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***IMPACT ASSESSMENT***

*accompanying the*

Proposal for a

**REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX)**

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## 1. PROCEDURAL ISSUES AND CONSULTATION OF INTERESTED PARTIES

### 1.1. Background and political context

The Frontex Agency was set up in 2004 and became operational in 2005.

As requested by the Hague programme the Commission adopted on 13 February 2008 a Communication on the evaluation and future development of the FRONTEX Agency (COM(2008) 67 final) (hereafter "Communication").

In conclusion the Commission recommended a number of improvements for how the Agency operates within its mandate and that in the medium-term the mandate should be revised. The Communication and the recommendations contained in it were based on a detailed Impact Assessment (SEC(2008) 148).

The Communication was welcomed by **Council conclusions in June 2008**. The Council shared the Commissions assessment that the Agency had been very successful since its inception and called for a further strengthening of the Agency, largely in line with the recommendations of the Communication.

This call has been repeated by the **Pact on immigration and asylum** agreed by the European Council under the French Presidency, which stated that coordination for the control of external borders of the EU will be provided by Frontex whenever it proves necessary. The Pact asked for the Agency's resources to be strengthened to deal with crisis situations and that Member States will undertake to provide it with the resources it requires.

The **European Council conclusions of June 2009**, in the context of the fight against illegal immigration and the situation at the southern borders of the EU in particular, underlined a need for strengthened border control operations coordinated by FRONTEX, clear rules of engagement for joint patrolling and the disembarkation of rescued persons, and increased use of joint return flights.

In the same context, in its **conclusions of October 2009, the European Council** called for the enhancement of the operational capacities of FRONTEX as well as progress in its development and invited the Commission to present proposals to that end early in 2010. The conclusions indicated that such an enhancement could be based on the following elements:

- the preparation of clear common operational procedures containing clear rules of engagement for joint operations at sea, with due regard to ensuring protection for those in need who travel in mixed flows, in accordance with international law;
- increased operational cooperation between FRONTEX and countries of origin and transit;
- examination of the possibility of regular chartering, financed by FRONTEX, of joint return flights.

The **Stockholm programme adopted by the European Council 10-11 December 2010**, called upon the Commission to present a proposal no later than early 2010, "...to clarify the mandate and enhance the role of Frontex, taking account of the

results of the evaluation of the Agency and the role and responsibilities of the Member States in the area of border control. Elements of these proposals could contain preparation of clear common operational procedures containing clear rules of engagement for joint operations at sea, with due regard to ensuring protection for those in need who travel in mixed flows, in accordance with international law; increased operational cooperation between Frontex and countries of origin and transit and examination of the possibility of regular chartering financed by Frontex. In order to promote the proper enforcement of the applicable statutory framework for Frontex operations, the Commission should consider including a mechanism for reporting and recording incidents that can be satisfactorily followed up by the relevant authorities."

The **European Parliament adopted a resolution** on the evaluation and future development of the Frontex Agency following the Communication on 18 December 2008. The Resolution considered the Agency as an essential instrument in the Union's global strategy on immigration and called on the Commission to present proposals to review the mandate of the Agency in order to strengthen its role and make it more effective. Notably, the resolution called for a system of "compulsory and irrevocable solidarity", to "... enable Frontex, in preparing and completing its missions, to remove the uncertainty as to the extent of the resources it can count on in real time." The resolution also called for an increase of the Agency's budget, for better cooperation with third countries, for obligations on international human rights standards and towards asylum seekers in rescue operations to be met, and for Frontex to strengthen and take up its key role in supporting joint return operations.

An **independent evaluation** took place during 2008. That evaluation, contracted by the Frontex Management Board as requested by Article 33 of the Frontex Regulation, was performed by the COWI Company, Denmark.<sup>1</sup> On the basis of the evaluation, and in accordance with Article 33 of the Regulation, the **Frontex Management Board addressed 16 recommendations** concerning changes to the legal basis of the Agency to the Commission on 3 July 2009.<sup>2</sup>

With the exceptions described below this impact assessment covers all recommendations of the Communication and those issued by the Management Board. It also covers certain additional points raised in the European Council conclusions, the Stockholm programme and in the resolution of the European Parliament as mentioned above.

As concerns the recommendations of the 2008 Communication, the following have already been implemented by the Agency or are still being studied by the competent bodies, within the framework of the current legal basis:

The setting up of specialised branches, the merger of joint operations and the European Patrol Network, development of risk analysis together with Europol, the management of ICONet, the management of CIREFI, purchase of light technical

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[http://www.frontex.europa.eu/download/Z2Z4L2Zyb250ZXgvZW4vZGVmYXVsdF9vcGlzeS82Mi8xLzE/cowi\\_report\\_final.doc](http://www.frontex.europa.eu/download/Z2Z4L2Zyb250ZXgvZW4vZGVmYXVsdF9vcGlzeS82Mi8xLzE/cowi_report_final.doc)

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[http://www.frontex.europa.eu/download/Z2Z4L2Zyb250ZXgvZW4vZGVmYXVsdF9vcGlzeS82Mi8xLzE/recommendations\\_of\\_the\\_mb\\_following\\_the\\_article\\_33\\_evaluation20090701\\_final.pdf](http://www.frontex.europa.eu/download/Z2Z4L2Zyb250ZXgvZW4vZGVmYXVsdF9vcGlzeS82Mi8xLzE/recommendations_of_the_mb_following_the_article_33_evaluation20090701_final.pdf)

equipment, training on fundamental rights, asylum and law of the sea, testing of new technologies, giving Frontex a role in the Schengen evaluation mechanism, associating Frontex in the development of EUROSUR, and developing interagency cooperation.

Among the recommendations of the Management Board based on the external evaluation, the definition of “external borders” is not taken up in this impact assessment, as this is a purely legal issue and as the Commission does not agree that the current definition constitutes a problem. Neither is the recommendation on introducing a legal basis for the transit of weapons covered, as the Commission does not consider the Frontex Regulation to be the appropriate instrument for this purpose.

Also, the following recommendations may be reflected in the proposal but without being covered in the impact assessment as it would be disproportionate in relation to the very limited changes required in the Regulation, or as it concerns issues which have become standard provisions for EC Agencies since the legal basis for Frontex was adopted, or as it concerns purely legal issues: clarifying the mandate as regards research and development; harmonising the subsistence allowances for guest officers; introducing a provision on the strategy of the Agency (multi-annual plan); revising the provision on the term of office for the members of the Management Board; introducing a new article on security provisions; introducing a new article on cooperation with EU Agencies.

The selection of recommendations covered in this impact assessment also corresponds, largely, to the issues that were identified as the most significant challenges facing Frontex during the stakeholder consultations, in particular the meetings with Member States representatives in the autumn of 2009.

## **1.2. Procedural issues and consultations with interested parties**

In the follow-up to the Communication extensive discussions were held in the Council and the European Parliament. Civil society and academia organised discussions on the role of Frontex in the context of the Union's immigration policy. The Commission has participated in some of those conferences and seminars and taken note of a number of research papers and studies.

Regular discussions and information exchange have taken place with Member States in the context of the Management Board meetings of the Agency. The Agency has continuously reported on its activities in the Management Board, in the institutions, and through the various reports foreseen by the legal basis. Moreover, consultations have taken place between Commission officials dealing with the FRONTEX Agency and their counterparts in the Agency.

The aforementioned impact assessment and the external evaluation contain substantial amounts of data. In addition the annual reports of the Agency have been used, as well as data collected through ad hoc consultations of the Agency.

Frontex, in association with the Austrian authorities, organised a workshop for the members or their representatives of the Management Board, chaired by the Commission, on the review of the legal framework of the Agency on 10 September 2009 in Baden, Austria. The Commission also consulted Member States in the Committee on Immigration and Asylum in its meeting on 5 October 2009. Both occasions provided for a useful exchange of ideas with Member States' experts on

how the different conclusions and recommendations could be translated into practical action and to what extent changes in the current legal basis is required.

While the position of the Council and its Member States as well as the European parliament, have been very positive as illustrated by the conclusions and resolutions quoted in the previous section, the position of civil society and academia has been more critical. The main concern that has been put forward is an alleged vague and unclear legal framework for Frontex operations at the sea border, which is considered not to provide sufficient safeguards as concerns the protection of fundamental rights.

A first dedicated Commission Inter-service meeting took place on 2/10/2009 with representatives the Legal Service (SJ), the Secretariat-General (SG), Taxation and Customs Union (TAXUD), Enterprise and Industry (ENTR) and External Relations (RELEX), with a second meeting held on 03/11/2009 and a third meeting on 11/12/2009.

### **1.3. Opinion of the Impact Assessment Board**

Following the opinions of the impact assessment board of 8 December 2009 and 11 January 2010, the impact assessment has been revised substantially especially with regard to the problem definition and baseline, the definition of the general and operational objectives, the sections related to subsidiarity and proportionality, and costs.

## **2. PROBLEM DEFINITION**

### **2.1. The legal framework**

Since the entry into force of the Treaty of Amsterdam in 1999, a number of common measures have been adopted to manage better the external borders of the European Union in accordance with Article 62 (1) and (2) of the EC Treaty.

Built around the three pillars of common legislation, common operations and financial solidarity, key steps have been taken with the adoption of the Schengen Borders Code<sup>3</sup>, the Practical Handbook for Border Guards (Schengen Handbook)<sup>4</sup> and the rules for local border traffic<sup>5</sup>, the establishment of Frontex<sup>6</sup>, the creation of the Rapid Border Intervention Teams<sup>7</sup> and the creation of the External Borders Fund<sup>8</sup>.

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<sup>3</sup> 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).

<sup>4</sup> Commission Recommendation C(2006) 5186 of 6 November 2006 establishing a common "Practical Handbook for Border Guards (Schengen Handbook)" to be used by Member States' competent authorities when carrying out the border control of persons.

<sup>5</sup> Regulation (EC) No 1931/2006 of the European Parliament and of the Council of 20 December 2006 laying down rules on local border traffic at the external borders of the Member States and amending the provisions of the Schengen Convention (OJ L 29 of 3.2.2007, p. 3).

<sup>6</sup> Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (OJ L 349, 25.11.2004, p. 1).

<sup>7</sup> Regulation (EC) No 863/2007 of the European Parliament and of the Council of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers (OJ L 199, 31.7.2007, p. 30).

### *The current legal framework for the Frontex Agency*

The European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX) has been established by Council Regulation (EC) 2007/2004<sup>9</sup>. The primary responsibility for the control of external borders lies with the Member States. As a result, the Agency has been established to ensure the coordination of Member States' actions in the implementation of Community measures, thereby contributing to an efficient, high and uniform level of control on persons and surveillance of the external borders of the Member States.

The main tasks of FRONTEX are described in articles 2 to 14 of its founding Council Regulation (EC) No 2007/2004, which has been modified in 2007 by Regulation (EC) 863/2007 of the European Parliament and of the Council establishing a mechanism for the creation of Rapid Border Intervention teams<sup>10</sup>.

As core task can be highlighted to **coordinate operational cooperation** between Member States, in the form of organising **joint operations**, which serve to reinforce border control at certain sections of the external borders for a limited (but sometime for several years) time as well as **allowing Member States to work together to exchange knowledge and best practices**. A further core task is the **development of risk analysis**, which on the one hand provides the basis for the operational cooperation organised by the Agency itself and on the other supports Member States in their own efforts in conducting border management for their part of the external border.

Member States are obliged to comply with the provisions of the EC acquis when taking part in operations coordinated by Frontex, in particular the Schengen Borders Code. Likewise Member States must comply with the basic principles of fundamental rights as laid down in the Charter when applying Community law. For sea border operations participating Member States are also bound to comply with a number of provisions in the area of international law that may be applicable, notably in the field of search and rescue.

The Commission has prepared a draft decision to clarify the applicable obligations on Member States when participating in maritime operations coordinated by the Agency, including notably the applicability of the Schengen Borders Code and the principle of non-refoulement. This draft decision is intended to meet, in part, the request of the Stockholm programme as far as "rules of engagement" are concerned and also to meet the concerns expressed by civil society and academia. This decision is currently being discussed in the Council.

## **2.2. The context**

Migratory pressure remains high or is rising at certain border sections of the Union. A total of 175 000 illegal border crossings were detected in 2008, which was an increase of 20% compared to 2007. 140 000 refusals of entry were made in 2008. In 2007, 468

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<sup>8</sup> Decision No 574/2007/EC of the European Parliament and of the Council of 23 May 2007 establishing the External Borders Fund for the period 2007 to 2013 as part of the General programme "Solidarity and Management of Migration Flows" (OJ L 144, 6.6.2007, p. 22).

<sup>9</sup> OJ L 349, 25.11.2004, p. 1.

<sup>10</sup> OJ L 199, 31.7.2007, p. 30.

000 apprehensions of illegally staying persons were made, while more than 10 000 victims of human trafficking were reported by the Member States.

These challenges must be considered in the context of the EU's overall immigration policy which involves measures to fight illegal immigration, to promote legal immigration, and develop cooperation with third countries of origin and transit, as well as the development of a Common European Asylum System. While noting that border management is one tool in fighting illegal immigration, and while respecting the principle that Member States are responsible for controlling their part of the external borders, **Frontex is one of many tools in the EU's border management policy.** In other words while an important part of the context in which Frontex operates is the need to reduce illegal immigration, it cannot be defined as the problem that Frontex was set up to solve single-handedly.

To put the current role of Frontex in perspective, the total number of detections of irregular migrants for the year 2008 at the external borders amounts to approximately 84 000 for the land borders of which approximately 16% are detected during Frontex operations and for the sea borders a total of approximately 91 000 of which 62 % are detected during Frontex operations. The number of refusals of entry is only known for the land borders i.e. a total of approximately 47 000 of which 10 % take place during Frontex operations.

In 2007 488 000 return decisions were issued by the Member States, while 226 000 removals were effected. Frontex has provided assistance regarding the return of approximately 800 returnees in 2008.

In view of Frontex' role it has to be underlined again that Frontex cannot realistically be expected to address the entire problem of illegal immigration or to take over the responsibility for the management of the EU's external borders from the Member States.

Expectations from EU institutions and Member States have nevertheless been very high since the Agency became operational in 2005 and continue to be so, as shown by the sources quoted in chapter 1.

As an illustration the budget of the Agency has increased much more rapidly than what was foreseen in the financial perspectives and hence the quantity of its activities are clearly beyond what was expected just a few years ago: from 6 million in 2005, 19 million in 2006, 42 million in 2007, 70 million in 2008, to 88 million in 2009.

Reference can be had to the General Report of Frontex for 2008, and its work programme for 2009, both available via the Frontex website, for a detailed description of its on-going activities.

### **2.3. What are the problems to be addressed?**

The very construction of Schengen means that one Member State controls its section of the external borders on behalf of all the others. Due to their geographical location, and the patterns of travel flows and migratory routes, Member States face unequal different workloads as well as critical situations at certain sections of the border.

By way of illustration of the differing workload between Member States in managing their part of the external borders, the number of border crossings at the air borders of the Netherlands were 27,7 million in 2008 while 2,5 million in Hungary; at the land borders 23,4 million in Poland while obviously 0 in the 15 Member States/associated

countries (fully participating in Schengen) without an external land border; at the sea borders 5,8 million in Greece while 110 000 in Sweden.

In terms of migratory pressure at the sea borders Spain registered 16 000, Malta 2 000, Italy 35 000, and Greece 32 000 illegal border crossings 2008, while figures for other Member States were negligible.

Based on the principle of solidarity, the EU needs to be able to provide support to Member States to compensate for these differences. The External Borders Fund and the **Frontex Agency** complements each other for this purpose with former being a tool for financial solidarity, not covering running costs, and the latter **a tool for operational solidarity on a temporary and punctual basis, covering such costs.** Operational solidarity is implemented in practice through joint operations, channelling additional resources to sections of the external borders where Member States cannot alone cope with the pressure they are facing. The support provided via Frontex can be adapted to shifting migratory pressure, moving resources from one section/Member State to another as migratory routes shift.

No other tool exists that can do what Frontex does. But even though Frontex proved to be very useful is in providing a framework for Member States to cooperate with each other subject to particular pressures<sup>11</sup>, **the operational cooperation is still inefficient and insufficient.** The operational solidarity proved to be insufficient, which is well illustrated by the actual deployment of equipment. Also, Frontex is not using its potential in the best possible way, in terms of coordination of operational cooperation and support to the MS in carrying out the border management, due to unclear or insufficient existing legal provisions.

The problems to be addressed are therefore of a punctual nature on a number of specific points where Frontex has not been able to deliver according to the expectations of the institutions or where the legal framework has proven inadequate in the light of experiences made. The specific problems addressed in this impact assessment have been identified on the basis of the previous impact assessment, the external evaluation and the recommendations of the Management Board, and the conclusions of the European Council as explained in section 1. While these sources do not provide for contradictory recommendations they neither provide for an identical set of problems as they all emanate from an analysis carried out from different perspectives. Further differences come from the fact that the external evaluation is more recent in time and was able to rely on more extensive practical experiences of the Agency.

### *2.3.1. Insufficient technical equipment put at the disposal by Member States*

This issue was covered by the Communication as well as by the Management Board recommendations. Calls for a reinforcement of Frontex in this respect was included in the Council conclusions of 2008, the Pact on immigration and asylum, the European Council conclusions of June and October 2009, and the Resolution of the European Parliament.

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<sup>11</sup> Joint operation Hera off the Canary Islands, which has received the highest budgetary allocation of all Frontex operations and which has been the only operation to have been conducted year-round, contributed to reducing the number of arrivals from around 31 000 in 2005 to around 2 200 arrivals for 2009 (until end October).

The previous impact assessment noted that the insufficient equipment made available by the Member States demonstrated the lacking operational solidarity and was the missing link in moving towards semi-permanent operations at key points of the external borders, that is, joint operations conducted throughout the year at specific sections of high migratory pressure.

The Agency itself does not own any technical equipment. The Agency is currently managing a Central Record of Available Technical Equipment (CRATE) which lists the equipment Member States have indicated that they are willing to make available for joint operations. However, these indications are not legally binding in any way.

By 1 January 2008 CRATE contained 18 aircraft, 20 helicopters, and a total of 91 vessels (including open sea patrol vessels, coastal patrol vessels, and coastal patrol boats). By comparison the following equipment were actually deployed during Frontex coordinated operations in 2008 by Member States other than the host state of the operation: 8 aircraft, 5 helicopters, 12 vessels; for each category of assets the average time of deployment was around one month.

While the equipment listed in CRATE in 2009 increased somewhat, the equipment deployed was the following: 7 aircraft, 6 helicopters, and 9 vessels, with a similar average time for the deployment. If the contributions of the host state are included the number of vessels was 38.

The number of Member States contributing equipment increased from 8 in 2008 to 13 in 2009.

In comparison the Agency estimates, based on risk analysis and experiences of the operations carried out so far, its future operational needs to a total of 92 vessels, 14 aircraft and 18 helicopters.

Based on this data several problems can be identified: While Member States are ready to list a large number of equipment in CRATE a very small share of that equipment is actually made available; for example, as concerns vessels and excluding the contributions of the host state, only about 10% of the vessels in total. In spite of repeated calls by the institutions (see eg Council conclusions of June 2008 and the EP Resolution of December 2008) the contributions of the Member States, based on the current voluntary system, have only marginally increased.

Secondly, a majority of the vessels deployed come from the host state and not from other Member States. Consequently, Frontex is not functioning so much as a tool for coordination of operational solidarity – as its general objectives indicate and as stressed by the European Council – but rather as a tool for financial solidarity, which does not form part of its objectives.

Thirdly, based on the estimates for the future and leaving any budgetary constraints aside for the sake of this analysis, the current availability of equipment will not come close to meeting the needs, having regard to the degree to which the equipment in CRATE has been made available so far.

Besides the problem of quantity the evaluation also noted problems related to planning and implementation. Under the current mandate, if equipment is required at short notice most Member States are not in a position to decide, prepare and send the necessary technical equipment to the region where the operation will be deployed.

### 2.3.2. *Insufficient human resources put at the disposal for joint operations by Member States; lack of uniform standards*

This issue was covered by the Communication as well as by the Management Board recommendations.

The current Regulation is silent on the provision of human resources to joint operations. The mechanism for the rapid border intervention teams provides a system for the compulsory deployment of human resources (border guards) but restricted to emergency operations (RABIT teams).

The Agency has nevertheless, based on administrative arrangements, set up the "Frontex Joint Support Teams" (FJST) as a working method to organise and train border guards for their participation in future joint operations, which currently contain some 600 border guards of the Member States. These arrangements have been copied from the arrangements for the RABIT teams and have been welcomed by Member States.

The exact competencies of the Agency to organise those teams is however unclear as the current legal basis is silent on this issue. The first problem is therefore of a legal nature, as the current practices should be given a clear legal foundation.

A second problem concerns the fact that the Agency currently needs to make ad hoc requests to Member States to contribute with border guards for each individual operation. This creates planning problems both for the Agency and for the Member States; the former cannot predict what Member States will be willing to contribute, and the latter cannot foresee what they will be asked to contribute, as this is dependent on the responses of the other Member States. This concerns to a minor extent the quantity (the number of border guards) but in particular the quality (the specific competences required); the latter issue was highlighted in the evaluation, also with regard to language skills.

This problem is difficult to quantify as issues related to the quality of border guards and the planning capacity of the Agency cannot be put in direct relation to the number of illegal immigrants (potentially) detected at certain points of the external borders.

### 2.3.3. *Inefficient coordination and follow up of joint operations*

This issue was part of the Management Board recommendations and, in part, is covered by the Stockholm programme and the Resolution of the European Parliament.

18 joint operations have been carried out by the Agency in 2009, at all types of borders (land, air and sea). The current Regulation contains no rules on how operations under Frontex should be prepared and conducted. As a result the Agency takes on a different role during different operations, depending on ad hoc arrangements. While the Agency does draw up an operational plan for each operation such a plan is not foreseen in the legal basis. Neither, as a consequence, does the legal basis specify what the Agency can or should do to ensure that the plan is actually agreed and properly implemented. Naturally, border guards from different Member States are accustomed to different modus operandi and will have different expectations in terms of objectives of the operation. As the challenges facing one section of the external borders may not occur at other sections, some border guards may initially be unfamiliar with the operational environment and the tasks they are assigned. As a result the Agency is in no position to ensure that operations are

launched and carried out in line with the overall objectives of the Agency and of the overall border management policy of the Union.

The lack of clarity on this point also leads to frequent misunderstandings in the media as regards the actual role and responsibilities of Frontex staff serving during joint operations.

This is first and foremost a legal problem. Having regard to the scope and number of Frontex operations the division of tasks and responsibilities between the Agency and the Member States must be clear to ensure legal certainty and transparency.

Secondly, this lack of clarity prevents Member States from cooperating more efficiently with each other. An absence of provisions in the current legal basis on what "coordination" actually is supposed to mean entails an absence of coordination on the ground. With large numbers of border guards and equipment from different Member States working together coordination is a must. However, with Frontex not being able or competent to fulfil this role it is left to the host state of the operation, which may not have the administrative capacity or sufficient experience to take on this role, as was noted in the evaluation. Practical experience shows also that the concrete role taken on by the coordinating officer of the Agency differs widely from one operation to another: in some operations a coordinating officer is not present throughout the whole operation, in other the officer has solely the role of observer, and in yet others the officer is asked to virtually take over the supervision of the operation. Other concrete problems seen over recent years have involved the postponement of the launch of operations due to disagreements between Member States on the exact content of the operational plan, or splitting one operation into two separate, parallel operations taking place in adjacent areas.

Further shortcomings in this regard include the persistent lack of evaluations of joint operations, which is a shared responsibility between the Agency and the participating Member States which entails that future operations cannot be improved based on "lessons learnt".

#### *2.3.4. Insufficient and inefficient cooperation with third countries*

This issue was covered by the Communication as well as by the Management Board recommendations, and by the European Council conclusions of October 2009, the Stockholm Programme, and the Resolution of the European Parliament.

The facilitation of operational cooperation between Member States and third countries and the cooperation between FRONTEX and third countries is an important strand of the tasks of the Agency. Cooperation with third countries is a key component of the integrated border management model and can support the successful implementation of joint operations, enhance the added value of risk analysis, and support capacity building in third countries.

A series of working arrangements (protocols and/or memoranda of understanding) have been concluded between FRONTEX and the following third countries in accordance with the relevant provisions of the current legal basis: Russia, Ukraine, Moldova, Georgia, the Western Balkan countries, and the USA.

However, while cooperation based on the working arrangements, or on ad hoc fact finding missions to third countries, can identify concrete follow-up measures, Frontex cannot carry out those measures itself like for example in-depth feasibility studies on

how to upgrade the border management of the external borders of a third country. Follow-up is therefore not in the hands of Frontex, although the Agency may have the relevant expertise at its disposal, but is dependent on finding other organisations or national authorities that could implement such projects based on available funding instruments.

There is therefore no possibility for the Agency in assisting third countries in a more pro-active manner, on the basis of its working arrangements. Notably, third countries who are in the process of building up their own border management systems frequently request financial support from the Agency, which is seen as a natural interlocutor by them for that purpose. The commitment of third countries in cooperating with the Agency for the purpose of i.a. operational activities would increase if Frontex would be able to offer direct technical assistance. Nor can the Agency assist in implementing projects funded under the EU's external relations programmes. This problem was noted in the previous impact assessment and has, since it is a "yes or no" question of limitations in the legal basis, not evolved since.

### *2.3.5. Collection, storage and processing of personal data*

This issue was covered by the Management Board recommendations.

The Frontex Regulation does at the moment not contain any specific legal basis for the collection and processing of personal data. However, the Agency is subject to Regulation 45/2001, whenever collection and processing of personal data is carried out by the agency in the exercise of activities which fall within the scope of Community law. Under condition that the processing of personal data is indispensable and proportionate to allow the Agency to carry out its tasks as specified by the Regulation such collection and processing is subject to the provisions laid down in Regulation 45/2001, including the general principles of data protection. Current examples in this regard would include the processing of personal data necessary for the Agency to organise meetings with experts of Member States, third countries and organisations with which the Agency cooperates, the need to process personal data as necessary in the organisation of joint return flights, and the storage of certain personal data when such data is contained in an ancillary fashion in reports transmitted by the Member States to the Agency.

As noted by the evaluation, the risk analysis carried out by the Agency could be substantially enriched if it could collect and process certain types of personal data, which could allow for a better operational support from the Agency to the Member States. This could in particular include making use of information collected during joint operations concerning persons involved in the facilitation of illegal immigration. Currently, during joint operations, guest officers operate under the command of the host state of the operation (the Member State on whose territory the operation is carried out). When guest officers collect certain personal data whilst carrying out their duties during such operations, the responsibility for the processing of any such data therefore rests with the host state. Practical experience shows that this data is not always analysed by the host state nor forwarded to the competent authorities at national or European level.

However, if such risk analysis would involve the processing of personal data by FRONTEX, this would require a specific legal base, based on the assessment of the necessity and proportionality of such measures. Subject to applicable provisions on

criminal investigations such data should be forwarded to the competent authorities of the host state and to Europol.

### 2.3.6. *Return*

This issue was covered by the Communication as well as by the Management Board recommendations, as well as by the European Council Conclusions of June and October 2009, the Stockholm programme, and the Resolution of the European Parliament.

This area was identified in the previous impact assessment as one where less progress has been made in supporting Member States. Since then certain progress has been made. The number of Frontex co-ordinated joint return operations increased from 13 flights (covering 428 returnees) in 2007 to 15 flights in 2008 covering around 800 returnees. At the same time the budget for operating expenditure have been rapidly increasing to a level of 2 million euro for 2008 and 5,3 million euro for 2009. In parallel Frontex has built experience in all aspects of joint removal operations and as a result Member States request the presence of Frontex officers in joint return operations.

A first shortcoming of the current situation relates to mismatch between the legal basis and reality: while the legal basis only talks about Frontex "assisting" Member States the Agency has already, and successfully, taken on a "coordinating" role.

There is however a strong call from Member States for Frontex to provide them with more support in this area. Problems highlighted by Member States include difficulties in obtaining travel documents for undocumented persons and obtaining the agreement of the third country concerned for the returns with countries for which readmission agreements are not yet in place. Frontex is not able to offer any assistance to the Member States in this regard. A second problem is therefore the absence of support from Frontex beyond its current coordinating role.

### 2.3.7. *No use of the expertise of the Agency to evaluate Member States' performance in the area of border management*

This issue was, to some extent, covered by the Communication, but not by the Management Board recommendations.

A possible role for the Agency in the evaluation of Member States in meeting the standards of the Schengen acquis was favourably evaluated in the previous impact assessment.

A role for Frontex in this regard was not put forward in the various council conclusions and EP resolutions.

The recent proposal of the Commission to revise the existing Schengen evaluation mechanism foresaw an advisory role for Frontex with input in the form of risk analysis from the Agency. A role in that mechanism can be considered fully covered by the current legal basis and will therefore not form part of the problem definition of this impact assessment.

Against this background the problem can be defined as follows.

Firstly, the risk analysis of the Agency remains weak when it comes to assessing the capacity of Member States' border management systems to manage the threats they

are facing. An underlying reason is that Frontex is not carrying out any on-site inspections in the Member States to evaluate the situation from a tactical and operational point of view.

Secondly, Frontex has no mandate to evaluate or react on any shortcomings in the application of EC law, including with regard to fundamental rights, during joint operations. The full compliance with the *acquis* could be considered especially important when those activities are funded and coordinated by the Community. Any possible solutions to this problem must respect the basic division of tasks under the Treaty, with the Commission being sole responsible for monitoring the application and implementation of EC law, and with the impossibility for allocating discretionary powers to Community Agencies.

#### **2.4. How would the problem evolve, all things being equal?**

In general, without any changes to the legal framework the level of activities – qualitatively and quantitatively – can be expected to level out largely in line with what is foreseen in the Agency's work programme for 2010. A number of problems are of a legal nature and can only be addressed by appropriate amendments to the Regulation.

It is impossible to predict in what way illegal border crossings for the Schengen area as a whole would evolve all things being equal. There is no direct link between the functioning of Frontex and the level of illegal border crossing, as the trends depend on many different factors (for example the economic situation of the residents' country, friends or relatives present on the territory of the EU, the overall social environment, the activities of traffickers of human beings, etc.)]

In this context it should be underlined that there is no mathematical formula at hand to calculate the possible successes or failures of the efforts undertaken by the national border guard authorities and the Frontex Agency. For instance the deployment of 1 patrol vessel in the Mediterranean Sea can result one day in the interception of 50 irregular migrants; however there is no possibility to know beforehand how many migrants might be intercepted the next day. The same applies for the number of deployed resources (technical and human) – if 1 patrol vessel intercepts one day 50 irregular migrants, there is no guarantee to say that 2 patrol vessels would intercept 2x50 migrants.

For those reasons the activities of the Frontex Agency are driven by the ongoing findings of thorough risk analysis when deploying technical and human resources.

In what concerns the efficiency of the border management ensured by Frontex, the problem definition (see chapter 3) describes the problems *in extenso* that need to be addressed to optimise and further develop the efforts undertaken by the Member States to secure the external borders. If status quo was to be continued, inefficient and insufficient operational cooperation in the framework of Frontex would persist, in particular with regard to:

As concerns the **technical equipment**, the voluntary nature underlying the provision of resources, and the reliance on Member States for this purpose, means that the amount of resources available for joint operations will remain at the current level, as described above, which is clearly insufficient compared to the needs identified. Without sufficient equipment at its disposal, FRONTEX would not be able to provide adequate and timely assistance at specific sections of the EU borders. Also the

Agency would not be able to plan its operations as the availability of equipment would remain unclear at the beginning of a given year.

The current system entails a lack of predictability that has a negative impact on the capacity of the Agency to plan operations and allocate resources between operations in the most optimal way. The complete dependence on Member States contributions means that the Agency can never be sure that it is able to implement an operation identified as necessary based on its risk analysis. Each potential operation has to adapt, in terms of planning and objectives, to the resources eventually made available by Member States.

A similar result can be expected as regards **human resources**, where the current administrative arrangements would have to continue without a legal basis. The Agency has already exhausted all possibilities to solve the current problems and cannot take any further measures in this regard without a change in the legal basis. If nothing changes, due to unpredictability both on the part of the Agency: whom Member States will be willing to contribute; and the MS: whom they will be asked to contribute, the Agency will continue to meet obstacles in coordinating timely and efficient (the lacking specific competences required) joint operations.

The **coordination of operations** would continue to be based on ad hoc solutions as is currently the case. As a consequence the insufficient transparency on who does what would persist. Also the inefficient system of evaluating would make impossible to build on the experiences gathered in the course of operations. A certain risk can be identified in that continuing to operate under an unclear legal framework may reduce the interest of Member States to participate while the perceived lack of transparency of the legal framework could incite a sustained criticism against the operations coordinated by it.

**Cooperation with third countries** could also level out. The Agency would continue not being able to use its follow up expertise. However, a clear risk is that some third countries would lose their interest in cooperating with the Agency in the absence of any concrete possibilities for the Agency to more pro-actively support capacity building in those countries.

**The usefulness and quality of the risk analysis** carried out by the Agency would continue to develop also without access to personal data, as this is not the only source or determining factor in this regard. However, if the situation continues as it is today, the value added of information gathered by guest officers would not probably be used for the risk assessment purposes, also without such access there are certain limits to how far a further positive development can be expected to continue.

**Return operations** can be expected to further develop also without changes to the legal framework. However, the legal basis of the Agency would not fully correspond to the role it is actually taking.

Finally, the expertise of the Agency cannot be used to **evaluate the performance of the Member States in the area of border management** without a legal basis, and no alternative source or tool could provide for that apart from Frontex.

## 2.5. Right to act

Subsidiarity and proportionality have already been addressed in the previous impact assessment having regard to the legal basis of the Agency. That analysis remains valid

having regard to the fact that the Lisbon Treaty does not bring fundamental changes to the competence of the EU to act in this field and as the general objectives of the current legal basis are not questioned in this impact assessment.

A detailed description of the impacts regarding subsidiarity and proportionality can be found in point 5.8.

### **3. OBJECTIVES**

The objectives have already been identified in the previous impact assessment and are in line with the objectives as defined in the existing legal basis of the Agency (cf Article 1 of the Regulation), having regard to the problem definition as explained in chapter 2. In this regard it should be noted that there is general consensus (cf chapter 1) that the Agency has performed very well since its inception and that the general objectives of the Agency as established by the legal basis are correctly defined. There are no reasons to revisit them or to consider adding further general objectives.

Not all specific objectives in the previous IA are relevant for this one, as certain recommendations of the Communication are not covered in this impact assessment, as explained in chapter 1. However, one of the specific objectives (on risk analysis) is now explained in some more detail to cover all recommendations of the Management Board.

Therefore the objectives of the current initiatives do not imply developing EU policy in new areas since it is matter of reinforcing current actions. However a proposal in this area is of strategic importance because of the calls from the European Council and the European Parliament to strengthen the role to Frontex in the management of the EU's external borders.

#### **3.1. General objectives (cf Article 1 of the Regulation)**

To contribute to an integrated management of the external borders at European level, including through reinforcing operational solidarity by the EU with Member States and through cooperating with third countries;

To contribute to the effective control of the external borders by supporting the border management carried out by Member States;

To facilitate the application of existing and future Community measures (notably core instruments of the EU acquis such as the Schengen Borders Code) relating to the management of the external borders by ensuring the coordination of operational cooperation between Member States.

#### **3.2. Specific objectives (cf Article 2 of the Regulation)**

The specific objectives reflect the different tasks of the Agency and contribute to the achievement of the general objectives.

**Coordinating operational cooperation between Member States in the field of management of the external borders:** This involves notably the coordination of joint operations at specific border sections for a given (limited) period of time. This specific objective contributes directly to more effective controls of the external borders (the second general objective) by allowing for an increased deployment of technical means and human resources at specific border sections. It also contributes to

the third general objective by providing for exchange of best practices and experiences between Member States.

**Cooperation between the Agency and the authorities of third countries.** Such cooperation may cover exchange of information and common risk analyses, training, and joint operational activities. This specific objective contributes directly to the first general objective, as an integrated border management at European level must involve cooperation with third countries, and as a result indirectly to the second general objective with positive effects on more effective border control and more effective operational coordination.

**Carrying out risk analyses.** This may include measures to facilitate the exchange of information relevant for the tasks of the Agency and the Member States, as well as cooperation with other (EU) agencies, in particular with Europol, and international organisations. This contributes to all three general objectives, as the results feed into all four levels of the integrated border management, especially measures in cooperation with third countries, measures at the border, and measures within the Schengen area. Risk analyses, which is largely based on information and data transmitted by the member States, allows for focussing resources in response to threats and therefore to a more effective control of the borders, and also to identifying needs for operational cooperation between Member States.

**Provide member States with the necessary support in organising joint return operations.** This contributes to the first general objective, as return form an important part of the integrated border management system as a whole.

### **3.3. Operational objectives**

- Ensure the availability of technical equipment for joint operations
- Ensure the availability of qualified border guards for joint operations
- Ensure more efficient coordination, implementation and evaluation of joint operations
- Ensure more efficient cooperation between Frontex and third countries on border management
- Improve the risk analysis carried out by Frontex by giving the Agency access to new sources of data
- Improve efficiency of joint return operations
- Improve the evaluation of the performance of Member States in the area of border management

## **4. POLICY OPTIONS**

In the previous impact assessment the preferred policy option included implementing a set of short/medium term recommendations and, in the longer term, amending the legal basis for the Agency. As the outcome of that impact assessment entailed discarding the status quo no "do nothing" option is considered separately. The assessment of the baseline scenario is covered by the problem definition in chapter 2.

Due to the level of detail in defining the specific problems described in chapter 2, it is not possible to identify individual policy options that would correspond to all specific problems. As a consequence the following "building blocks" have been defined, each corresponding to one operational objective; in relation to each building block two or more policy suboptions will be assessed as alternatives to each other:

- Revising existing provisions on the use of technical equipment in joint operations, including the mechanisms for contributions from the Member States of such equipment;
- Mechanisms to improve the availability of border guards in joint operations;
- Revising the role of the Agency in preparing, coordinating and implementing operations, including with regard to the sharing of tasks between the Agency and the Member States;
- Expanding the mandate of the Agency in cooperating with third countries on border management;
- Mandating the Agency to collect and process personal data;
- Revising the mandate of the Agency as concerns return operations;
- Mandating the Agency to contribute to evaluating the performance of Member States in the area of border management.

#### **4.1. Assessment criteria**

The policy options are assessed against largely the same criteria as in the previous impact assessment; moreover an overall subsidiarity and proportionality examination will be provided for all suboptions.

Does the option contribute to meeting the identified shortcoming, i.e. to better reaching the relevant objective(s)?

Does the option have an impact on third countries?

Does the option have a budgetary impact on the Agency or on the Member States?

What are the possible impacts on fundamental rights?

## **5. DESCRIPTION OF SUBOPTIONS AND ANALYSIS OF IMPACTS**

### **5.1. Revising existing provisions on the use of technical equipment in joint operations, including the mechanisms for contributions from the Member States of such equipment**

**Suboption 1:** A technical equipment pool with compulsory contributions of equipment by MS

A 'technical equipment pool' (TEP) bringing together equipment and assets owned by Member States could be created, building on the existing central record of technical equipment (CRATE) set up under Article 7 of the current Regulation. Such a pool would be organised by categories of operations (air, sea, land) and by type of equipment (aircraft, vessels, helicopters, jeeps, etc).

All Member States could contribute to the technical equipment pool, by indicating which type of equipment they can offer to the pool for the year  $n+1$ ; the TEP should be reviewed on a yearly basis i.e. during the discussions of the operational plans for the year  $n+1$ . The numbers should be based on the experience gathered so far by the Agency with the exact needs to be quantified by the Management Board of the Agency on a yearly basis. The system would be flexible as the contributions from Member States could be adapted to the needs each year based on risk analysis.

A minimum number of the different types of equipment would need to be defined and be binding on the Member States, possibly combined with a referral mechanism whereby the Agency would report to the Council on any shortcomings. The mechanism would need to foresee exceptions for Member States to withdraw equipment when facing national imperative needs, but widely defined exceptions would deprive the pool of its value. The concrete contributions that would need to be requested from Member States in the medium term are difficult to predict. The amount of equipment needed would not necessarily call for a contribution from all Member States, especially heavy equipment which in addition not all Member States have at their disposal for obvious reasons.

#### **Suboption 2: Acquisition or leasing of equipment by Frontex**

For the performance of the duties within its mandate the Agency may acquire or lease the necessary technical equipment. This suboption forms as such part of status quo as it legally feasible under the current mandate, although it has not yet been exploited; during the first years of operation the Agency's budget was clearly insufficient for that purpose. Moreover, the Agency has so far concentrated on making the best use of the baseline, i.e. relying on the voluntary contributions of Member States. However, the choice of this suboption could nevertheless be accompanied by certain legislative changes providing further details for the practical implementation.

This suboption would therefore consist in FRONTEX buying some or all of the necessary technical equipment to be used in joint operations, including airplanes, helicopters, radars, vessels, trucks, etc.

In legal terms equipment such as vessels and aircraft would need to be registered in a Member State and be provided with a crew from that Member State.

A possible model could involve pursuing forms of co-ownership with individual Member States to share purchasing costs as well as actual use, and the Member State in question taking on registration and provision of the crew. The share of the Agency and the Member State in question, in terms of use of the equipment, would need to be negotiated on a case-by-case basis, possibly yearly, to allow for adapting to concrete needs.

Equally feasible within the current legal framework would be for Frontex to lease its own technical assets whilst taking due account of EU procurement rules and the financial regulations. Concerning the more important technical assets such as vessels and aircraft, practice has shown that the leasing of an aircraft is part of common economic activity. Leasing of adequately equipped patrol vessels is however untested.

**Suboption 3:** A combination of suboptions 1 and 2

There is no reason to regard suboptions 1 and 2 as mutually exclusive; on the contrary Frontex could work with a combination of equipment contributed by Member States for specific operations and its own equipment. Frontex would take into account its own equipment, or equipment leased, when assessing the contributions needed from the Member States for a given year. In practice this suboption would involve putting all equipment in the same pool, ie Frontex own or leased equipment would be added to the TEP.

This suboption would also allow for a phased approach whereby Member States' contributions are adapted over time to a gradual increase of equipment owned or leased directly by Frontex. It would also allow for greater flexibility, as Frontex would be able to resort to two different sources in ensuring the availability of equipment.

*5.1.1. Do the suboptions address the general objectives?*

All suboptions would positively impact on the shortcomings identified and allow the Agency to better meet the relevant operational objective, as they would increase the availability of equipment for joint operations. All suboptions would contribute to the general objectives, as the operational solidarity would increase with a view to temporarily reinforcing border control at specific sections. As compared to the baseline, border control would be more effective as with a higher number of assets deployed, possibly a higher number of persons attempting to cross the border illegally could be detected and apprehended. The Agency would be able to better plan its operations as the availability of equipment would be clear at the beginning of the year.

As concerns suboption 1 Member States might however become more reluctant to contribute in the knowledge that any commitment would be binding. This could in part be mitigated by allowing for 100% financing of the costs incurred by Member States.

As concerns suboption 2, a negative impact on the operational objective might be that Member States would no longer see the need to actively participate with equipment in joint operations, considering that any shortcomings could be met by Frontex purchasing/leasing ever greater amounts of equipment. This may however not be feasible in view of the capital costs involved; the capacity of the Agency to coordinate operations may as a result be reduced. Moreover, it would deprive joint operations of an indirect added value in getting Member States to work together. Moreover, the positive impact of this suboption would take some time to materialise, as procurement procedures (be it for acquisition or leasing) will be lengthy. For acquisition equipment will need to be ordered and construction time will need to be considered. This suboption would however have the greatest positive impact in giving Frontex a higher

capacity and efficiency to act based on its own risk analysis, as it would not have to rely on Member States' contributions. Frontex can purchase or lease the type of equipment adapted to its precise needs, which would allow for a definite increase in the assets deployed at border sections under pressure.

*5.1.2. Do the options have an impact on external countries/partners?*

No direct impact, but the framework for cooperation with third countries discussed under section 5.4, would influence the needs.

*5.1.3. Can the involved costs be (or become) part of the FRONTEX budget and how high are they?*

The Agency is already co-financing the equipment deployed during joint operations. A maximum of 80 % of the total eligible costs of the operations is supported by the Agency budget; however, as contributions in kind are allowed from the MS the Agency may effectively cover 100% of the actual costs incurred by MS.

As an example for the year 2010 an amount of approximately 33 million € is foreseen by the Agency's budget for operational coordination, out of which 26.5 million € for operations at the sea borders.

In this context it should be noted that the magnitude of the costs is very difficult to project because costs are directly dependant on the exact needs, which in turn can only be defined by the Agency itself on a yearly basis subject to endorsement of the Management Board.

However, the following estimate can be done, starting with suboption 1:

The daily total cost for the deployment of one coastal patrol vessel is around 4000€ The additional cost of deployment of one vessel for 180 days would thus be 720 000€ per year, out of which 576 000€ would be covered by the Agency's budget and 144 000€ by the contributing Member State. For an aircraft the equivalent estimates would be around 10 000€ and 1.8 million € respectively; thus 1.44 million € to be borne by the Agency's budget and 360 000€ by the Member State.

For suboption 2, the running costs can be estimated based on the above figures.

As for capital costs estimates differ widely depending on the size, range and equipment of the vessel. By way of illustration equipment financed via the external borders fund, and based on the annual programmes of the Member States, range between one and two million € for one coastal patrol vessel, up to 22 million € for an offshore patrol vessel, and between 4 and 25 million € for one aircraft.

As concerns leasing, a comparison can be made with the costs incurred by the CFCA and EMSA, for service contracts involving vessels put at the disposal of the Member States when needed. EMSA, for example, has access to a total of nine vessels on stand by for emergencies covered within a total yearly budget of 16 million €

As this option depends on needs decided each year by the Frontex Management Board, and is in fact about creating availability of equipment when needed, drawing

up a scenario of the cost impact on the Frontex budget is therefore virtually impossible based on the uncertainties outlined above and taking also into account that an increase in the availability of equipment will need to be phased in gradually for administrative and operational reasons. In particular speculating about the budgetary impact of possible future purchases of equipment by Frontex serves no meaning, as it would depend on the modalities to be defined for the co-ownership and the delivery time. However, as a hypothetical scenario for the short-term (2-3 years) an additional three coastal patrol vessels and three aircraft put at the disposal of the Member States would entail a total annual budget impact for Frontex of around 6 million€

Commitments of operational expenditure in the Frontex budget in 2008 was 94%, which would leave a scope of 3 million€ to be used for additional equipment. However, the use of the payment appropriations were much lower at 44% which may indicate that underlying real costs incurred by the Agency are lower than the commitments; hence an increase in the technical equipment would, within certain limits such as the short-term scenario above, not necessarily require an increase in the annual budget of the Agency.

#### *5.1.4. What are the possible impacts on fundamental rights?*

An increase in the availability of equipment does not as such impact on fundamental rights.

#### *5.1.5. Comparison of the suboptions*

All suboptions in this regard would contribute to solving the existing shortcomings and allowing for meeting the general objectives of an effective control of the external borders and of coordinating joint operations, through a higher availability of equipment. Which suboption that would provide for the biggest quantitative impact on the operational objective is impossible to predict. The impacts are also heavily dependent on the exact terms for their implementation, in particular suboption 1. Moreover, in view of the operational character of Frontex operations in response to changing challenges a precise quantified benchmark of the ideal number of equipment cannot be set, against which respective impacts can be measured.

The preferred option would therefore be suboption 3. This would avoid making a definite choice that would restrict the Agency in the future. Thus, a compulsory mechanism for Member State's contributions should be set up to guarantee the availability of a minimum number of equipment each year. This should be combined with the possibility for Frontex to purchase or lease its own equipment in the future. While the latter is already feasible under the current Regulation it would benefit from a clarification, making this possibility on the one hand more explicit, and on the other hand requesting the Agency to carefully assess the needs and costs before going in this direction.

As for costs, in general the running costs for suboption 1 and 2 would be similar, while suboption 2 (in the case of acquisition) would also involve capital costs. In relative terms it is thus obvious that suboption 2 has a greater budgetary impact on the Agency. However in the longer term, the acquisition of equipment by Frontex would

result in savings, as the Agency would not have to incur the costs of co-financing equipment of the Member States.

As concerns the Member States the impact in relative terms of the two suboptions is neutral, in the assumption that actual running costs are in practice covered to 100% by the Agency for equipment contributed by the Member States.

The impact on fundamental rights is neutral in comparison between the options.

## **5.2. Mechanisms to improve the availability of border guards in joint operations**

**Suboption 1:** Establish “Frontex Joint Support Teams” (FJST) to participate in joint operations and pilot projects based on a compulsory mechanism for Member States to contribute with guest officers to those teams, in the form of a pool of human resources to be used by the Agency during its operations and pilot projects.

The Frontex Joint Support Teams (FJST) would be established by analogy to the RABIT teams; their overall number and their tasks and powers and responsibilities should be set by the Regulation; their profiles and conditions for deployment (including their allowances) could be set by the Management Board on a proposal by the Executive Director.

**Suboption 2:** Lower the threshold for the deployment of Rabbit teams. The current Rabbit teams could thereby be used to reinforce joint operations. These teams are currently restricted to emergency situations, and foresee already a compulsory component. The exceptions allowing Member States not to deploy their guest officers upon the request of the Agency are narrowly defined. The Rabbit teams have so far never been deployed in view of the rather high threshold set for their deployment in terms of what constitutes an emergency.

**Suboption 3:** Foresee the gradual creation of a pool of border guards on semi-permanent detachment from Member States to Frontex for a period of say six months, to be used exclusively for joint operations. It would thus be for the Agency to decide for which operations and for which concrete tasks those guest officers should be deployed during their six-month detachment.

### *5.2.1. Do the suboptions address the general objectives?*

All of these suboptions would positively address the shortcoming in question and have a positive impact on the operational objective. Border guards taking part in operations would be trained according to uniform standards and the availability of persons with specific competences would be predictable thereby meeting the operational objective. Frontex would therefore be better able to launch timely tailor-made operations for different parts of the border based on its risk analysis, and the impact of those operations in terms of ensuring more efficient border control would be higher. Already for reasons of legal clarity either suboption 1 or 2 should be retained, as reflecting already current practice.

The second suboption would have the indirect and negative impact of depriving the EU of its only true emergency response capacity. Frontex would not be able to rely on

the availability of the Rabbit teams if the border guards in question are already deployed in different member States for the purpose of joint operations.

The third suboption can in terms of impact on the operational objective be compared with the Agency purchasing its own equipment: very positive impact in terms of the capacity of the Agency to plan, initiate and implement operations. However, it would require careful legal provisions on the status of those persons. Completely independent border guards employed as temporary agents by the Agency would not be feasible, as the Agency does not and cannot dispose of a complete set of provisions with regard to issues such as disciplinary rules, civil and criminal liability, use of force, competent jurisdiction, etc. They could only be employed with the status of national experts, as their rights and obligations during the operations would need to fit with the current rules on guest officers in the Frontex Regulation. They would thus be subject, in a very explicit manner, to a triple legal framework, made up of relevant parts of their national law (cf home state concept in the current Regulation), the Frontex Regulation as such, and the internal rules of Frontex (as decided by the Management Board) as concerns seconded national experts. This suboption presupposes that the latter rules would be amended to allow for direct instructions from the host state during the operations to which they would be deployed. As a consequence it would also need to be clarified that temporary agents employed by Frontex cannot carry out border control tasks during operations but only coordinating functions.

The first and the third suboption are both therefore very dependent on a careful definition of the modalities for their implementation, although in different ways; the first in the sense of how the compulsory aspect is defined, the third in the sense of how issues of command and control as well as legal accountability are defined.

*5.2.2. Does the option have an impact on external countries/partners?*

No direct impact.

*5.2.3. Can the involved costs be (or become) part of the FRONTEX budget and how high are they?*

The unit costs for the first two suboptions would not be different compared to the status quo.

As for the third suboption, in 2009 the allowance for a Frontex national detached expert amount to 4127,- €per month. Guest officers of the Member States deployed during joint operations cost on average 180,- €per day (+/- 3960 per month). These figures indicate that the difference is minimal between the total cost of a guest officer of a Member State deployed during a joint operation or if the same person would be detached to the Agency.

*5.2.4. What are the possible impacts on fundamental rights?*

An increase in the availability of border guards does not as such impact on fundamental rights. However, the risks of having an EU body and its staff exposed to situations of possible violations of fundamental rights would increase, due to the fact that they would be more involved in concrete operations than they are currently.

The fundamental rights involved are, mainly, human dignity, prohibition of torture and inhuman or degrading treatment or punishment, right to liberty and security, principle of *non-refoulement*, non-discrimination, and the rights of the child.

#### 5.2.5. *Comparison of the suboptions*

While the positive impacts on the operational objective of the first (compulsory pool) and the second (revising the Rabit teams) suboptions are close to identical the second suboption brings the negative impact of depriving the EU of a true emergency response mechanism. That suboption should therefore be discarded.

The third suboption has the clear advantage of allowing the greatest degree of capacity to act of the Agency. It also has a stronger impact than the first suboption in the sense of allowing an even greater degree of harmonised, high qualifications of the border guards in question. However, the third suboption is not feasible as the only solution having regard to the needs. It is simply unrealistic to assume that Frontex would be able to employ such a number; in other words this suboption cannot, in isolation, meet the operational objective.

Thus, in conclusion, the qualitative impact, in the sense of ensuring highly qualified border guards, of the third suboption with regard to meeting the operational objective is the highest, while the quantitative impact, in the sense of ensuring the availability of a sufficient number of border guards, on the same objective of the first option is the highest.

Suboption 1 and 3 will in practice have to be combined: the setting up of a pool of human resources made up of guest officers from the Member States seconded to individual operations as well as guest officers employed as national experts by the Agency on a short-term (6 months) basis. The cost impact of these suboptions is quasi the same (see point 5.2.3) and can therefore be easily combined. The two possible sources of guest officers can therefore compensate for any shortcoming in numbers in each other. The long-term aim whether one source should gradually become predominant can be determined by the Management Board.

### **5.3. Revising the role of the Agency in preparing, coordinating and implementing operations, including with regard to the sharing of tasks between the Agency and the Member States**

**Suboption 1:** Frontex is awarded the sole lead for the implementation of joint operations, the establishment of the operational plan, and the sole right of initiative for the launch of operations.

**Suboption 2:** Frontex is awarded a co-leading role together with the host state for the implementation of joint operations. Frontex is responsible for drawing up the operational plan but subject to the final agreement of the host state. Both Frontex and Member States may take the initiative for the launch of operations, within the limits of the discretionary powers that can be delegated to a Community Agency.

The lead / co-lead aspects would also differ between the two suboptions as concerns the overall command over the implementation of the operation in the sense of deciding where individual units are deployed and which tasks they should carry out.

Both suboptions would involve creating a legal basis for the establishment of the operational plan, which is already common practice. Both suboptions would also involve providing updated information on ongoing joint operations including the incident reporting obligations, the issuance of full evaluation reports on joint operations (compared against the operational plan) and their distribution to the members of the Management Board and EU Institutions.

Explicit provisions on obligatory incident reporting and evaluations of the joint operations would ensure that any alleged breaches of EC law would be followed up on by the competent authorities and, within its competences, by the Commission. The right for Frontex to abort an operation could also be foreseen and used as a last resort should the Agency consider, under its own responsibility, that EC law is not fully complied with.

### *5.3.1. Do the suboptions address the general objectives?*

Virtually any step in this direction would increase the degree of harmonisation in terms of how complex operations are implemented in practice. A more clear and explicit legal framework is a positive thing in itself, by making the work of the Agency more transparent in terms of who does what. It would thereby also clarify the objective of coordinating operations in itself and allow for setting better benchmarks in terms of what the Agency should achieve through its coordinating function in particular and in making border control more efficient in general.

Operations will be conducted in a more harmonised manner and therefore be more efficient in strengthening border control. Stronger rules on evaluation and reporting would bring value added in terms of increased transparency and gradual better focussing of future operations, as well as a better identification of needs based on the better evaluated experiences. Both suboptions therefore clearly meet the operational objective.

A clear legal status for the operational plan would also allow for addressing the request of the Stockholm programme to establish clear rules of engagement, to the extent that this request is not covered by the draft decision on the law of the sea proposed by the Commission as referred to under section 2.1.

### *5.3.2. Can the involved costs be (or become) part of the FRONTEX budget and how high are they?*

These changes will clarify and reduce the current diverging practices of the Agency and the competent authorities of Member States. No further extra costs are to be foreseen through optimisation of the working practices. On the contrary some efficiency savings in terms of MS expenditure could occur, as the clear coordination role of Frontex could prevent splitting of joint operations or parallel operations, which happens currently as described under 2.3.3.

### *5.3.3. What are the possible impacts on fundamental rights?*

The risks of having an EU body and its staff exposed to situations of possible violations of fundamental rights would increase, due to the fact that the Agency would

be more involved in concrete operations than they are currently and because of the possible co-lead role in operations.

As concerns suboption 1, the legal obligation to comply with fundamental rights would weigh more on the Agency compared to the current situation, where this legal obligation weighs mainly on national authorities when implementing Community law. Awarding the Agency the lead for the implementation of joint operations could mean that the Agency would exercise a sufficient degree of control over the conduct of operations to render it liable for possible violations of fundamental rights that may occur during the operation. It would therefore require adopting, on the level of the EU, a number of comprehensive legal acts that would address topics currently regulated on the national level (e.g. detailed rules on the use of force, disciplinary rules for border guards,...). There is also a risk that some uncertainties could arise as regards the responsibility and the duty of involved guest officers as regards the obligation to comply with fundamental rights. Consequently, additional binding rules and procedures on the relationship between host Member State's border guards and guest officers would be needed in order to establish a legal framework for potential issues connected to fundamental rights that might arise in the performance of their duties (conflicts of interest, reporting potential breaches of EU law including fundamental rights, complaints procedure, liability, jurisdiction, compensation). These rules should ensure that guest officers, whatever their precise legal status, always implement Community legislation in accordance with fundamental rights.

The impact described above would be mitigated in suboption 2 under the assumption of a clear legal framework for border guards semi-detached to Frontex as described in section 5.2.

The fundamental rights involved are, mainly, human dignity, prohibition of torture and inhuman or degrading treatment or punishment, right to liberty and security, principle of *non-refoulement*, non-discrimination, and the rights of the child.

#### 5.3.4. *Comparison of the options*

Suboption 1 would have a higher impact on the general objective of effective border control in the sense that the operations would exclusively be designed to meet needs identified at European level, ie based on Frontex own risk analysis and more efficient. It would also achieve a full harmonisation – with Frontex always in the lead all operations can be conducted based on the same, pre-established *modus operandi*.

On the other hand the impact of suboption 2 may well be higher in some respects as a co-leading role of the host state allows for adapting to local conditions and challenges. The Agency will never be in a position to replace the combined expertise of all border guard authorities and units of the entire European Union. Some Member States may also consider that allowing Frontex “free hands” in implementing operations on their territory is not compatible with national sovereignty, and they may therefore refuse to accept any operations at their external borders, which would effectively prevent reaching the operational objective.

In balance, and while it seem counterintuitive, suboption 2 is likely to have the highest positive impact as compared to the baseline.

The preferred suboption is therefore to award the Agency a co-leading role with clearly defined modalities on who does what and who is responsible for what. The preferred suboption includes providing for detailed provisions on the operational plan and on the evaluation of operations, including with regard to incident reporting.

#### **5.4. Expanding the mandate of the Agency in cooperating with third countries on border management**

**Suboption 1:** Allowing Frontex to carry out technical assistance projects in third countries, using either its own budget or that of the EU's external financial programmes. Frontex, as a Community Agency, would thus become eligible to become a beneficiary/implementing partner of the EU's large financial and technical supporting programmes set up by ECHO/AIDCO/RELEX towards third countries. The level of cooperation should continue to be in line with the overall EU's external policy.

**Suboption 2:** Allowing Frontex to deploy liaison officers in third countries. To enhance the knowledge of immigration flows, to obtain better data on expected flows and to assist Frontex during joint operations in a geographical area close to the third country in question the posting of Frontex Liaison Officers (FLOs) could provide the solution.

**Suboption 3:** Mandating Frontex to carry out border control missions at the borders between third countries. The European Union has been financing a number of initiatives aimed at assisting third countries to establish and further develop their border management systems in accordance with the relevant European standards, such as the Border Management Programme in Central Asia (BOMCA) or the Border Assistance Mission to Moldova and Ukraine (EUBAM). Taking into account that Frontex shall provide the Commission and the Member States with the necessary technical support and expertise in the management of the external borders, this expertise could be exploited in the context of those initiatives aimed at assisting third countries in the field of border management.

Thus participation of (or coordination with) Frontex in missions like the above mentioned ones could also be addressed. In the latter regard a further step would be to mandate Frontex to take over the implementation of such missions.

##### *5.4.1. Do the suboptions address the general objectives?*

These options would all contribute to the general objective of supporting the integrated border management system of which cooperation with third countries is a crucial element. On one hand it would ensure more efficiency in terms of enabling the Agency to enhance the quality of risk analysis, improving day-to-day cooperation at specific border crossing points, and on the other hand enhancing the capacity of third countries to manage their own borders, which can relieve the pressure on the EU external borders.

The first suboption would allow Frontex to implement a closer cooperation with third countries, on the basis of its working arrangements, more effectively by directly supporting ia capacity-building projects to follow-up on weaknesses in the border

management of the third countries in question, and thereby clearly meeting the operational objective.

The second suboption would also have a positive impact on the operational objective but in a different manner, by improving the information flow to the Agency as well as the Member States on the situation in third countries ie with regard to facilitation of illegal immigration. On that basis risk analyses would be enriched and as a result allow for a better targeting of Frontex operations. A further positive impact would be on cooperation with third countries as a whole on migration issues, especially as Frontex could complement the existing network of Member States' immigration liaison officers network and deploy its own liaison officers in countries where few Member States are represented.

As regards suboption 3 more particularly, these missions are only indirectly linked to the objectives of Frontex, as the latter is focussed on the external borders of the EU and its Member States while these missions concern the borders between third countries. Well managed borders between third countries do have an indirect effect on the internal security of the EU, but to a varying degree. It should also be noted that such missions are, today, not necessarily constrained to control of persons but also involves control of goods, which is not covered by the Frontex mandate. Hence the impact on the operational objective would be lower, and of a more indirect nature.

#### *5.4.2. Does the option/recommendation have an impact on external countries/partners?*

All suboptions will have an impact on relations with third countries. Overall the most positive impact will come from the increased capacity of the EU to meet requests for assistance from these third countries, as part of an overall reinforced cooperation between the EU and third countries on migration. In depth consultations with third countries and relevant Commission services will need to be organised to implement these provisions by the Agency within the context of the EU external policy.

#### *5.4.3. Can the involved costs be (or become) part of the FRONTEX budget and how high are they?*

The first and second suboptions will have an impact on the budget. The carrying out of technical assistance projects as well as the posting of liaison officers will as such be a possibility in the Regulation, while the actual implementation will be up to the Management Board to decide in the context of the annual work programme. The cost impact can therefore not be estimated. The latter should also be seen in the context of the expenses of the EU external relations programmes which do already have a component related to border control/ integrated border management. By way of illustration projects funded under these programmes on integrated border management in third countries have ranged from 1 to up to 15 million euro. Given that the number of such projects should be limited to priority countries, and not duplicate assistance already being carried out under the EU's external relations programmes, an assumption could be that Frontex would implement 1-2 projects per year with a budget of up to two million euro each. A further reason to keep the number of projects limited would be to limit the impact of staffing of Frontex to run the projects as such. As for the posting of liaison officers the preferred model would be to station those

officers in the EU delegations, which would lead to a marginal increase in the administrative costs for those delegations. A gradual posting of up to 5 liaison officers could be envisaged, which would involve a limited cost impact; based on calculations in the Frontex budget 2010 the total yearly average cost for one temporary agent is estimated at 100 000 euro, which would thus give a total cost impact of 500 000 euro for this suboption.

The costs for the third suboption would be substantial: as a comparison the costs for the EUBAM mission from November 2005 to November 2009 was around 44 million euro in total, and it currently employs more than 200 staff. However, as this mission is financed under the ENPI instrument for the Community budget the cost impact could be considered neutral.

#### *5.4.4. What are the possible impacts on fundamental rights?*

Technical assistance to operations, which could lead to violations of fundamental rights (e.g. allowing for excessive use of force, breaching the right to privacy, *refoulement*), should not be offered to third countries, within the framework of these projects. Consequently any provision of such assistance would have to be in line with the EU's overall external relations policy including with regard to the respect of human rights by the country in question.

In the implementation of the second suboption, due regard should be taken regarding the prevention of potential ethnic profiling in the collection of data on the migration flows.

For the third suboption the legal framework is in part set by the third countries in question where the missions would take place, and it would have to be ensured that the operations take place under a framework fully respecting fundamental rights.

#### *5.4.5. Comparison of the suboptions*

All the suboptions are complementary rather than mutually exclusive and could thus, in theory, be combined. However, while the positive impacts on the operational objective for suboptions 1 and 2 are clear, the impact of suboption 3 is only indirect and it would, in addition, entail important question marks on the modalities for its implementation and also significant costs.

The preferred option is clearly to open for the Agency to carry out technical assistance projects and to deploy its own liaison officers in third countries. The scope of those activities will be covered within the existing budget depend on the priorities defined in the context of the annual work programme. The total cost impact would be 3-4 million euro per year.

The taking over of border control missions concerning the borders between third countries contributes only indirectly to the objectives and would have a substantial cost impact and would raise concerns with regard to fundamental rights. The legal safeguards to mitigate any potential negative impact in that regard would be complex to set in place. This third suboption should therefore be discarded, while recalling that Frontex can nevertheless put its expertise at the disposal of such missions on an ad hoc basis.

## 5.5. Mandating the Agency to collect and process personal data

**Suboption 1:** Allow the Agency to process, store, collect and transfer (including to third countries) all personal data gathered by different actors during Frontex joint operations and to use that data for the purpose of risk analysis and operational coordination. It should be noted that this suboption corresponds to the suggestions made by a number of Member States during the discussions during the autumn of 2009 and by the Agency itself.

**Suboption 2:** Enable the Agency to collect, process and store personal data for the purpose of risk analysis and to contribute to the security at the EU external borders.

### 5.5.1. *Do the suboptions address the general objectives?*

As a starting point for any assessment whether FRONTEX should be mandated to process personal data it should be recalled, that any interference by a public authority in the right for private life is only legal when in accordance with the law and is necessary in a democratic society for overriding public interests as referred to in Article 8(2) ECHR and in Article 8 of the Charter on Fundamental rights. Therefore a basic requirement would not only be a specific legal base for such data processing, but a justification of the necessity for such legal base.

The processing of personal data by a Community Agency falls under the provisions of the data protection Regulation 45/2001 which imposes a series of requirements in order to process data in compliance with the rules on the protection of personal data. Even if the processing of personal data for the purposes of FRONTEX would be necessary and proportionate and covered by a legal base, the transfer or the sharing of such data to/with third countries or entities will need to fulfil an additional set of requirements in order to protect the fundamental rights and freedoms of natural persons vis à vis to recipients which are not subject to Directive 95/46/EC (cf Article 9 of Regulation 45/2001).

Some direct positive impacts on the operational objective are clear such as the added value personal data can provide to complete the pre-frontier intelligence picture necessary for a state of the art risk analysis model or to enhance the exchange of information between competent authorities to enhance the fight against cross border crime at the EU external borders (both part of the current Frontex mandate). Personal data on facilitators operating outside the EU can provide a better picture of migration routes and hubs used by migrants and help to identify where those networks operate. Other positive impacts are more difficult to identify such as the effect the processing of personal data could have on the search for facilitators of illegal immigration or, more general, on traffickers in human beings. Ensuring follow-up to information related to facilitators of illegal immigration is a matter of investigating crime and as such outside the scope of the tasks of the Agency, and therefore the operational objective. As concerns more specifically **suboption 1**, the processing of personal data by the Agency cannot be considered necessary to ensure an effective completion of its tasks related to operational coordination. The follow-up to be given, as based on personal data, is not directly linked to the tasks of Frontex: for example, the issuing of individual decisions on refusal of entry, on return, or on the introduction of alerts in the SIS all fall under the responsibility of national authorities. A positive impact on

the operational objective is difficult to identify compared to the baseline, which covers the possibility of receiving data on illegal immigrants in an anonymous form. A positive impact on the general objective of supporting a more efficient border control by Member States by accessing personal data is not established. On the contrary this suboption risks duplicating the collection of personal data performed by border guards of Member States on a daily basis whilst performing their normal duties.

As concerns **suboption 2**, one of the key objectives of the Agency is to further develop a Common Integrated Risk Analysis Model (CIRAM). Although it is true that the Agency has established a well functioning mechanism to receive data from the competent national authorities as part of the Frontex Risk Analysis Network (FRAN) most of this information is of a statistical nature and does not allow the Agency to develop a pro-active stance regarding risk analysis.

The early identification of new trends and patterns in routes and modus operandi of illegal migration will be beneficial for the majority of the operations conducted and/or coordinated by the Agency as well as be useful for Member States in conducting their own border management activities. The collection of personal data gathered during joint operations, pilot projects or being part of the exchange of relevant purpose oriented information with other competent authorities active at the EU external borders will enhance the capacity of the Agency to deliver timely and up to date risk analysis models. Information on the location and modus operandi of facilitators' networks need to be constantly updated to follow resulting changes in migratory routes towards Europe. Frontex needs to be able to adapt its operations to those routes at short notice. Being able to access personal data on facilitators would increase the analytical capacity of Frontex in this regard and thus positively impact on the operational objective. Frontex would also be in a better position to support Member States by informing on changes in migratory routes also when no joint operations are being implemented. This would thus concern persons for which there are reasonable grounds to believe that they are involved in the organisation and facilitation of illegal immigration, principally in third countries. Frontex would solely use the data for the purpose of their risk analysis, ie to gain a better understanding of migratory routes, and not for any kind of tracking or investigations of the individuals concerned.

The same applies to the support the Agency can provide to assist other competent EU authorities in the fight against cross border crime. Part of the integrated border management model is a close cooperation between all agencies involved at the border, typically police, border, and customs authorities. The same applies at European level, where a close cooperation between Frontex and Europol can provide mutual benefits for risk analysis and organised crime threat assessments. The results of the risk analysis could be sent to Europol as assisting tools. Moreover Europol could receive upon request and in accordance with agreed modalities between both agencies from Frontex data for the enrichment of its analytical working files; data which is in the current situation missing.

It should be stressed that for legitimacy, necessity and proportionality reasons any legal mandate in this regard should target specific purposes (i.e. risk analysis, fight against cross border crime at the EU external borders) and give specific justification whether the processing of what personal data for these purposes is necessary and

proportionate, but no purposes like the fight against crime, which are in the competence of Member States, Europol or other EU Agencies.

Equally, if the processing of personal data by FRONTEX is lawful, necessary and proportionate, the storage of the data should be rather limited in time but enough to ensure that the data can be processed in a reliable manner, according to the purposes for which they have been collected for. The same applies for the exchange of information containing personal data with other competent EU or national authorities i.e. these should be limited to the strict necessary to achieve the specific purposes for which they have been collected and not serve any other purposes. In this sense Frontex would be receiving raw data directly from interviews of migrants carried out by guest officers during joint operations. A certain amount of time will be needed to analyse and extract the relevant information (be it in the form of personal data or not) and assess its validity and links to other sources. Once the analysis is completed the data should be destroyed. As a safeguard a clear time limit would need to be set such as three months.

The onward transmission of personal data to third countries should not be authorised as this data transfer would not contribute to the specific aims of the data processing conducted by the Agency and would therefore not be lawful. Any retransmission of personal data to Member States would not be justified either. Such a prohibition would avoid any use of personal data for the purpose of issuing alerts on individuals.

#### *5.5.2. Do the options have an impact on external countries/partners?*

The lawfulness of any data processing by FRONTEX would depend in particular on the assessment and justification of the necessity and proportionality of the envisaged data processing, including whether transfers of personal data to third countries would be lawful, subject to a specific legal basis for such processing of personal data.

#### *5.5.3. Can the involved costs be (or become) part of the FRONTEX budget and how high are they?*

The costs for both options are not estimated to be significant.

#### *5.5.4. What are the possible impacts on fundamental rights?*

Potentially substantial impact which would need to be mitigated through a stringent data protection regime, under condition that the processing of personal data by FRONTEX and the extent of this data processing is lawful.

#### *5.5.5. Comparison of the options*

Suboption 2, under condition that the processing of personal data for these purposes is lawful and necessary, is proportionate and has a clear positive impact on the operational objective. The impact of suboption 1 is only marginally bigger than for suboption 2 while it raises important question marks concerning proportionality and necessity. Therefore only suboption 2 should be retained.

## 5.6. Revising the mandate of the Agency as concerns return operations

**Suboption 1:** This suboption would involve FRONTEX taking over a coordinating role together with the leading Member State. This coordinating role would become manifest in the preparation of the return operation by collecting and providing the necessary information via the ICONet and the tasks during the concrete return operation.

**Suboption 2:** It could be envisaged to choose an even stronger approach, not limiting the Agency to a co-coordinating role, by taking over from the leading Member State the responsibility and the bulk of organisational tasks for the whole joint return operation. This could mean that FRONTEX would be responsible for taking the initiative for a joint operation, would be the main contact body for the country of return in order to prepare the operation and in particular obtaining the necessary travel documents and permissions and would be in direct contact with the authorities of the main return hub. This suboption could also envisage tasking exclusively FRONTEX to exercise the relations with the country of return, which has been suggested by a number of Member States during the stakeholder consultations. However, also in this option Member States would remain responsible for, notably, the individual return decisions as well as the treatment of persons before, during and after the return, in accordance with EU law and fundamental rights.

### 5.6.1. *Do the suboptions address the general objectives?*

Suboption 1 corresponds effectively to the role Frontex is, gradually, assuming currently. There is thus an added value in making this role explicit in the legal basis.

Both suboptions will clearly have a positive impact on the operational objective in allowing Frontex to provide stronger support to Member States where they are struggling to effectively implement the return decisions issued. Frontex can be more proactive when providing support which should lead to a higher number of return operations in practice. Coordination between several Member States can only function effectively if one body is taking on, as a minimum, all logistical tasks and builds up not only experience but also a harmonised approach to the implementation of such operations. Moreover, the principle of the leading Member State taking over the responsibility provide for legal certainty concerning the applicable national law on board.

As concerns the second suboption, in practical terms a leading role of the Agency is expected to be counterproductive with regard to the operational objective. First, joint return operations are demand driven. This demand is created by Member States and not by the Agency. The need for a joint return operation relates to the concrete needs of the individual Member States to return in a certain moment a certain number of third-country nationals to one or more specific third-countries. In this respect the Agency can facilitate the communication among Member States by providing the necessary information via the ICONet, but is not in the position to anticipate Member States' concrete needs and priorities which, as the practice has proven, can change in short intervals.

Secondly, it is proven that the cooperation with the country of return is an inevitable precondition for the return. FRONTEX should not replace the leading Member State in the return process. Available statistics on return decisions and effected removals indicate huge differences in the effectiveness of Member States' return policy. These differences are in particular caused by the different developed relations with the country of return. Some Member States dispose of excellent working relations to certain countries of return due to historical, political, economical or other reasons. These relations can not be compensated by any kind of FRONTEX working arrangement with the country of return. Keeping for the Agency a co-coordinating role will not exclude FRONTEX from direct contacts with the country of return and for example taking the lead in an advance party to the country of return. Finally, there are also legal obstacles in giving Frontex such a prominent role, as the relevant decisions related to the return process must be taken by a Member State authority.

*5.6.2. Does the option have an impact on external countries/partners?*

No direct impact as long as the role of the Agency is limited to a co-coordinating role with at least one Member State in the lead.

*5.6.3. Can the involved costs be (or become) part of the FRONTEX budget and how high are they?*

The involved costs are already covered by the FRONTEX budget. The increase in the number of operations resulting from a stronger role for Frontex is impossible to predict as the preconditions will remain the same, i.e. return decisions taken by the Member States and obtaining the agreement of the third countries in question. By way of illustration return operations in 2008 amounted to on average 380 000 euro; assuming that an increased role for Frontex could result in an additional 5 return operations the cost impact of the suboptions would be around 1,9 million euro. Enhancing the role of Frontex could result in fewer return operations organised by Member States on their own; instead of two Member States organising two separate return operations, Frontex could organise one joint operation. Consequently certain efficiency savings in terms of Member States' expenditure could occur, as the clear coordination role of Frontex could result in replacing current return organised individually by Member States.

*5.6.4. What are the possible impacts on fundamental rights?*

No impact as long as the limits on the powers awarded to the Agency as described above are respected.

*5.6.5. Comparison of the options*

While the positive impact of both suboptions is in part common, the second suboption entails certain additional positive impacts which however are mainly theoretical, having regard to the significant negative impacts. The preferred option is clearly to foresee a coordinating role for the Agency, but not to shift the responsibility and the main burden from the leading Member State to the Agency.

## **5.7. Mandating the Agency to evaluate Member States' performance in the area of border management**

**Suboption 1:** Mandating Frontex to carry out inspections in Member States, in particular evaluating Member States' capacity to face threats and pressure at the external borders, more particularly their capacity in terms of national structures, equipment and resources. Frontex would make use of that information to refine its risk analysis and better target its operations.

**Suboption 2:** Giving Frontex an explicit role with regard to Member States' compliance with EC law during joint operations, thus giving Frontex a role in observing and reporting in this respect. This suboption is a logical consequence of, but would go beyond, the evaluation aspects foreseen under section 5.3, as the latter concerns the evaluation of whether a specific operation meet its operational objectives.

### *5.7.1. Do the suboptions address the general objectives?*

Frontex could provide a source of well trained experts and ensure a high degree of independence for the evaluations envisaged under suboption 1. A better understanding of the situation on the ground would allow Frontex to identify with more precision where operational support could have an added value, thus having a positive impact on the objectives of ensuring more efficient border control and coordinating operations. More extensive knowledge in this regard would contribute also to the objective of providing high-quality risk analyses to the benefit of all Member States.

A role for Frontex in this regard would have a positive impact on the operational objective, in the sense of being better able to target support to Member States based on a better understanding of the situation on the ground, and thereby better contribute to more effective border control.

The main positive impact of the second suboption would be with regard to Frontex role in facilitating the application of EC law.

However, a negative impact of the second suboption would entail from the fact of giving Frontex "double hats", effectively visiting Member States with the purpose of supporting them to better control their borders (eg joint operations) and at the same time effectively inspecting whether Member States are complying with their obligations. Moreover the role Frontex can take on with regard to the second suboption will in effect have to be very limited as the Agency cannot in any way take on the role as guardian of the Treaty as allocated to the Commission. Moreover, the potential positive impact of this suboption on the operational objective is less than it appears at first sight as Frontex is a centre of excellence of operational expertise, not legal expertise. In this regard, the Agency should not be put in a position where it is forced to make delicate judgments on whether a given incident was in accordance with EC law or not.

### *5.7.2. Does the option have an impact on external countries/partners?*

No direct impact.

5.7.3. *Can the involved costs be (or become) part of the FRONTEX budget and how high are they?*

The first suboption would involve certain staff costs (*see figures provided under 5.2.3*), the second suboption would not have any significant cost impact.

5.7.4. *What are the possible impacts on fundamental rights?*

No direct impact, recalling as concerns the second suboption that Member States obligations to comply with EC law are absolute, independent of the role of Frontex and independent of whether Member States are carrying out border control within the context of a joint operation or not.

5.7.5. *Comparison of the options*

For the second suboption the negative impacts clearly cancel out the positive impacts, while for the first suboption, assuming that a careful definition of the concrete purpose is done, there are clear positive impacts on the core objectives of Frontex, ie coordinating operations and carrying out risk analysis.

## 5.8. Subsidiarity and proportionality

All suboptions considered in this impact assessment respect the following principles and limits of the current legal basis and are therefore in line with the subsidiarity and proportionality principles:

- Border management is a shared competence between the EU and its Member States; **Member States are responsible** for controlling their part of the external border of the Schengen area; the revision of the Frontex regulation aims amongst others to clarify the respective roles and responsibilities of the various actors participating in Frontex joint operations and pilot projects; it does not transfer any executive powers of the national border guard authorities of the Member States to the Agency.
- Frontex **cannot impose** any activity on the territory or at the border of a Member State **without the consent** of that Member State; even in the scenario whereby the Agency launches on its own initiative an operation, it needs the prior consent of the Member State on whose territory the operation is scheduled to take place;
- Any border guard operating in another Member State **shall be subject to instructions** by the authorities of that Member State; furthermore border guards participating in joint operations and pilot projects remain subject to the disciplinary measures of their home Member State while performing their tasks and exercising their powers during a joint operation or pilot project coordinated by the Agency;
- Any decisions on refusal of entry of a person in accordance with the Schengen Borders Code **shall be taken only by border guards of the Member State whose territory the person is seeking to enter**; any appeals or allegations of misconduct shall be addressed to the relevant public authorities of that same Member State; the revision of the legal framework in which the Agency operates does not contain provisions that depart from the Schengen Borders Code; moreover explicit

references to the Schengen Borders Code provide that border control activities shall be conducted in accordance with the Schengen Borders Code;

- Any decisions related to the return of an individual can **only be taken by a national authority of a Member State**; any appeals or allegations of misconduct shall be addressed to the relevant public authorities of that same Member State; the Frontex Agency can not take decisions related to the return of a given person to a third country destination;
- Frontex **cannot be the sole registered owner** ("flag state") of equipment such as vessels or aircraft nor provide the crew (out of its own staff) for such equipment; the rules including the required overall minimum numbers per type of equipment, the conditions for deployment and reimbursement of costs shall be decided on a yearly basis by the Management Board on a proposal by the Executive Director;

## **6. ASSESSMENT OF THE PREFERRED POLICY OPTION**

### **6.1. Summary of the preferred option**

The preferred option would therefore consist of combining new provisions in the Frontex Regulation on:

- (1) A revised mechanism with compulsory contributions of equipment from Member States combined with the gradual acquisition/leasing by Frontex of its own equipment, based on further analyses of needs and costs
- (2) A revised mechanism with compulsory contributions of human resources from Member States combined with a pool of border guards on semi-permanent detachment from Member States to Frontex, with the status as national experts
- (3) Awarding the Agency a co-leading role for the implementation of joint operations, with detailed rules for the operational plan, evaluation, and incident reporting, to be enforced by Frontex
- (4) Allowing Frontex to finance and implement technical assistance projects in third countries and to deploy liaison officers in third countries
- (5) Giving Frontex a limited mandate to process personal data related to facilitation of illegal immigration, under condition that such processing of personal data by Frontex is lawful, necessary and proportionate in relation to the tasks of the Agency
- (6) Giving Frontex a coordinating role in implementing joint return operations
- (7) Giving Frontex a mandate to analyse operational risks and requirements in the Member States

### **6.2. Overall assessment of impact of the preferred policy option**

Taken as a whole, the preferred option will have a clear and substantial impact on all of the general, specific and operational objectives. Notably the combination of the first three points above will have a very positive impact on European solidarity by

expanding the tools at the disposal of the Agency and increasing its capacity to act. They will address all components related to the objective of coordination of joint operations and therefore the reinforcement of border controls at specific sections: with more reliable and higher quality of own human resources, own technical equipment, and a stronger say in how operations are designed it is a comprehensive response to the problems identified. In that sense the synergies of combining all the building blocks are clear. However, this must be accompanied by stronger requirements on the Agency and on the Member States in defining, and periodically reviewing, the actual needs.

There are also synergies in combining the fifth and the sixth points with the points related to joint operations. The fifth and sixth points will allow Frontex to provide better risk analyses to the benefit of the Member States but also to the direct benefit of the Agency itself when preparing and launching joint operations. In combination these reinforcements will allow for better targeting and better implementing the coordination of operations with, in total, a significant improvement in efficient border control at key sections of the external border.

#### *6.2.1. Subsidiarity and proportionality*

The preferred option fully respects the limits and principles described in section 5.8 above. In addition it should be noted that the possibility for the Agency itself to contribute to the pool of border guards, and the clarification of **the role of the Agency in coordinating operations, do not concern the responsibility for carrying out border control but the responsibility for coordinating cooperation between Member States and how resources are provided for such cooperation.** Moreover, while Member States are given a collective responsibility to ensure that the necessary equipment is available for that cooperation, no individual Member State would be legally obliged to contribute with, for example, a specific vessel or aircraft. The provisions with regard to cooperation with third countries do not influence the bilateral cooperation Member States have with third countries nor their possibilities to continue to deploy their own liaison officers. With regard to personal data the Agency is not taking over any tasks or competences of the Member States, but rather assuming a complementary role in providing better risk analysis at European level. The preferred option as concerns return reflects largely current practices. Finally, with regard to evaluations, the same analysis as for personal data can be applied.

All the components of the preferred option can be implemented gradually and will not require any disruption of current activities. The pace of the gradual transition to new solutions is largely in the hands of the Agency itself and its Management Board when deciding upon the yearly work programme. It also stays squarely within the current objectives of the Agency as defined by the existing legal basis. The main issue of proportionality concerns the amount of equipment that should be put at the disposal of the Agency for the purpose of carrying out joint operations; this is ultimately in the hands of the Management Board to decide when defining the minimum amount of equipment that Member States should be obliged to contribute and also when defining the amount of equipment the Agency should purchase. In case of disagreement between the Member States representatives a referral mechanism to the Council is foreseen, as the question can be considered to have a political dimension, ie the extent to which the EU should support Member States facing particular pressure at their

section of the external border. In this sense an additional check on subsidiarity and proportionality is therefore built into the implementation of the preferred option. Overall the preferred option is therefore proportionate to the objectives pursued.

### 6.2.2. *Costs*

As concerns costs, it should first of all be noted that no ideal quantity of Frontex activities can be specified in this impact assessment. In other words it is impossible to state that in year 20XX Frontex should carry out X operations in order to meet its objectives in full. The underlying difficulties related to the setting of an ideal quantity are part of the problem definition and addressed under point 2.4. This applies also to the potential efficiency and cost savings of the Member States and of the Agency.

The events and circumstances related to irregular migration are numerous and are changing constantly. What was a problem at a specific border crossing point some years ago for a specific Member State does no longer require extensive operations today. An EU border crossing point with no particular pressure today can become a 'hot spot' tomorrow because of riots in a neighbouring third country or by a natural catastrophe. Therefore the exact quantity of the activities of the Agency needs to be adapted year by year to face the real challenges and needs related to irregular migration facing the Union when it comes to controlling the external border effectively, as it is ultimately the responsibility of the Management Board to define, on a yearly basis in the work programme of the Agency. This also concerns priority-setting within the resources available, for example, it is up to the Board to decide for a given year whether to reallocate resources between joint operations and joint return operations.

Consequently an assessment cannot be made of the total impact on the budget of the Agency as a whole, as this depends on a detailed estimate of the precise work programme of the Agency. This in turn is subject to the procedure laid down by the Regulation with the responsibilities of the Management Board and of the two arms of the budgetary authority of the Community. It would therefore be misleading to simply cumulate the cost estimates of the various suboptions that make up the preferred option. At the same time, due to clearer division of tasks and responsibilities and enhanced coordination capacities of the Agency, some efficiency savings can be expected, however, for the reasons mentioned above, they cannot be quantified.

The budget impact of the preferred option can clearly as such be accommodated within the current budget of the Agency within the coming years; in other words it does not automatically lead to a need for an increased budget. Should the needs of the Agency in terms of equipment be confirmed for the coming years, and should that need be endorsed by the Management Board, the Agency will need to request an increased budget in the course of the annual budgetary procedure taking into account the limits of the current and future financial perspectives.

## **7. MONITORING AND EVALUATION**

Monitoring and evaluation of the implementation of the future actions and measures set out in the preferred policy options will be an important element to ensure their effectiveness. All activities of FRONTEX included in its work programme are

accompanied by indicators for each action, which allows for monitoring based on the annual report of the Agency.

A continuous monitoring of the activities of the Agency also takes place through the Management Board which meets, normally, five times per year, and through direct reporting by the Agency at meetings of the Council and the EP.

The Agency is obliged to report on its activities as well as the implementation of its budget through the general report foreseen by the Frontex Regulation and the Annual Activity report foreseen by the Financial Regulation.

The above provisions, which so far have been considered generally satisfactory and are in line with the EU's horizontal policy on Agencies, would apply to the preferred policy option put forward here also. In addition the preferred option also contains a number of measures to strengthen the monitoring and evaluation of the activities of the Agency. The evaluation of the performance of the Agency as concerns joint operations will be improved through the obligation to draw up evaluation reports and to set performance indicators. Incident reporting will ensure that any problems encountered during joint operations and pilot projects are brought to the attention of the responsible public authorities and the Management Board. The tendency towards a harmonisation of the Frontex procedures towards Member States participating in joint operations and pilot projects will certainly contribute to a more effective evaluation of the activities of the Agency. Certain provisions are also foreseen that would involve a more frequent and detailed reporting by the Agency on to what extent its resource needs are met with regard to technical equipment. Finally, the acquisition of technical equipment by the Agency would be subject to an ex ante cost-benefit analysis.