

ECJ General Advocate's opinion on sea surveillance and the Schengen Borders Code: reasserting the Parliament's legislative role, re-opening the Frontex debate?

The European Court of Justice's General Advocate Paulo Mengozzi on 17 April 2012¹ recommended that the Council's decision amending the Schengen Borders Code (SBC) for it to cover and regulate EU's surveillance at sea external borders should be annulled.

In July 2010, the European Parliament had lodged an action for annulment before the European Court of Justice against Council Decision 2010/252 supplementing the Schengen Borders Code². It was argued that the Decision was illegal because the followed procedure to adopt it (comitology procedure) was not appropriate given the impact the contested decision had on the SBC and on Frontex Regulation.

The General Advocate's opinion comes a few weeks after a major ECHR ruling on push back operations at sea and maintains the question of maritime surveillance and border control operations high on the European agenda

Challenging "comitology": the political aspects of the case

Council Decision 2010/252 was adopted following the "regulatory procedure with scrutiny" of the "comitology procedure", whereby the European Commission, through committees made of Member States' representatives, makes decision to implement legislative and non-legislative acts under powers delegated by the Council, with, until 1999, no parliamentary scrutiny on the process.

Since 1999, progress has been made in granting MEPs the right to be informed about the texts to be adopted in comitology. After the Lisbon Treaty came into force in December 2010, the European Parliament has gained more powers and has the capacity of formulating non-binding recommendations if the Commission's proposal will impact on legislation adopted by both the Council and the European Parliament (co-decision).

This new power was inspired by the "regulatory procedure with scrutiny" (RPS), adopted in 2006 and still in application for acts adopted prior to the entry into force of the Lisbon Treaty (like the Schengen Borders Code). The RPS enables the European Parliament not only to formulate objections, but to veto a text submitted by the Commission. This procedure does not allow for partial amendments, and should only apply in cases where the original legislation was adopted in the co-decision procedure and where the submitted text amends "non-essential elements" of this legislation³.

¹<http://curia.europa.eu/juris/document/document.jsf?text=&docid=121662&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1482131>

² <http://register.consilium.europa.eu/pdf/en/10/st08/st08089.en10.pdf>

³ Peers <http://www.statewatch.org/analyses/no-115-lisbon-treaty-decision-making.pdf>

Such procedure was used by the Commission to have the Schengen Borders Code supplemented in 2010. However, the European Parliament did not block the text in the first place as it was entitled to. Instead, it decided to challenge the legality of the text on procedural grounds, arguing that the Council Decision was impacting on essential elements of the Schengen Borders Code, and of Frontex Regulation. Pending the examination of its action for annulment by the European Court of Justice, the Parliament had requested that the Decision remains in place.

First of all, the Parliament decided not to block the text, as:

“A considerable number of MEPs who voted in favour of the contested decision considered that it exceeded the implementing powers conferred by the SBC but that it was none the less preferable for the Union to create a legal instrument, however imperfect it might be, to address the increase in migration by sea expected in the summer of 2010”.

It has to be noted that the Council Decision was adopted shortly after mounting criticism and concern regarding human rights violation during sea border control operations, as exemplified by Human Rights Watch report on Italy’s push back operations to Libya, denouncing inter alia the role of Frontex and the failure of Maltese and Italian border guards to rescue migrants in distress at sea⁴.

Second, the fact that Parliament decided not to block but rather to challenge the legality of the text, may be seen as an attempt to oppose excessive comitology and impose its existence as a co-decision maker in the field of Justice and Home Affairs, including border controls, as enshrined in the 2009 Lisbon Treaty. The General Advocate agreed with the Parliament that Council Decision 2010/252 was amending the Schengen Borders Code by adding and also altering essential elements of it and, as such, should have been adopted following the ordinary legislative procedure.

Third, the challenge before the ECJ further asserts the Parliament as a democratic institution on an equal footing with the Council in the co-decision process, including in its rights to review acts when their legislative basis was co-decided by the Parliament. Indeed, as argued by the General Advocate,

“[I]t is hardly worth pointing out that review of the lawfulness of an act by exercising a veto in the course of its adoption procedure may not be regarded as an alternative to judicial review”.

This is a significant element of the opinion as it upholds the Parliament’s legitimacy in launching an action for annulment.

Besides, as underlined by the General Advocate, to deny the Parliament that right would be “depriving the parliamentary minority of an instrument of protection”.

⁴ http://www.hrw.org/sites/default/files/reports/italy0909webwcover_0.pdf

Indeed, whereas the veto in the RPS procedure is conditional upon a greater majority than that normally provided for in respect of deliberations in the Parliament, the launch of a procedure to the ECJ does not even require a vote by the Parliamentary Assembly. The RPS procedure, if left as the sole resort for the Parliament to express its voice, would question some of the basic rules of democracy.

Expected consequence of the General Advocate's opinion

Beyond the institutional equilibrium and the Parliament's role in challenging, ex post, the adoption of a Council Decision, the General Advocate provides here an interesting legal opinion on the Schengen Borders Code which takes a particular significance in the context of the widening of Frontex's mandate and of the forthcoming EUROSUR.

As recalled by the General Advocate, the European Court of Justice had clarified what should be understood by "essential elements" of a particular law, namely "provisions which are intended to give concrete shape to the fundamental guidelines of Community policy" (Opinion para 28)⁵. Mengozzi thus considered that Council Decision 2010/252 amended the shape of fundamental guidelines of the Schengen Borders Code.

Calling for the annulment of the Council Decision may well have significant consequences for Frontex and open the way to new negotiations over the scope covered by Frontex Regulation and the Agency's mandate, a few months only after the adoption of Regulation 1168/2011 amending Regulation 2004/2007⁶.

Disembarkation, apprehension, seizure

Measures listed in point 2.4 of Annex I of the Council Decision do, according to the General Advocate, "bind [Member States] to a particular interpretation of those obligations and powers" which are derived from international obligations which all Member States and Frontex should abide by. Without creating new powers, such imposing of a certain interpretation of these obligations does not take into account disagreements which still remain amongst EU Member States and institutions. Because such aspects remain controversial and highly sensitive, they cannot be imposed through a comitology procedure and "are reserved to the legislature".

This point is essential as the General Advocate makes an explicit reference to the recent ECHR ruling *Hirsi and Jamaa v Italy*⁷ where Italy was condemned for not committing to the principle of non refoulement as it pushed back irregular migrants to Libya in 2009.

⁵ Case C-240/90 Germany v Commission [1992] ECR I-5383.

⁶ <http://www.statewatch.org/news/2011/nov/eu-oj-frontex-regulation.pdf>

⁷ <http://www.statewatch.org/news/2012/feb/echr-italy-libya-interception-at-sea-prel.pdf>

If Council Decision 2010/252 were to be annulled by the European Court of Justice, it would not apply to Frontex anymore, leaving the Agency with only non-binding texts and guidelines on the fundamental rights aspects of its border control and surveillance activities. As it is likely that a new Decision would be negotiated following the co-decision legislative procedure, bringing back the question of Frontex's sea operations and the Agency's responsibilities and accountability, questions which were left partly unaddressed when amendments to Regulation 2004/2007 were adopted in November 2011⁸.

Geographical scope of Schengen Borders Code

First, the General Advocate dismissed the Parliament's argument according to which border surveillance should not exceed the external limit of the Member State's territorial waters or the contiguous zone, and does not extend to the high seas.

What seems, at first glance, to legitimate the EU's surveillance at sea sometimes beyond EU territorial waters (high seas and third countries' territorial waters) actually proves a powerful interpretation. Indeed, the General Advocate combines this understanding with the consequences it has on intercepted migrants in high seas and the responsibility for Frontex to ensure access to the territory for asylum:

"These measures entail options likely to affect individuals' personal freedoms and fundamental rights (for example, searches, apprehension, seizure of the vessel, etc.), the opportunity those individuals have of relying on and obtaining in the Union the protection they may be entitled to enjoy under international law (...) and also the relations between the Union or the Member States participating in the surveillance operation and the third countries involved in that operation" (para 61).

In doing so, the General Advocate gives further emphasis to the interplay, in some specific cases, between surveillance operations and international protection issues.

Frontex: not an SAR agency

The General Advocate concluded with a strong statement: Annex II of Council Decision 2010/252, providing Frontex with non-binding guidelines for search and rescue operations "govern aspects of the operation that do not fall within Frontex's duties". In a nutshell: Frontex is a border agency, not a search and rescue agency.

This obviously does not mean that the Agency is not bound by the international law of sea whereby people in distress at sea should be provided assistance. Should Council Decision be annulled by the European Court of Justice, it is likely that an

⁸ <http://www.statewatch.org/analyses/no-140-frontex-reg-text.pdf>

additional debate on the role of Frontex will be launched. Indeed, on the one hand, as reflected in the Parliament's decision to maintain the Council Decision as a second-best, the humanitarian issue at stake during sea operations is a reality which needs to be addressed. On the other, as highlighted by the European Commission," the fact that most of the maritime operations coordinated by it turn into search and rescue operations removes them from the scope of Frontex" (65).

By dismissing the Council's argument and by considering that Council Decision 2010/252 amends Frontex Regulation in that it assumes that the Agency's mandate covers search and rescue operations, the General Advocate re-opens the debate of the collusion between SAR and maritime surveillance and whether such responsibilities should be that of the same Agency.