

Meijers Committee

Standing committee of experts on international immigration, refugee and criminal law

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To (by email) European Parliament
Civil Liberties, Justice and Home Affairs Committee
Rue Wiertz
BE-1047 Bruxelles

Reference CM1215
Regarding Note on the proposal for a Regulation establishing the European Border Surveillance System (COM (2011)0873)
Date 12 September 2012

Dear members of the Civil Liberties, Justice and Home Affairs Committee,

In view of the deadline for amendments coming Monday 17th September, the Meijers Committee would like to raise a few specific concerns with respect to the proposal for a Regulation establishing the European Border Surveillance System (COM (2011)0873). These comments mainly refer to the recent text by the Council of 1 August 2012 (12905/12) as well as the draft report by Jan Mulder of 3 July 2012 (PE491.337v02-00).

In light of these concerns, the Meijers Committee suggests that:

1. The goal of Eurosur to protect the lives of migrants should be guaranteed in the recital and in Article 1 of the Regulation;
2. The scope of Article 12a (2) (b) on the processing of personal data with regard to the powers based upon the Frontex Regulation should be clarified;
3. Amendment 40 of the draft report by Jan Mulder should be accepted as it includes the protection of lives of migrants in the exchange of information with neighbouring States;
4. Amendment 46 of the draft report by Jan Mulder should be accepted as it extends the content of the evaluation explicitly to the processing of personal data;
5. The reference to 'migrant profiles' in Article 9(6) (c) and Article 10 (5bis) (c) should be deleted or an explicit reference must be made in accordance with Article 20 of the proposed General Data Protection Regulation (COM (2012) 9,10 and 11);
6. Article 10 (5bis) on the classification of information on own assets in the operational layer of the European situational picture as EU restricted should be deleted;
7. Article 18bis should be deleted from the current draft by the Council, as long as there is no decision of the Council by which United Kingdom and Ireland are allowed to participate in measures building upon the Schengen acquis.

Should any questions arise, the Meijers Committee is prepared to provide you with further information on this subject.

Yours sincerely,



Prof. mr. C.A. Groenendijk
chairman

Note on the proposal for a Regulation establishing the European Border Surveillance System (COM (2011)0873)

Introduction

The Meijers Committee confirms the necessity of a common policy and a uniform legal framework within the EU to address the arrival of asylum seekers and refugees at the southern external borders of Europe. In a recent report by the Parliamentary Assembly of the Council of Europe it was called upon to have a more uniform application of maritime law (f.i. responsibility sharing regarding Search and Rescue Zones, interpretation of the definition 'distress', agreement on disembarkation), abolition of national legislation which deters commercial or civilian vessels from responding to distress calls and European responsibility sharing regarding asylum seekers reaching (or trying to reach) Europe. The Meijers Committee supports these recommendations.¹

Assessing the content of the current proposal for a Regulation establishing the European Border Surveillance System, the Meijers Committee not only has doubts with regard to the necessity and efficiency of the proposed measures (also considering the high permanent costs involved), but is also very concerned with regard to the effects of Eurosur for the fundamental rights of asylum seekers and refugees, including the right to privacy and data protection. In particular, the Meijers Committee warns against the risks of increased surveillance as this might also increase the human costs of undocumented migration: border surveillance indeed will have an impact on migration routes but not on the root causes of migration.

Emphasizing its general concerns with regard to this proposal, the Meijers Committee would like to underline the importance of specific amendments by Jan Mulder to the Commission proposal that should be accepted by LIBE and would like to warn against amendments that have recently been implemented by the Council in the text of 1 August 2012 (12905/12) and that should not be accepted.

1. The humanitarian purpose of Eurosur, 'to protect the lives of migrants' that was proposed in the report by the rapporteur Jan Mulder, was implemented in earlier Council documents (11437/12 of 20 June 2012) but has now been deleted during the current discussion in the Council (12905/12 of 1 August 2012). According to the most recent Council text the only goal of Eurosur is to prevent illegal migration and cross-border crime. The Meijers Committee finds that the humanitarian goal of Eurosur should be stressed to ensure the respect of human rights treaties and the responsibility of individual states with regard to the protection of lives at sea. **Therefore, it should be included, both in the preamble as in Article 1, that "The Regulation establishes a common framework (..) to protect the lives of migrants and to prevent illegal migration and cross-border crime at the external borders"**.

Moreover, the aim of the Eurosur proposal to increase situational awareness also means that there is an increased responsibility under international refugee law and the Search and Rescue regime based on the International Convention on Maritime Search and Rescue. **The Meijers Committee regrets that there is no explicit reference to this responsibility in Article 15 which deals with the external border surveillance activities, and suggests that such a reference should be implemented.**

2. Article 12a contains an explicit reference to the processing of personal data by the use of the 'National Situational Picture', which feeds the concern of the Meijers Committee that the establishment of Eurosur involves exchange of personal data on migrants, including third states which are possibly the countries of origin of asylum seekers.

The proposal refers to the Directive 95/46 and the Framework Decision 2008/977, however these rules are currently under review and will be replaced by a new general legislative framework on data protection (COM(2012) 9,10 en 11). The Meijers Committee advocates that the adoption of the Eurosur Regulation, which involves the use of personal information, is postponed until the final

¹ "Lives lost in the Meditterrean Sea, who is responsible?", Report by the Parliamentary Assembly, document 12895, 5 april 2012.

adoption of clear and uniform rules on data protection. The same has been done with the Data Retention Directive, having regard to the prejudicial nature of an overall EU framework for data protection.

The Meijers Committee further proposes to clarify the actual meaning of the addition in Article 12a (2) (b). This provision includes an extra exception to the general principle that ‘the European Situational Picture and Common Pre-Frontier Intelligence Picture’ shall not be used for processing personal data. According to the draft Article 12a (2)(b), this will be possible ‘to the extent allowed by Article 11c of the Frontex Regulation 2007/2004’ (as amended by Regulation 1168/2011). This provision refers to the power of the Frontex Agency to process personal data during joint operations, pilot projects and rapid interventions.

To stress the extra requirements necessary for the processing of personal data by the Frontex Agency, the Meijers Committee suggests that the addition in the second phrase of Article 11c of the Frontex Regulation is also explicitly added in the Eurosur Regulation.

Therefore the following sentence should be added to Article 12a (2) (b):

‘Such further processing of personal data by the Agency shall be limited to personal data regarding persons who are suspected, on reasonable grounds, by the competent authorities of the Member States of involvement in cross-border criminal activities, in facilitating illegal migration activities or in human trafficking activities as defined in points (a) and (b) of Article 1(1) of Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence ().’*

3. As mentioned above the Meijers Committee has great concerns with regard to the provisions in the proposed Regulation allowing for the exchange of information and cooperation with neighbouring states, as this may jeopardize both the safety and protection of asylum seekers and refugees, and their data protection rights. The Meijers Committee therefore supports the inclusion of amendment 40 as proposed by the rapporteur Jan Mulder in his draft report, providing that this exchange and cooperation should also serve **the protection of lives of migrants** and that **the agreements must be notified to the Commission**. The Meijers Committee furthermore proposes to include an extra provision to strengthen the democratic accountability of the adoption of third country agreements. **Therefore, in Article 18 of the proposal an extra provision should be added, stating:**

‘The Commission will inform the European Parliament of any of such agreement, including the content of these agreements.’

The Meijers Committee also supports amendment 42 in the draft report, stating:

‘Any exchange of personal data with third countries shall be prohibited.’

4. Considering the estimated costs of the establishment and operation of Eurosur, combined with the doubts as expressed by different organizations with regard to the real costs of illegal immigration at the external borders, a continuous evaluation of Eurosur is an absolute requirement.² This enables the Commission and Member States to assess both financial and human costs as the added value of this system. **Therefore, the Meijers Committee supports amendment 46 of Jan Mulder extending the content of the evaluation explicitly to the processing of personal data.**
5. In an earlier comment with regard to the EU PNR the Meijers Committee has expressed its concerns with regard to the use of profiling and the risks of stigmatization and discrimination of specific groups of individuals (CM1108). The proposed Article 9 and 10 in the Draft regulation (version 1 August 2012, Council doc 12905/12), dealing with respectively the ‘National Situational Picture’ and the ‘European Situational Picture’, clearly involve the use of profiling in order to prevent illegal migration.

² Borderline “The EU’s New Border Surveillance Initiatives”, A Study by the Heinrich Böll Foundation, Dr. Ben Hayes and Mathias Vermeulen, June 2012.

According to Article 9 (6) (c), the analysis layer of the 'national situational picture' shall consist of different 'sub-layers' including an intelligence sub-layer which contains analysed information on illegal migration and cross border crimes relevant for the attribution of the impact levels to the external borders sections 'such as migrant profiles, routes and facilitation analysis'.

The Meijers Committee proposes to either delete 'migrant profiles' in Article 9 (6) (c) and Article 10 (5bis) (c), or to insert an explicit provision, in accordance with Article 20 of the proposed Regulation on the protection of personal data (COM (2012) 11) reading:

'Every natural person shall have the right not to be subject to a measure which produces legal effects concerning this natural person or significantly affects this natural person, and which is based solely on automated processing intended to evaluate certain personal aspects relating to this natural person or to analyze or predict in particular the natural person's performance at work, economic situation, location, health, personal preferences, reliability or behaviour.'

6. According to Article 10 (5bis) of the draft Regulation (version 1 August 2012, Council doc 12905/12), 'information on own assets in the operational layer of the European situational picture shall be classified as EU Restricted'. The Meijers Committee considers this proposed amendment of the Council a non-acceptable breach of the democratic principles underlying the European Union, affecting the rights of both individuals, national parliaments, and the European Parliament to be informed on the operation and effects of a large-scale EU project, which not only involves high financial costs, but possibly also affects fundamental rights of individuals. Classifying information which forms the basis of the operation of Eurosur and results in specific external border surveillance measures as EU Restricted, means that these measures are exempted from democratic control and accountability.

The Meijers Committee therefore proposes that Article 10(5bis) will be deleted.

7. Finally, the Meijers Committee would like to raise a point with regard to the legal basis of the Eurosur Regulation and the position of the United Kingdom and Ireland. The draft Regulation (version 1 August 2012, Council document 12905/12) provides in Article 18bis in the cooperation and the exchange of information with the United Kingdom and Ireland, 'on the basis of bilateral or multilateral agreements between the United Kingdom and Ireland and one or several Member States'. Furthermore, this Article 18bis provides that the national coordination centres as developed on the basis of this Regulation, will be the contact points for this exchange of information. The Meijers Committee stresses that, as is explicitly underlined in the preambles 11 and 12 of this draft, that the Regulation constitutes a development of provisions of the Schengen acquis, in which the United Kingdom and Ireland are not participating. The proposed cooperation with the United Kingdom and Ireland using the mandate and the mechanism set up by the Eurosur Regulation, therefore lacks a proper legal basis. The Meijers Committee refers in this regard to an earlier judgment of the Court of Justice of the European Union (CJEU) (C-137/05, 18 December 2007), in which the CJEU dismissed the action of the United Kingdom and Ireland in order to be allowed to participate in the application of Regulation 2252/2004 (biometric passport). This dismissal was grounded on the fact that the Regulation 2252/2004 was to be considered as constituting a measure building upon the Schengen acquis. The CJEU recalled its earlier judgment in Case C-77/05 *United Kingdom v Council*, in which it held that checks on persons at the external borders of the Member States and consequently the effective implementation of the common rules on standards and procedures for those checks must be regarded as constituting elements of the Schengen acquis.

Based on the same reasoning, the Meijers Committee finds that Article 18bis should be deleted from the current draft, as long as there is no decision of the Council by which United Kingdom and Ireland are allowed to participate in measures building upon the Schengen acquis, in accordance with Article 4 of Protocol no 19 (Schengen acquis) and Protocol no 21 (Position United Kingdom and Ireland with regard to Area of Freedom, Security and Justice) to the EU Treaties.