



Analysis

“If at first you don’t succeed”...

European Commission proposes new rules on interception and disembarkation during Frontex sea operations

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On 12 April 2013, the European Commission submitted a draft regulation establishing rules for sea border surveillance in the context of operations coordinated by Frontex. This proposal follows an ECJ (Court of Justice of the European Union) ruling in September 2012 which annulled the earlier Decision 2010/252 on the same matter after the European Parliament challenged the validity of the procedure adopted to pass the Decision.

Background

Decision 2010/252 was adopted on 26 April 2010 to supplement the 2006 Schengen Borders Code (SBC) by clarifying the responsibilities and duties of “*participating units*” during surveillance operations at external sea borders in the context of operational cooperation coordinated by Frontex. It was proposed by the Commission in the context of the increasing death toll of migrants trying to reach Europe by sea and mounting criticism regarding human rights violations during sea border control operations, as demonstrated in the Human Rights Watch (HRW) report on Italy’s “push back” operations to Libya. The HRW report had denounced, *inter alia*, the role of Frontex and the failure of Maltese and Italian border guards to rescue migrants in distress at sea.¹

The text was adopted through the “Regulatory Procedure with Scrutiny” whereby the European Parliament can formulate objections and veto a text where the original legislation (Schengen Borders Code) was adopted under the co-decision procedure and where the submitted text (Council Decision 2010/252) only amends “non-essential elements” of this legislation.

The European Parliament was of the opinion that the Decision “*exceeded the implementing powers conferred by the Schengen Borders Code.*” However, as the death toll in the Mediterranean increased, MEPs in favour considered “*that it was none the less preferable for the Union to create a*

¹ http://www.hrw.org/sites/default/files/reports/italy0909webwcover_0.pdf

legal instrument, however imperfect it might be, to address the increase in migration by sea expected in the summer of 2010.”²

After the adoption of Decision 2010/252, the European Parliament challenged its legality arguing that the Decision was introducing new “essential elements” to the role of border guards as defined in the SBC. These included granting border-guards new enforcement powers (the interception of ships for example), including search and rescue and disembarkation within the scope of border surveillance, as well as extending the territorial scope of border surveillance to “*contiguous zones and the high seas.*” Moreover, the possibility of disembarking migrants intercepted on the high seas in third countries modified “essential elements” of maritime surveillance since it opposed the rights established in Article 13 of the SBC – which states migrants ought to be notified of the reasons why they were refused access to the Schengen zone and should be able to challenge this decision.

The European Parliament’s opinion was supported by the European Court of Justice’s Advocate Paolo Mengozzi on 17 April 2012. [See Statewatch analysis]³

On 5 September 2012, the ECJ found that the Decision did introduce new elements, i.e. the use of the “Regulatory Procedure with Scrutiny” was inappropriate and only the European legislature could decide on that matter. The Court did not rule on whether the text amended already existing elements of the SBC or the Frontex Regulation. It annulled Decision 2010/252 in its entirety because:

*“The adoption of rules on the conferral of enforcement powers on border guards ... **entails political choices** falling within the responsibilities of the European Union legislature... it is important to point out that provisions on conferring powers of public authority on border guards – such as the powers conferred in the contested decision, which include stopping persons apprehended, seizing vessels and conducting persons apprehended to a specific location – **mean that the fundamental rights of the persons concerned may be interfered with to such an extent that the involvement of the European Union legislature is required.**”⁴ [emphasis added]*

The Decision will be maintained “*until the entry into force of new rules within a reasonable time.*”

New proposal

The Commission’s proposal for a draft Regulation was therefore submitted in reaction to the ECJ’s ruling. Due to its nature, the Regulation will be fully binding, contrary to the previous Decision where doubts remained as to the binding nature of Part II of the Annex on search and rescue obligations and disembarkation during Frontex sea operations – Article 1 of the Decision stated this part of the text was not binding, which was challenged by the ECJ in its ruling.

Crucially, the draft Regulation proposes clarification - the European Parliament argues it is a modification - on what the Commission understands by border surveillance:

² General Advocate?

³ <http://www.statewatch.org/news/2012/may/ecj-schengen-borders.pdf>

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<http://curia.europa.eu/juris/document/document.jsf?text=&docid=121662&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1482131>

*“Border surveillance is not limited to the detection of attempts at irregular border crossing but equally **extends to steps such as intercepting ships** 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 border surveillance operation at sea and arrangements intended **to bring such an operation to a successful conclusion.**”*
[emphasis added]

As with Decision 2010/252, the draft Regulation recalls Member States’ obligation to ensure that border surveillance is proportionate to the objective pursued and respects fundamental rights including the rights of refugees and asylum-seekers, with the “procedure Directive”⁵ explicitly mentioned.

A constant: Frontex’s unaccountability

The draft Regulation simply presents Frontex as the coordinator of maritime surveillance operations which may entail search and rescue. Despite the explanatory memorandum attached to the proposal stating that its changes include the amendment of Frontex Regulation 2004/2007, the draft Regulation does not acknowledge the role of the Agency as a potential initiator of joint operations, especially at sea. This is a new power granted to the Agency since October 2011 with the amendment of Article 3 of its mandate.

The draft Regulation does not clarify the chain of responsibilities either as it simply reproduces Article 1 of the Decision 2010/252 whereby:

“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.”

As pointed out by Statewatch in previous coverage and emphasised by the Council of Europe in a recent report:

*“Given that the amended Frontex Regulation (Article 3.1) allows the Agency to “initiate and carry out joint operations and pilot projects”, one may therefore consider that Frontex could be held responsible, at least in part, for the way these activities are carried out in practice, when initiated by Frontex.”*⁶

Risk of refoulement

It is worth noting that the draft Regulation foresees that *“Member States and the Agency are bound by the provisions of the asylum acquis ... with regard to applications for asylum made in the territory, including at the border of the transit zones of Member States.”*

This suggests that asylum law obligations **do not apply** to situations in contiguous zones or on the high seas, which is particularly disturbing given that Article 10(3) foresees that *“in the case of*

⁵ Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status.

⁶ <http://assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=19547&Language=EN>

interception on the high seas...disembarkation may take place in the third country from where the ship departed."

If implemented, this article may be in contradiction with the principle of non-*refoulement*, even if Article 10(3) is conditional upon the respect of all the conditions laid out in Article 4. In particular, Article 4(1) prohibits disembarkation or transfer to the authorities of a country where there is a risk of the death penalty, torture, inhuman or degrading treatment and punishment. Article 4(2) emphasises that no decision shall be taken without taking into account the situation in the country.

However, as stressed in the latest report by the Fundamental Rights Agency on the rights of migrants at the EU's southern sea borders,⁷ six out of the eight countries with which the EU cooperates still criminalise unauthorised emigration. Frontex itself cooperates with many countries, many of them with a poor human rights record including Belarus or Nigeria.

It is worth noting that no impact assessment seems to have been conducted on the fundamental rights impact of the potential disembarkation of intercepted migrants and refugees in the third country from which they departed.

Moreover, the draft Regulation does not give concrete suggestions as to who shall be responsible for assessing the situation of third countries during a Frontex sea operation. No mention is made of the Frontex Consultative Forum on Fundamental Rights, of the UNHCR, of the European Asylum Support Office or any supporting agency which may help gain an accurate and timely insight on the situation in the country of disembarkation. The draft regulation lacks proper guarantees to put the obligation of non-*refoulement* into practice, especially since it does not allow all migrants to reach the EU where their situation can be assessed in a fair manner, pursuant to the obligations enshrined in the Procedure Directive.

Risks of *refoulement* also exist when implementing Article 6 of the draft Regulation on interception in the territorial sea. Paragraph 6(1)g states that participating units in the Frontex operation may order "*the ship to modify its course outside of or towards a destination other than the territorial sea or the contiguous zone.*" Such a situation would echo what has been described as "push-backs" of migrants and refugees, a practice condemned by the European Court of Human Rights in February 2012 in *Hirsi and Jamaa v. Italy*,⁸ a ruling to which the Commission refers in the present draft Regulation.

Many NGOs, including the Jesuit Refugee Council (JRS), Human Rights Watch⁹ and Migreurop¹⁰, have denounced the EU's logic of the "externalisation" of migration and asylum management in third countries and its negative impact on migrants, which JRS calls the "*inability to access asylum in EU territory.*"¹¹

In 2007, the Council of Europe issued a paper on irregular migrants in Europe where it stressed that:

⁷ <http://fra.europa.eu/en/press-release/2013/fundamental-rights-eus-southern-sea-borders-deficiencies-promising-practices-and>

⁸ <http://www.statewatch.org/news/2012/feb/ecj-italy-libya-judgment.pdf>

⁹ <http://www.hrw.org/news/2012/09/12/europe-failing-tackle-boat-tragedies-mediterranean>

¹⁰ <http://www.migreurop.org/rubrique43.html?lang=fr>

¹¹ <http://www.jirseurope.org/AdvocacyPages/Externalisation%20of%20Asylum/EXTERNALISATIONcampaign.htm>

“A number of European states have ‘externalised’ their border controls. UNHCR has emphasised the need to ensure that measures taken to manage borders, fight trafficking, and facilitate removal and readmission, do not result in violations of basic rights, including the right of access to effective asylum procedures.”¹²

On 19 April 2013 in a report on Frontex, the Council of Europe recommended that:

“The European Union ensure[s] that Frontex and EU member States comply with their human rights obligations by revising the Schengen Borders Code to take into account the fact that EU member States and Frontex have responsibilities that go beyond border surveillance, in particular in relation to non refoulement, search and rescue activities and other interceptions at sea.”¹³

Search & Rescue

It is doubtful that the draft Regulation really addresses the issues at stake in terms of search and rescue responsibilities.

First of all, recent reports published within the past few weeks by the Council of Europe and the Fundamental Rights Agency of the European Union have pointed out specific concerns leading to the potential violation of the rights of migrants and refugees during sea border operations. These reports suggest that the existence of Decision 2010/252 – which remains in force until the Regulation is adopted – did not significantly improve the situation. An emblematic example is the ‘Left-To-Die’ tragedy in March 2011 where about 72 people were left adrift in the Mediterranean without being provided assistance, which resulted in the deaths of 63 of them.¹⁴

The Commission’s proposal highlights that it *“should not affect the responsibilities of search and rescue authorities, including for ensuring that coordination and cooperation is carried out in such a way that the persons rescued can be delivered to a port or a place of safety.”*

As stated in Article 9 of the draft Regulation, if participating units identify a vessel in distress, they *“shall promptly communicate their assessment of the situation to the responsible Rescue Coordination Centre”* and ensure the safety of the persons in distress *“while awaiting instructions.”*

However, several recent examples have shown how lengthy notification procedures may have resulted in belated interventions that did not provide immediate support to people in distress. The draft Regulation does not bring forward any alternative procedure to ensure faster interventions and the disembarkation of migrants in distress in a place of safety on EU territory.

In September 2012, Judith Sunderland from Human Rights Watch wrote:

“Frontex, the EU external borders agency, and a proposed new European External Border Surveillance System should have clear and specific guidelines as well as procedures to ensure that rescue is the paramount consideration in European operations at sea. The moral and financial burden for rescuing lives at sea should be borne by all of the continent's nations, not

¹² <https://wcd.coe.int/ViewDoc.jsp?id=1237553>

¹³ <http://www.statewatch.org/news/2013/apr/eu-coe-frontex-report-2013.pdf>

¹⁴ http://assembly.coe.int/ASP/NewsManager/EMB_NewsManagerView.asp?ID=7843&L=2

just those on Europe's southern borders. Above all, base politics should not be allowed to stand in the way of humanitarian imperatives.”¹⁵

Concluding remarks

It remains to be seen what amendments will be made by the Council and the European Parliament in the legislative process.

The current ‘trilogue’ negotiations¹⁶ regarding the draft Regulation on the European Border Surveillance System – EUROSUR - reflect a political disagreement between the three institutions on the purpose of increased surveillance at sea borders.

While the Commission considers that EUROSUR should help *“improve the reaction capability when detecting and preventing irregular migration and cross-border crime as well as protecting and saving lives of migrants”*, the Council is pushing for a more security-based approach where EUROSUR will improve *“reaction capability...for the purpose of detecting, preventing and combatting illegal and cross-border crime and subsequently contributing to better protecting and saving the lives of migrants.”* The European Parliament, on the contrary, is promoting an understanding of EUROSUR as improving *“reaction capability...with an aim to protect and save lives of people in distress at the external borders.”¹⁷*

The Commission’s proposal for a draft Regulation on Frontex sea operations comes at the same time as official reports have questioned the Agency’s involvement in operations that may lead to the violation of migrants’ rights and as the EU’s Ombudsman issued recommendations to Frontex to improve its fundamental rights strategy. The Ombudsman emphasised that:

“The main concern is that the [Fundamental Rights] Strategy does not clarify Frontex's responsibility for possible infringements of fundamental rights which occur in the course of its operations.”

The fact that the Commission’s proposal will be discussed through legislative procedure means that the European Parliament will be expected to play a significant role in amending the text regarding both the understanding of border surveillance, and Frontex’s responsibilities when carrying out sea operations.

¹⁵ Ibid at 9

¹⁶ ‘Trilogue’ negotiations refer to discussions between the co-legislators – the Council of the EU and the European Parliament – and the European Commission.

¹⁷ <http://www.statewatch.org/news/2013/mar/eu-council-eurosur-multi-column-7142-13.pdf>