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NOTE

From: Presidency

To: Strategic Committee on Immigration, Frontiers and Asylum/Mixed Committee (UE-Iceland/Liechtenstein/Norway/Switzerland)

Subject: Proposal for a Regulation of the European Parliament and of the Council establishing rules for 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 of the European Union

I. INTRODUCTION - LEGAL FRAMEWORK

The legal basis of the above proposal is Article 77(2)(d) of the Treaty on the Functioning of the European Union (TFEU), which provides that the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt “any measure necessary for the gradual establishment of an integrated management system for external borders.”

The objective of the Union policy in this context is to ensure the efficient monitoring of the crossing of the Member States’ external borders, through, among other means, border surveillance. This draft Regulation shall apply to border surveillance operations carried out by Member States at their sea external borders in the context of operational cooperation coordinated by Frontex.

It is recalled that this proposal came as an answer to the annulment by the European Court of Justice (ECJ) of the Council Decision 2010/252/EU (henceforth "2010 Decision"), which had been adopted as an implementing measure with a view to supplementing the Schengen Borders Code (SBC).

It is also recalled that Part II of the Annex of the 2010 Decision comprised non-binding guidelines for search and rescue situations, as well as for disembarkation in the context of sea operations coordinated by Frontex. In this regard the ECJ, in its judgment of September 2012¹, stated that "*the mere fact that the title of Part II to the Annex of the contested decision contains the word 'guidelines' and that the second sentence of Article 1 of that decision states that the rules and guidelines in Part II are 'non-binding' cannot affect their classification as essential rules*" (point 80). The ECJ observed that "*Part II of that annex forms part of the operational plan drawn up for each operation coordinated by the Agency*" (point 81) and that "*since the conditions provided for by that plan must therefore be complied with, it necessarily follows that the rules in paragraphs 1.1 and 2.1 of Part II to the Annex of the contested decision are intended to produce binding legal effects*" (point 82).

In that judgment, the ECJ annulled the 2010 Decision insofar as it considered that it contains essential elements of the surveillance of the sea external borders of the Member States related to the interception, rescue and disembarkation, which it considered to go beyond the scope of the implementing measures, of which adoption was allowed pursuant to Article 12(5) SBC and that only the EU legislature [under the ordinary legislative procedure] was entitled to adopt rules of such a nature.

The Court, out of concern that the cessation of validity of the 2010 Decision could compromise the smooth functioning of the current and future operations coordinated by Frontex, decided to maintain the effects of the annulled instrument, inviting the EU legislature to replace it by new rules within a reasonable time. It is recalled that pursuant to Article 266 TFEU "*the institution whose act has been declared void [...] shall be required to take the necessary measures to comply with the judgment of ECJ*".

¹ See ECJ Judgement of 17 April 2012 in Case C-355/10, European Parliament v Council. See also information note on that judgment in doc. 14236/12.

Moreover, the Presidency recalls that already in October 2009, the European Council called for establishing “*clear common operational procedures containing clear rules of engagement for joint operations at sea, with due regard to ensuring protection for those in need who travel in mixed flows, in accordance with international law*”.¹ This was again confirmed in the Stockholm Programme of December 2009, where the European Council called for “*clear rules of engagement for joint operations at sea, with due regard to ensuring protection for those in need who travel in mixed flows, in accordance with international law*.”²

Finally, the Presidency considers that following the tragic events of Lampedusa, the finalisation of the Council position in this dossier has become a matter of political urgency.

II. STATE OF PLAY AND POSSIBLE WAYS FORWARD REGARDING THE CURRENT PROPOSAL

Following the above judgment, this proposal was submitted by the Commission in April 2013. It was presented to the SCIFA / Mixed Committee meeting of May 2013 for a first exchange of views and thereafter, the Working Party on Frontiers/Mixed Committee, focusing on it as a matter of priority, has recently completed its first reading³.

On the basis of these discussions, the Presidency has concluded that the main outstanding issue under the draft Regulation is linked to the provisions regarding search and rescue situations - Article 9 - and disembarkations - Article 10⁴:

The Presidency intends, in close cooperation with the Council Legal Service and the Commission, to submit to delegations tentative compromise suggestions, with a view to better addressing most of the issues raised during these first-reading discussions.

¹ European Council, Presidency Conclusions 29-30 October 2009.

² See point 5.1 of the Stockholm Programme, “Integrated management of the external borders”, OJ C 115, 4.5.2010, p. 1.

³ See doc. 14389/12 (consolidated outcome of proceedings on the proposal, doc. will follow).

⁴ Other important outstanding issues in particular are linked with: the definition of the term “place of safety” - Article 2(11) and the allocation of responsibilities among those who participate in a sea operation under the scope of this draft Regulation and their ensuing duties, including those towards the third-country nationals concerned - Articles 4-12.

With regard to the provisions contained in Articles 9 and 10, certain delegations could support in principle the Commission proposal.

On the other hand, six delegations considered that the EU has no competence to legislate in the field of search / rescue and disembarkation and therefore that these elements should be deleted from this draft Regulation and remain under the competence of Member States.¹ These delegations suggested amending Articles 9 and 10 so that they refer only to the applicable international conventions or bilateral agreements governing search/rescue and leave it to the operational plan, which will be set up for each of the operations, to set out such modalities, including on disembarkation.

The Presidency considers that leaving such elements to be ruled in the operational plans adopted by Frontex could be seen as delegating to Frontex the powers to establish essential elements of legislation touching upon the fundamental rights of individuals which pursuant to the abovementioned ECJ judgement should be reserved to the EU legislature, the very reason for which the 2010 Decision has been annulled. A remedy to this difficulty could be to retain in the Regulation a set of substantial rules and criteria that Frontex would need to observe when establishing the operational plan. This could become a starting point for a compromise.

Moreover, the Presidency considers that it follows from the ECJ judgement that – at least in so far as the Proposal does not go beyond the scope of the 2010 Decision – there is no impediment for the EU to legislate in the said fields.

Against this background, the Presidency, intends to intensify its efforts with a view to reconciling the diverging approaches and reaching a compromise which could be supported by a sufficient majority of delegations. This envisaged Council position could serve as a basis for starting informal consultations with the European Parliament in due course. It is recalled that the Rapporteur has recently submitted his draft report to the LIBE Committee. It could also be noted that the Parliament and the Rapporteur have repeatedly expressed their wish to reach an agreement on the file before the end of this Parliament's legislative term next year.

¹ Doc. 14612/13 reflects the position of these six delegations in detail (see also the aforementioned outcome of proceedings).

In this context, the Presidency would like to invite delegations to study in a compromise spirit all possible solutions, bearing in mind the unequivocal mandate of the ECJ to replace the annulled 2010 Decision with a new legal instrument within a reasonable time (a mandate that could be deemed as not being observed if no instrument is adopted before the Parliament's elections next year). It should also be taken into account that any further improvement of the legal framework under which sea operations coordinated by the Frontex will be conducted could enhance the integrated management of the sea external borders and could be vital to counter effectively tragedies as the one which very recently took place near Lampedusa.

III. CONCLUSION

Having regard to all the comments of the Member States, which vary from expressing support for the Commission proposal in so far as it includes provisions on search and rescue and disembarkation, to objecting to such provisions as expressed in the position of the six Member States, the Presidency would like to propose the following approach, with a view to reaching a compromise within the Council and subsequently with the European Parliament:

The proposal of the six Member States could be used as a starting point, adding, however, the necessary substantial rules and criteria regarding search and rescue and disembarkation, which Frontex would need to observe when establishing the operational plan. Moreover, the possibility to identify and retain in the proposal further rules of procedural nature addressed to the participating units (e.g. obligations of consultation or information), which would clearly contribute to better coordination of sea operations, should be explored. This solution would provide for an indispensable framing of the responsibilities of Frontex for it to adopt operational plans, while respecting the competences of the Member States which they exercise in the framework of international conventions and avoiding any possible conflict with existing international law.

The SCIFA/Mixed Committee is invited to provide its green light for the Working Party on Frontiers to continue working on the file, regarding search and rescue and disembarkation, on the basis of the approach suggested by the Presidency.