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on on the Surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Members States

Committee on Civil Liberties, Justice and Home Affairs

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Current Proposal

- Different legal instrument and decision-making procedure - The present proposal for a Regulation is based on Article 77(2)(d) TFEU, which provides for the adoption of any measure necessary for the gradual establishment of an integrated management system for external borders, by the European Parliament and the Council, acting in accordance with the ordinary legislative procedure.

- Single legal instrument - It follows the same objective as the annulled Decision, to incorporate within a single legal instrument, existing provisions of EU and international law, aiming to overcome the different interpretations of international law adopted by Member States and their diverging practices to ensure the efficiency of sea operations coordinated by Frontex.

- Scope and content - Also the scope and content of this proposal are similar to those of the decision, namely border surveillance operations at sea carried out by Member States under the coordination of Frontex. However, it goes further by:

- trying to clarify the concepts of detection, interception and rescue.
- explicitly covering a broader concept of border surveillance. It will cover the detection of attempts at irregular border crossing and other steps such as interception measures, and arrangements intended to address situations such as search and rescue that may arise during a sea operation and arrangements intended to bring such an operation to a successful conclusion. The idea is not to transform Frontex into a search and rescue body, or that it takes up the functions of a rescue coordination centre, but merely that Frontex will have to assist Member States, during a sea operation, to fulfil their obligation under international maritime law to render assistance to persons in distress.

- Legally binding instrument - The non-binding guidelines (Part II of the Annex to the annulled Decision) will now become legally binding and directly applicable in the Member States, setting up rules on how to deal with these situations in all sea operations coordinated by Frontex.

- Covers Legal and Judicial developments on the protection of fundamental rights - It also takes into account the legal and judicial developments (such as the amendments to Regulation EC No 2007/2004 and the judgment of the European Court of Human Rights in *Hirsi Jamaa and Others v. Italy*) concerning the protection of fundamental rights as well as the principle of non-refoulement in sea operations. In case of disembarkation in a third country, the persons intercepted or rescued must be identified and their personal circumstances must be assessed to the extent possible before disembarkation, namely if there is a possible violation of the principle of *non-refoulement* and guaranteeing that information will be given to the migrants about their situation and the proposed place of disembarkation, giving them the opportunity to express their concerns or possible objections.

- Respects the Principle of subsidiarity - The implementation of this Regulation does not affect the divisions of competence between the Union and the Member States nor the 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 Organised Crime and its Protocol against the Smuggling of Migrants by Land, Sea and Air, the Convention relating to the Status of Refugees, the Convention for the Protection of Human Rights and Fundamental Freedoms and other relevant international instruments.

Interception:

- Measures to be taken in the territorial sea :

There are various maritime zones which a vessel carrying irregular migrants will cross on its way to its destination. State action is dependent upon the location of the vessel at any particular time, according to the existing rights and obligations of States under international law.

Territorial sea is an extension of the coastal State's territory which may extend up to 12 nautical miles. It is subject to the sovereignty of the coastal State which is thus entitled to exercise territorial jurisdiction over this sea area adjacent to its coasts. Nevertheless, ships have a right to innocent passage through the territorial seas. Passage is considered to be innocent provided that it is not prejudicial to the peace, good order or security of the coastal State.

Maritime interception is based on the classical understanding that a State has sovereign authority over a defined territory, subject to the overriding obligation to respect human rights and humanitarian principles, the State is empowered to take the necessary steps to prevent passage that is not innocent. For instance in the case of a boat carrying irregular migrants or where there is a case of migrant smuggling, mandated authorities representing a State may prevent its onward movement, and either take the passengers and crew onto their own vessel, accompany the vessel to port, or force it to modify its course.

The basic principle governing the exercise of jurisdiction is that it is generally limited to the territory of the State exercising jurisdiction; it cannot be exercised within the territory of another State unless the latter State consents, as otherwise that State's territorial sovereignty would be violated.

- Measures to be taken in the high seas:

On the high seas, with limited exceptions, there is a freedom of navigation to be exercised subject to the flag State's duty to act in accordance with its international obligations. In principle, it is only the flag State which may exercise jurisdiction over a ship on the high seas. Vessels may, nevertheless, be boarded in accordance with the right of self-defence, or when authorised by the United Nations Security Council.

However, save for a few exceptions such as piracy and the slave trade, unauthorised broadcasting and the exercising of jurisdiction over stateless vessels, maritime interception can only be done with the flag State's consent.

In accordance with the Protocol against the Smuggling of Migrants, intervention on the high

seas is possible where there are reasonable grounds to suspect that a vessel is engaged in the smuggling of migrants. Subject to the authorisation of the flag State, the intercepting State may board or search the vessel and if there is evidence of migrant smuggling, it may take appropriate measures with respect to the vessel, persons and cargo on board.

- Measures to be taken in the contiguous zone :

The contiguous zone is an adjacent zone to the territorial sea and it is not part of the territorial sea. It may not extend beyond 24 miles from the baselines from which the breadth of the territorial sea is measured. It is part of the European Economic Zone or of the high seas, and freedom of navigation applies.

Even if it is not part of the territorial sea, the coastal state may exercise the necessary control to prevent and punish the infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea.

Search and Rescue Situations

The right to life is one of the most fundamental of human rights. According to international rules, in the maritime context, there is a duty to render assistance to persons in distress at sea and this applies to all vessels.

Rescue operations are extremely complex and risky due to factors such as a large number of persons to be rescued and who might have experienced a traumatic experience, adverse weather and sea conditions and, also technical challenges inherent in transferring passengers from one vessel to another.

Special attention must also be given to the fundamental rights of the migrants. Migrants who have been rescued and taken on board of government vessels should receive very basic, but clear information, in a language they understand, on where they will be brought and what will happen to them afterwards.

Even if they are not within the scope of this Regulation, it is important to mention that private vessels might have also an important role in saving lives at sea. For that reason, it is important to find solutions to provide private vessels, in particular fishing vessels, with the necessary support, especially when they face economic loss because they are involved in rescue operations.

Member States are establishing EUROSUR as a platform for exchanging border management information between themselves and with Frontex. Given the close link between rescue at sea and maritime surveillance, the EUROSUR system has a life-saving potential which should be fully made use of, as it is likely to provide information on vessels or persons threatened by serious and imminent danger requiring immediate assistance.

An effective and functioning rescue system in the Mediterranean is essential to reduce the number of deaths at sea.

Disembarkation

Border control measures fall clearly under the scope of EU law (Article 79 TFEU) and search and rescue operations are regulated by international law of the sea. However, they are intrinsically linked with immigration control, especially, when it concerns the question where to disembark migrants taken on board by vessels.

For migrants rescued or intercepted on the high seas, the absence of clear disembarkation rules and the different interpretation of international rules, namely of what is the nearest place of safety, not only creates problems between Member States, but it also increases the risk that migrants are disembarked in ports in which their lives and freedom would be at risk.

For this reason, it is essential to provide further legal clarity on the respect for fundamental rights in the context of maritime surveillance and on the disembarkation of persons intercepted or rescued at sea, including the full respect the principle of *non-refoulement*. This principle bans the return of individuals to the country of origin or other countries where there is a risk of persecution, torture or other serious harm. EU Member States must respect this principle not only during border control, but also in rescue operations (*Hirsi Jamaa and Others v. Italy*, 23 February 2012).

It is important to ensure that facilities used to host migrants immediately upon arrival are equipped to provide adequate care and protection, paying special attention to the case of separated children, families and individuals with specific needs, such as survivors of torture or suspected victims of human trafficking.

Member States should also make all reasonable efforts to avoid a prolonged stay of migrants in initial reception facilities, particularly, where these do not provide the necessary conditions for long stays.

The existence of effective mechanisms to identify international protection needs at borders is fundamental to enable individuals to lodge an asylum application, and that every official who may be in contact with migrants is instructed to direct asylum seekers to the competent national asylum authority.