



**STANDARD FORM OF EXPLANATORY MEMORANDUM FOR EUROPEAN UNION  
LEGISLATION AND DOCUMENTS**

Council number 12143/18  
COM(2018) 631 final  
ADD 1

**PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE  
COUNCIL ON THE EUROPEAN BORDER AND COAST GUARD AND REPEALING  
COUNCIL JOINT ACTION NO 98/700/JHA, REGULATION (EU) NO 1052/2013 OF THE  
EUROPEAN PARLIAMENT AND OF THE COUNCIL AND REGULATION (EU) NO  
2016/1624 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

Submitted by the Home Office on

17 OCT 2018

**SUBJECT MATTER**

1. This Explanatory Memorandum (EM) concerns a proposal for legislation from the European Commission to the Council of the European Union (EU) on reinforcing the European Border and Coast Guard Agency (the Agency, also still known as Frontex), and incorporating the Agency, a legislative base for the False and Authentic Documents Online (FADO) system and an expanded European Border Surveillance System (Eurosur) into the same Regulation.
2. In its explanatory memorandum, the Commission states that the European Border and Coast Guard Regulation (Regulation (EU) 2016/1624) made improvements to both the control of the external EU borders and the effective return of irregular migrants. However, the Commission asserts that more needs to be done in these areas to meet future migration challenges and ensure the Agency can respond to the ambition and needs of the EU.
3. In February 2018, the Commission set out its vision<sup>1</sup> for a strengthened and fully operational Agency and proposed in May to create a standing corps of 10,000 border guards and to triple funding for migration and border management<sup>2</sup>. It also proposed to provide financial support to equip and train the national component of the Agency in Member States.

<sup>1</sup> COM(2018) 98 final 'A new, modern Multiannual Financial Framework for a European Union that delivers efficiently on its priorities post-2020'

<sup>2</sup> COM(2018) 321 final 'The Multiannual Financial Framework for 2021-2027'

To that end, on 12 June 2018, the Commission proposed a combination of the Asylum and Migration Fund, Border Management Instrument and Internal Security Fund to total €20.9 billion (£18.8 billion) in the next Multi-Annual Financial Framework, starting in 2021.

4. In addition, in its June 2018 conclusions, and supported by Member States, the European Council underlined the need for a strengthened Agency with more resources and an enhanced mandate (including in cooperation with third countries) to more effectively control the EU's external borders. In its Resolution of May 2018, the European Parliament called for an Integrated Border Management (IBM) strategy, of which the Agency forms the technical and operational delivery arm, to be implemented promptly.
5. The Commission is therefore, in line with existing provisions in the policy area and other EU policies, proposing a number of changes to the Agency. In particular, by 2020, a standing corps of 10,000 operational staff with executive powers and their own equipment, able to perform all activities related to border control and returns in support of Member States. This will address the gaps in resources for regular joint operations caused by having to rely on voluntary contributions from Member States, repeatedly highlighted as an issue by the Commission (the Rapid Reaction Pool of 1,500 border guards set up under the 2016 Regulation can only be deployed in emergency situations). Reviews of Agency operations demonstrate a clear need for fully trained Agency staff to be available to be deployed anywhere when needed.
6. It is proposed that the standing corps be composed of staff employed by the Agency and short and long term mandatory secondments from Member States. Initially the majority would be secondees rather than staff employed directly by the agency. Agency staff will have executive powers conferred on them, including the use of necessary force, and will ultimately be the main resource for deployments, as will their equipment. A financial support system will be provided to help Member States meet their mandatory short and long term secondment obligations. The standing corps will be deployed between three types of teams – border management, returns and migration management support – and the Agency will be able to establish antenna offices in the Member State where the operational activity is taking place. Support teams will also be able to be deployed in hotspots, reinforcing the cooperation between the Agency and the EU Agency for Asylum.
7. The existing pooling mechanisms (the annual pledging mechanism, the Rapid Reaction Pool and the pools of returns specialists and returns escorts) have been integrated in the proposal but the forced return monitors pool remains separate due to its need for independence.
8. The proposal also aims to structure the political steering of IBM by establishing a multiannual strategic policy cycle to improve the coordination and planning of EU and national IBM strategies. This will be followed by a framework for integrated capability and contingency planning by the Agency and Member States. This should reinforce early warning mechanisms to enable a quicker reaction to crises and to address emerging risks. It will also improve the preparation for border operations, define thresholds for intervention and coordinate training, equipment, research and development.

9. The proposal also incorporates the European Border Surveillance System (EUROSUR) Regulation into the European Border and Coast Guard Regulation as a necessary element of the Agency and enlarges its scope from land and sea border surveillance to border control. This will entail additionally reporting on air borders and secondary movements (previously done voluntarily by Member States), improved information exchange with third countries and third parties and a strategic risk analysis to better detect, anticipate and react to crisis situations and plan operations.
10. The Return Directive (in a separate proposal, Council number 12099/18) is being reviewed with the aim of achieving a more coherent and effective returns policy. The European Border and Coast Guard proposal therefore also aims to enhance the returns assistance provided by the Agency to Member States through the addition of tasks such as the preparation of return decisions and identification of third country nationals, as well as developing systems on returns management and information exchange. The Agency will also be able to provide assistance to the returns activities of and in third countries, including via joint returns operations and acquiring travel documents.
11. The proposal also aims to reinforce cooperation between the Agency and third countries in other ways. The Agency will be able to operate in a third country, subject to their agreement and including on returns, even if it does not neighbour a Member State.
12. Lastly, following on from Council Conclusions in March last year, the FADO system will be integrated into the framework of the Agency. Currently managed by the Council General Secretariat, FADO makes the detection of false documents easier. The Agency will be able to adapt the system according to requirements but it will still be available at differing levels of detail, including to the general public.
13. All the above is intended to enable the Agency to act as border police, reinforcing IBM by ensuring the protection of the EU's external borders, effectively managing migratory flows and contributing to a high level of security within the EU. The Commission states that the standing corps, plus the extra equipment and ability to act in third countries will be a significant shift for border management.

## **SCRUTINY HISTORY**

14. The European Border and Coast Guard Regulation cleared scrutiny on 26 October 2016.

## **MINISTERIAL RESPONSIBILITY**

15. The Home Secretary has responsibility for policy relating to Immigration and Asylum in the United Kingdom.

## **INTEREST OF THE DEVOLVED ADMINISTRATIONS**

16. Not applicable. The United Kingdom's immigration policy is a reserved matter under the devolution settlements. However, the Devolved Administrations have been consulted in the preparation of this EM.

## **LEGAL AND PROCEDURAL ISSUES**

- i. **Legal basis**  
This legislative proposal is based on Article 77(2)(b) and (d) and Article 79(2)(c) of the Treaty on the Functioning of the European Union (TFEU).
- ii. **European Parliament Procedure**  
Ordinary legislative procedure.
- iii. **Voting procedure**  
Qualified majority voting.
- iv. **Impact on United Kingdom Law**  
As the UK does not participate in the immigration and border aspects of the Schengen acquis, the UK will not take part in the adoption of this proposed regulation and will not be bound by it or subject to its application. The impact on UK law should, therefore, be minimal, and we will not be expected to make any changes to our law as a result of the proposal.
- v. **Application to Gibraltar**  
The proposal carries over the language on Gibraltar from the existing Regulation, including the provision which notes the controversy between UK and Spain and suspends the application of the Regulation to the borders of Gibraltar.
- vi. **Fundamental rights analysis**  
The Commission states that the proposal respects and observes the principles of fundamental rights in line with Articles 2 and 3 TEFU and the Charter of Fundamental Rights of the EU.

## **APPLICATION TO THE EUROPEAN ECONOMIC AREA**

17. The Schengen acquis and measures building upon it apply to Norway, Iceland, Switzerland and Liechtenstein under individual Agreements concluded with the European Union.

## **SUBSIDIARITY**

18. The objective of the proposal is to effectively manage the EU's external borders and the Commission's explanatory memorandum states that control of the external border is a common and shared interest which is better accomplished at EU level, in accordance with the principle of subsidiarity as set out in Article 5 of TFEU.

## **POLICY IMPLICATIONS**

19. On 23 June 2016, the EU referendum took place and the people of the UK voted to leave the EU. Until exit negotiations are concluded, the UK remains a full member of the EU and all the rights and obligations of EU membership remain in force. During this period the Government will continue to negotiate, implement and apply EU legislation.
20. The European Border and Coast Guard Regulation replaced what was known as the Frontex Regulation in October 2016. The remit of the new Agency was expanded, notably on cooperation with third countries.

21. This new proposal carries over the provisions of the 2016 Regulation in relation to the UK (Article 71 in the current text). Namely, the UK is excluded from full participation in the European Border and Coast Guard on the grounds that it builds on areas of the Schengen agreement in which the UK does not take part. The UK is however invited to attend the Management Board meetings of the Agency but without the right to vote. UK officials are able to participate in European Border and Coast Guard activities and joint operations as advisers/observers with the agreement of the Management Board on a case-by-case basis (the UK makes no direct contribution to the Agency's central budget but provides experts and technical equipment to support Agency activities on a cost free basis).
22. The provisions are, however, caveated due to the UK's notification of its wish to withdraw from the EU. It appears that representatives of the UK may only be invited to attend the meetings of the Management Board up until withdrawal from the EU. Also, the special arrangements applicable to the UK's operational cooperation with the EU on the basis of the Regulation will apply "as long as the UK is a Member State or, provided an agreement between the EU and the UK based on Article 50 of the Treaty [on the Functioning of the European Union] enters into force, as long as the UK is assimilated to a Member State on the basis of such agreement".
23. Additionally, provisions allowing the exchange of information between the EU and the UK via EUROSUR have been carried over from the EUROSUR Regulation and incorporated into the Article on cooperation with the UK. EUROSUR is the EU's border surveillance system created to enhance the security of the external borders of the Schengen area through effective surveillance and sharing of information, including with neighbouring third countries. It was developed on the provisions of the Schengen agreement in which the UK does not participate. However, under Article 19 of the EUROSUR Regulation (Article 71 paragraphs 2-6 in the current text of the proposal), the UK can form limited agreements with participating Member States to cooperate and exchange information to help strengthen the UK's border security and that of our European partners. This is similarly caveated due to the UK's notification of its wish to withdraw from the EU.
24. The movement of FADO (one of the tools to which the UK retained access under the opt out then re-opt in procedure under Protocol 36 in 2014) to the new regulation raises a question mark about our continued legal access to the data. We will ask for clarification from the Commission on how they envisage this working.
25. As regards joint operations taking place on the territory of third countries, these are unlikely to affect the UK directly.
26. On the returns element of the proposal, the UK is supportive of an effective returns policy.
27. Overall, the UK is broadly supportive of this proposal. We have a strong interest in effective management of the EU's external border, not just in combating illegal migration, and cross-border crime but also as part of the EU-wide counter-terrorism effort.
28. We see great value in supporting the Agency and we have participated in a range of activities since the Agency was first formed. Our operational support demonstrates our commitment to practical cooperation with EU Member States, particularly those facing the greatest pressures at their external borders to tackle illegal migration and organised immigration crime.

29. As part of a deal on withdrawal from the EU, we want to continue to provide operational support to the Agency on a case by case basis to strengthen the EU's external border and the proposal appears to make allowances for this. Our continued cooperation will be dependent on an ongoing relationship with the Agency whereby operational rules for engagement are clear and we continue to have policy channels for engagement.

#### **CONSULTATION**

30. The Commission's explanatory memorandum lists a number of evaluation reports, discussions and workshops held on the Agency, as well as specific workshops and consultations on EUROSUR. The Devolved Administrations and Gibraltar have been consulted in the preparation of this EM.

#### **IMPACT ASSESSMENT**

31. The Commission's explanatory memorandum states that, given the number of reports, discussions, workshops and consultations relating to this proposal and especially the European Council's call in June to further strengthen the Agency, no impact assessment was required.

#### **FINANCIAL IMPLICATIONS**

32. The Commission's explanatory memorandum sets out budgetary implications for the EU. There will be no direct financial implications for the UK as a result of the proposals.

#### **TIMETABLE**

33. The Commission states that the standing corps of border guards should be ready for deployment by 1 January 2020.



**Rt Hon Caroline Nokes MP  
Minister of State for Immigration**