



EUROPEAN PARLIAMENT

2009 - 2014

Committee on Civil Liberties, Justice and Home Affairs

19.7.2013

WORKING DOCUMENT 1

on on 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

Committee on Civil Liberties, Justice and Home Affairs

Rapporteur: Carlos Coelho

Context

During the last decade, the Mediterranean region has been affected by a number of international and regional geopolitical and economic developments, leading to enormous political instability, and contributing to increased migratory flows and asylum pressure from the Southern shores of the Mediterranean to its Northern shores, notably the Southern EU Member States located at the geographical periphery of the EU, such as Greece, Italy, Spain, Malta and Cyprus.

The events which occurred in the Mediterranean between 2006 and 2009 underlined the urgency of strengthening efforts to prevent irregular migration effectively at the Member States's southern external borders and to prevent further loss of life at sea. The situation was further aggravated in 2011 with the uprisings against authoritarian regimes in countries like Egypt, Tunisia and Libya. Indeed, the so-called 'Arab Spring' has changed the power balance in that region and created a new set of conditions for the Euro-Mediterranean relations. In particular, with regard to irregular migration, the situation in some EU Member States and in specific regions, like for example Lampedusa, has changed dramatically, with the growing influx of irregular migrants arriving at its southern shores.

The number of persons crossing Europe's southern sea borders, in an attempt to flee conflict, persecution, or just to improve their economic opportunities, using the maritime route to cross international borders clandestinely, amounted to around 10.000 people in 2010, increased to over 70.000 people in 2011, to drop again to around 20.000 people in 2012. As regards 2013, UNHCR estimates that over 8.000 people reached Italy and Malta during the first six months of the year. These crossings are organised by smugglers and involve the use of small craft or dinghies which are often overcrowded and unseaworthy, thus jeopardising the lives of the persons on board.

However, there is a clear discrepancy between the expectations of migrants upon their decision to start the journey and the realities they face during the trip and upon arrival at their first European destination and, unfortunately, some do not survive the trip. According to UNHCR estimates, more than 1.500 refugees or migrants in an irregular situation drowned or went missing in 2011 while attempting to cross the Mediterranean Sea.

Although the phenomenon is not widespread throughout the EU, it affects the EU as a whole. This situation resulted in prompt calls for more solidarity and sustainable responses from the EU to support those countries most affected by irregular arrivals by sea. Responsibility-sharing and solidarity became indispensable factors to ensure that the fundamental rights of asylum seekers and refugees are fully respected in the EU.

EU Border Management

In 1999, Article 1(5) of the Treaty of Amsterdam established the European Area of Freedom, Security and Justice. Since then, the EU has elaborated common rules on border management and has adopted an integrated approach to border management that includes not only the control of external borders, but also cooperation with third countries.

EU Regulation 2007/2004 established the European Agency for the Management of

Operational Cooperation at the External Borders of the Member States of the European Union (Frontex) to ensure the coordination of Member States' actions in the implementation of measures in the field of external border management. Operational support to EU Member States in the management of external EU borders is offered, through Frontex, which has coordinated operations among several Member States at the external eastern and southern borders of the EU since 2005. Frontex promotes this integrated approach to border management through the exchange of information and cooperation between Member States, assisting Member States with training, the development of surveillance systems and risk analysis as well as cooperation and technical assistance in third countries.

The coordinated joint operations can take place at different types of external borders (air, land, sea) and are carried out under the command of the host State. Other EU and Schengen-associated countries provide human and material resources, which they deploy to the operational area. An important part of Frontex operations are those carried out at sea, having already coordinated almost 50 large joint operations at sea, and they consume an important share of the overall Frontex budget for operations (59% of the total budget spent in 2011 on joint operations went to sea borders).

Since 2009, nearly all maritime operations have been organised under the European Patrols Network (EPN) programme, which supports the coordination of national surveillance measures such as patrols for the EU's southern maritime borders and their integration into joint European activities. The priorities for joint operations are identified in the context of the EPN.

The objective of the Union's policy in the field of the EU external borders is to ensure the efficient monitoring of the crossing of external borders including through border surveillance, in order to prevent unauthorised border crossings, to counter cross-border criminality and to apprehend or take other measures against those persons who have crossed the border in an irregular manner. In this regard, border surveillance is not limited to the detection of irregular border crossing but it includes steps such as intercepting vessels suspected of trying to gain entry to the Union without submitting to border checks, as well as arrangements intended to address situations such as search and rescue that may arise during a sea operation and arrangements intended to bring such an operation to a successful conclusion.

Some criticism has been made on the framework of Frontex operations, raising some open questions regarding search and rescue situations. In response, the Council of the European Union adopted Decision 2010/252/EU in order to provide guidance on the surveillance of sea borders in the context of Frontex joint operations.

Legal context

In October 2009, the European Council invited the Commission to present the necessary proposals to establish "*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*". On 26 April 2010, the Council adopted a Decision (2010/252/EU) as an implementing measure which supplemented the Schengen Borders Code. This decision is intended to strengthen border surveillance operations coordinated by the Agency. It contains binding rules for sea border operations

(Part I of the Annex) and non-binding guidelines for search and rescue situations and for disembarkation of rescued or intercepted persons (Part II of the Annex) in order to ensure the safety of those seeking international protection and to prevent loss of life at sea.

The Decision incorporated, within a single legal instrument, existing provisions of EU and international law, aiming to overcome the different interpretations of international maritime law adopted by Member States and their diverging practices to ensure legal certainty and the efficiency of sea operations coordinated by Frontex. The Decision addressed concerns over the protection of fundamental rights during these operations by including provisions guaranteeing the respect of fundamental rights, addressing the special needs of vulnerable persons and prohibiting *refoulement*.

The European Parliament recognised the importance of such an instrument however it considered that it should have been adopted as a legislative act and not an implementing measure. The European Parliament therefore brought an action for the annulment of this Council Decision, which was adopted under the comitology procedure based on Article 12(5) of the Schengen Borders Code. This article provides that "*additional rules governing surveillance*" may be adopted in accordance with the regulatory procedure with scrutiny, which provides for the adoption of measures designed to amend non-essential elements of a legislative instrument.

The European Parliament argued that the Decision exceeded the scope of the implementing powers in Article 12(5) of the Schengen Borders Code because it introduced new essential elements into the Code, it altered essential elements of the Code and modified the system created by the Frontex Regulation. In view of the significance of this instrument, the European Parliament requested the Court to maintain the effects of the Decision until it is replaced.

The Court recalled that the adoption of essential elements is reserved to the European Union legislature and may not be delegated. The Court observed that although the aim of border surveillance is to prevent individuals from crossing the border illegally, the Code does not contain rules concerning the measures which border guards are authorised to apply against persons or ships when they are apprehended. However, the Council Decision lays down measures which border guards may take against ships and persons on board (e.g. a ship may be stopped, searched or seized). In addition, the Council Decision includes also provisions on the rescue of vessels or persons in distress at sea and on the disembarkation of the persons intercepted or rescued at sea.

The Court found that the adoption of such rules on the conferral of powers on border guards entails political choices which fall within the responsibility of the European Union legislature. Also, provisions on conferring powers of public authority on border guards means that the fundamental rights of the persons concerned may be interfered with to such an extent that the involvement of the European legislature is required.

Although the Court recognised that certain provisions governing the practical arrangements for carrying out border surveillance were non-essential elements, it annulled Decision 2010/252/EU in its entirety. It considered that the provisions on interception, search and rescue and disembarkation are connected due to the fact that they relate to the overall conduct

of surveillance operations and rescue operations, respectively. As requested by the European Parliament, the Court held that the effects of the Decision must be maintained until the entry into force, within a reasonable time, of new rules intended to replace the annulled Decision.