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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

1. At its meeting of 3 September 2013, the Working Party resumed the first reading of the proposal and examined Articles 2 to 9 thereof. At the request of the Presidency, certain delegations sent written contributions subsequently, in order to clarify their interventions during the aforementioned discussion.
2. The text of the aforementioned Articles is included in the Annex. Delegation's comments (including their written submissions) are set out in footnotes.

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 Member States of the European Union¹

CHAPTER I

GENERAL PROVISIONS

Article 1

Scope

This 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 the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

¹ **ES, FR, IT, EL, MT:** reservations on the proposal (and in particular on Arts. 9 and 10 thereof). **These delegations** have serious concerns regarding the elements of this proposal, which go beyond the scope of Decision 2010/252/EU, especially because in the latter those elements were provided for as optional guidelines. They also expressed the view that the legal base of the draft Regulation might not cover all the issues which are dealt with in it (i.e. interception, rescue, disembarkation); in addition, **these delegations** pointed out that these issues are already sufficiently covered by the relevant International Law instruments and any further legislation on them (in the context of this proposal) has no added value and may result in legal uncertainty concerning Member States' (MS) International Law obligations and practices. **CLS** drew attention to ECJ decision in case C-355/10 which, among other things, confirmed indirectly that the EU is competent to legislate in the field covered by Council Decision 2010/252. **CLS** drew attention to the note to COREPER 14236/12 which recognizes ECJ's broad interpretation of term "border surveillance" - as in Article 12 of Schengen Border Code (SBC) and confirmed the correctness of Art. 77.(2)(d) as the legal basis for the proposal. **CY, DE, FI, NL, PT, RO, SE, SI:** general scrutiny reservations on the proposal. **Cion:** the scope of the proposal does not go beyond the current 2010/252 Decision. The additional binding elements are in line with the ECJ case-law, (which, irrespective of their non-binding character in the 2010/252 Decision, would have raised a lack of competence issue, if the ECJ had found any). In the light of the above, **Cion** pointed out that it would be politically indefensible to narrow down the scope of the 2010/252 Decision in the present proposal.

Article 2

Definitions

For the purpose of this Regulation, the following definitions shall apply:

1. 'Agency' means the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union established by Regulation (EC) No 2007/2004;
2. 'sea operation'¹ means a joint operation, pilot project or rapid intervention carried out by Member States for the surveillance of their external sea borders under the coordination of the Agency;
3. 'host Member State' means a Member State in which a sea operation takes place or from which it is launched;
4. 'participating Member State' means a Member State which participates in a sea operation by providing assets² or human resources³, but which is not a host Member State;
5. 'participating unit' means a maritime or aerial unit⁴ of the host Member State or of a participating Member State;⁵

¹ **NL** suggested replacing "sea operation" with "maritime operation".

² In reply to **NO**, **Cion** clarified that the term "assets" mirrors the equipment that the participating MS (while exercising its jurisdiction in the context of the sea operation under this proposal) will be providing for the operations, in the light of the SBC relevant provisions.

³ In reply to **NL** (which suggested replacing the term "human resources" with "border guards or other personnel", in order to be more in line with the Frontex Regulation, **Cion** pointed out that "human resources" is intended to encompass not only border guards, but also other personnel, such as interpreters, screening officers, etc., in the light of the SBC relevant provisions.

⁴ **EL** suggested adding reference to land units, in order to allow for the participation of onshore surveillance units in the operations under the scope of this proposal. **Cion** pointed out that, it has to be clarified whether the land unit would be a fixed one or not; in this context the question of whether a jurisdiction is established by the MS concerned is an important issue; this definition has to be read in conjunction with Arts 6 and 7 of the proposal. In reply to the request of **MT** to add "... or leased by the host Member State..." **Cion** pointed out that the choice of the word "of" was made to provide more flexibility, as it amounts to "under the responsibility of", without presupposing "ownership" of the participating unit.

⁵ **SE** suggested adding at the end of this point the following wording: "... that according to international law has the authority to take measures foreseen by this Regulation". **Cion** pointed out that this suggestion is addressed by Art. 7 and could be further reflected at a later stage.

6. 'International Coordination Centre' means the coordination structure established within the host Member State for the coordination of the sea operation;
7. 'National Coordination Centre' means the national coordination centre established for the purposes of the European Border Surveillance System (EUROSUR) in accordance with Regulation (EU) No [.../...];
8. 'ship' means a boat, vessel or any other craft used at sea;¹
9. 'stateless ship'² means a ship without nationality or 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;³
10. 'Protocol against the Smuggling of Migrants' means the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organised Crime signed in Palermo, Italy in December 2000;⁴

¹ **BE, EL, ES, FR:** suggested replacing the term "ship" (which - they consider that - does not include every means of travelling by the sea) with "vessel", (which is of a broader scope and is defined under the 2000 Palermo protocol against the Smuggling of Migrants), or with a more generally-worded definition (e.g. "anything that floats"). In particular, **BE** suggested the following wording: 'vessel' means any type of water craft, including non-displacement craft and seaplanes, used or capable of being used as a means of transportation on water. **Cion** pointed out that the definition was meant to be as wide as possible ("or any other craft used at sea") and that the term "ship" aims at providing a brief reference thereto.

² **BE:** In accordance with its suggestion under point 8, suggested defining in this point the notion of "stateless vessel".

³ **EL:** this term, as well as the terms "place of safety" and "Rescue Coordination Center", are defined comprehensively in the relevant International Conventions (SAR 1979 and UNCLOS 1982) and it is therefore suggested to make a reference to these Conventions for the purpose of defining these terms. In this vein, **MT** suggested bringing this definition in line with the definition of "a ship without nationality" contained in UNCLOS and in line with the reference of a "stateless ship" provided for in Art. 92(2) of the UNCLOS. **Cion** recalled that the current definition is taken verbatim from the 2010 Council Decision; hence, it is agreed language.

⁴ **BE:** the signature took place on 15 November 2000.

11. 'place of safety' means a location where rescue operations are considered to terminate and where the survivors' safety of life including as regards the protection of their fundamental rights is not threatened,¹ where their basic human needs can be met and from which transportation arrangements can be made for the survivors' next destination or final destination;
12. 'Rescue Coordination Centre' means a unit responsible for promoting efficient organisation of search and rescue services and for coordinating the conduct of search and rescue operations within a search and rescue region as defined in the 1979 International Convention on Maritime Search and Rescue.²

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¹ **EL, ES, MT, RO:** if this definition is retained, it should be brought in line with the definition under Art. 6(12) of the 2004 IMO Resolution on the "Guidelines on the Treatment of Persons Rescued at Sea". In this sense and given that the obligation to respect fundamental rights is provided for elsewhere in this proposal, the wording "as regards the protection of their fundamental rights is not threatened" is not necessary in this provision and could alter the nature of the definition. **RO** suggested, given that one of the objectives of this proposal is to strengthen the protection of fundamental rights, that concepts related to international protection, which are already part of the EU acquis, such as "safe country of origin", or "safe country" may be used in this context. **Cion:** the aforementioned IMO Guidelines provision - along with Art. 6(17) thereof - cover also the concept of "place of safety". The relevant provision of the SAR Convention has been taken verbatim in this definition (whose wording intends also to comply with the Hirsi case of the ECJ). **CLS** pointed out that that two definitions of "place of safety" (providing for different levels of protection) can be found in international acquis (the first in Resolution MSC.167(78), and the second in Resolution 1821(2011) of the Parliamentary Assembly of the Council of Europe); this divergence leaves the EU legislator a certain discretion regarding the issue.

² **BE:** for clarification purposes, the term could be named "**Maritime** Rescue Coordination Centre".

³ **SE** suggested adding a new definition in the proposal with regard to the concept of "contiguous zone", which would read as follows: "contiguous zone" means a zone that has been established by the coastal state pursuant to relevant rules of international law and duly defined in national regulation to encompass immigration purposes".

BE, BG, RO suggested introducing in the proposal a definition on the operational plan, on the basis of Art. 3a of Regulation (EC) 2007/2004 (given its importance in the context of the Frontex operation, its legally binding character and in order to confirm the distribution of responsibility among those participating in the operations). In the same context, **RO** suggested reviewing Arts 4 and 10, in order to better reflect what happens in practice, addressing among other things the issue of responsibility of Frontex regarding disembarkation decisions.

Moreover, **BG** suggested providing in the proposal definitions regarding detection, interception, interception and other key issues with a view to facilitating the implementation of the future Regulation.

CHAPTER II

GENERAL RULES

Article 3

Safety at sea

Measures taken for the purpose of a sea operation shall be conducted in a way that does not put at risk the safety of the persons intercepted or rescued and the safety of the participating units.¹

Article 4

Protection of fundamental rights and the principle of *non-refoulement*²

1. No person shall be disembarked in, or otherwise handed over to the authorities of a country where there is a serious³ risk that such person would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment or from which there is a serious risk of expulsion, removal or extradition to another country in contravention of the principle of *non-refoulement*.

¹ **FR** queried about the consequences of an accident taking place in the context of a sea operation. While understanding these concerns, **Cion** pointed out that it would be difficult to assess an accident-causing incident in abstract. **BE, NO**: in order to better reflect the amendments suggested by delegations under Art. 4, the following wording shall be added at the end of the sentence: "... or third parties involved".

² **EL**: considers that the obligations for the sea border operation units provided for under paras 2-4 cannot be implemented before the persons rescued have been disembarked in a safe place (which is the basic mission of such operations). **EL, FR, RO** (the latter entered a reservation on this Art.): it would be quite difficult for the participating units to carry out the obligations set out in this Art. in relation to the respect of fundamental rights, taking into account that they are not entitled to take all the necessary decisions, nor do they have the necessary updated information and the appropriate training for this purpose. **EL**: the host MS should be the primary responsible party for implementing this Art. **Cion** pointed out that the responsibility of the participating units emanates from their direct involvement in the operation and this does not exclude a prior co-ordination with their decision making authorities. (see also relevant comments under para. 2 of this Art.).

³ **SE** suggested deleting the word "serious" and adding (supported by **FI**) the case of "persecution" as an obligatory ground to refrain from disembarkation. **CLS** confirmed that the current definition of the principle of non-refoulement (that is applicable to maritime operations covered by the proposal) is correct and ensures a sufficient level of protection, given that it draws on the EU primary law (Art. 19 of the Charter of the Fundamental Rights of the EU, to be read together with Art. 52(3) and Art. 6 of TEU).

2. Before deciding on disembarkation in a third country, the participating units shall take into account the general situation in that third country and intercepted or rescued persons shall not be disembarked in that third country when the host Member State or the participating Member States are aware or ought to be aware that this third country is engaged in practices as described in paragraph 1.¹

¹ **IT** suggested adding as a criterion for deciding whether a third country would be a proper disembarkation place, to check beforehand whether this country hosts projects funded by the EU (and the MS) in order to strengthen the protection of human rights on its territory. **ES, FR** could support this suggestion. **Cion** could further consider it, but pointed out that the fact that such a project would be on-going might not be a positive signal regarding the level of protection at that third country and at any rate, the actual situation on the ground of this country would be the key factor.

NL: the responsibility of all the stakeholders (host MS, participating MS, Frontex, participating units) in the context of this Art., has to be better clarified.

RO suggested clarifying the principles / criteria on which the evaluation of the general situation in the third country should be based and raised the issue of subsidiarity in relation to this procedure. **RO** also pointed out that the wording "ought to be aware ... as described in paragraph 1" is very vague and the whole provision does not assist in confirming whether this third country is engaged in the practices set out in para. 1. **RO** considered that the decision-making ability of the participating units will be hampered because they will only be provided with general training (which will not be helpful enough in such cases), under para. 5 and they will lack the necessary detailed information regarding the situation in the area (this information will be mainly held by the host MS and Frontex). For these reasons, **RO** suggested amending para. 2 as follows: "~~When Before~~ deciding on disembarkation in a third country, the **Agency and the host Member State participating units** shall take into account the general situation in that third country and intercepted or rescued persons shall not be disembarked in that third country when ~~the host Member State or the participating Member States are aware or ought to be aware that~~ this third country is engaged in practices as described in paragraph 1. **In this regard, a list of third countries shall be adopted in accordance with the examination procedure referred to in Article... (art. 5 of Regulation 182/2011).**"

In the same vein and in order to clarify who has to ensure the respect of the non-refoulement principle in the assessment of the general situation in the third country, **MT** proposed the following wording for para.2: "Before ~~deciding on~~ disembarkation in a third country, the host Member State and the Member State to which a participating units belongs shall take into account the general situation in that third country and intercepted or rescued persons shall not be disembarked in that third country when the host Member State or the participating Member States concerned are aware or ought to be aware that this third country is engaged in practices as described in paragraph 1. ". At any rate, **MT** considers this para. redundant since the operational plan should include provisions on disembarkation, including which third countries are not considered safe for disembarkation, in order to ensure that there are no disagreements on this among the host and participating Member States in a given operation.

BE (which pointed out that the decision of the host MS regarding the situation in the third country could be based on the information provided by the Frontex Risk Analysis procedure, thus reference to the Agency could also be included), **DE, EL, FR** could support (completely or partially) the above submissions of **NL, RO** and **MT**. **BE** pointed out, that according to the Frontex Regulation, only the host MS and the Frontex Executive Director could terminate an operation and this should be reflected throughout the proposal.

Cion would be ready to further reflect on the issue, in the light of the Frontex Regulation and confirmed that any updated information in the planning stage described in this para. would be integrated in the operational plan. **Cion** also pointed out that any decision that the participating units might need to take would be based on their respective national law and their hierarchical decision - making procedure; furthermore, any information necessary for the assessment of the situation (which would normally be derived from the host MS, but also from Frontex) should be shared among all those involved in the operation. In this context, a degree of anticipation from the host or the participating MS ("ought to be aware") will be essential.

3. ¹In case of disembarkation in a third country, the participating units shall identify the intercepted or rescued persons and assess their personal circumstances to the extent possible before disembarkation. They shall inform the intercepted or rescued persons of the place of disembarkation in an appropriate way and they shall give them an opportunity to² express any reasons for believing that disembarkation in the proposed place would be in violation of the principle of *non-refoulement*.³

¹ **NL** reiterated its request (submitted under para. 2) for clarifying the allocation of responsibility among all the participants and the sharing of information at the stage of the operation described in para. 3 and queried whether all the information under this para would be provided to the TCN on board. **CY** (which entered a scrutiny reservation on the point), **NO**: also pointed out that the responsibilities stemming from this para. should be allocated in a clearer way among the parties involved, without placing disproportionate tasks on the participating unities.

RO asked for clarification regarding the evaluation of the personal circumstances of the TCN concerned, querying whether his/her health, financial situation, personal status (in the light of Art. 12 of the Geneva Convention) would be among the criteria and pointing out that the outcome of such evaluation might differ on account of the staff who would undertake it.

RO suggested rewording the first sentence of this para. so as to emphasise that a representative of the host MS has to be aboard the ship involved in the operation: "... the participating units **and the representative of the host Member States on board shall have the responsibility to identify the...**". **RO** also suggested amending the second phrase as follows: "They **shall undertake reasonable efforts to inform** the intercepted...". In the same spirit, **BE** suggested "... shall **to the maximum extent possible, take the following steps; identify... assess their personal circumstances and inform the intercepted or rescued ...**".

² **SE**: suggested adding "... to express **any request for international protection or** any reasons for believing that ...".

³ **RO** stressed that it would be quite difficult to implement the last sentence of this para. due to the language barriers that would likely occur between the TCN concerned and the staff involved in the operation. In the same vein, **MT**, supported by **EL**, suggested deleting para. 3, considering that identification of the TCN concerned and assessment of their personal circumstances is not feasible at sea prior disembarkation and on the other hand, MS cannot be expected to ensure that the crew of all vessels participating in such operation have the necessary language proficiency to give to the TCN concerned all the information under this provision.

MT: the safeguards of the principle of non-refoulement under paras 1 and 2 are sufficient, thus, the obligation of the MS to let the TCN express their reasons against the proposed disembarkation is redundant and might lead to abuse through the smugglers networks.

Cion: recalled that all MS which participate in the operations are bound by the International and EU acquis (including the relevant case-law) regarding their obligations; while acknowledging the difficulties they may face, **Cion** pointed that the participating MS shall make an effort to obtain the necessary information and then (on the basis of an overall assessment under para. 2) try to implement comprehensively para. 3 as well.

EL, ES, FR, IT, LV, MT: instead of entering into a detailed allocation of responsibility and the inevitable difficulties it would entail, it would be advisable to just refer to the general principle of responsibility for such operations, under International Law. **CY**: suggested indicating in the text that MS should not be bound by possible declarations of the TCN on board while deciding about disembarkation options. **Cion** pointed out that MS would need a common understanding on the implementation of this provision, especially, in the light of the Hirschi ruling; hence, some detailed wording would be of added value.

4. The participating units shall address 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 throughout the sea operation.
5. Border guards¹ participating in a sea operation shall be trained with regard to relevant provisions of fundamental rights, refugee law and the international legal regime of search and rescue.²

¹ **FR** suggested replacing "border guards" with "agents involved in participating units". **RO** pointed out that, since representatives of several law enforcement authorities participate in the operations under this proposal, the training should contain the Law of the Sea legislation; the role of Frontex with regard to the provision of training should also be highlighted; to this effect, **RO** suggested amending the provision as follows: "**Member States, under the coordination of the Agency, shall ensure that the training of the participants in a sea operation includes relevant provisions of the main tasks of an operational plan, fundamental rights, refugee law, international legal framework on search and rescue, United Nations Convention on the law of the sea and other United Nations Conventions and International Maritime Organisation' regulations on maritime field**".

² **BE**: suggested adding at the end of the sentence, for clarification purposes: "in accordance with Art. 5(2) of the Frontex Regulation".

CHAPTER III

SPECIFIC RULES

Article 5

Detection

1. Upon detection, the participating units shall approach a ship suspected of crossing or intending to cross the border in an irregular manner¹ to observe its identity and nationality and, pending further measures, it shall be surveyed at a prudent distance. The participating units shall communicate² information about the ship immediately to the International Coordination Centre.
2. Where the ship is about to enter or it has entered the territorial sea or the contiguous zone of a Member State that is not participating in the sea operation, the participating units shall communicate information about the ship to the International Coordination Centre, which shall convey this information to the National Coordination Centre of the Member State concerned.
3. The participating units shall communicate information about any ship suspected of being engaged in illegal activities at sea outside the scope of a sea operation to the International Coordination Centre, which shall convey this information to the National Coordination Centre of the Member State or Member States concerned.

¹ **FR** pointed out that the wording of the provision could be clarified, given that it would not be the ship itself but its passengers who would cross, or intend to cross, a border. **SE** shared these concerns and suggested adding the following clarifying wording: "... in an irregular manner **within the scope of a sea** operation to observe...". **EL, ES** suggested highlighting that the scope of the provision would cover only maritime borders and that Frontex would have the co-ordinating role. To this effect, **EL** suggested adding at the end of the para. the wording: "... and for the purposes of the sea operation co-ordinated by the Agency". **FR** also queried about the possible ways to identify a "suspect ship" (visually, through radio contact, etc). **Cion** indicated that the detection would be based on visual means and stressed that neither an interception / rescue operation, nor a jurisdiction exercise would be carried out at this stage.

EL indicated that the obligation of the International Co-ordination Center (ICC) to inform the National Co-ordination Center gives the impression that for incidents taking place on their territorial waters, the MS will be informed by the ICC. **Cion** recalled that the ICC is defined in Art. 2.

² **DE, NL** suggested replacing the word "communicate" with "collect and report" (suggestion applicable also to paras 2 and 3).

Article 6

Interception in the territorial sea

1. In the territorial sea¹ of the host Member State or a participating Member State,² the participating units shall³ take one or more of the following measures when there are reasonable grounds to suspect that a ship is carrying⁴ persons intending to circumvent checks at border crossing points or is engaged in the smuggling of migrants by sea:
 - (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 may not be authorised to cross the border and that persons directing the craft⁵ may face penalties for facilitating the voyage;
 - (d) seizing the ship and apprehending persons on board;

¹ **LV**: suggested adopting the more precise term: “territorial sea of the operation”, as long as the scope of this provision will not be the whole territorial sea of the MS concerned. **Cion** recalled that the notion of the territorial sea is well established in the Law of the Sea acquis. **LV** also suggested aligning the wording of Art. 6(1) with Art. 5(1) - in the former case, the wording refers to persons who intend to circumvent the border checks while in the latter, the wording refers to the ship, which carries them and will be suspect of illegal border crossing.

² **EL, ES**: suggested deleting the wording "or a (the) particular Member State", (suggestion applicable also to paras 2 and 3) because the host MS, in whose waters the operation takes place, should be responsible to take the measures, enumerated in this provision. **Cion**: this stage covers only interception actions; the participating MS may be the neighbouring of the third country concerned.

³ **MT**, supported by **BE, FR, IT, SE**: suggested replacing the "shall" with "may". **MT** pointed out that it should be at the discretion of the MS concerned to decide whether it would be appropriate to take any of the measures set out in this provision. The term "shall" implies that at least one of these measures should always be taken and this cannot be acceptable on the territorial sea. **FR** indicated that there is a risk of conflict between the Palermo Protocol and this provision. **Cion** pointed out that, with due respect to MS' sovereignty on their territorial seas, a primary objective of this proposal is to achieve an increased degree of co-operation among MS in the context of the Frontex-co-ordinated operations and at any rate, the MS concerned should always give their authorisation, for action on their territorial seas.

⁴ **NL**: suggested replacing the wording "that a ship is carrying persons intending" with: "that the ship **may be** carrying persons **who have the intention to**".

⁵ **Cion**: the correct term is “ship”, in accordance with the Art. 2(8) definition.

- (e) ordering the ship to modify¹ its course outside of or towards a destination other than the territorial sea or the contiguous zone, including escorting the vessel or steaming nearby until the ship is heading on such course²;
- (f) conducting the ship or persons on board to the host Member State or to another Member State participating in the operation, or to the coastal Member State.³

2. The host Member State or the participating Member State on whose territorial sea the interception takes place shall authorise the measures referred to in paragraph 1⁴ and it shall instruct the participating unit appropriately⁵ through the International Coordination Centre. The participating unit shall inform the host Member State, through the International Coordination Centre, whenever the master of the ship requests that a diplomatic agent or a consular officer of the flag State be notified.

¹ **NL**: suggested replacing "modify" with "alter" and "is heading on such course" with "until it is confirmed that the ship is keeping that given course".

² **BE**: suggested adding at the end of the sentence "without prejudice to the application of Art. 9".

³ **MT** suggested the following amendment to this point: "conducting the ship or persons on board to the ~~host Member State or to another Member State participating in the operation, or to~~ coastal Member State."; **MT** stressed that where interception takes place in the territorial sea, given that actions within the territorial seas are undertaken purely under the jurisdiction of that coastal State to whom the territorial seas belong, then the jurisdictional chain should remain unbroken and the coastal State should continue to remain responsible for custody of the vessel and/or the persons concerned. **IT** pointed out that the host MS shall remain responsible, or otherwise authorise the participating MS to take the action provided under this point. **FI, Cion** also recalled that any participating MS will have to carry out the interception on behalf of the Schengen Area as a whole and may have to conduct the ship or the TCN to the appropriate MS.

⁴ **MT**: suggested amending the wording of the provision as follows: "...takes place **may** authorise **one or more of** the measures...", pointing out that the term "shall" implies that the MS concerned must always give authorisation and the reference to all the measures can be construed that the MS must give a blanket authorisation and it would be up to the participating ship to decide which particular measure to use. **MT** emphasised that the jurisdiction of the coastal MS concerning its territorial waters should not be affected by this proposal. **BE**, supporting the optional wording, suggested the alternative "**The authorisation for the measures referred to in para. 1 may be given by either the** host MS...takes place." In the same vein, **IT, SE** suggested reverting to the 2010 Council Decision, where the discretionary power of the MS concerned was clearer.

⁵ **NL** considered that the wording "it shall instruct the participating unit appropriately" should be further clarified, querying whether it covers information channels within the MS concerned or the information channels within Frontex.

3. Where there are reasonable grounds to suspect that a ship without nationality or one that may be assimilated to a ship without nationality¹ is carrying persons intending to circumvent the checks at border crossing points or is engaged in the smuggling of migrants by sea, the host Member State or the participating Member State in whose territorial sea the stateless ship is intercepted shall authorise and instruct the participating unit to stop it² and to take any of the measures³ laid down in paragraph 1.⁴
4. Any operational activities in the territorial sea of a Member State that is not participating in the sea operation shall be conducted in accordance with the authorisation of that Member State. The International Coordination Centre shall be informed of any communication with that Member State and of the subsequent course of action authorised by that Member State.

¹ **Cion:** the correct term is “stateless ship”, in accordance with the Art. 2(9) definition.

² **NL** suggested replacing "to stop" with "to halt".

³ **MT:** suggested amending the wording of the provision as follows: “...the intercepted ship is intercepted **may** authorise... and to take **one or more of** the measures...”, pointing out that the term “shall” implies that the MS concerned must always grant authorisation and the reference to all the measures leads to the conclusion that it will be up to the participating unit to choose one; if this wording is retained then the liability for actions in this context should clearly be transferred to the MS to which the participating ship belongs. **BE** also supported the optional character of this provision by substituting “may” for “shall”.

⁴ **RO:** ICC should also be informed about the activities taken up in the context of this para.; hence, **RO** suggested converting the last sentence of para. 4 into a new para. applicable to points 3 and 4, which would read as follows: “The International Coordination Center shall be informed of any communication **in accordance with paragraphs 3 and 4 of this article** ~~with that Member State~~ and of the subsequent course of action ~~authorised by that Member State~~”.

Article 7

Interception on the high seas¹

1. On the high seas, the participating units shall² take one or more of the following measures when there are reasonable grounds to suspect that a ship is engaged in the smuggling of migrants by sea subject to the authorisation of the flag State³ in accordance with the Protocol against the Smuggling of Migrants:
 - (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 may not be authorised to cross the border and that persons directing the craft⁴ may face penalties for facilitating the voyage;

¹ **FR, RO** pointed out that according to UNCLOS, the maritime zones beginning from the shore are: territorial sea, contiguous zone, exclusive economic zone, high seas and consider that this order should be maintained; therefore, they propose the inversion of Articles 7 and 8, as follows: Article 7 – Interception in the contiguous zone, and Article 8 – Interception on the high seas. **RO** also suggested, for legal safety purposes for this proposal, defining the high seas so that it is specified expressly that this maritime zone is understood as including also the exclusive economic zone: "high seas" means waters extending beyond the contiguous zones of Member States, and including the exclusive economic zones of Member States.". **SE**: suggested amending the title of the Art. as follows: "Interception on the high seas **and in the exclusive economic zone outside the contiguous zone**".

² **EL**: as it suggested on other similar cases, the responsibility to take the measures set out in this Art. should rest with the host MS. Hence, appropriate amendments should be made in paras 1, 2, 3, 6 and 10. **MT** suggested replacing "shall" with "may", pointing out that it at the discretion of the MS concerned to decide whether it is appropriate for any of these measures to be authorised. The term 'shall' implies that at least one of these measures must always be taken, which also implies that one of these measures must always be authorised (see also comments under Art. 6).

Furthermore, **MT** stressed that it should be a 'may' clause since the text does not regulate the use of force by the officers involved and because of the issue of liability should an accident occur. Related to this point, is also the question of responsibility in respect of undue delays. In this case, liability may be attributed to the flag State on the basis of its granting of authorisation to board the ship.

³ **FR** queried whether these measures could be taken without involving the host MS. **Cion** clarified that the participating units could be of the host or the participating MS.

⁴ **Cion**: the correct term is "ship" in accordance with the Art. 2(8) definition.

FR pointed out that, in accordance with the Palermo Protocol, this provision should rather focus on (and address) the facilitators.

- (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 sea or the contiguous zone,¹ including escorting the vessel or steaming nearby until the ship is heading on such course;²
 - (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.³
2. Where the ship is flying the flag or displays the marks of registry of the host Member State or of a participating Member State, that Member State shall,⁴ after confirming the nationality of the ship, authorise the measures laid down in paragraph 1.
 3. Where the ship is flying the flag or displays the marks of registry of a Member State that is not participating in the sea operation or of a third country, the host Member State or a participating Member State, depending on whose participating unit has intercepted this ship, shall notify the flag State, it shall request confirmation of registry and, if nationality is confirmed, it shall request authorisation from the flag State to take any of the measures laid down in paragraph 1. The host Member State or the participating Member State shall inform the International Coordination Centre of any communication with the flag State and of the measures authorised by the flag State.

¹ **Cion:** the wording "transit sea or contiguous zone" should be replaced by the correct "high seas". **BE** queried whether this is possible on the high seas, as it might be considered as a contravention of the principle of freedom on high seas.

² **BE:** suggested adding at the end of the sentence "without prejudice to the application of Art. 9".

³ **MT** suggested amending the wording of this provision as follows: "on board to the host Member State ~~or to another Member State participating in the operation~~ under the jurisdiction of which the interception takes place."

⁴ **SE:** MS shall have the flexibility to refuse the authorisation of measures laid down in para. 1 (suggestion applicable also to para 10 of this Art.). In the same vein, **MT** suggested replacing "shall" with "may", and clarifying that the authorisation would not need to relate to all the measures listed in para.1 of this Art. (see also relevant comments under Art. 6).
In addition, **MT** indicated that although paragraph 1 refers to the Palermo Protocol, paragraph 2 would depart from the provisions of the said Protocol which leaves it to the flag state to decide (i) whether or not to authorise another State vessel to take any measures; (ii) which measures to authorise if it does grant authorisation; and (iii) to subject the authorisation to conditions, including on responsibility and the extent of the measures to be taken. For this purpose, **MT** suggested inserting a clear provision for the intervening Member States to assume full liability for the consequences of the actions conducted by their vessels.

4. Where, though flying a foreign flag or refusing to show its flag, there are reasonable grounds to suspect that the ship is, in reality, of the same nationality as a participating unit, that participating unit shall verify the ship's right to fly its flag. To this end, it may approach 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 participating Member State of which the ship is allegedly flying the flag shall be contacted through the appropriate channels.¹
5. Where, though flying a foreign flag or refusing to show its flag, there are reasonable grounds to suspect that the ship is, in reality, of the nationality of the host Member State or another participating Member State, the participating unit shall verify the ship's right to fly its flag upon authorisation of that Member State.²
6. Where, in the cases referred to in paragraphs 4 or 5, the suspicions regarding the nationality of the ship prove to be founded, the host Member State or the participating Member State shall authorise the measures laid down in paragraph 1.³
7. 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 or those measures which derive from relevant bilateral or multilateral agreements.

¹ **NL** suggested clarifying the scope of the term "through the appropriate channels (see comments under Art. 6). Furthermore, **NL** indicated that the wording should refer to "approach **and board** the suspect vessel **in order to verify the ship's documents**" in order to allow the verification of the ship's papers

² **FR** pointed out that such authorisation is not necessary on the high seas. **Cion** will further check the issue.

³ **MT** suggested replacing "shall" with "may", and clarifying that the authorisation may cover "one or more" of the measures listed in para.1 of this Art. (see also relevant comments under para. 2 of this Art. and the concerns of **MT** about the discretion that the MS should enjoy and about their liability if the wording is interpreted as obliging MS to always grant authorisation).

8. Where there are reasonable grounds to suspect that a ship without nationality¹ or one that may be assimilated to a ship without nationality is engaged in the smuggling of migrants by sea, the participating unit may board and stop the ship with a view to verifying its statelessness. If suspicions prove to be founded further appropriate measures as laid down in paragraph 1 may be taken in accordance with national law and international law.²
9. A Member State that has taken any measure in accordance with paragraph 1 shall promptly inform the flag State of the results of that measure.
10. The national official representing the host Member State or a participating Member State at the International Coordination Centre shall be designated under national law as an authority³ for the authorisation to verify the right of a ship to fly the flag of the Member State concerned or to take any of the measures laid down in paragraph 1.⁴

¹ **RO**: suggested amending it to “stateless ship”.

² **DE, NL** queried whether these measures would be taken in accordance with the national law of a participating MS or of the host MS. **NL** suggested, for the sake of uniformity of action during a Frontex operation, to opt for the latter option (in line with the Frontex Regulation. Thus, **NL** suggested adding the following sentence: "In particular the host MS will make all the necessary arrangements to ensure that these measures are performed in accordance with European and international standards". **Cion** pointed out that the measures should be taken in accordance with the national law of the intercepting MS. **BE**: suggested adding at the end of the sentence “... and according to prior agreement in the operational plan”.

FR: had concerns about the compatibility of this provision with UNCLOS. **MT**: Article 110 of the UNCLOS limits actions of boarding, which is to verify the documents and does not provide a basis for stopping the ship. Likewise, the Protocol against the Smuggling of Migrants limits the measures permitted to boarding and searching.

³ **MT** suggested replacing the wording "... be designated under national law as an authority..." with "...be responsible to facilitate communications with the relevant authorities of the flag state in seeking...". **MT** pointed out that such a decision may carry serious liabilities and it is therefore most unlikely that such powers of authorisation can be vested in a low to medium grade officer. In the case of **MT** these powers are vested in the Prime Minister, a fact which demonstrates the seriousness of such decisions. It would be more appropriate to empower the national official to serve in a manner to facilitate communications with the relevant authorities of the Flag State. In addition, **MT** suggested that such a process to allow ship boarding should mirror that process and associated safeguards defined in the Convention for the Suppression of Unlawful Acts against the safety of Maritime Navigation 2005 (SUA Convention 2005).

⁴ **RO** proposes the rewording of the text, in order to highlight the ICC role, since the national legislation is not drawn up regarding a certain person: “The national official representing the host Member State or a participating Member State at the International Coordination Centre shall **have the authority to be designated under national law as an authority for the authorisation to the verification of** the right of a ship to fly the flag of the Member State concerned or to take any of the measures laid down in paragraph 1.”

11. Where the grounds for suspecting that a ship is engaged in the smuggling of migrants on the high seas prove to be unfounded or the participating unit does not have jurisdiction to act, but there remains a reasonable suspicion that the ship is carrying persons intending to reach the border of a Member State and to circumvent checks at border crossing points, that ship shall continue to be monitored. The International Coordination Centre shall communicate information about the ship to the National Coordination Centre of the Member States towards which it is directed.

Article 8

Interception in the contiguous zone

1. In the zone contiguous to the territorial sea of a Member State, which is a host Member State or a participating Member State, the measures laid down in Article 6(1) shall be taken in accordance with Article 6(2).¹
2. The measures laid down in Article 6(1) shall not be taken in the contiguous zone of a Member State that is not participating in the sea operation without the authorisation of that Member State. The International Coordination Centre shall be informed of any communication with that Member State and of the subsequent course of action authorised by that Member State.²
3. Where a stateless ship is transiting the contiguous zone, Article 7(8) shall apply.³

¹ **SE:** suggested adding the following sentence at the end of the para.: “Such authorisation may only be given for measures that are necessary to prevent infringements within its territory or territorial sea”.

² **NL** suggested adding the following sentence at the end of the para: “If the MS does not give the authorisation and where there are reasonable suspicions that the ship is carrying persons intending to reach the border of a MS, Art. 7(1) shall apply”. **Cion** confirmed that without prior authorisation, the participating unit cannot take any action.

³ **RO** suggested clarifying this provision and querying whether the intention is to assimilate a stateless ship transiting the contiguous zone with a ship involved in the smuggling of migrants. **Cion** confirmed that the ground for jurisdiction is the smuggling of migrants.

Article 9

Search and rescue situations¹

1. During a sea operation, participating units shall render assistance to any ship 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.

¹ **EL, ES, FR, MT:** reservations and **IT** scrutiny reservation on the Art. (see also the introductory comments of **these delegations** under footnote 1 of p. 2). **ES:** emphasised that there is no legal basis for Arts 9 and 10 of the proposal, (see Art. 77.2d TFEU, Art. 12.1 of the SBC and Council Declaration on EUROSUR Regulation). **EL** pointed out that search and rescue are regulated by the relevant International Conventions and not need to be redefined by the proposed Regulation. **EL** maintained that any discussion and adoption of such measures should take place within the framework of the International Maritime Organization with their consequent international standing and binding power having at the same time binding nature on third countries as well.

EL also stressed that the way in which this Art. regulates the application of search and rescue measures transforms a priori all incidents of illegal crossings of sea borders into search and rescue incidents. Moreover, Art. 9 allows for search and rescue mechanisms, considered as an inseparable part of police measures for the surveillance of the external sea border.

On the basis of these remarks, **EL** and **ES** submitted the following amendment to Art. 9: "For the purposes of the sea operation coordinated by the Agency, Member States shall instruct their participating units to comply with the obligation to render assistance to persons in distress at sea in response to the applicable provisions of the international conventions governing search and rescue situations and to the requirements concerning the respect of fundamental rights of the distressed persons." (the underlined wording was included only in the version presented by **EL**). In the same spirit, **MT** suggested the following alternative wording for Art. 9: "During a sea operation, Member States shall instruct their participating units ~~shall~~ to comply with the obligation to render assistance to any ship or person in distress at sea, in accordance with applicable provisions of international Conventions governing search and rescue and fundamental rights. They shall do so regardless of the nationality or status of such a person or the circumstances in which that person is found."

BE, FI, NL, SE: support the **Cion** proposal, pointing out that a clear agreement on how the relevant International Law is applied gives an added value to these provisions. They also contended that nothing in this Art. is contrary to the International Law. **Cion** recalled that the International Law co-existed without any problem with the 2010 Council Decision and that the ECJ indicated that the non-binding part of the above Decision should become mandatory, in view of its link with the operational plan. **Cion** also agreed that a further and clearer interpretation of the International Law is needed for the smooth running of the Frontex operations. **CLS** observed that that this provision touches the limits of EU competence in the sense that providing for operations of which the main objective is "rescue of lives at sea" would already go beyond the competences of the EU legislator. **CLS** suggested that the solution adopted in the recent EUROSUR Regulation may serve as a reference point.

2. When facing, in the course of a sea operation, a situation of uncertainty, alert or distress as regards a ship or any person on board, the participating unit shall forward as soon as possible¹ all available information to the Rescue Coordination Centre responsible for the search and rescue region in which the situation occurs.
3. A ship or the persons on board shall be considered to be in a situation of uncertainty in particular when:
 - (a) doubt exists as to the safety of a ship or the persons on board; or
 - (b) there is lack of information concerning progress or position of a ship.
4. A ship or the persons on board shall be considered to be in a situation of alert in particular when:
 - (a) apprehension exists as to the safety of a ship or the persons on board because of information that serious difficulties exist, but not to the extent that a distress situation is likely; or
 - (b) there is continued lack of information concerning progress or position of a ship.²
5. A ship or the persons on board shall be considered to be in a situation of distress in particular when:
 - (a) positive information is received that a ship or a person on board is in danger and needs immediate assistance; or
 - (b) attempts to establish contact with the ship fail and unsuccessful inquiries point to the probability that the ship is in distress;³ or
 - (c) information is received which indicates that the operating efficiency of the ship has been impaired to the extent that a distress situation is likely.

¹ **BE** queried why using "as soon as possible" here and "promptly" at point 7.

² **RO**: suggested, for a better time delimitation of the alert phase and in order to avoid confusion, using the wording of the S.A.R Convention “**when, following the uncertainty phase, there is continued...**”.

³ **RO**: suggested, for a better time delimitation of the danger/distress phase and in order to avoid confusion, using the wording of the S.A.R Convention “**when, following the alert phase, attempts to establish...**” **BE** suggested deleting the part of the sentence “and unsuccessful inquiries point to the probability that the ship is in distress”.

6. When assessing the situation for the purposes of paragraphs 3 to 5, participating units shall take all relevant elements into account, including:
- (a) the existence of¹ 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 passengers² in relation to the type and condition of the ship;
 - (d) the availability of necessary supplies such as fuel, water, food to reach a shore;
 - (e) the presence of qualified crew and command of the ship;
 - (f) the availability and capability 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, including weather and marine forecasts.
7. Participating units shall promptly communicate their assessment of the situation to the responsible Rescue Coordination Centre. While awaiting instructions from the Rescue Coordination Centre, participating units shall take all the appropriate measures to ensure the safety of the persons concerned.

¹ **BE** suggested, that the wording "the existence of" unless proven differently, could be deleted as redundant.

² **BE** suggested replacing "passengers" with "persons on board" - suggestion applicable also to points (g) and (h).

8. The existence of a distress situation shall not be exclusively dependent on or determined by an actual request for assistance. Where, despite a ship being perceived to be in a distress situation, the persons on board refuse to accept assistance, the participating unit shall inform the Rescue Coordination Centre and continue to fulfil a duty of care by surveying the ship at a prudent distance and by taking any measure necessary for 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.
9. 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 shall contact the Rescue Coordination Centre of the host Member State¹ unless another Rescue Coordination Centre is better placed to assume coordination of the search and rescue situation.
10. The participating units shall inform the International Coordination Centre as soon as possible of any contact with the Rescue Coordination Centre and of the course of action taken by them.
11. Where the ship cannot or can no longer be considered as being in a distress situation or the search and rescue operation has been concluded, the participating unit shall, in consultation with the International Coordination Centre, resume the sea operation.

¹ **NL** suggested deletion of the last part of the sentence (“unless another Rescue ... situation”), because it considers that otherwise it would not be clear who decides which other RCC is better placed to assume co-ordination of the search and rescue situation. In the same line, **BE** also indicated the vagueness of this wording and suggested including the hierarchy of the RCC in the operational plan in question. **Cion** pointed out that the RCC of the host MS would not be the most appropriate because of the general geographical-strategic situation.

Article 10

Disembarkation

1. The modalities for the disembarkation of the persons intercepted or rescued in a sea operation shall be set out in the operational plan. Those modalities for disembarkation shall not have the effect of imposing obligations on Member States not participating in the sea operation unless they expressly provide authorisation for measures to be taken in their territorial sea or contiguous zone in accordance with Article 6(4) or Article 8(2).
2. In the case of interception in the territorial sea or the contiguous zone as laid down in Article 6(2) or Article 8(1), disembarkation shall take place in the host Member State or in the participating Member State in whose territorial waters or contiguous zone the interception takes place.

In the case of interception in the territorial sea or the contiguous zone as laid down in Article 6(4) or Article 8(2), disembarkation shall take place in the Member State in whose territorial waters or contiguous zone the interception takes place.

3. Subject to the application of Article 4, in the case of interception on the high seas as laid down in Article 7, disembarkation may take place in the third country from which the ship departed. If that is not possible, disembarkation shall take place in the host Member State.
4. In the case of search and rescue situations as laid down in Article 9, the participating units shall cooperate with the responsible Rescue Coordination Centre to provide a suitable port or place of safety for the rescued persons and to ensure their rapid and effective disembarkation.

Without prejudice to the responsibility of the Rescue Coordination Centre, the host Member State and the participating Member States shall as soon as possible ensure that a port or place of safety is identified taking into account relevant factors, such as distances to the closest ports or places of safety, risks and the circumstances of the case.

Where the participating unit is not released of its obligation referred to in Article 9(1) as soon as reasonably practicable, taking into account the safety of the rescued persons and that of the participating unit itself, it shall be authorised to disembark the rescued persons in the host Member State.

5. The participating units shall inform the International Coordination Centre of the presence of any persons within the meaning of Article 4(1), and the International Coordination Centre shall convey that information to the competent national authorities. On the basis of that information, the operational plan should determine which follow-up measures may be taken.

CHAPTER IV

FINAL PROVISIONS

Article 11

Entry into force

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaties.

Done at Brussels,

For the European Parliament
The President

For the Council
The President