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NOTE

From:	Presidency
To:	Permanent Representatives Committee/Council
Subject:	State of play in the orientations set out by the European Council in the area of the Union of freedom, security and justice

This note sets out the state of play on the main orientations in the area of the Union of freedom, security and justice, which is the fourth priority area of the Strategic Agenda adopted in June 2014. It aims to provide the Council with an overview of progress achieved on relevant policies and to serve as a basis for discussion on further steps required in this area.

The discussion will be focused on the following questions:

- 1. What is the assessment of the ministers regarding the progress undertaken so far?*
- 2. Is there scope to improve the follow-up, both at national and European levels, and how?*

MANAGING MIGRATION

1. The issue of the management of migration flows, in particular the irregular flows, is at the core of the strategic guidelines adopted by the European Council last July. The guidelines pay special attention to the need of addressing the root causes of irregular migration flows, to the prevention and tackling of irregular migration, as well as to the reinforcement of the cooperation with countries of origin and transit (with a strong emphasis also on the importance of integrating migration in the EU external policy). Among the priority subjects to be addressed particular focus is put on the need to fully implementing the operational actions identified by the Task Force Mediterranean (TFM).
2. The TFM was established following the accident of Lampedusa, on 3 October 2013, when a boat packed with African migrants caught fire and sank. Its objective was to consider and define a series of operational measures to reinforce, in particular, the control of the sea in the region, as well as to assist Member States in their efforts of managing the migratory pressures. Following the work of the TFM, the Commission issued, in December 2013, a Communication identifying 37 concrete and operational actions to be implemented by the EU and its competent agencies, the Member States and other relevant stakeholders in five priority areas of action. The Commission has regularly reported to the Council on the state of play of the implementation of the TFM and issued a Staff Working Document on this subject in June 2014.
3. Building upon the results of the Task Force Mediterranean, the Italian Presidency presented a Note "*Taking action to better manage migratory flows*", in September 2014, suggesting a strategic approach to better respond to migratory pressure in a structured and flexible manner and go beyond the immediate emergency measures. On the basis of this note and the ensuing discussions in COREPER, at its meeting on 9-10 October 2014, the JHA Council adopted Council Conclusions proposed by the Presidency, agreeing that the guiding principles for achieving a strategic and operational approach towards better managing migration flows are:
 - 1) action in cooperation with third countries,
 - 2) reinforced management of external borders and Frontex and
 - 3) action at Member States' level - reception and fingerprinting.

The three pillars encompass in particular the cooperation with third countries, with a specific focus on the fight against smugglers and traffickers in human beings, the strengthening of FRONTEX's ability to respond in a flexible and timely manner to emerging risks and pressures, and finally actions in the EU to uphold and fully implement the EU Common European Asylum System (CEAS).

4. The Council has also underlined that these priorities should be implemented, through operational actions, by all players involved without delay and under the coordination of the Commission, in close coordination with the EEAS and the Council. The Commission and the EEAS have been invited to report, by next December, on the implementation of the above-mentioned principles.
5. Reference should also be made to the launch of the Triton operation coordinated by Frontex, which is expected to start by November 1st. The Triton operation is not supposed to replace the Italian Mare Nostrum operation of October 2013 - launched and developed as a military operation with humanitarian purposes and credited with rescuing roughly 100.000 migrants attempting to reach Europe in under a year -, but it is intended to reinforce border surveillance of the Italian external sea border. The operation is based on the needs as defined by Italy and constitutes a concrete response for concrete solidarity with the Member States most exposed to the migratory pressures.

COMMON EUROPEAN ASYLUM SYSTEM (CEAS)

6. The European Council in its Conclusions concerning the area of Freedom, Security and Justice adopted in June 2014, recognised that, faced with challenges such as instability in many parts of the world as well as global and European demographic trends, the European Union needs an efficient and well-managed migration, asylum and borders policy and that a comprehensive approach is required offering protection to those in need while tackling irregular migration resolutely.

7. The Union's commitment to international protection requires a strong European asylum policy based on solidarity and responsibility. In the area of freedom, security and justice, it was agreed to strengthen cooperation in the field of asylum. As a result, the legislative framework of the CEAS was developed, setting EU standards so that similar applications for protection are treated alike and should result in similar outcomes, irrespective in which Member State the application is made.
8. The legislative framework of the CEAS consists of three Directives and two Regulations entered into force in 2012-2013. The "Qualification Directive" had to be transposed in December 2013 and the Reception Conditions Directive as well as the main provisions of the Procedures Directive should be completed by July 2015. The Dublin Regulation became applicable in January 2014 while the Eurodac Regulation will apply as of July 2015. By 21 July 2016, the Commission shall report to the EP and the Council on the application of the Dublin Regulation. The Agency responsible for operating the Eurodac system shall submit an annual report to the European Parliament, the Council, the Commission and the Data Protection Supervisor. The Commission is expected to report on the transposition and application of the Qualification Directive by June 2015 and of the Reception Conditions and the Procedures Directives by July 2017.
9. The full transposition and effective implementation of the CEAS is an absolute priority. This should result in high common standards and more effective functioning of national asylum systems. It should go hand in hand with a reinforced role for the European Asylum Support Office (EASO) - operational since June 2011 - particularly in promoting the uniform application of the acquis. The CEAS also implies that Member States, in particular those in the front-line, build up capacity to ensure flexible national systems for reception and asylum, capable to respond to sudden flows of immigration.

10. The cornerstone of the CEAS is the Dublin Regulation which governs the determination of the Member State responsible for the examination of the application for international protection. Member States are expected to establish national asylum systems allowing them to process the asylum applications made on their territory while respecting the EU standards. Member States under particular migratory pressure can ask for the financial support from the Asylum, Migration and Integration Fund (AMIF) 2014 - 2020 and for practical support from EASO.

SMART BORDERS PACKAGE

11. The three proposals for EU Regulations on the Smart Borders Package (SBP) (consisting of the Entry/Exit System (EES), the Registered Travellers Programme RTP and consequential amendments to the Schengen Borders Code) were submitted in March 2013. The Working Party on Frontiers completed its first reading of the EES and RTP proposals in early 2014.
12. The idea of modernising border management to ensure a more effective protection of the external borders as well as to ease border crossings by bona fide travellers was launched by the Commission in 2008. This was endorsed by the European Council in December 2009 when adopting the Stockholm Programme. The Strategic Guidelines for legislative and operational planning for the coming years within the area of freedom, security and justice, endorsed by the European Council on 26/27 June 2014, provide that "Integrated Border Management of the external borders should be modernised in a cost efficient way to ensure smart border management with an entry-exit system and registered travellers programme and supported by the new Agency for Large Scale IT Systems (eu-LISA)".

13. Following discussions in the LIBE Committee, as well as concerns expressed by delegations at Council, an approach, providing for a study followed by a pilot project for the purpose of testing and validating viable solutions for the EES and the RTP, was endorsed by Coreper in February 2014. The study has been carried out under the responsibility of the Commission in close cooperation with the eu-LISA IT Agency and Member States, and the Commission is expected to present it to the Member States and the European Parliament on 15 and 16 October 2014, respectively. Following discussions on this report the Presidency will invite Coreper to provide political guidelines on further steps. Based on the choices determined, the Commission will then prepare the terms of reference of the pilot project.
14. The Commission and eu-LISA have been reflecting on the way to organise the Smart Border pilot project, in consultation with Member States. A first approach would involve only the checking of key aspects of the EES and the RTP. An alternative approach would provide for the building of an end-to-end prototype (i.e. a full model of the system, in order to test it thoroughly in the pilot phase). A third option would be based on piloting limited prototype(s) together with key scenarios, and would be a hybrid of the first two approaches.
15. The Commission and eu-LISA are in favour of the third option, due to budgetary and time constraints, having in mind also the above approach agreed in Coreper. Several delegations showed a preference for the second approach, which could in principle provide more comprehensive results. However this approach would delay the entry into operation of the systems, foreseen for 2020 assuming the legislation is adopted in 2016.

16. It should also be noted that alongside the preparation of the pilot project an important debate is in progress regarding the possible access to the EES for law enforcement purposes. In the Conclusions on Borders and Terrorism adopted by the JHA Council on 5 June 2014 (6626/4/14), the Council concluded "*that the examination of the proposals on the Smart Borders Package (Entry/Exit System and Registered Travellers Programme) should be continued and that the legal and technical conditions for the access for law enforcement purposes to the Entry/Exit System by competent authorities of Member States should be examined by the Commission and the Member States so that this access is effective from the beginning*".
17. At the Working Party on Frontiers meeting on 18 June 2014, delegations confirmed (almost unanimously) their unequivocal support for granting such access and submitted their views on issues regarding the implementation of such access (such as the purposes of giving access, the authorities which could be involved in the procedure, the granting of such access to EUROPOL, the types of data to which access should be granted and the data retention period). Since then, work has been pursued, in the light of the results of a questionnaire, on the issue, and the Presidency intends to submit the draft provisions on the matter to the Working Party on Frontiers on 31 October 2014.
18. Due attention will need to be paid to recent case-law (the tests of necessity and proportionality - "the need to know" principle) for the final shaping of the Smart Border Package.
19. This whole exercise (the study, the pilot project and the issues which are examined in parallel) is expected to facilitate significantly the legislative procedure, by providing clear answers on the aforementioned concerns raised by Council and the European Parliament.

TERRORISM, INCLUDING FOREIGN FIGHTERS

20. The European Council recognised in August 2014 that the rise of the Islamic State of Iraq and the Levant (ISIL) is a major threat to European security and called for determined action to stem the flow of foreign fighters to Iraq and Syria and accelerated implementation of the package of EU measures in support of Member States efforts.
21. The Council has extensively debated the issue since 2013 and adopted a number of measures. The EU Counter-Terrorism Coordinator, in close consultation with the services of the Commission and the EEAS, presented five papers to the Council setting out a comprehensive analysis of the various aspects of the phenomenon and a proposed a number of recommendations and priorities for action.
22. In this context, the adoption by the Council in June 2014 of the Revised EU Strategy for Combating Radicalisation and Recruitment to Terrorism is also important. It reflects the changing nature of the threat and the increased understanding of radicalisation and recruitment to terrorism over the past years.
23. A Group of Member States most affected by the foreign fighters phenomenon was formed under the leadership of the Belgian Minister to exchange information on the threat and discuss areas where intensified cooperation was needed. At their last meeting in July 2014, the Ministers approved a set of measures mainly aimed at improving the exchange of information among national authorities. To ensure coherence with work at EU level, the Italian Presidency is taking forward their implementation in the relevant Council Working groups.
24. In response to the request of the European Council to the Council and the EP to finalise work on the EU PNR before the end of 2014, the Council expressed its support to the Presidency's efforts to revive the discussion on EU PNR within the European Parliament.

25. Regarding checks at external borders, the Council agreed to improve without further delay the checks at the external borders under the existing legal framework. To this end, the Council invited the Commission to update the Schengen Borders Handbook with a view to having a harmonised approach on non-systematic checks at the external borders and agreed on the need to develop common risk indicators.
26. The Council also approved a number of specific actions that will help speed up the implementation of the measures already agreed, as requested by the European Council. These focus, inter alia, on strategic communications and terrorist use of internet, and call for strengthening of cooperation between relevant agencies and other bodies in their respective fields of competences and enhancing cooperation with third countries. The JHA Council will come back to this issue in December.

EUROPEAN PUBLIC PROSECUTOR'S OFFICE

27. In July 2013 the Commission put forward a proposal for a Regulation setting up the European Public Prosecutor's Office (EPPO) in order to enhance the fight against crimes affecting the financial interests of the EU. The Council has been working intensively on the proposal in order to ensure that this new structure will be able to blend in smoothly into Member States' justice system while, at the same time, ensuring an effective oversight and direction of criminal investigations in these matters.
28. The Italian Presidency is engaged in ensuring a balanced approach to the many issues at stake in the creation of the Office, which will ensure a maximum of efficiency while respecting Member States' legal traditions. The JHA Council will be asked to assess progress made in this sense at its meeting in December 2014.

PROCEDURAL RIGHTS FOR PERSONS SUSPECTED OR ACCUSED IN CRIMINAL PROCEEDINGS

29. The Italian Presidency has started examination of the two Commission proposals for Directive in the field of procedural rights in criminal proceedings concerning, respectively, the presumption of innocence and provisional legal aid.
30. The outcome of the negotiations will be presented at the December JHA Council with a view to establishing a provisional position of the Council and engaging swiftly in discussions with the colegislator on these dossiers.

DATA PROTECTION PACKAGE

31. The data protection package consists of two legislative proposals, one for a General Data Protection Regulation and another one for a Directive on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data. The European Parliament adopted its position at first reading on 12 March 2014 on both proposals.
32. The negotiations in the Council on the Regulation have been slow due to very complicated subject-matter and the legal complexities flowing from the replacement of a Directive by a Regulation. At the JHA Council in June 2014, Ministers could for the first time reach a partial general approach on a part of the Regulation, namely Chapter V on International Transfers. Another partial general approach, on Chapter IV on controllers and processors, was reached at the JHA Council on 10 October 2014.
33. The intention of the Italian Presidency on the Regulation is to bring other Chapters for partial general approach to the December Council. All Presidencies have prioritised the work on the Regulation, as this will set the general data protection framework for the future. In its Conclusions of 26/27 June 2014, the European Council reiterated that it was crucial to adopt a strong EU General Data Protection framework by 2015.

EU PASSENGER NAME RECORD

34. On 3 February 2010, the Commission presented a proposal for a Directive of the European Parliament and of the Council on the use of Passenger Name Record data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime. On 26 April 2012, the Council reached a general approach on this proposal. Since then, there has been no progress on the file as the file is blocked within the Parliament
35. The rapporteur (Kirkhope, ECR, UK) issued his report on 14 February 2012. At the vote in the LIBE Committee on 24 April 2013 he was, however, outvoted and the Commission proposal was rejected, with a majority of 30 against 25 votes, as the rapporteur had no support from S & D, ALDE and the Greens. On 12 June 2013, the Plenary (EPP and S&D majority) sent the file back to the LIBE Committee. The negotiations/informal trilogues with the rapporteur and his shadows can not start until the Committee vote has taken place as this vote is the negotiation mandate given by the Committee to the rapporteur.
36. On 30 August 2014 the European Council underscored the need for determined action to stem the flow of foreign fighters and called on the Council and the European Parliament to finalise work on the EU Passenger Name Record proposal before the end of 2014. At the JHA Council debate of 9 October 2014 on the follow-up to these Conclusions, Ministers reaffirmed their strong will to negotiate the PNR Directive with the EP rapporteur and his shadows on the text of a draft PNR Directive.

INSOLVENCY PROCEEDINGS

37. The file is part of the SMA II package, which the European Council has requested to be adopted by the end of the previous EP term; status of the file, next steps planned, main difficulties.

38. The proposed Insolvency Regulation is aimed at making cross-border insolvency proceedings more efficient and effective with a view to ensuring the smooth functioning of the internal market and its resilience in economic crises. In particular, the proposed Insolvency Regulation is aimed at helping otherwise viable businesses overcome financial difficulties and get a "second chance", which is of the outmost importance in situations of economic crisis. The proposed Insolvency Regulation is subject to the ordinary legislative procedure. The European Parliament adopted its position at first reading on 5 February 2014¹.
39. On 5 and 6 June 2014, the Council (Justice and Home Affairs) reached an agreement on the normative part of the proposed Insolvency Regulation and, on 9 and 10 October 2014, on its recitals and Annexes. Moreover, the Council agreed that these texts should constitute the basis for the negotiations with the European Parliament. At the present stage, the objective is to finalise negotiations with the European Parliament, with a view to reaching an early second reading agreement before the end of the year.
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¹ See 5910/14 CODEC 241 JUSTCIV 19 PE 50.