



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 21 January 2010

5323/1/10

REV 1

LIMITE

FRONT 6

COMIX 46

"A" ITEM NOTE

from: General Secretariat of the Council

to: Council

No. prev. doc.: 5044/10 FRONT 1 COMIX 8

No. Cion prop.: 16870/09 FRONT 105 COMIX 903 (COM(2009) 658 final)

Subject: **Draft Council Decision supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of the operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders**

The Commission transmitted on 7 December 2009 a proposal for a Council Decision on the above subject.¹

The background for the proposal is that on 19 October 2009, the Schengen Borders Code Committee was asked to give a formal opinion on a draft Commission Decision on the same subject in the framework of the Regulatory procedure with scrutiny on the basis of Articles 12(5) and 33(2) of the Schengen Borders Code. However, as the Committee did not deliver an opinion², the Commission has submitted the proposal for a Council Decision pursuant to Article 5a(4)(a) of Council Decision 1999/468/EC.³

¹ Doc. 16870/09 FRONT 105 COMIX 903. The proposal was circulated to delegations informally on 30 November 2009 in three languages (EN/FR/DE).

² The threshold required for issuing a Committee opinion (223 votes - UK/DK/IE do not participate) was not reached.

³ Council Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission, as amended by Council Decision 2006/512/EC ("Comitology Decision").

The draft has been examined at various meetings by the Working Party on Frontiers/Mixed Committee, the JHA Counsellors group/Mixed Committee and Coreper/Mixed Committee.

At the meeting of Coreper on 21 January 2010, agreement was reached on the basis of document 5323/10 FRONT 6 COMIX 46 by a qualified majority. IT and MT explained their positions and indicated they would abstain.

The text referred to is set out in Annex I. A draft Council declaration regarding possible adjustments to the guidelines in the future is set out in Annex II.

The Council, with IT and MT abstaining, is on this basis asked to:

- decide to:
 - envisage to adopt the draft Council Decision set out in Annex I, and
 - submit the draft Council Decision to the European Parliamentin accordance with Article 5a(4)(d) of Council Decision 1999/468/EC ("Comitology Decision"), and
- agree that, provided that the European Parliament does not oppose the adoption of the measure under Article 5a(4)(e) of the Comitology Decision, the Council will, at the adoption of the measure in accordance with Article 5a(4)(g) of that Decision, adopt the declaration set out in Annex II and include it in the minutes of the Council.

Draft

COUNCIL DECISION

supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to 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)⁴, and in particular Article 12(5) thereof,

Having regard to the proposal from the Commission,

Whereas:

- (1) The purpose of border surveillance is to prevent unauthorised border crossings, to counter cross-border criminality and to apprehend or take other measures against persons who have crossed the border illegally. Border surveillance should be effective in preventing and discouraging persons from circumventing the checks at border crossing points, and in detecting the unauthorised crossing of the external borders.
- (2) The European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union ("the Agency") is responsible for the coordination of operational cooperation between Member States to facilitate the application of Community law, including with regard to border surveillance. Additional rules are necessary with regard to border surveillance activities carried out by maritime and aerial units of one Member State at the sea border of other Member States in the context of the operational cooperation coordinated by the Agency, and to further strengthen such cooperation.

⁴ OJ L 105, 13.4.2006, p. 1.

- (3) In accordance with Regulation (EC) No 562/2006 and with general principles of EU law, measures taken in the course of the surveillance operation should be proportionate to the objectives pursued and fully respect fundamental rights and the rights of refugees and asylum seekers, including in particular the prohibition of *refoulement*. Member States are bound by the provisions of the asylum acquis, and in particular of Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status⁵, with regard to applications for asylum made in the territory, including at the border or in the transit zones of Member States.
- (4) At its meetings of 18 and 19 June and of 29 and 30 October 2009, the European Council underlined the need for strengthened border control operations coordinated by the Agency and for clear rules of engagement for joint patrolling. The European Council in June also stressed the need for rules on disembarkation of rescued persons.
- (5) Account should be taken of the fact that border surveillance operations coordinated by the Agency are conducted in accordance with an operational plan and with the schedule and instructions issued by a coordination centre in which participating Member States and the Agency are represented, and that one or more host Member States are identified before the start of the operation, the border of which will be surveyed.
- (6) The implementation of this Decision is without prejudice to the division of competence between the European Union and the Member States, and should not affect obligations of Member States under the United Nations Convention on the Law of the Sea, the International Convention for the Safety of Life at Sea, the International Convention on Maritime Search and Rescue, the United Nations Convention against Transnational Organized Crime and its Protocol against the Smuggling of Migrants by Land, Sea and Air, the Convention relating to the Status of Refugees, the European Convention on Human Rights and other relevant international instruments.
- (7) When conducting a border surveillance operation at sea, a situation may occur where it will be necessary to render assistance to persons found in distress.
- (8) In accordance with international law, every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers, to render assistance to any person found at sea in danger of being lost and to proceed with all possible speed to the rescue of persons in distress. Such assistance should be provided regardless of the nationality or status of the persons to be assisted or of the circumstances in which they are found.
- (9) In order to provide for better coordination among the Member States participating in the operation with regard to such situations, non binding guidelines should be included in this Decision, as outlined in part II of the Annex, to facilitate the conduct of such operations. This Decision should not affect the responsibilities of search and rescue authorities, including for ensuring that coordination and cooperation occur so that the persons rescued can be delivered to a place of safety.

⁵ OJ L 326, 13.12.2005, p. 13.

- (10) This Decision respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union, notably human dignity, prohibition of torture and of inhuman or degrading treatment or punishment, right to liberty and security, non-refoulement, non discrimination and the rights of the child. This Decision should be applied by the Member States in accordance with these rights and principles.
- (11) Since the objectives of the action to be taken, namely the adoption of additional rules for the surveillance of the sea borders by border guards operating under the coordination of the Agency, cannot be sufficiently achieved by the Member States, due to the differences in their legislations and practices, and can therefore, by reason of the multinational character of the operations, be better achieved at EU level, the EU may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Decision does not go beyond what is necessary in order to achieve those objectives.
- (12) In accordance with Articles 1 and 2 of the Protocol No 22 on the position of Denmark, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, Denmark is not taking part in the adoption of this Decision and is not bound by it nor subject to its application. Given that this Decision builds upon the Schengen *acquis*, Denmark shall, in accordance with Article 4 of the said Protocol, decide within a period of six months after the Council has decided on this Decision whether it will implement it in its national law.
- (13) As regards Iceland and Norway, this Decision constitutes a development of provisions of the Schengen *acquis* within the meaning of the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the latter's association with the implementation, application and development of the Schengen *acquis*⁶ which fall within the area referred to in Article 1, point A, of Council Decision 1999/437/EC⁷ of 17 May 1999 on certain arrangements for the application of that Agreement.
- (14) As regards Switzerland, this Decision constitutes a development of provisions of the Schengen *acquis* within the meaning of the Agreement between the European Union, the European Community and the Swiss Confederation concerning the association of the Swiss Confederation with the implementation, application and development of the Schengen *acquis*⁸, which fall within the area referred to in Article 1, point A, of Council Decision 1999/437/EC of 17 May 1999, read in conjunction with Article 3 of Council Decision 2008/146/EC⁹.

⁶ OJ L 176, 10.7.1999, p. 36.

⁷ OJ L 176, 10.7.1999, p. 31.

⁸ OJ L 53, 27.2.2008, p. 52.

⁹ OJ L 53, 27.2.2008, p. 1.

- (15) As regards Liechtenstein, this Decision constitutes a development of provisions of the Schengen *acquis* within the meaning of the Protocol signed between the European Union, the European Community, the Swiss Confederation and the Principality of Liechtenstein on the accession of the Principality of Liechtenstein to the Agreement between the European Union, the European Community and the Swiss Confederation concerning the association of the Swiss Confederation with the implementation, application and development of the Schengen *acquis*, which fall within the area referred to in Article 1, point A, of Council Decision 1999/437/EC of 17 May 1999, read in conjunction with Article 3 of Council Decision 2008/261/EC¹⁰.
- (16) This Decision constitutes a development of provisions of the Schengen *acquis* in which the United Kingdom does not take part, in accordance with Council Decision 2000/365/EC of 29 May 2000 concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen *acquis*¹¹. The United Kingdom is therefore not taking part in its adoption and is not bound by it or subject to its application.
- (17) This Decision constitutes a development of provisions of the Schengen *acquis* in which Ireland does not take part, in accordance with Council Decision 2002/192/EC of 28 February 2002 concerning Ireland's request to take part in some of the provisions of the Schengen *acquis*¹². Ireland is therefore not taking part in its adoption and is not bound by it or subject to its application.
- (18) The Schengen Borders Code Committee, consulted on 19 October 2009, did not deliver an opinion, which required that the Commission, in accordance with Article 5a (4) point a) of Decision 1999/468/EC, submitted a proposal relating to the measures to be taken to the Council and forwarded it to the European Parliament at the same time,

HAS ADOPTED THIS DECISION:

Article 1

The surveillance of the sea external borders in the context of the operational cooperation between Member States coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union ("the Agency") is governed by the rules laid down in part I of the Annex. Those rules and the non-binding guidelines in part II of the annex shall form part of the operational plan drawn up for each operation coordinated by the Agency.

¹⁰ OJ L 83, 26.3.2008, p. 3.

¹¹ OJ L 131, 1.6.2000, p. 43.

¹² OJ L 64, 7.3.2002, p. 20.

Article 2

This Decision is addressed to the Member States in accordance with the Treaties.

Done at Brussels,

For the Council

The President

Part I

Rules for sea border operations coordinated by the Agency

1. GENERAL PRINCIPLES

- 1.1. Measures taken for the purpose of the surveillance operation shall be conducted in accordance with fundamental rights and in a way that does not put at risk the safety of the persons intercepted or rescued as well as of the participating units.
- 1.2. No person shall be disembarked in, or otherwise handed over to the authorities of, a country in contravention of the principle of non-refoulement, or from which there is a risk of expulsion or return to another country in contravention of that principle. Without prejudice to point 1.1, the persons intercepted or rescued shall be informed in an appropriate way so that they can express any reasons for believing that disembarkation in the proposed place would be in breach of the principle of non-refoulement.
- 1.3. The special needs of children, victims of trafficking, persons in need of urgent medical assistance, persons in need of international protection and other persons in a particularly vulnerable situation shall be considered throughout all the operation.
- 1.4. Member States shall ensure that border guards participating in the surveillance operation are trained with regard to relevant provisions of human rights and refugee law, and are familiar with the international regime on search and rescue.

2. INTERCEPTION

- 2.1. Upon detection, the ship or other sea craft ("ship") shall be approached in order to observe its identity and nationality and, pending further measures, it shall be surveyed at a prudent distance. Information about the ship shall be communicated immediately to the coordination centre established in the context and for the purposes of the Frontex coordinated sea operation.
- 2.2. If the ship is about to enter or it has entered the contiguous zone or the territorial waters of a Member State that does not participate in the operation, information about the ship shall be communicated to the coordination centre, which will convey the information to the Member State concerned.
- 2.3. Information about any ship suspected of being engaged in illegal activities at sea outside the scope of the operation shall be communicated to the coordination centre, which will convey the information to the Member State or Member States concerned.

- 2.4. Measures taken in the course of the surveillance operation against ships or other sea craft with regard to which there are reasonable grounds for suspecting that they carry persons intending to circumvent the checks at border crossing points may include:
- (a) requesting information and documentation on ownership, registration and elements relating to the voyage, and on the identity, nationality and other relevant data on persons on board;
 - (b) stopping, boarding and searching the ship, its cargo and persons on board, and questioning persons on board;
 - (c) making persons on board aware that they are not authorised to cross the border and that persons directing the craft may face penalties for facilitating the voyage;
 - (d) seizing the ship and apprehending persons on board;
 - (e) ordering the ship to modify its course outside of or towards a destination other than the territorial waters or contiguous zone, escorting the vessel or steaming nearby until the ship is heading on such course;
 - (f) conducting the ship or persons on board to a third country or otherwise handing over the ship or persons on board to the authorities of a third country;
 - (g) conducting the ship or persons on board to the host Member State or to another Member State participating in the operation.
- 2.5. Measures laid down in paragraph 2.4 shall be taken under the following conditions:
- 2.5.1. Territorial waters and contiguous zone
- 2.5.1.1. Measures referred to in paragraph 2.4 shall be taken upon authorisation and in accordance with the instructions from the host Member State transmitted to the participating unit via the coordination centre. To that end, the participating unit shall communicate to the host Member State, via the coordination centre, whether the master of the intercepted vessel has requested that a diplomatic agent or consular officer of the flag State be notified.
- 2.5.1.2. Any operational activities in the territorial waters or contiguous zone of a Member State that does not participate in the operation shall be conducted in accordance with the authorization of the coastal State. The coordination centre shall be informed of any communication with the coastal State and of the subsequent course of action.
- 2.5.2. The High Seas beyond the contiguous zone
- 2.5.2.1. If the ship flies the flag or displays the marks of registry of the nationality of a Member State participating in the operation, measures referred to in paragraph 2.4 shall be taken upon authorisation of the flag State. The national official representing that Member State at the coordination centre shall be entitled to grant or to transmit such authorisation.

2.5.2.2. If the ship flies the flag or displays the marks of registry of a Member State that does not participate in the operation or of a third country, confirmation of registry shall be requested from the flag State through the appropriate channels and, if nationality is confirmed, authorisation shall be requested, in accordance with the Palermo Protocol against the smuggling of migrants, from the flag State to take the measures referred to in paragraph 2.4.

The coordination centre shall be informed of any communication with the flag State.

2.5.2.3. If, though flying a foreign flag or refusing to show its flag, there are reasonable grounds for suspecting that the ship is, in reality, of the same nationality as the participating unit, the participating unit shall proceed to verify the ship's right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it shall proceed to a further examination on board the ship, which must be carried out with all possible consideration. The country of which the ship is allegedly flying the flag shall be contacted through the appropriate channels.

2.5.2.4. If, though flying a foreign flag or refusing to show its flag, there is reasonable ground for suspecting that the ship is, in reality, of the nationality of another Member State participating in the operation, verification of the ship's right to fly its flag shall be conducted upon authorisation of that Member State. The national official representing that Member State at the coordination centre shall be entitled to grant or to transmit such authorisation.

If, in the above cases, the suspicions regarding the nationality of the ship prove to be founded, measures referred to in paragraph 2.4 shall be taken under the conditions laid down in paragraph 2.5.2.1.

2.5.2.5. If there are reasonable grounds for suspecting that the ship is without nationality or may be assimilated to a ship without nationality, the patrol unit shall proceed to verify the ship's right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it shall proceed to a further examination on board the ship, which shall be carried out with all possible consideration.

Measures referred to in paragraph 2.4 shall be taken if the suspicions that the ship is without nationality prove to be founded and that there are reasonable grounds to suspect that the ship is engaged in the smuggling of migrants by sea in accordance with the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime.

A ship is without nationality or may be assimilated to a ship without nationality when the ship has not been granted by any State the right to fly its flag or when it sails under the flags of two or more States, using them according to convenience.

2.5.2.6. Pending or in the absence of authorisation of the flag State, the ship shall be surveyed at a prudent distance. No other measures shall be taken without the express authorisation of the flag State, except those necessary to relieve imminent danger to the lives of persons as set out in part 3 or those measures which derive from relevant bilateral or multilateral agreements, or unless the ship has entered the contiguous zone.

Part II

Guidelines for search and rescue situations and for disembarkation in the context of sea border operations coordinated by the Agency

3. SEARCH AND RESCUE SITUATIONS

- 3.1. The obligation to render assistance to the persons in distress at sea shall be carried out by Member States in accordance with the applicable provisions of international conventions governing the search and rescue situations and in accordance with requirements concerning the respect for fundamental rights. Participating units shall provide assistance to any vessel or person in distress at sea. They shall do so regardless of the nationality or status of such a person or the circumstances in which that person is found.
- 3.2. When facing in the course of the border surveillance operation a situation in which uncertainty or apprehension exists as to the safety of a ship or of any person on board, the participating unit should forward as soon as possible all available information to the Rescue Coordination Centre responsible for the search and rescue region where the situation is taking place.

In cases where the Rescue Coordination Centre of the third country responsible for the search and rescue region does not respond to the notification transmitted by the participating unit, the latter should contact the Rescue Coordination Centre of the host Member State.

While awaiting instructions from the Rescue Coordination Centre, participating units should take all the appropriate measures to ensure the safety of the persons concerned.

- 3.3. Participating units should take all relevant elements into account and communicate their assessment to the responsible Rescue Coordination Centre, including in particular:
- (a) the existence of a request for assistance,
 - (b) the seaworthiness of the ship and the likelihood that the ship will not reach its final destination,
 - (c) the number of passengers in relation to the type of ship (overloading),
 - (d) the availability of necessary supplies (fuel, water, food, etc.) to reach a shore,
 - (e) the presence of qualified crew and command of the ship,
 - (f) the availability of safety, navigation and communication equipment,

- (g) the presence of passengers in urgent need of medical assistance,
- (h) the presence of deceased passengers,
- (i) the presence of pregnant women or children,
- (j) the weather and sea conditions.

3.4. The existence of an emergency should not be exclusively dependent on or determined by an actual request for assistance.

In cases where, despite a ship being perceived to be in a state of emergency, the persons on board refuse to accept assistance, the participating unit should inform the Rescue Coordination Centre and continue to fulfil a duty of care, taking any measure necessary to the safety of the persons concerned, while avoiding taking any action that might aggravate the situation or increase the chances of injury or loss of life.

3.5. The coordination centre of the operation should be informed as soon as possible of any contact with the Rescue Coordination Centre and of the course of action taken by the participating unit.

3.6. If the ship cannot or can no longer be considered as being in a state of emergency or the search and rescue operation has been concluded, the participating unit should, in consultation with the coordination centre of the operation, resume the operation in accordance with part I.

4. DISEMBARKATION

4.1. "The operational plan should spell out the modalities for the disembarkation of the persons intercepted or rescued, in accordance with international law and any applicable bilateral agreements. The operational plan shall not have the effect of imposing obligations on Member States not participating in the operation.

Without prejudice to the responsibility of the Rescue Coordination Centre, and unless otherwise specified in the operational plan, priority should be given to disembarkation in the third country from where the ship carrying the persons departed or through the territorial waters or search and rescue region of which that ship transited and if this is not possible, priority should be given to disembarkation in the host Member State unless it is necessary to act otherwise to ensure the safety of these persons.

4.2. The coordination centre should be informed of the presence of persons within the meaning of paragraph 1.2, and should convey that information to the competent authorities of the host Member State. Based on that information, the operational plan should determine which follow-up measures may be taken.

Council declaration for adoption and inclusion in the minutes of the Council at the final adoption of the draft Council Decision set out in Annex I

"The Council invites the European Agency for the management of operational cooperation at the external borders of the Member States of the European Union to report on the practical application of this Decision to the Council and the Commission two years after its entry into force, or before that date if significant problems are detected. In case of, in the context of the evaluation of the sea operations, special difficulties in the practical implementation are identified, the Commission may be invited to reflect on possible proposals to amend the Decision appropriately."
