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

2013/0106(COD) - 12/04/2013 - Legislative proposal

PURPOSE: to establish rules for the surveillance of the external sea borders of the Union in the context of operational cooperation coordinated by the FRONTEX agency.

PROPOSED ACT: Regulation of the European Parliament and of the Council.

ROLE OF THE EUROPEAN PARLIAMENT: the European Parliament decides in accordance with the ordinary legislative procedure and on an equal footing with the Council.

BACKGROUND: following the call by the European Council of October 2009, the Council adopted Decision 2010/252/EU to strengthen border surveillance operations coordinated by the FRONTEX agency and to establish clear rules of engagement for joint patrolling and the disembarkation of intercepted or rescued persons.

In the context of this proposal, the Commission had chosen to present its proposal under the comitology procedure based on Article 12(5) of the Schengen Border Code4 considering the decision as being an additional measure governing border surveillance.

Problem of legal interpretation: the Decision incorporated, within a single legal instrument, existing provisions of EU and international law. The aim was to overcome the different interpretations of international maritime law adopted by Member States and their diverging practices to ensure the efficiency of sea operations coordinated by the Agency. There was a risk that, in a sea operation, **different rules, sometimes even conflicting ones, would apply to the same situation**.

Amidst this legal uncertainty, Member States' participation in sea operations coordinated by the Agency was low in terms of contributing craft, vessels and human resources. This, in turn, hindered the effectiveness of the operations and undermined efforts of EU solidarity.

Some Member States, Members of the European Parliament, human rights organisations and academics had questioned whether **fundamental rights and the rights of refugees were being respected** during sea operations coordinated by the Agency, particularly on the high seas. The decision aimed to address these concerns by establishing a number of guarantees to ensure the respect of these rights.

Besides these various problems of legal interpretation, the European Parliament considered that the decision should have been adopted in accordance with the ordinary legislative procedure and not the comitology procedure. Therefore, it brought an action before the Court of Justice of the European Union against the Council (mainly because it considered that the decision exceeded the implementing powers conferred under Article 12(5) of the Schengen Borders Code) requesting the annulment of the decision.

At the end of the day, the Court annulled the Decision but decided to maintain its effects until it is replaced by new rules within a reasonable time.

This is the purpose of this proposal.

IMPACT ASSESSMENT: in view of the considerable preparatory work undertaken prior to the adoption of Council Decision 2010/252/EU, the Commission considered that this proposal need not be accompanied by an impact assessment.

LEGAL BASIS: Article 77(2)(d) of the Treaty on the Functioning of the European Union (TFEU).

CONTENT: this proposal seeks to establish rules for the surveillance of the external sea borders of the Union in the context of operational cooperation coordinated by the FRONTEX agency and to replace Decision 2010/252/EU for the above-mentioned reasons.

The text of the initial decision mainly sought to adopt additional common rules for the surveillance of sea borders by border guards and for the coordination of the operations of the FRONTEX agency.

The main provisions were included in an annex setting out:

- rules for sea border operations coordinated by the Agency, in particular in cases of the interception of persons at sea (including on the high seas;
- non-binding guidelines for search and rescue situations and for disembarkation in the context of sea operations coordinated by the Agency.

The main changes to the initial text may be summarised as follows:

Scope: the scope of application of this proposal is the same as that of the decision, namely border surveillance operations at sea carried out by Member States under the coordination of the Agency. Although in the decision, the concept of 'border surveillance' was understood as including interception measures and arrangements for rescue arising during border surveillance operations, there was still doubt as to whether these measures did in fact fall under the concept of border surveillance as defined in the Schengen Borders Code. This proposal explicitly covers this broader concept of border surveillance by indicating that border surveillance is not limited to the detection of attempts at irregular border crossing but **also extends to steps such as interception measures, and 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.

Case of search and rescue: given that FRONTEX is now also entrusted with assisting Member States in circumstances requiring increased technical assistance at the external borders, taking into account that some situations may involve humanitarian emergencies and rescue at sea for example rendering assistance to persons in distress, this proposal sets out rules on how to deal with these situations in a sea operation coordinated by the Agency.

Operational plan: provisions are envisaged to ensure that this proposal is in line with the amendments made to Regulation (EC) No 2007/2004 establishing FRONTEX. The operational plan has now become a legally binding instrument with regard to all operations coordinated by the Agency and not only as regards rapid interventions, i.e. including sea operations. The rules laid down in this proposal are intended to form part of the operational plan drawn up in accordance with Regulation (EC) No 2007/2004.

Fundamental rights: the legal and judicial developments concerning the protection of fundamental rights are also taken into account in this proposal in particular in regard to the principle of ***non-refoulement*** in

sea operations. In this way, in the case of disembarkation in a third country, the persons intercepted or rescued must be identified and their **personal circumstances must be assessed** to the extent possible before disembarkation. They must also be informed of the place of disembarkation in an appropriate way and they must be given an opportunity to express any reasons for believing that disembarkation in the proposed place would be in violation of the principle of *non-refoulement*. This would guarantee that the migrants are informed about their situation and the proposed place of disembarkation thereby allowing them to express any objections.

Detection, interception and rescue: the proposal clearly distinguishes between detection, interception and rescue.

- as regards **interception**, this proposal while retaining the same set of measures as in the Decision, distinguishes between the measures that may be taken in **the territorial sea, on the high seas and in the contiguous zone**, thus clarifying the conditions under which these measures may be taken and the jurisdictional basis on which action may be taken particularly as regards stateless ships. Based on the Protocol against the Smuggling of Migrants by Land, Sea and Air, **interception of ships on the high seas is now clearly linked to the requirement of having a reasonable suspicion that the ship is engaged in the smuggling of migrants**. As in the Decision, the exercise of jurisdiction on the high seas must always be based on the authorisation of the flag State.
- as regards **search and rescue situations,** the text in this proposal remains similar to the Decision. The wording is aligned to that used in the 1979 International Convention on Maritime Search and Rescue and the International Aeronautical and Maritime Search and Rescue Manual (IAMSAR). Also, on the basis of these international instruments, the proposal includes criteria as to when a ship is considered to be in a situation of uncertainty, alert and distress, as well as a definition of a rescue coordination centre.

Disembarkation: this proposal, unlike the Decision, **addresses the issue of disembarkation in terms of interception and rescue**. As regards interception in the territorial sea or in the contiguous zone, **disembarkation takes place in the coastal Member State**. As regards interception on the high seas, subject to guaranteeing the protection of fundamental rights and the principle of *non-refoulement*, **disembarkation may take place in the third country from which the ship departed**. If this is not possible, then **disembarkation takes place in the host Member State**.

As regards **disembarkation following a rescue operation**, this proposal refers to the concept of **'place of safety'** as defined in the Guidelines on the Treatment of Persons Rescued at Sea issued by the International Maritime Organisation, taking into account aspects of fundamental rights, and requires Member States to cooperate with the responsible rescue coordination centre to provide a suitable port or place of safety and to ensure rapid and effective disembarkation.

This proposal takes into account the fact that, at this stage, the maritime and aerial units would be acting under the coordination of the rescue coordination centre, which determines the appropriate port or place of disembarkation.

However, it also recognises the possibility for the maritime units to disembark in the host Member State if they are not released of their obligation to render assistance to persons in distress as soon as reasonably practicable, taking into account the safety of the rescued persons and that of the maritime unit itself.

Territorial provisions: lastly, the proposal includes a series of classical provisions in regard to the participation (or otherwise) of Denmark, Ireland and the United Kingdom in the current text, in accordance with the relevant provisions of the Treaties and protocols and on the association of third countries in its enforcement.

BUDGETARY IMPLICATION: the proposal has no implications for the EU's budget.