

Permanente commissie
van deskundigen in
internationaal vreemdelingen-,
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Secretariaat
postbus 201, 3500 AE Utrecht/Nederland
telefoon 31 (30) 297 42 14/43 28
telefax 31 (30) 296 00 50
e-mail cie.meijers@forum.nl
<http://www.commissie-meijers.nl>

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To European Parliament
Civil Liberties, Justice and Home Affairs Committee
Rue Wiertz
BE-1047 BRUXELLES

Reference CM08007 I

Regarding Views on the Commission report on the evaluation and future development of the FRONTEX agency (COM(2008) 67 final)

Date 04 April 2008

Dear Members of the LIBE Committee,

The Standing Committee of experts on international immigration, refugees and criminal law ('the Standing Committee') would like to share with you its views on the Commission report on the evaluation and future development of the FRONTEX agency released on 13 March this year (COM(2008) 67 final). The Standing Committee has some concerns about the envisaged increased cooperation between the FRONTEX agency and third countries, without an accompanying legal framework or set of guidelines setting the parameters under which such cooperation may take place. The Standing Committee considers it opportune for your Committee to assert a close scrutiny over the work of the FRONTEX agency and would welcome the involvement of the European Parliament in foreseen discussions about the future role of the agency in the management of European border controls.

I Migrants 'diverted back'

According to the statistical Annex to the Commission's report, in the course of operations of sea border control coordinated by FRONTEX in the years 2006-2007, 34.905 illegal migrants have been 'intercepted' and a total of 9.671 illegal migrants have been 'diverted back' (operations Hera, Agios, Minerva, Poseidon). The Standing Committee observes that the evaluation fails to specify to which procedures these illegal migrants have been subjected. The Standing Committee is worried, in particular, about the treatment of migrants which have been 'diverted back' and doubts whether these migrants have been able to benefit from safeguards laid down in Community asylum legislation and the Schengen Borders Code. The Standing Committee assumes that these migrants have been diverted back before reaching the territory of the European Union, and have accordingly not been granted the opportunity to lodge a claim for asylum, have not been allowed access to a determination procedure, nor have been granted the opportunity to appeal against the refusal of entry.

Such practices could sincerely jeopardize access to international protection for refugees. Consequently, the Standing Committee considers it of utmost importance that it is clarified which kinds of migrants have been intercepted or turned back, on what legal basis migrants have been refused further passage and the extent to which agreements put in place with receiving countries guarantee compliance with international refugee and human rights law, e.g. Article 33 Refugee Convention and Article 3 ECHR. The Standing Committee would like to point out that it cannot be ruled out beforehand that refugees who are entitled to protection according to international and community law have also been subjected to these practices.

II Cooperation with third countries

In border control missions along the external borders of the Union, cooperation is increasingly sought with third countries. According to the Commission evaluation, such cooperation is 'a key component of the integrated border management model'. Without questioning this strategic focus, the Standing Committee is of the opinion that the physical transfer of border controls towards the territories of third countries may not be used as a means to circumvent international obligations or norms laid down in Community law regarding border controls and asylum applications lodged at the border or within the territories of EU Member States. In its green paper on the future of the Common European Asylum System, the Commission held that 'measures to combat illegal migration and the smuggling of human beings should be implemented in a manner which does not deprive the right to asylum of its practical meaning' and announced that 'the Commission's efforts are focusing on providing operational and financial assistance to help Member States to establish effective protection-sensitive entry management systems' (para 5.3.).

The Standing Committee regrets that this intention has not met with similar focus in the Commission evaluation report on FRONTEX. Although the report underscores that 'experiences gained from joint operations show that border guards are frequently confronted with situations involving persons seeking international protection or crisis situations at sea' (para 15.), the Commission addresses this issue merely by proposing the set up of specialized training courses for border personnel on relevant provisions of European and international law. In the view of the Standing Committee, such an approach does not suffice. International protection can only meaningfully be guaranteed if the issue of asylum is addressed on a strategic level, which involves the mandate of FRONTEX, the choice of third countries with which FRONTEX cooperates and requires the issue to be addressed in the setting up of operational plans and working agreements with third countries. Border guards should under all circumstances operate under clear guidelines when dealing with migrants who claim international protection.

III Democratic accountability of FRONTEX

Shortly before release of the Commission evaluation, the House of Lords made public its report on the functioning of FRONTEX.¹ In its report, the House of Lords makes a number of critical remarks regarding the functioning of FRONTEX. Amongst others, the House of Lords recommends that rules on disembarkation of migrants must be formulated which apply to all FRONTEX maritime operations; that Member States taking part in operations should follow clear guidelines clarifying powers and obligations in the different sea areas; that working arrangements with third countries should include meaningful guarantees for the treatment of repatriated migrants; and that FRONTEX should be more formally accountable to the European Parliament. The Standing Committee fully subscribes these recommendations.

In line with the House of Lords recommendations as to the democratic accountability of FRONTEX, the Standing Committee considers it opportune for the LIBE Committee to assert a close scrutiny over the work of the agency. Such scrutiny should, in the view of the Standing Committee, include an assessment of the manner in which operations of border control which take place outside EU territory and in collaboration with third countries are carried out. Since it appears that there are currently no clear guidelines for Member States' border guards and other officers taking part in these operations, there is ample need for adequate democratic supervision. In the past, your Committee has organized hearings on the 'Tragedies of Migrants at Sea', an issue which indeed bears continuous attention. The Standing Committee would invite your Committee to ensure FRONTEX is held accountable for the manner in which it fulfils its mandate, which includes adherence to Community law and international human rights. Moreover, it should be ensured that there is explicit reporting on the procedures and the way in which those rights are guaranteed in practice. Any future report of the Commission on the activities of FRONTEX should contain information on those procedures, the number of individuals that have been returned and to which third countries, how many of those persons had applied for asylum and which guarantees were provided by the countries to which the persons were returned.

¹ House of Lords Select Committee on European Union, 'FRONTEX: the EU external borders agency, Report with evidence', 5 March 2008 (Ninth Report).

IV Future evaluation

The Standing Committee is aware that the Management Board of FRONTEX will commission an independent external evaluation in 2008 on the implementation of the FRONTEX Regulation pursuant to Article 33 of that Regulation. Since the Regulation expressly aims at respecting fundamental rights and observance of the principles recognised by Article 6(2) of the Treaty on European Union and, with regard to the powers of border guards stationed in another Member State, refers to the safeguards of the Schengen Borders Code and other relevant provisions of Community law, the Standing Committee suggests that the LIBE Commission asks the Commission to ensure that the issues of asylum and international protection will be with the appropriate specificity addressed in the external evaluation of FRONTEX.

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

Yours sincerely,

On behalf of the Standing Committee,



Prof. dr. C.A. Groenendijk
Chairman



Prof. dr. P. Boeles
Executive secretary