[1]The passage from Mauritania, the Cape Verde and Senegal towards the Canary Islands is significantly longer and riskier. It can be added here that a similar shift in migration routes has taken place with regard to illegal migration from Libya towards Italy. Increased surveillance of the Sicilian Channel has diverted illegal migrants to the considerable longer passage through the Gulf of Sirte.

The Standing Committee believes that guarding the EU's external borders, as well as providing durable solutions to asylum seekers, should be a common responsibility for the EU Member States. At present, Mediterranean Member States (most notably Italy, Spain, Malta, Greece and Cyprus) suffer a disproportionate burden in taking in asylum seekers. Practices in these countries show that individual Member States are insufficiently capable of dealing with sudden influxes of large numbers of illegal migrants, potentially leading to overcrowded reception facilities, rushed determination procedures, collective expulsions and a lack of judicial guarantees offered to asylum seekers.[2] The Standing Committee therefore welcomes developments amounting to a common approach, as long as they are undertaken within the appropriate refugee protection and human rights framework.

The creation of Rapid Border Intervention teams must be seen as supplemental to the creation, in 2004, of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX), by EC regulation 2007/2004. FRONTEX' main tasks exist of coordinating Member State cooperation in the sphere of external border controls and the supply of expertise and technical equipment to individual Member States. The proposed regulation adds another task to the FRONTEX mandate: the deployment of "Rapid Border Intervention Teams to Member States requesting assistance when faced with situations of particular pressure, especially the arrivals at points of the external borders of large numbers of third country nationals trying to enter illegally into the European Union."[3]

In summary, the rapid intervention teams consist of a list of officers of national border guards whom Member States put at the disposal of FRONTEX. They will be offered training by FRONTEX and can be deployed 'in circumstances requiring increased technical and operational assistance at its external borders' in the territory of a Member State at a temporary basis. The tasks of the Rapid Border Intervention Teams consist of both surveillance of external borders and the participation in border checks. Art. 7 of the proposal lists the competences relating to border checks, art. 8 lists the competences relating to surveillance. Included in these competences are: (1) the check of travel documents of persons crossing the border; (2) checking that a person is not the object of alert for refusal of entry in the Schengen Information System (SIS); (3) searching means of transport and possessions of persons crossing the border and; (4) preventing persons from illegally crossing external borders. Art. 7 (3) stipulates that decisions to refuse entry shall be taken by members of the teams only after consultation with, and subject to the agreement of, a commanding officer of the border guard of the host Member State. It is up to each Member State to decide whether it wants to make officers available to the intervention teams and, furthermore, the teams can only be employed in a Member State at the latter's request.

The joint execution of external border controls and the proliferation of EU activities in this field raises – at least – two legal issues to which the Standing Committee would like to draw attention. The first one is the question of State responsibility for possible human rights violations emanating from actions undertaken by members of multinational intervention teams; the second one is the issue of pre-border checks and the joint processing of illegal immigrants intercepted at sea.

2. Liability for conduct of Rapid Border Intervention Teams

According to the proposal, members of the Rapid Border Intervention teams remain officers of the national border guards of their Member States. They are allowed to wear their own uniform and will be continued to be paid by their own State, but must also wear a blue armband with the insignia of the European Union. They shall perform activities as laid down in the operational plan concluded between FRONTEX and the

[1] 'Feasibility study on the control of the European Union's maritime borders' by Civipol Conseil to the European Commision, Doc. 11490/1/03, Rev. 1, FRONT 102, COMIX 458, 19 September 2003, at p. 15.
[2] See e.g. Human Rights Watch report 'Stemming the Flow: Abuses Against Migrants, Asylum Seekers and Refugees', vol. 18, no. 5(E), September 2006; Commissioner for Human Rights of the Council of Europe, Country Report Italy, CommDH(2005)9, pp. 37-44.
[3] Art. 12 (1) draft proposal.

host Member State and fall under the direct command of officers of the national border guard of the host Member State. The members of the teams are bound to comply with Community law and the national law of the host Member State. Article 10 of the proposal holds that home Member States are liable for any damages caused by their officers (*civil liability*), although the host Member State shall compensate this damage to the victims on behalf of the home Member State. Art. 11 confers the *criminal liability* with respect to offences committed against or by guest officers to the host Member State. With regard to *administrative liability*, the proposal envisages that appeals against decisions to refuse entry shall be addressed to the authorities of the host Member State.

This approach serves the principle of effective judicial protection and is in conformity with both the case law of the European Court of Human Rights[4] and the Articles on State Responsibility adopted by the *International Law Commission*. Article 6 hereof holds that: 'The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed'. Since the proposed regulation envisages that guest officers will operate under the direct command of the host Member State and shall only take instructions from the host Member State, it is appropriate to confer responsibility for actions of these guest officers to the host Member State.

This does mean however, that, while wearing the uniform of their own Member State and being continued to be paid by the home Member State, the home Member State effectively loses control over conduct undertaken by its border guards operating abroad. Since the regulation stipulates that guest officers need to comply with Community Law and the national law of the host State, they are – *a contrario* – not bound to comply with the national laws of their home State. Art. 4 (1) of the proposal stipulates that members of the teams shall *only* take instructions from the host Member State. This can result in border guards practicing competences which they do not have when active in their own State. This is potentially problematic, especially when the host country conducts border policies which run counter to principles adhered to in the home Member State. In this regard, one cannot overlook current practices of pre-border checks and the processing of illegal immigrants intercepted at sea.

3. Pre-border checks and the (joint) processing of illegal immigrants intercepted at sea

At present, off the shores of Mauritania, Senegal and the Cape Verde, FRONTEX is already coordinating a joint external border operation under the header of operation Hera II – started in May 2006. This operation takes the form of pre-border surveillance and interception. In accordance with agreements made between Spain and Mauritania, Senegal and the Cape Verde, patrol boats and planes from Spain, Italy, Portugal and Finland patrol the continguous zones of these West-African countries (24 nautical miles) and assist the local coast guard in intercepting illegal migrants and sending them back to shore. Only if the vessels are intercepted outside the 24-miles zone, are the boats being escorted to the Canary Islands. Although the United Nations Convention on the Law of the Sea normally does not authorize inspections outside ones own territorial waters by a State other than the flag State, the Convention makes an exception when the vessel has no nationality or its nationality is in doubt, or when the flag State has consented to the inspection (Article 110). The Hera II headquarters in Tenerife has reported that the joint operation inside the continguous zones of Mauritania, Senegal and the Cape Verde has resulted in approximately 1.250 people being returned to African shores in the period May-September 2006. Currently, talks are under way between the European Commission, Italy and Libya, in order to set up a similar operation off the coast of Libya. Already in July 2003, the Italian Ministry of Interior issued a decree that enabled the Italian navy to intercept ships carrying asylum seekers and migrants and, if possible, to force the vessels back to the territorial waters of the countries from which they came without consideration for identifying asylum seekers.

The Programme of measures to combat illegal immigration across the maritime borders of the European Union adopted by the JHA Council in 2003 expressly calls for 'International cooperation between Member States, as well as between them and non-member countries, which will in particular have to involve stepping up "pre-border" checks and joint processing of illegal immigrants intercepted at sea.'[5] Extra-territorial border enforcement activities of the EU and its Member States raises refugee protection as well as broader human rights concerns. The Standing Committee is particularly worried about the practice of pre-border checks resulting in migrants immediately send back to a third country without some form of individual assessment, nor any possibility of access to a determination procedure. Such a practice is, as will be underlined below, in conflict with both international law and standards developed in Community law.

Although the extra-territorial application of the Refugee Convention is much disputed (e.g. US Supreme Court in *Sale, Acting Comr, Immigration and Naturalisation Service v Haitian Centers Council Inc* 509 US 155 (1993); Inter-American Commission on Human Rights, Merits Report No 51/96, Case 10.675, *Haitian Boat People (United States of America)*, 13 March 1997; House of Lords, *R. v. Immigration Officer at Prague Airport*, [2004] UKHL 55, 9 December 2004) and the Refugee Convention at any rate seems to exclude persons from protection who are still inside their country of origin, both the European Convention on Human Rights and the International Covenant on Civil and Political Rights do have extra-territorial effect. The ECtHR held in Loizidou that *'…the responsibility of Contracting Parties can be involved because of acts*

[4] E.g. ECtHR 26 June 1992, *Drozd and Janousek v. France and Spain* (Appl. 12747/87), ECtHR 14 July 1977*, X and Y v. Switzerland* (joined appl. 7289/75 and 7349/76), DR 9, p. 57.
[5] Doc. 13791/03, FRONT 146, COMIX 631, 21.10.2003), para. 26.

of their authorities, whether performed within or outside national boundaries, which produce effects outside their own territory.' [6] In Issa, the ECtHR elaborated the reasoning behind the extraterritorial application of the ECHR: *'Accountability in such situations stems from the fact that Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory.'*[7]

In *Xhavara and others v. Italy and Albania* (No 39473/98), the ECtHR considered a case of Albanian citizens who were trying to enter Italy illegally when their boat sank following a collision with an Italian warship whose crew was attempting to board and search the vessel. The Italian operation took place as a consequence of the wave of Albanian citizens immigrating illegally into Italy, after which Italy decided to set up a naval blockade and signed an agreement with Albania authorising the Italian navy to board and search Albanian boats. Although the ECtHR held that Italy did not act contrary to the right of a person to leave one's country (art. 2(2) prot. 4), the ECtHR did rule that the interception activities which extended to international waters and to the territorial waters of Albania fell under Italian jurisdiction and that Italy therefore, had to take '*all the necessary measures to avoid, in particular, drowning.'*

The extraterritorial application of the ECHR and the ICCPR implies that, when dealing with illegal immigrants at high seas, States must also comply with the principle of non-refoulement as embedded in articles 2 and 3 of the ECHR and may not send back immigrants without allowing those who make a credible showing of political refugee status from access to a determination procedure. In this respect, the current practice in West-African waters seems to comply with international law: persons intercepted at the high seas or in Spanish territorial waters are escorted to the territory of Spain and allowed to make a claim for asylum.

With regard to the practice of intercepting illegal migrants in the territorial waters of African countries without allowing further passage towards the Canary Islands, the following remarks can be made. The Refugee Convention seems to exclude persons who are still inside their country of origin – albeit in the territorial waters – from protection, since, according to Article 1, a person can only fall under the refugee definition when he is 'outside the country of his nationality'. The UNHCR has interpreted this clause as 'a general requirement for refugee status that an applicant who has a nationality be outside the country of his nationality. There are no exceptions to this rule. International protection cannot come into play as long as a person is within the territorial jurisdiction of his home country.'[8] On these grounds, the House of Lords in a case concerning the conduct of British immigration Officers operating at the airport of Prague, whose main tasks consisted of not allowing Chech Roma asylum seekers from boarding plains heading for the UK, ruled that these asylum seekers could not invoke the Refugee Convention.

This reasoning, however, does not automatically apply to the principle of non-refoulement as enshrined in the ECHR and the ICCPR. Although this principle is commonly understood as referring to the *return, expulsion* or *extradition* of persons to a country where they face a real risk of suffering serious harm, neither the ECHR nor the ICCPR explicitly makes a territorial reservation analogous to the Refugee Convention. In fact, the word 'return' (or "refouler") is absent in the relevant provisions in both the ICCPR and the ECHR. The ECtHR has repeatedly stated that the absolute prohibition of torture or inhuman or degrading treatment – which includes the prohibition of refoulement – is an obligation which State parties have to adhere to with regard to anyone who falls under their jurisdiction, regardless of where this jurisdiction is asserted.[9] This implies that the principle of non-exposure to prohibited treatment is applicable to the handover of illegal migrants from the jurisdiction of one State to the other, even if the handover concerns an immigrant which has physically never left his country of origin but who only temporarily has been brought under the jurisdiction of a foreign State acting within his country of origin. In these cases, the transferring State may not proceed with the transfer without appropriate enquiry into the risk and seriousness of the harm the claimant fears.[10]

In this regard, it must moreover be mentioned that, contrary to the *R. v. Immigration Officer at Prague Airport* case, not all immigrants intercepted within the continguous zones of Mauritania, Senegal and the Cape Verde, hold the nationality of these countries. The West-African migration route is used by persons coming from across the African continent and even beyond. Late September it was reported that a ship of Asian asylum seekers, mostly Pakistani, had managed to reach the Canary Islands. It falls beyond dispute that these persons can invoke the Refugee Convention and that, when asserting jurisdiction over these persons, European countries are bound to adhere to the principle of non-refoulement.

Furthermore, the Standing Committee would like to draw attention to Recommendations 1645 (2004) and 1737 (2006) of the Parliamentary Assemblee of the Council of Europe, in which the Committee of Ministers of the Council of Europe were invited to call upon member states to:

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[6] ECtHR 23 March 1995, Case 15318/89 (*Loizidou v. Turkey*), par. 62.
[7] ECtHR 16 November 2004, Case 31821/96 (*Issa and Others v. Turkey*), par. 71. See with regard to the extra-territorial application of the ICCPR e.g. HRC 29 July 1981, Case CCPR/C/13/D/52/1979 (*Lopez Burgos v. Urugay*), par. 12.3. and HRC 29 July 1981,Case CCPR/C/13/D/56/1979, (*Celiberti de Casariego v. Uruguay*), par. 10.3.
[8] UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* (1992).
[9] E.g. ECtHR 7 July 1989, case 14038/88 (*Soering v. United Kingdom*), par. 88.
[10] see also E. Lauterpacht and D. Betlehem, 'The scope and content of the principle of non-refoulement', in: Feller, Türk and Nicholson (eds.), *Refugee Protection in International Law*, Cambridge, 2003, at. para 67.

(Recommendation 1645 (2004) Access to assistance and protection for asylum-seekers at European seaports and coastal areas)
a. ensure that those who wish to apply for asylum at seaports and coastal areas are granted unimpeded access to the asylum procedure, including through interpretation in their language or, if this is not possible, in a language they understand, and to free and independent legal advice;
b. ensure that every person seeking entry at seaports or coastal areas be given the possibility of explaining in full the reasons why he or she is trying to do so, in an individual interview with the relevant authorities;
[…]
i. accept responsibility for processing asylum applications of clandestine passengers when the first port of call on the planned route of the ship is on their national territory;
j. in the context of their responsibilities for immigration control, conduct sea patrolling operations in such a way as to fully comply with the 1951 Geneva Convention on the Status of Refugees and the 1950 European Convention on Human Rights, by avoiding sending people back to countries where they would be at risk of persecution or human rights violations;

(Recommendation 1737 (2006) (New trends and challenges for Euro-Mediterranean migration policies)
8.3. comply to the letter with international human rights protection conventions in all operations to prevent or deal with illegal migration and, in particular:
8.3.1. guarantee the right to leave one's country;
8.3.2. guarantee unimpeded access to asylum procedures for people in need of international protection;
8.3.3. ensure that return measures are applied in keeping with human rights standards and with due regard for safety and dignity;
8.3.4. avoid returning irregular migrants to countries where they would be at risk of persecution or human rights violations;
8.3.5. avoid secondary migration movements by sending back migrants to non-European countries, whose nationality they do not have and by which they have merely transited;
8.3.6. examine and take account in all cases of the root causes of these migration movements.

The Standing Committee would like to recall that access to the asylum procedure is one of the cornerstones of the Common European Asylum System as shaped by the asylum regulations and directives adopted under title IV of the EC Treaty. Article 3 (1) of EC Regulation 343/2003 holds that 'Member States shall examine the application of any third country national who applies at the border or in their territory to any one of them for asylum'. The Procedures Directive (2005/85/EC) obliges Member States, with as controversial exception the 'European safe third countries concept', to allow for an individual examination of asylum cases when employing either the safe country of origin or the safe third country concept. These provisions must be seen in the light of Article 18 of the Charter of Fundamental Rights of the European Union which holds that Member States are to 'guarantee the right to asylum'. Although this provision cannot be read as obliging Member States to grant asylum themselves, Member States must guarantee that durable solutions are available.[11]

The practice of refusing access without an individual screening procedure or the possibility of a legal remedy against such refusal also runs counter to the approach taken in the recently revised Schengen border code (regulation EC No 562/2006), which, with regard to the 'Control of external borders and refusal of entry' holds that:

> 'Persons refused entry shall have the right to appeal. Appeals shall be conducted in accordance with national law. A written indication of contact points able to provide information on representatives competent to act on behalf of the third-country national in accordance with national law shall also be given to the third-country national (Article 13 (3)).'

The Schengen border code furthermore stipulates that all decisions of refusal of entry must be substantiated and in written form (Article 13 (2)).

The Standing Committee is of the opinion that the physical transfer of border controls towards the high seas or the territories of third States may not be used as a means to circumvent international obligations or norms laid down in Community law with regard to border controls and asylum applications lodged at the border or within EU Member States. The Standing Committee regards the practice of pre-border checks and surveillance, if amounting to categorically excluding groups of persons from access to EU territory without an individual examination of asylum claims or the possibility to lodge an appeal, as running counter to (1) (the spirit of) the Refugee Convention (2) the ICCPR and ECHR and (3) principles of Community law.

4. Conclusion and Recommendations

Although the Standing Committee welcomes increased Member State cooperation in the sphere of external border controls, the Committee notes that, at present, a clear Community framework with regard to the

[11] see also H. Battjes, *European Asylum Law and International Law*, Leiden: Brill Publishers, 2006 at p. 114.

practice of pre-border controls and surveillance is non-existent. The Schengen border code narrowly defines the EU's external borders as 'the Member States' land borders, including river and lake borders, sea borders and their airports, river ports, sea ports and lake ports, provided that they are not internal borders' (Article 2 (2)). The absence of explicit provisions relating to the use of the instrument of pre-border checks could lead to EU agencies and individual Member States making use of this legal vacuum in Community law by engaging in activities which run counter to International human rights law. As a minimum, international human rights law applicable to the instrument of pre-border controls should be defined in a Community framework whenever the EU participates or condones Member State participation in these controls.

The Standing Committee is worried that the setup of Rapid Border Intervention Teams will lead to the participation of border guards from across Europe in practices of pre-border checks and surveillance, including the practice of sending back potential refugees without a screening procedure. Therefore, either (1) the proposed regulation should be amended or (2) new legislation on EU level should be drafted which fully guarantees that in pre-border situations potential refugees will never be denied access to a determination procedure.

The draft proposal on Rapid Border Intervention Teams does not contain a provision on express agreement granted by the home Member State for the participation of its border guards in an individual operation. The proposal provides an extremely speedy decision-making procedure on the deployment of Rapid Border Intervention Teams. FRONTEX has to decide on a request for deployment by a Member State within five working days (Article 12 amending Regulation 2007/2004 Article 8 f (2)). If FRONTEX decides to authorize deployment, it has to draw up an operational plan together with the requesting State immediately (amended Article 8 f (3)). The Rapid Border Intervention team shall then be deployed no later than five working days after the date of agreement of the operational plan (amended Article 8 f (5)). The role of Member States whose border guards are deployed in this decision-making procedure is reduced to a minimum. Amended article 8 f (4) merely holds that 'As soon as the operational plan has been agreed, the Executive Director [of FRONTEX] shall inform the Member States whose border guard officers are to be deployed.' With regard to the composition of the teams, FRONTEX will take into account both the relevant professional experience of the officers (in particular the knowledge of languages) together with the circumstances the requesting Member State is facing (amended Article 8 b), without any provision referring to consultation or preferences of home Member States. This means that, after the provision of a list of available officers for joint operations to FRONTEX, participating member States effectively lose control over the actual deployment of their officers and the conditions under which they will operate.

The Standing Committee therefore recommends:

1. The drafting of EU legislation concerning the use of the instrument of pre-border controls which guarantees that the use of that instrument should not circumvent existing obligations emanating from human rights treaties and Community law. Access to durable solutions for asylum seekers must under all circumstances be guaranteed. This legislation can also take the form of amendment of regulation 562/2006 (Schengen Borders Code) by inserting a chapter on 'pre-border controls and surveillance'.
2. As long as legislation mentioned under (1) does not exist, the current proposal on the establishment of Rapid Border Intervention Teams should be amended by way of insertion of a provision ensuring that access to durable solutions for asylum seekers is under all circumstances guaranteed and that activities engaged in by Rapid Border Intervention Teams shall never preclude access to a determination procedure.
3. Additionally, the insertion of a provision in the current proposal requiring explicit approval prior to the deployment of Rapid Border Intervention Teams in a Member State by the European Parliament and/or the home Member State whose officers will be deployed in another Member State.

As a final note, the Standing Committee would like to underline that although border patrols in itself can be useful instruments in the fight against illegal migration, they do not take away root causes for illegal migration and – as long as these root causes exist – can realistically not be expected to prevent the ongoing influx of illegal migrants into the EU. Answers must be found in an integral approach, encompassing issues of prevention, conditions for granting asylum, effective return policies and the fight against human trafficking. In this regard, not only further harmonization and coordination of policies in the area of Justice and Home Affairs, but also an intensification of cooperation with third countries is desirable; within the human rights framework as provided by *inter alia* the European Convention on Human Rights and the 1951 Refugee Convention.

Utrecht, October 24, 2006