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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels,
COM (2009)

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Draft

COMMISSION DECISION

of

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

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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 COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

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)¹, and in particular Article 12(5) thereof,

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 such activities carried out by maritime and aerial units of a 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.
- (3) In accordance with Regulation (EC) No 562/2006 and with general principles of Community law, measures adopted in the course of the surveillance operation should be proportionate to the objectives pursued and be in full respect for fundamental rights and for 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

¹ OJ L 105, 13.4.2006, p. 9.

refugee status², with regard to applications for asylum made in the territory, including at the border or in the transit zones of Member States.

- (4) The European Council of 18/19 June 2009 underlined the need for strengthened border control operations coordinated by the Agency and for clear rules of engagement for joint patrolling and the 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 agreed by participating Member States and by the Agency 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 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, the Convention relating to the Status of Refugees, the European Convention on Human Rights and other relevant international instruments.
- (7) 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. This Decision does 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.
- (8) This Decision respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union, and 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.
- (9) Since the objectives of the action to be taken, namely the adoption of additional common 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 Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. 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.

² OJ L 326, 13.12.2005, p. 13.

- (10) In accordance with Article 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark did not take part in the adoption of Regulation (EC) No 562/2006 and is therefore not bound by it nor subject to its application. However, given that Regulation (EC) No 562/2006 builds upon the Schengen *acquis* under the provisions of Title IV of Part Three of the Treaty establishing the European Community, Denmark in accordance with Article 5 of the Protocol, notified by letter of 8 June 2006 the transposition of this Regulation in its national law. It is therefore bound under international law to implement this Decision.
- (11) 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*³ which fall within the area referred to in Article 1, point A, of Council Decision 1999/437/EC⁴ on certain arrangements for the application of that Agreement.
- (12) 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 on the Swiss Confederation's association with the implementation, application and development of the Schengen *acquis*⁵, which fall within the area referred to in Article 1, point A, of Decision 1999/437/EC read in conjunction with Article 3 of Council Decision 2008/146/EC on the conclusion of that Agreement⁶.
- (13) 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 on the Swiss Confederation's association with the implementation, application and development of the Schengen *acquis*⁷, which fall within the area referred to in Article 1, point A, of Decision 1999/437/EC read in conjunction with Article 3 of Council Decision 2008/261/EC⁸.
- (14) 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*⁹. The United Kingdom is therefore not taking part in its adoption and is not bound by it or subject to its application. This Decision should therefore not be addressed to the United Kingdom.

³ OJ L 176, 10.7.1999, p. 36.

⁴ OJ L 176, 10.7.1999, p. 31.

⁵ OJ L 53, 27.2.2008, p. 52.

⁶ OJ L 53, 27.2.2008, p. 1.

⁷ OJ L 83, 26.3.2008, p. 3.

⁸ OJ L 83, 26.3.2008, p. 3.

⁹ OJ L 131, 1.6.2000, p. 43.

- (15) 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*¹⁰. Ireland is therefore not taking part in its adoption and is not bound by it or subject to its application. This Decision should therefore not be addressed to Ireland.
- (16) The measures provided for in this Decision are in accordance with the opinion of the Schengen Borders Code Committee,

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") shall take place in accordance with the guidelines laid down in the annex. These guidelines shall form part of the operational plan as drawn up by the Agency and the participating Member States for each operation coordinated by the Agency.

Article 2

This Decision is addressed to the Kingdom of Belgium, the Republic of Bulgaria, the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, the Republic of Hungary, the Republic of Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, Romania, the Republic of Slovenia, the Slovak Republic, the Republic of Finland and the Kingdom of Sweden.

Done at Brussels,

For the Commission

Member of the Commission

¹⁰ OJ L 64, 7.3.2002, p. 20.

Guidelines for Frontex operations at sea

1. GENERAL PRINCIPLES

- 1.1 Measures taken for the purpose of the surveillance operation should be conducted 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. 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 should be considered throughout all the operation.
- 1.3. These guidelines should be applied by Member States in accordance with fundamental rights. Member States should 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 should be approached in order to observe its identity and nationality and, pending further measures, it should be surveyed at a prudent distance. Information about the ship should be communicated immediately to the coordination centre.
- 2.2 If the ship is about to entering 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 should be communicated to the coordination centre, which will convey the information to the Member State concerned.
- 2.3. Information about ships suspected of being engaged in illegal activities at sea outside the scope of the operation should 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 is reasonable ground 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 should be taken under the following conditions:

2.5.1. Territorial waters and contiguous zone

Measures referred to in paragraph 2.4 should be taken upon authorisation and in accordance with the instructions from the host Member State(s) transmitted to the participating unit via the coordination centre. To that end, the participating unit should communicate to the host Member State, via the coordination centre, if the master of the intercepted vessel has requested notification to a diplomatic agent or consular officer of the flag State.

2.5.2. Exclusive Economic Zone and the High seas

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 should be taken upon authorisation of the flag State. The national official representing that Member State at the coordination centre should 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 should be requested from the flag State through the appropriate channels and, if nationality is confirmed, authorisation should be requested from the flag State to take the measures referred to in paragraph 2.4.
The coordination centre should 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 is reasonable ground for suspecting that the ship is, in reality, of the same nationality as the patrol unit, the patrol unit should 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 should 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 should 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 should be conducted upon authorisation of that Member State. The national official representing that Member State at the coordination centre should be entitled to grant

or to transmit such authorisation.

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

- 2.5.2.5. If there is reasonable ground for suspecting that the ship is without nationality or may be assimilated to a ship without nationality, the patrol unit should 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 should proceed to a further examination on board the ship, which should be carried out with all possible consideration.

Measures referred to in paragraph 2.4 should 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.

It should be considered that 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 should be surveyed at a prudent distance. No other measures should be taken without the express authorisation of the flag State, except those necessary to relieve imminent danger to the lives of persons in accordance with part 3 or those measures which derive from relevant bilateral or multilateral agreements, or unless the ship has entered the contiguous zone.
- 2.6. Any operational activities in the territorial waters of a Member State that does not participate in the operation or of a third country should be conducted in accordance with the authorisation and instructions of the coastal State. The coordination centre should be informed of any communication with the coastal State and of the subsequent course of action.

3. SEARCH AND RESCUE SITUATIONS ARISING IN THE COURSE OF THE OPERATION

- 3.1. When facing in the course of the operation a situation in which uncertainty or apprehension exists as to the safety of a ship or of any person on board, or where there is a reasonable certainty that the ship or any person on board are threatened by grave and imminent danger and require immediate assistance (hereinafter, "emergency"), 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. While awaiting instructions from the Rescue Coordination Centre, participating units should take all the appropriate measures to ensure the safety of the persons concerned.

In cases where the Rescue Coordination Centre responsible for the search and rescue region does not respond to the notification transmitted by the participating unit, it should contact the Rescue Coordination Centre of the host Member State that is geographically the closest to the emergency.

- 3.2. 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.
- 3.3. The existence of an emergency should not be exclusively dependent on or determined by an actual request for assistance.

In cases where, despite a craft 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 to take any action that might aggravate the situation or increase the chances of injury or loss of life.

- 3.4. 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.
- 3.5. If the Rescue Coordination Centre assesses that the ship cannot or can no longer be considered as being in a state of emergency or that the search and rescue operation has been concluded, the participating unit should, in consultation with the coordination centre of the operation, continue the border surveillance operation in accordance with part 2.

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.

Priority should be given to disembarkation in the third country from where the persons departed or through the territorial waters or search and rescue region of which the persons transited or, if this is not possible, to disembarkation in the geographically closest place where the safety of the persons can be ensured.

- 4.2. No person should be disembarked in or otherwise handed over to the authorities of a country with regard to which there are substantial grounds for believing that he or she would be subjected to persecution or to torture or to other forms of inhuman or degrading treatment or punishment, or from which there is a risk of expulsion or return towards such a country. The persons intercepted or rescued must be informed in an appropriate way, in particular with regard to the place of disembarkation.
- 4.3. The coordination centre should be informed of the presence of persons who have expressed a fear of persecution within the meaning of paragraph 4.2, and should convey that information to the competent authorities of the host Member State.