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New rules on Frontex operations at sea

The regulation on Frontex operations at sea sets new rules for intercepting and pushing back migrants at sea as well as for rescuing them. It replaces the current Council decision of 2010, which was struck down by the European Court of Justice because the European Parliament was unlawfully excluded from co-decision-making.

The regulation has two major objectives:

- better rules on rescuing migrants at sea in the context of Frontex operations
- legalising push backs; more particularly the regulation aims at bringing Frontex operations in line with the landmark Hirsi ruling by the European Court on Human Rights which condemned Italy in 2012 for returning boat people collectively to Libya.

We Greens had an important impact on improving the regulation

- We insisted on binding rules for search and rescue. We also achieved that it is now clearly defined when Frontex and the member states participating in a Frontex operation have to take action to rescue migrants instead of turning a blind eye on them (by including a definition on boats in distress).
- We succeeded in improving the safeguards for people in need of protection, for instance by carrying home a broad definition of the principle of non-refoulement, by insisting that access to interpreters, legal advisers and medical staff must be ensured and by narrowing down the possibility not to do an individual assessment of persons on board.
- We insisted on deleting the possibility of forcing boat to return on the high sea.

The new regulation is much better and provides significantly better safeguards for refugees than the current rules. However, despite our achievements, the regulation falls short of effectively protecting refugees. At the end of the day it legalises push back operations rather than effectively protects people fleeing from persecution.

Why is the regulation still not protecting refugees effectively?

The regulation allows Frontex to push boats back from the European shores or to conduct or hand over persons on board to third countries. This is illegal. The European Court of Human Rights has defined clear criteria for push backs. They are not fulfilled. Push backs are only in line with international law if those pushed backed or returned are not in need of protection. According to the core principle of international and European refugee protection, the principle of non-refoulement, refugees must not be sent or pushed back to a place where their life would be at risk

or where they would be at risk of persecution. The crucial question is therefore: *How to identify people in need of protection on a boat?* In the Hirsi ruling, the European Court of Human Rights argued that the personal circumstances of each person on board must be assessed; that persons on board must have an opportunity to put arguments against their return; that access to interpreters and to legal advisers must be ensured; and that persons on a boat must have the possibility to effectively oppose their immediate return by access to legal remedies with a suspensive effect.

The regulation falls short of fully implementing the Hirsi ruling:

- It does not provide for legal remedies with a suspensive effect
- Access to interpreters and legal advisers is granted only “if necessary”. In addition, the regulation nowhere stipulates that interpreters or legal advisers must be on board. In the trilogue negotiations it was rather envisaged to call them by radio.
- People on board must be informed of the place of disembarkation only “in a way [not in a language!] they understand or may reasonably be presumed to understand”
- Border guards are not in any case required to assess the personal circumstances of the persons on board

In practice, this leaves Frontex and the Member States participating in a Frontex operation with important loopholes for escaping the principle of non-refoulement.

To pick out just one example: When insisting on informing persons on board of the place of disembarkation in a *way* rather than in a language they understand, the Council indicated that this would allow Member States to point just on a map to show people where they would be disembarked. Fine so far. However, if a common language does not exist, how could refugees then “express any reasons for believing that disembarkation in the proposed place would be in violation of the principle of non-refoulement” in a way Frontex would understand? They could wave or shout. But probably every person on board would wave or shout no matter if he or she is in need of protection or rather looking for a better life in Europe. And how, if everybody waves or shouts, can they make clear that an interpreter would be needed in their case? As mentioned above, interpreters will be provided only if necessary, possibly via a radio interpreters help line.

Although the regulation clearly is an improvement as compared to the current rule (see below) it still falls short of complying with core European case law on the principle of non-refoulement.

*The LIBE Flash is the monthly newsletter by **Ska Keller**, spokesperson on migration of the Greens in the European Parliament, on news related to the Committee on Civil Liberties, Justice and Home Affairs (LIBE) of the European Parliament. It focuses on policy developments in the area of EU border surveillance and migration. If you want to subscribe or unsubscribe, please write an email to franziska.keller@europarl.europa.eu or to stefanie.sifft@europarl.europa.eu*

Overview of the new regulation and its assessment from a Green perspective

	Current rules Council Decision 2010/252/EU of 24 April 2010	New regulation Rules for the surveillance of the external sea borders in the context of Frontex operations (Coelho report)	What the Greens wanted	Assessment of the outcome from a Green perspective
Rescuing migrants in distress at sea	Non-binding guidelines	Binding rules including a definition on boats in distress	Binding rules including a definition on boats in distress	+ The binding rules should put an end to different interpretations by Member States on whether and when they have to rescue migrants
Push backs	Frontex can push back boats and force them to change course. It also can hand the boat or the persons on board over to a third country and should preferably do so	Frontex can still push back boats in the coastal waters but not on the high sea any more (because it is against the law of the sea). Handing over boats or persons to 3rd countries is still possible and preferred	No push backs and no handing over to third countries	- Asylum seekers could be prevented from lodging an asylum application in the EU since the rules on push backs allow denying entry in more cases than the Schengen Borders Code. In general, safeguards against refoulement are too weak (see below).
Disembarkation of rescued or intercepted migrants	Preferably in a third country, only as a last resort in the member state hosting a Frontex operation	Same rules; in case of a rescue operation it has to be a place of safety[i]	Disembarkation in the <u>closest</u> place of safety	- For reasons of safety first, disembarkation should take place in the closest place of safety

Safeguards for people in need of protection	General reference to the principle of non-refoulement without much further details on how it should be applied	More extensive provisions on the protection of human rights and the principle of non-refoulement including certain procedural guarantees such access to interpreters and legal advisers “if necessary”	Full implementation of the Hirsi ruling, in particular: Full access to interpreters and legal advisers as well as to legal remedies	0 The safeguards are significantly better. But there are important loopholes and the Hirsi ruling is not fully implemented (no provisions on legal remedies).
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[i] Place of safety is defined as a place “where the survivors’ safety of life is not threatened, where their basic human needs can be met [...], taking into account the protection of their fundamental rights in compliance with the principle of non-refoulement” (Article 2, para 11 of the new regulation)