NOTE FOR THE FILE

Draft Council Decision supplementing the Schengen Borders Code as regards sea border surveillance in the context of operational cooperation coordinated by FRONTEX (COM(2009)658) as amended by the Council on 25 January 2010

Background

The questions of who is responsible for saving people at sea and where they should be disembarked have been subject to intense debates in the context of surveillance operations concerning the EU's sea borders coordinated by Frontex. The operations take place in a highly complex legal and political environment and touch upon international law issues and on the EU's relations with third countries.

After long preparatory work, including a study on the relevant international law instruments completed in 2007, the Commission drafted a set of guidelines intended to
- ensure that international rules are uniformly applied by all Member States taking part in surveillance operations coordinated by Frontex (Convention on the Law of the Sea (UNCLOS), conventions on safety at sea and search and rescue, international law on refugees and fundamental rights) and
- create a basis in EU law enabling one Member State to carry out surveillance of another Member States' maritime borders.

The Commission presented the draft guidelines in the form of an implementing measure, based on Article 12 (5) of the Schengen Borders Code. This provision, together with Article 33 of the Borders Code, authorises the Commission to adopt additional measures governing border surveillance in accordance with the regulatory procedure with scrutiny as laid down in Council Decision 1999/468/EC ("comitology decision"). After the entry into force of the Treaty of Lisbon this procedure continues to apply until the basic legal act, the Schengen Borders Code, has been aligned to the framework of the Treaty of Lisbon. Therefore, the regulatory procedure with scrutiny applies to the present draft measure.

The draft was first submitted to the Borders Code Committee. Member States' experts failed to agree on the draft; therefore, the Committee did not issue a formal opinion. One of the controversial issues was whether the Commission's draft went beyond its implementing powers.

On 7 December 2009, the Commission submitted a revised draft to the Council and to the Parliament, in the form of a draft Council Decision (COM(2009)658).

In accordance with the regulatory procedure with scrutiny the Council, acting by qualified majority, had the following options:

- oppose the proposed measure, in which case it will not be adopted; the Commission may submit an amended proposal or present a legislative proposal (option 1)
- envisage adopting the proposed measure, in which case it shall without delay submit it to the European Parliament (option 2)
- not act within the two months, in which case the Commission shall without delay submit the measures to the Parliament

The Council had to act within a deadline of two months, i.e. before 7 February 2010.

On 25 January 2010 the Council, with Italy and Malta abstaining, decided to envisage adopting draft Council Decision and submit the draft Council Decision to the European Parliament. Furthermore, the Council agreed on an additional declaration to be adopted by the Council if Parliament does not oppose the measure, asking Frontex to report on the practical implementation of this decision.

European Parliament's role in the procedure and deadline

In accordance with the regulatory procedure with scrutiny, Parliament has four months in total, starting from the date of referral on 7 December 2009, to scrutinise the draft measure. In practice, Parliament now has two more months to take position ***before 7 April 2010.***

Parliament's options in the regulatory procedure with scrutiny are limited to the following. Parliament may, acting by a majority of its component Members,

- ***oppose the adoption of the measure****; in this case, Parliament must justify its opposition, stating that the proposed measure exceeds the implementing powers granted to the Commission in the basic instrument, or is not compatible with the aim or the content of the basic instrument or does not respect the principles of subsidiarity or proportionality;* if Parliament opposes, the draft measure shall not be adopted; the Commission may submit an amended proposal or present a legislative proposal
- ***not oppose the adoption of the draft measure****; in this case, the draft measure may be adopted by the Council or the Commission.

LIBE, as the committee responsible, will prepare Parliament's position, in accordance with Rule 88 of the Rules of Procedure. The Member responsible in LIBE is Michael Cashman, rapporteur for the basic act, the Schengen Borders Code. Once the Council's position, adopted on 25 February 2010, has been officially referred to the Parliament, the chairman will set a deadline for Members who wish to propose that the committee objects to the draft measure. If the committee decides to object, it shall table a motion for a resolution to the plenary for adoption before 7 April 2010.

Action undertaken by LIBE so far:

On 11 January 2010, LIBE, as the committee responsible, heard presentations of the Commission (Mr Henrik Nielsen, Head of Unit, DG JLS) and the Spanish Presidency (Mr Burgos Nieto, JHA Counsellor) and held a first exchange of views on the file. During the debate, several Members highlighted the political importance of the decision on the guidelines (Mr Busuttil, Mrs Flautre, Mr Moraes, Mrs Hennis-Plasschaert) and the fact that this was a long-standing discussion in the Council. The Executive Director of Frontex (Mr Laitinen) underlined the swift adoption of guidelines would enhance the efficiency of Frontex' operations.

Next steps:

The Council will refer its position, which was adopted on 25 January 2010, to the Parliament within a few days. Then it will be Parliament's turn to take a position before the expiry of the deadline on 7 April 2010.

In order to prepare LIBE's position, the rapporteur recommends that an opinion be requested from the Parliament's legal service, which should answer the following questions:

1)
 a) Having regard to the delineation between "rules" and "guidelines" for Member States in the draft measure as amended by the Council, could the content be considered a "non-essential element" of the final legal framework shaping the role of the Member States and Frontex?
b) Has the Commission exceeded its implementing powers under Article 12 (5) of the Schengen Borders Code by proposing the present draft measure?

2) In case the content or a part of the content of the draft measure touches upon essential elements of the basic act, could the objectives of the measure be achieved by a legislative act, notably by amending the basic act, i.e. the Schengen Borders Code?

OPERATIONAL INFORMATION:

Documents:

- Proposal for a Council Decision supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of the operational cooperation coordinated by Frontex, COM(2009)658 of 27.11.2009, as amended by the Council on 25 January 2010
- Commission staff working document, Study on the international law instruments in relation to illegal immigration by sea, SEC (2007)691 of 15.5.2007, available in EN and FR.

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