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NOTE

From: Presidency

To: Permanent Representatives Committee/Council / Mixed Committee
(EU-Iceland/Liechtenstein/Norway/Switzerland)

Subject: Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC

I INTRODUCTION

The aforementioned proposal was submitted by the Commission, as part of the Borders Package on 15 December 2015. The main purpose of the proposal is to set up a European Border and Coast Guard which will be consisting of the European Border and Coast Guard Agency (replacing Frontex) and the national authorities responsible for border management. The primary objective of the European Border and Coast Guard (EBCG) shall be to ensure and implement, as a shared responsibility, the European integrated border management at the external borders, with a view to managing migration effectively and ensuring a high level of security within the EU, while safeguarding EU-internal free movement.

The provisions of this proposal related to coast guard functions are linked to the proposals on amending Regulation 1406/2002 establishing a European Maritime Safety Agency (EMSA) and Regulation and Regulation 768/2005, establishing a European Fisheries Control Agency (EFCA), and are aimed at ensuring European cooperation on coastguard functions. The Presidency examined the relevant provisions of the three proposals in a coordinated way in the competent Council Working Parties,¹ aiming at achieved coherence between their respective wordings.

With a view to providing swiftly credible responses to the situation at the external borders of the Union and the ongoing migratory crisis, the European Council stressed in its Conclusions of 17-18 December 2015 that the “Council should adopt its position on the "European Border and Coast Guard" proposal under the Netherlands Presidency”. This mandate was reaffirmed and became more emphatic when in the Conclusions of the European Council held on 18-19 February 2016 it was held that “work should be accelerated with a view to reaching a political agreement under the Netherlands Presidency and to make the new system operational as soon as possible”.

In the light of this strong mandate, the Presidency has set the objective of making quick and good progress on this proposal as a matter of absolute priority. This has been facilitated by the use of a thematic approach in the handling of the proposal², and by the idea of confirming agreement in principle on the tentative compromises reached on the discussed chapters of the draft Regulation.³

¹ the Working Party on Frontiers, the Shipping Working Party and the Working Party on Internal and External Fisheries Policy.

² See also doc. 6309/16 for a further analysis on the Presidency's approach.

³ In order to keep up with its mandate, the Presidency decided to have two-day meetings of the competent Working Party on Frontiers on the proposal every other week with meetings of the JHA Counsellors in between and address the issues which are ripe for agreement in principle to Coreper in due time.

II CHAPTER I AND CHAPTER II, SECTION 2, OF THE EBCG PROPOSAL

The provisions of Chapters I and Chapter II, Section 2, of the proposal⁴ were discussed thoroughly by the Working Party on Frontiers on 8, 19, 28-29 January and 11-12 February 2016. These Chapters include Articles on important issues for the setting up of the European Border and Coast Guard, like European integrated border management, shared responsibility, liaison officers of the Agency in the Member States and the vulnerability assessment. Certain issues contained in this group of Articles were addressed by the SCIFA meeting of 15 January 2016, (such as the shared responsibility between Member States and the Agency for the external border controls and the vulnerability assessment to be carried out by the Agency regarding the Member States capacities with regard to border control). These issues were also dealt with in the informal JHA Ministerial held on 25 January 2016 which provided valuable guidance.

At the JHA Counsellors meeting on 18 February 2016, substantial progress was made, and the Presidency has on that basis prepared the attached revised version of the relevant provisions of Chapter I and Chapter II, Section 2, of the proposal. The Presidency believes that there is sufficient support for the revised text as a basis for further proceedings.

III EBCG, EMSA and EFCA

The Working Party on Frontiers examined the provisions related to coast guard functions (Articles 7(1)(q) and 52) at its meetings referred to above. In parallel, the competent Working Parties examined thoroughly the EMSA and EFCA proposals in a series of meetings⁵, resulting in a broad agreement on most outstanding issues and in harmonisation of the three texts where appropriate.

⁴ With the exception of Article 2 on definitions, which will be dealt with when the discussion on the relevant operative provisions will be further advanced.

⁵ The Shipping Working Party examined the proposal on 13 and 20 January and on 10 February 2016- see doc. 6283/16 for further details and the Working Party on Internal and External Fisheries Policy on 14 January and 11 February 2016 - see doc. 6330/16 for further details.

In order to streamline the above work, the Presidency held a Counsellors meeting on 18 February 2016, with the participation of Counsellors responsible for the EMSA and EFCA proposals, during which a very significant degree of common ground between Member States was registered with regard to the coast-guard related provisions of the three above mentioned proposals. After that meeting revised texts have been prepared. The Presidency believes there is sufficient support for the revised text related to coast guard functions set out in the Annex and the corresponding texts set out in 6283/16 (EMSA) and 6330/16 (EFCA) for the purpose of further proceedings.

IV CONCLUSION

In the light of the above, the Presidency believes that the compromise text included in the Annex and in 6283/16 and 6330/16 has a sufficient degree of support by delegations. It invites the Committee to confirm this with a view to preparing the upcoming negotiations with the European Parliament on this file.

CHAPTER I

EUROPEAN BORDER AND COAST GUARD

Article 1

Subject matter

A European Border and Coast Guard is hereby set up to ensure a European integrated border management at the external borders with a view to managing migration effectively and ensuring a high level of internal security within the Union, while safeguarding the free movement of persons therein.

[Article 2

Definitions

For the purposes of this Regulation, the following definitions shall apply:

- (1) 'external borders' means the land and sea borders of the Member States and their airports and seaports, to which the provisions of Title II of Regulation (EC) No 562/2006 of the European Parliament and of the Council¹ apply;
- (2) 'border control' means border control as defined in point 9 of Article 2 of Regulation (EC) No 562/2006;
- (3) 'European Border and Coast Guard Teams' mean teams of border guards and other relevant staff from participating Member States, including national experts that are seconded by Member States to the Agency, to be deployed during joint operations, rapid border interventions as well as in the framework of migration management support teams;

¹ Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ L 105, 13.4.2006, p. 1).

- (4) 'host Member State' means a Member State in which a joint operation or a rapid border intervention, a return operation or a return intervention takes place or from which it is launched;
- (5) 'home Member State' means the Member State of which a member of the European Border and Coast Guard Teams is a border guard or other relevant staff member;
- (6) 'participating Member State' means a Member State which participates in a joint operation, rapid border intervention, return operation, return intervention or migration management support teams by providing technical equipment, border guards and other relevant staff deployed as part of the European Border and Coast Guard Teams, as well as a Member States which participate in return operations or return interventions by providing technical equipment or staff;
- (7) 'members of the European Border and Coast Guard Teams' mean the officers of border guard services or other relevant staff of Member States other than the host Member State, including national experts and border guards from Member States seconded to the Agency, who are participating in joint operations or rapid border interventions;
- (8) 'members of the teams' mean members of the European Border and Coast Guard Teams or teams of staff involved in return-related tasks participating in return operations or return interventions;
- (9) 'migration management support teams' mean teams of experts which provide operational and technical reinforcement to Member States at hotspot areas and which are composed of experts deployed from Member States by the European Border and Coast Guard Agency and the European Asylum Support Office, and from Europol or other relevant Union Agencies;
- (10) 'return' means return as defined in point 3 of Article 3 of Directive 2008/115/EC;

- (11) ‘return decision’ means a return decision as defined in point 4 of Article 3 of Directive 2008/115/EC;
- (12) ‘returnee’ means an illegally staying third-country national subject to a return decision;
- (13) ‘return operation’ means an operation to return illegally staying third-country nationals, that is coordinated by the Agency and involves technical and operational reinforcement being provided by one or more Member States under which returnees from one or more Member States are returned either through forced return or in voluntary compliance with an obligation to return;
- (14) ‘return intervention’ means an operation to return illegally staying third-country nationals providing for enhanced technical and operational assistance consisting of the deployment of European Return Intervention Teams to Member States and the organisation of return operations.]

Article 3

European Border and Coast Guard

1. The European Border and Coast Guard Agency and the national authorities of Member States which are responsible for border management, including coast guards to the extent that they carry out border control tasks, shall constitute the European Border and Coast Guard.
2. The European Border and Coast Guard Agency, by decision of the Management Board, shall establish, an operational and technical strategy for the European integrated border management, taking into account, where justified, the specific situation of the Member States, in particular their geographical location. This strategy shall be in line with Article 4 of this Regulation. It shall promote and support ~~ensure~~ the implementation of European integrated border management in all Member States.

3. The national authorities which are responsible for border management, including coast guards to the extent that they carry out border control tasks, shall establish their national strategies for integrated border management. Those national strategies shall be in line ~~coherent~~ with Article 4 and the strategy referred to in paragraph 2.

Article 4

European integrated border management

European integrated border management shall consist of the following components:

- (a) border control, including measures to prevent and detect illegal border crossing and to facilitate legitimate border crossing and measures related to the prevention, detection and investigation of cross-border crime, where appropriate;
- (b) analysis of the risks for internal security and analysis of the threats that may affect the functioning or security of the external borders;
- ~~(b1) Cooperation between Member States supported and coordinated by the European Border and Coast Guard Agency,~~
- (c) inter-agency cooperation among the national authorities in each Member State which are responsible for border control or for other tasks carried out at the border and among the relevant Union institutions, agencies, bodies and offices; including the regular exchange of information through existing information exchange tools, ~~and in particular, the European Border Surveillance System ('Eurosur') established by Regulation (EU) No 1052/2013 of the European Parliament and of the Council;~~¹²

¹ Regulation (EU) No 1052/2013 of the European Parliament and of the Council of 22 October 2013 establishing the European Border Surveillance System (Eurosur) (OJ L 295, 6.11.2013, p. 11).

² Put reference in recital

- (d) cooperation with third countries in the areas ~~of~~ covered by this Regulation, focusing in particular on neighbouring countries and on those third countries which have been identified through risk analysis as being countries of origin and/or transit for illegal irregular immigration;
- (e) technical and operational measures within the area of free movement which are related to border control and designed to prevent illegal irregular immigration and to counter cross-border crime;
- (f) return of third-country nationals illegally staying on the territory of the Member States;
- (g) use of state-of-the-art technology including large-scale information systems;
- (h) a quality control mechanism, in particular the Schengen Evaluation mechanism and possible national mechanisms, to ensure the implementation of Union legislation in the area of border management.
- (i) Solidarity mechanisms, in particular EU funding instruments.

Article 5

Shared responsibility

1. The European Border and Coast Guard shall implement the European integrated border management as a shared responsibility of the European Border and Coast Guard Agency and of the national authorities responsible for border management, including coast guards to the extent that they carry out border control tasks.
 - 1a. Member States shall ensure the management of their sections of the common external borders, in their interests and in the interest of all Member States and which have abolished internal border control, in full compliance with Union law and in accordance line with the technical and operational strategy referred to in Article 3(2), and in close cooperation with the Agency.

2. The European Border and Coast Guard Agency shall support ~~facilitate~~ the application of Union measures relating to the management of external borders by reinforcing, assessing and coordinating the actions of Member States in the implementation of those measures, and in return, ~~Member States shall ensure the management of their section of the external borders, in their interests and in interest of all Member States which have abolished internal border control, in full compliance with Union law and in accordance with the technical and operational strategy referred to in Article 3(2), and in close cooperation with the Agency.~~
3. ~~The European Border and Coast Guard Agency shall be responsible for the management of the external borders in the cases foreseen in this Regulation, in particular where the necessary corrective measures based on the vulnerability assessment are not taken or in the event of disproportionate migratory pressure, rendering the control of the external borders ineffective to such an extent that it risks putting in jeopardy the functioning of the Schengen area.~~

CHAPTER II

EUROPEAN BORDER AND COAST GUARD AGENCY

SECTION 2

MONITORING AND CRISIS PREVENTION

Article 8

Duty to cooperate in good faith

The Agency and the national authorities which are responsible for border management and return, including coast guards to the extent that they carry out border control tasks, shall be subject to a duty to cooperate in good faith, and an obligation to exchange information.

Article 9

~~General obligation to~~ Exchange of information

In order to perform the tasks conferred on them by this Regulation, the national authorities which are responsible for border management and return, including coast guards to the extent that they carry out border control tasks and shall provide the Agency shall in accordance with relevant Union and national law share in a timely and accurate manner ~~with all~~ the information necessary for the Agency and the relevant national authorities for that purpose. ~~to perform the the tasks conferred on it by this Regulation, in particular for the Agency to monitor the migratory flows towards and within the Union, to carry out risk analysis and to perform the vulnerability assessment.~~

Article 10

Monitoring of migratory flows and risk analysis

1. The Agency shall establish a monitoring and risk analysis centre with the capacity to monitor migratory flows towards and within the Union. For this purpose, the Agency shall ~~develop, in close cooperation with the Member States,~~ by a decision of the Management Board, establish a common integrated risk analysis model, which shall be applied by the Agency and the Member States.
2. The Agency shall prepare general and tailored risk analyses and submit it to the Council and the Commission.
3. The risk analysis prepared by the Agency, shall cover all aspects relevant to the European integrated border management within its mandate, in particular border control, return and irregular illegal secondary movements of third-country nationals within the Union. ~~†The~~ prevention of cross-border ~~(migration)~~ crime including facilitation of ~~irregular~~ illegal immigration, trafficking in human beings and terrorism shall be taken into account in so far relevant for the tasks of the Agency. ~~as well as †The situation in neighbouring relevant third countries shall be taken into account will be covered~~ with a view to developing a pre-warning mechanism which analyses the migratory flows towards the Union.

4. Member States shall provide the Agency with all necessary information regarding the situation, trends and possible threats at the external borders and in the field of return. Member States shall regularly or upon the request of the Agency provide it with all relevant information such as statistical and operational data collected in relation to the implementation of the Schengen acquis as well as information ~~and intelligence derived~~ from the analysis layer of the national situational picture established in accordance with Regulation (EU) No 1052/2013.
5. The results of the risk analysis shall be submitted, in a timely and accurate manner, to the Supervisory Board and ~~to~~ the Management Board.
6. Member States shall take results of the risk analysis into account when planning their operations and activities at the external borders as well as their activities with regard to return.
7. The Agency shall incorporate the results of a common integrated risk analysis model in its development of the common core curricula for the training of border guards and of staff involved in return-related tasks.

Article 11

Liaison officers in Member States

1. The Agency shall ~~ensure regular monitoring of~~ the management of the external borders, if necessary through liaison officers of the Agency in Member States.
- ~~2. The Executive Director shall appoint experts from the staff of the Agency to be deployed as liaison officers.~~
- 2(a) The Management Board shall, based on a risk analysis and on a proposal of the Executive Director; decide on determine the nature of the deployment, the Member State to which a liaison officer may be deployed and the duration of the deployment and notify its decisions to the Member State concerned. The Executive Director shall consult the Member State concerned on the nature and duration of the deployment before making its proposal, and on the tasks which are not covered by paragraph 3.

2. The Executive Director shall appoint experts from the staff of the Agency to be deployed as liaison officers.
3. The liaison officers shall act on behalf of the Agency and their role shall be to foster cooperation and dialogue between the Agency and the national authorities which are responsible for border management and return, including coast guards to the extent that they carry out border control tasks. The liaison officers shall, in particular:
- (a) act as an interface between the Agency and the national authorities responsible for border management, including coast guards to the extent that they carry out border control tasks;
 - (b) support the collection of information, as provided for by the relevant Union legislation and required by the Agency for carrying out the vulnerability assessment referred to in Article 12;
 - (c) monitor the measures taken by the Member State at border sections to which a high impact level has been attributed in accordance with Regulation (EU) No 1052/2013;
 - (d) where possible and necessary assist the Member States in preparing their contingency plans concerning border management;
 - (e) report regularly to the Executive Director on the situation at the external border and the capacity of the Member State concerned to deal effectively with the situation at the external borders and on the execution of return operations towards relevant third countries. If a report shows that there are serious concerns, the Executive Director informs the Member State concerned without delay.
 - (f) monitor the measures taken by the Member State with regard to a situation requiring urgent action at the external borders as referred to in Article 18;
 - ~~(g) report on the execution of return operations towards relevant third countries.~~

4. For the purposes of paragraph 3, the liaison officer shall, in compliance with the national and EU security and data protection rules, inter alia:

(a) ~~have unlimited~~ receive information from access to the national coordination centre and on the national situational picture established in accordance with Regulation (EU) No 1052/2013;

~~(b) have access to relevant national and European information systems available in the national coordination centre, on condition that he or she complies with the national and EU security and data protection rules;~~

(c) keep regular contacts with national authorities which are responsible for border management, including coast guards to the extent that they carry out border control tasks, whilst informing a point of contact designated~~defined~~ by the Member State concerned ~~the head of the national coordination centre.~~

5. The final report of the liaison officer shall be taken into consideration when drafting ~~form part of~~ the vulnerability assessment referred to in Article 12. The report shall be sent to the Member State concerned.

6. In carrying out their duties, the liaison officers shall remain under the responsibility of ~~take instructions only from~~ the Agency.

Article 12

Vulnerability assessment

1. The agency shall decide, by decision of the Management Board, establish on a common vulnerability assessment model.
2. The Agency shall assess the technical equipment, systems, capabilities, resources and if possible contingency plans of the Member States necessary for regarding border control. The Management Board shall approve objective indicators based on which it shall decide on the prioritisation of the Member State that should be assessed. That assessment shall be based on information provided by the Member State and where appropriate by the liaison officer, on information derived from Eurosur, in particular the impact levels attributed to the external land and sea border sections of each Member State in accordance with Regulation (EU) No 1052/2013, and on the reports and evaluations of joint operations, pilot projects, rapid border interventions and other activities of the Agency concerning border management.
3. Member States shall, at the request of the Agency, provide information as regards technical equipment ~~and~~ staff and to the extent possible financial resources available at national level to carry out border control, ~~and they~~ If possible Member States shall inform the Agency on their financial resources and shall submit and provide information on their contingency plans on border management.
4. The aim of the vulnerability assessment is for the Agency to assess the capacity and readiness of Member States to face upcoming challenges, including present and future threats and pressures at the external borders, to identify, especially for those Member States facing specific and disproportionate pressures, possible immediate consequences at the external borders and subsequent consequences on the functioning of the Schengen area, and to assess their capacity to contribute to the rapid reserve pool referred to in Article 19(5). That assessment is without prejudice to the Schengen evaluation mechanism.

5. The results of the vulnerability assessment shall be submitted to the Member States concerned and the Supervisory Board. The Member State concerned may comment on the assessment. The Supervisory Board which shall advise the Executive Director on the measures to be recommended taken by the Member States concerned based on the results of the vulnerability assessment, and taking into account the Agency's risk analysis, the comments of the Member State concerned and the results of the Schengen evaluation mechanism.
6. These measures should be aimed at reducing/eliminating the vulnerabilities identified in the assessment in order for member states to increase their readiness to face upcoming challenges by enhancing or improving their capabilities, technical equipment, systems, resources and contingency plans.
7. The Executive Director shall in consultation with the Member State concerned, make a recommendation adopt a decision setting out the necessary corrective measures to be taken by the Member State concerned, including the time limit within such measures shall be implemented, including by using resources under the Union financial instruments. The Executive Director shall invite the Member States concerned to take the necessary measures. The decision of the Executive Director shall be binding on the Member State and shall lay down the time limit within which the measures are to be taken.
8. Where a Member State does not adopt implement the necessary corrective measures of the recommendation within the time-limit set, the Executive Director shall refer the matter to the Management Board and notify the Commission. The Management Board shall adopt a decision on a proposal of the Executive Director setting out the necessary corrective measures to be taken by the Member State concerned, including the time-limit within which such measures shall be taken implemented. The decision of the Management Board shall be binding on the Member State. If the Member State does not take implement the measures within the time-limit foreseen in that decision, the Management Board shall notify the Council and the Commission and further action may be taken by the Commission in accordance with Article 18 of this Regulation.

[Coast Guard related provisions]

- (27) National authorities carrying out coastguard functions are responsible for a wide range of tasks, ~~including but not limited to~~ which may include maritime safety, security, search and rescue, border control, fisheries control, customs control, general law enforcement and environmental protection. The [European Border and Coast Guard Agency], the European Fisheries Control Agency established by Council Regulation (EC) No 768/2005¹ and the European Maritime Safety Agency established by Regulation (EC) No 1406/2002 of the European Parliament and of the Council² should therefore strengthen their cooperation, both with each other and with the national authorities carrying out coastguard functions to increase maritime situational awareness as well as to support coherent and cost-efficient action.
- (27a) The implementation of this Regulation does not affect the division of competence between the Union and the Member States or the obligations of Member States under international conventions such as the United Nations 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, the International Convention for the Prevention of Pollution from Ships, the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers and other relevant maritime international instruments.

[...]

¹ Council Regulation (EC) No 768/2005 of 26 April 2005 establishing a Community Fisheries Control Agency and amending Regulation (EEC) No 2847/93 establishing a control system applicable to the common fisheries policy (OJ L 128, 21.5.2005, p.1)

² Regulation (EC) No 1406/2002 of the European Parliament and of the Council of 27 June 2002 establishing a European Maritime Safety Agency (OJ L 208, 5.8.2002, p.1)

Article 7

Tasks

[...]

“(q) cooperate with the European Fisheries Control Agency and the European Maritime Safety Agency, each within their mandate, to support the national authorities carrying out coast-guard functions, as set out in Article 52 ~~in accordance with national law~~;

(a) by providing services, information, equipment and training, as well as

(b) by coordinating multipurpose operations.”

[...]

“Article 52

European cooperation in support of national authorities carrying out coastguard functions

1. The Agency shall, in cooperation with the European Maritime Safety Agency and the European Fisheries Control Agency, support national authorities carrying out coastguard functions at national and Union level, and where appropriate at international level by:

(a) sharing, fusing and analysing information available in ship reporting systems and other information systems hosted by or accessible to the agencies, in accordance with their respective legal bases and without prejudice to the ownership of data by Member States;

(b) providing surveillance and communication services based on state-of-the-art technology, including space-based and ground infrastructure and sensors mounted on any kind of platform;

(c) capacity building by elaborating guidelines, recommendations and best practices as well as by supporting the training and exchange of staff, with a view to enhancing the exchange of information and cooperation on coastguard functions, taking into account relevant initiatives in this field;

(d) capacity sharing by planning and implementation of multipurpose operations and the sharing of assets and other capabilities, to the extent those are coordinated by the agencies and with the agreement of the Member States concerned.

2. The modalities of the cooperation on coastguard functions of the Agency with the European Maritime Safety Agency and the European Fisheries Control Agency shall be determined in a working arrangement, in accordance with the respective mandates and financial rules applicable to the agencies. Such arrangement shall be approved by the Management Board of the Agency and the Administrative Boards of the European Maritime Safety Agency and the European Fisheries Control Agency.

3. The Commission shall, in close cooperation with the Member States, the Agency and the European Maritime Safety Agency and the European Fisheries Control Agency, make available, a practical handbook on European cooperation on coastguard functions, containing guidelines, recommendations and best practices for the exchange of information. The Commission shall adopt the handbook in the form of a recommendation.

[...]
