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THE EUROPEAN UNION**

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**NOTE**

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From:	Presidency
To:	Permanent Representatives Committee
No. Cion doc.:	8521/13 FRONT 38 CODEC 853 COMIX 246
Subject:	Proposal for a Regulation of the European Parliament and of the Council establishing rules for 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 of the European Union

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The legal basis of the above proposal is Article 77(2)(d) of the Treaty on the Functioning of the European Union (TFEU), which provides that the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt “any measure necessary for the gradual establishment of an integrated management system for external borders.”

The objective of the Union policy in this context is to ensure the efficient monitoring of the crossing of the Member States’ external borders, through, among other means, border surveillance. This draft 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 Frontex.

It is recalled that this proposal came as an answer to the annulment by the European Court of Justice (ECJ) of the Council Decision 2010/252/EU (henceforth "2010 Decision"), which had been adopted as an implementing measure with a view to supplementing the Schengen Borders Code (SBC).

In that judgment, the ECJ annulled the 2010 Decision insofar as it considered that it contains essential elements of the surveillance of the sea external borders of the Member States related to the interception, rescue and disembarkation, which it considered to go beyond the scope of the implementing measures, of which adoption was allowed pursuant to Article 12(5) SBC and that only the EU legislature [under the ordinary legislative procedure] was entitled to adopt rules of such a nature.

The Court in order to ensure the smooth functioning of the current and future operations coordinated by Frontex, decided to maintain the effects of the annulled 2010 Decision, until the EU legislature would adopt new rules within a reasonable time. It is recalled that pursuant to Article 266 TFEU *"the institution whose act has been declared void [...] shall be required to take the necessary measures to comply with the judgment of ECJ"*.

Moreover, the Presidency recalls that already in October 2009, the European Council called for establishing *"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"*.<sup>1</sup> This was again confirmed in the Stockholm Programme of December 2009, where the European Council called for *"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."*<sup>2</sup>

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<sup>1</sup> European Council, Presidency Conclusions 29-30 October 2009.

<sup>2</sup> See point 5.1 of the Stockholm Programme, "Integrated management of the external borders", OJ C 115, 4.5.2010, p. 1.

Following the above judgment, this proposal was submitted by the Commission to the European Parliament and to Council in April 2013. The Working Party on Frontiers/Mixed Committee, completed three readings thereof (the latest on 3 December 2013) on the basis of respective Presidency compromise proposals. In the meantime, the SCIFA/ Mixed Committee also discussed about the line to take on issues related to search and rescue (Art. 9) and disembarkation (Art. 10) in November 2013.

Bearing in mind the necessity to act within a reasonable time (which could not be deemed as observed if no instrument is adopted before the Parliament's elections next year), and following the tragic events of Lampedusa, the finalisation of the Council position regarding this dossier has become a matter of urgency.

Providing a mandate for this Presidency and the incoming one to be engaged in informal trilogues with the European Parliament, would be the first step towards a first-reading agreement, before the end of Parliament's term next year (a procedure that has to be completed in very tight deadlines). It is noted that the LIBE Committee voted on its Report for the proposal on 9 December 2013.

A new Presidency compromise text was examined by the JHA Counsellors at their meeting of 9 December 2013. This compromise was broadly acceptable by delegations; during this meeting further compromise suggestions were discussed positively in order to accommodate the few issues remaining outstanding, where it was possible in the context of a general and balanced compromise.

In the light of the aforementioned last examination of the proposal, the Presidency submits to the Permanent Representatives Committee certain new compromise suggestions (as highlighted in the annex to this note), with a view to confirming that there is a sufficient support for its overall compromise on the draft proposal.

In view of the above considerations, the Presidency is of the opinion that the proposal is ripe to be submitted to the Permanent Representatives Committee for confirming a negotiating mandate with the European Parliament.

## **Conclusion**

The Presidency invites the Permanent Representatives Committee to endorse the compromise package reflected in the annex, with a view to mandate the Presidency to conduct the first informal trilogue on the draft Regulation with the European Parliament.

Suggested amendments vis-à-vis the previous Presidency note (doc. 17333/13) are in bold, italics, underlined and strikethrough, whereas amendments vis-à-vis the original Commission proposal are in bold, italics and strikethrough.

2013/106 (COD)

Proposal for a

**REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**establishing rules for 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 of the European Union**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 77(2)(d) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national Parliaments,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) The objective of Union policy in the field of the Union external borders is to ensure the efficient monitoring of the crossing of external borders including through border surveillance. The purpose of border surveillance is 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. Border surveillance should be effective in preventing and discouraging persons from circumventing the checks at border crossing points. To this end, border surveillance is not limited to the detection of attempts at irregular border crossing but equally extends to steps such as intercepting ~~ship~~ *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 border surveillance operation at sea and arrangements intended to bring such an operation to a successful conclusion.

- (1a) *The scope of application of this Regulation is limited 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 ('the Agency') established by Council Regulation (EC) No 2007/2004 of 26 October 2004<sup>1</sup>. Investigative and punitive measures under criminal law are dealt with under national criminal law and in the existing instruments of mutual legal assistance in the field of judicial cooperation in criminal matters in the Union.*
- (2) ~~The *European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union ('the Agency')* established by Council Regulation (EC) No 2007/2004 of 26 October 2004<sup>2</sup>~~ is responsible for the coordination of operational cooperation between Member States in the field of management of the external borders, including as regards border surveillance. The Agency is also responsible to assist 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. Specific rules with regard to border surveillance activities carried out by maritime-,*land* and aerial units of one Member State at the sea border of other Member States or on the high seas in the context of operational cooperation coordinated by the Agency are necessary to further strengthen such cooperation.
- (3) The ~~*establishment of the*~~ European Border Surveillance System (EUROSUR) established by Regulation (EU) No ~~[.../...]~~1052/2013 of the European Parliament and of the Council of ~~[...]~~ 22 October 2013<sup>3</sup> should strengthen the information exchange and operational cooperation between Member States and with the Agency. This ensures that the situational awareness and reaction capability of Member States improves considerably, also with the support of the Agency, for the purposes of detecting, ~~and~~ *preventing and combating illegal irregular immigration, for combating and* cross-border crime and ~~for~~ contributing to *ensuring the* protection and ~~saving~~ the lives of migrants at their external borders. When coordinating border surveillance operations, the Agency should provide Member States with information and analysis concerning these operations.
- (3a) *This Regulation ~~is intended to~~ replaces Council Decision 2010/252/EU of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of operational cooperation coordinated by the Agency which was annulled by the Court of Justice of the European Union ('the Court') by its judgement of 5 September 2012 in case C-355/10.*
- (3b) *In that judgement, the Court maintained the effects of Decision 2010/252/EU until the entry into force of new rules. Therefore, as of the day of entry into force of this Regulation, the said Decision should cease to produce effect.*

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<sup>1</sup> OJ L 349, 25.11.2004, p. 1.

<sup>2</sup> OJ L 349, 25.11.2004, p. 1.

<sup>3</sup> OJ L 295, 6.11.2013, p. 11.

- ~~(3c) The Court annulled Decision 2010/252/EU because its provisions dealing with interception, rescue at sea and disembarkation implied the conferral of enforcement powers on border guards, which could interfere with the fundamental rights of persons concerned as well as with the sovereign rights of third countries, and as such constituted essential elements of surveillance of the sea external borders, and therefore should have been defined by the EU legislature.~~
- (4) During border surveillance operations *at sea*, Member States and the Agency should respect their *respective* obligations under *International Law, in particular* the United Nations Convention on the Law of the Sea, the International Convention for the Safety of Life at Sea, the International Convention on Maritime Search and Rescue, the United Nations Convention against Transnational Organized Crime and its Protocol against the Smuggling of Migrants by Land, Sea and Air, the Convention relating to the Status of Refugees, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the International Covenant on Civil and Political Rights, the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and other relevant international instruments.
- (4a) *When coordinating border surveillance operations at sea, the Agency should fulfil its tasks in full compliance with the relevant Union law, including the Charter of Fundamental Rights of the European Union ('the Charter of Fundamental Rights') and relevant international law, in particular as referred to in Recital (4).*
- (5) In accordance with Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code)<sup>1</sup> and general principles of Union law, any measure taken in the course of a surveillance operation should be proportionate to the objectives pursued, non-discriminatory and it should fully respect human dignity, fundamental rights and the rights of refugees and asylum seekers, including the principle of *non-refoulement*. Member States and the Agency are bound by the provisions of the asylum *acquis*, and in particular of *Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)*~~Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status~~<sup>2</sup> with regard to applications for asylum made in the territory, including at the border or in the transit zones of Member States.
- (6) The possible existence of an arrangement between a Member State and a third country cannot absolve Member States from those obligations whenever they are aware or ought to be aware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that third country amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment or where they are aware or ought to be aware that this third country is engaged in practices in contravention of the principle of *non-refoulement*.

<sup>1</sup> OJ L 105, 13.4.2006, p. 1.

<sup>2</sup> OJ L ~~180326, 29.6.2013~~~~13.12.2005~~, p. ~~6013~~.

- (7) During a border surveillance operation at sea, a situation may occur where it will be necessary to render assistance to persons found in distress. In accordance with international law, every State must require the master of a ~~ship~~ **vessel** flying its flag, in so far as he can do so without serious danger to the ~~ship~~ **vessel**, the crew or the passengers, to render assistance to any person found at sea in danger of being lost and to proceed with all possible speed to the rescue of persons in distress. Such assistance should be provided regardless of the nationality or status of the persons to be assisted or of the circumstances in which they are found.
- (8) That obligation should be carried out by Member States in accordance with the applicable provisions of international instruments governing search and rescue situations and in accordance with the requirements concerning the protection of fundamental rights. This Regulation 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.
- (8a) The conduct of sea operations in the search and rescue regions of a third country should be subject to establishing communication channels with the search and rescue authorities of that third country when planning a sea operation thereby ensuring that those authorities would be able to respond to search and rescue cases developing within their search and rescue region.*
- (9) Pursuant to Regulation (EC) No 2007/2004, border surveillance operations coordinated by the Agency are conducted in accordance with an operational plan. Accordingly, as regards sea operations, the operational plan should include specific information on the application of the relevant jurisdiction and legislation in the geographical area where the joint operation, ~~or~~ pilot project **or rapid intervention** takes place, including references to international and Union law, regarding interception, rescue at sea and disembarkation. ~~In turn,~~ **The operational plan should be established in accordance with the provisions of** this Regulation ~~governing the issues of~~ interception, rescue at sea and disembarkation in the context of sea border surveillance operations coordinated by the Agency **and having regard to the particular circumstances of the operation concerned.**
- (10) The practice under Regulation (EC) No 2007/2004 is that for each sea operation, a coordination structure is established within the host Member State, composed of officers from the host Member State, guest officers and representatives of the Agency, including the Coordinating Officer of the Agency. This coordination structure, usually called International Coordination Centre, should be used as a channel for communication between the officers involved in the sea operation and the authorities concerned.
- (11) This Regulation respects the fundamental rights and observes the principles recognised by the Charter of Fundamental Rights of the European Union, notably the right to life, human dignity, prohibition of torture, **of persecution** and of inhuman or degrading treatment or punishment, right to liberty and security, *non-refoulement*, non-discrimination, the right to an effective remedy, the right to asylum and the rights of the child.



- (12) Since the objectives of the action to be taken, namely the adoption of specific rules for the surveillance of the sea borders by border guards operating under the coordination of the Agency, cannot be sufficiently achieved by the Member States due to the differences in their laws and practices, and can therefore, by reason of the multinational character of the operations, be better achieved at the level of the Union, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve those objectives.
- (13) In accordance with Articles 1 and 2 of *the* Protocol (No 22) on the position of Denmark, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, Denmark is not taking part in the adoption of this Regulation and is not bound by it or subject to its application. Given that this Regulation builds upon the Schengen *acquis*, ~~under Title V of Part Three of the Treaty on the Functioning of the European Union~~, Denmark shall, in accordance with Article 4 of that Protocol, decide within a period of six months after the ~~date of adoption of~~ **Council has decided on** this Regulation whether it will implement it in its national law.
- (14) As regards Iceland and Norway, this Regulation constitutes a development of the provisions of the Schengen *acquis* within the meaning of the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the *latters'* association ~~of those two States~~ with the implementation, application and development of the Schengen *acquis*<sup>1</sup> which fall within the area referred to in Article 1, point A, of Council Decision 1999/437/EC **of 17 May 1999**<sup>2</sup> on certain arrangements for the application of that Agreement.
- (15) As regards Switzerland, this Regulation constitutes a development of the provisions of the Schengen *acquis* within the meaning of the Agreement between the European Union, the European Community and the Swiss Confederation ~~concerning~~ **on** the association ~~of the Swiss Confederation's~~ **association** with the implementation, application and development of the Schengen *acquis*,<sup>3</sup> which fall within the area referred to in Article 1, point A, of Decision 1999/437/EC read in conjunction with Article 3 of Council Decision 2008/146/EC ~~of 28 January 2008 on the conclusion of that Agreement on behalf of the European Community~~.<sup>4</sup>

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<sup>1</sup> OJ L 176, 10.7.1999, p. 36.

<sup>2</sup> OJ L 176, 10.7.1999, p. 31.

<sup>3</sup> OJ L 53, 27.2.2008, p. 52.

<sup>4</sup> OJ L 53, 27.2.2008, p. 1.

- (16) As regards Liechtenstein, this Regulation constitutes a development of the provisions of the Schengen *acquis* within the meaning of the Protocol signed between the European Union, the European Community, the Swiss Confederation and the Principality of Liechtenstein on the accession of the Principality of Liechtenstein to the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen *acquis*<sup>1</sup>, which fall within the area referred to in Article 1, point A, of Decision 1999/437/EC<sup>2</sup> read in conjunction with Article 3 of Council Decision 2011/350/EU of 7 March 2011 on the conclusion of that protocol on behalf of the European Union.<sup>3</sup>
- (17) This Regulation constitutes a development of the provisions of the Schengen *acquis* in which the United Kingdom does not take part, in accordance with Council Decision 2000/365/EC of 29 May 2000 concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen *acquis*.<sup>4</sup> The United Kingdom is therefore not taking part in its adoption and is not bound by it or subject to its application.
- (18) This Regulation constitutes a development of the provisions of the Schengen *acquis* in which Ireland does not take part, in accordance with Council Decision 2002/192/EC of 28 February 2002 concerning the request of Ireland to take part in some of the provisions of the Schengen *acquis*.<sup>5</sup> Ireland is therefore not taking part in its adoption and is not bound by it or subject to its application.

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<sup>1</sup> *OJ L 160, 18.5.2011, p. 21.*

<sup>2</sup> ~~*OJ L 176, 10.7.1999, p. 31.*~~

<sup>3</sup> *OJ L 160, 18.6.2011, p. 19.*

<sup>4</sup> OJ L 131, 1.6.2000, p. 43.

<sup>5</sup> OJ L 64, 7.3.2002, p. 20.

HAVE ADOPTED THIS REGULATION:

## CHAPTER I

### GENERAL PROVISIONS

#### *Article 1*

##### Scope

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.

#### *Article 2*

##### Definitions

For the purpose of this Regulation, the following definitions shall apply:

1. 'Agency' means the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union established by Regulation (EC) No 2007/2004;
2. 'sea operation' means a joint operation, pilot project or rapid intervention carried out by Member States for the surveillance of their external sea borders under the coordination of the Agency;
3. 'host Member State' means a Member State in which a sea operation takes place or from which it is launched;
4. 'participating Member State' means a Member State which participates in a sea operation by providing ~~assets or human resources~~ ***technical equipment, border guards deployed as part of the European Border Guard Teams or other relevant staff*** but which is not a host Member State;
5. 'participating unit' means a maritime, ***land*** or aerial unit ***under the responsibility*** of the host Member State or of a participating Member State ~~***that according to national and international law has the authority to take the measures foreseen by this Regulation***~~ ***takes part in a sea operation;***

6. 'International Coordination Centre' means the coordination structure established within the host Member State for the coordination of the sea operation;
7. 'National Coordination Centre' means the national coordination centre established for the purposes of the European Border Surveillance System (EUROSUR) in accordance with Regulation (EU) No ~~f.../...~~1052/2013;
8. ~~'ship' means a boat, vessel or any other craft~~ **'vessel' means any type of water craft, including boats, dinghies, floating platforms, non-displacement craft and seaplanes, used or capable of being used at sea;**
9. 'stateless ~~vessel ship~~' means a ~~vessel ship~~ without nationality or assimilated to a ~~vessel ship~~ without nationality when the ~~vessel ship~~ has not been granted by any State the right to fly its flag or when it sails under the flags of two or more States, using them according to convenience;
10. 'Protocol against the Smuggling of Migrants' means the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organised Crime signed in Palermo, Italy in December 2000;
11. 'place of safety' means a location where rescue operations are considered to terminate and where the survivors' safety of life ~~including as regards the protection of their fundamental rights~~ is not threatened, where their basic human needs can be met and from which transportation arrangements can be made for the survivors' next destination or final destination, **in compliance with the principle of non-refoulement;**
12. 'Rescue Coordination Centre' means a unit responsible for promoting efficient organisation of search and rescue services and for coordinating the conduct of search and rescue operations within a search and rescue region as defined in the 1979 International Convention on Maritime Search and Rescue.
13. **'Operational plan' means the operational plan referred to in Articles 3a and 8e of Regulation (EC) No 2007/2004.**
14. **'contiguous zone' means a zone adjacent to the territorial sea as defined in Article 33 of the United Nations Law of the Sea Convention and that has been established by the coastal State pursuant to relevant rules of international law and duly defined in national law and regulations to encompass immigration purposes.**

## CHAPTER II

### GENERAL RULES

#### *Article 3*

##### Safety at sea

Measures taken for the purpose of a sea operation shall be conducted in a way that does not put at risk the safety of the persons intercepted or rescued, ~~and~~ the safety of the participating units *or that of third parties*.

#### *Article 4*

##### Protection of fundamental rights and the principle of *non-refoulement*

1. No person shall be disembarked in, *forced to enter* or otherwise handed over to the authorities of a country where there is a serious risk that such person would be subjected to the death penalty, torture, *persecution* or other inhuman or degrading treatment or punishment or from which there is a serious risk of expulsion, removal or extradition to another country in contravention of the principle of *non-refoulement*. *Intercepted or rescued persons shall not be disembarked in a country when the host Member State or the participating Member States are aware or ought to be aware that that country is engaged in such practices.*
2. ~~Before deciding on disembarkation in a third country,~~ *When considering the possibility of disembarkation in a third country, in the context of planning a sea operation,* the participating units *host Member State, in coordination with participating Member States and the Agency,* shall take into account the general situation in that third country ~~and intercepted.~~ *The assessment of the general situation in a third country may shall be based on information available to the host Member State derived including from Union bodies, offices and agencies, and relevant international organisations, and ~~it~~ that assessment may shall be part of the operational plan. ~~and~~ Intercepted or rescued persons shall not be disembarked in that third country when the host Member State or the participating Member States are aware or ought to be aware that this third country is engaged in practices as described in paragraph 1.*

3. ~~In case of~~ *During the operation, before* disembarkation in a third country *and based taking into account* ~~on the assessment of the general situation in that third country in accordance with paragraph 2,~~ the participating units shall, *to the extent possible and without prejudice to Article 3,* identify the intercepted or rescued persons, ~~and~~ assess their personal circumstances, ~~to the extent possible before disembarkation. They shall, and~~ inform them ~~intercepted or rescued persons~~ of the place of disembarkation in an appropriate way, ~~and~~ ~~and they. They shall~~ give them an opportunity to express any reasons for believing that disembarkation in the proposed place would be in violation of the principle of *non-refoulement*.
4. The participating units shall address the special needs of children, victims of trafficking, persons in need of urgent medical assistance, persons in need of international protection and other persons in a particularly vulnerable situation throughout the sea operation.
5. Border guards *and other relevant staff* participating in a sea operation shall be trained with regard to relevant provisions of fundamental rights, refugee law and the international legal regime of search and rescue *in accordance with the second paragraph of Article 5 of Regulation (EC) No 2007/2004.*

## CHAPTER III

### SPECIFIC RULES

#### Article 5

##### Detection

1. Upon detection, the participating units shall approach a ~~ship~~ *vessel* suspected of *carrying persons ~~crossing circumventing~~ or intending to ~~cross the sea border in an irregular manner circumvent checks at border crossing points or of being engaged in the smuggling of migrants by sea in order~~* to observe its identity and nationality and, pending further measures, ~~it~~ shall ~~be~~ *surveyed that vessel* at a prudent distance. The participating units shall ~~communicate~~ *collect and report* information about the vessel immediately to the International Coordination Centre.
2. Where ~~thea~~ ~~ship~~ *vessel* is about to enter or it has entered the territorial sea or the contiguous zone of a Member State that is not participating in the sea operation, the participating units shall ~~communicate~~ *collect and report* information about ~~thate~~ ~~ship~~ *vessel* to the International Coordination Centre, which shall convey this information to the National Coordination Centre of the Member State concerned.
3. The participating units shall ~~communicate~~ *collect and report* information about any ~~ship~~ *vessel* suspected of being engaged in illegal activities at sea outside the scope of a sea operation to the International Coordination Centre, which shall convey this information to the National Coordination Centre of the Member State or Member States concerned.

#### Article 6

##### Interception in the territorial sea

1. In the territorial sea of the host Member State or a *neighbouring* participating Member State, the participating units shall, ~~upon~~ *subject to the authorisation of the coastal Member State*, take one or more of the following measures when there are reasonable grounds to suspect that a ~~ship~~ *vessel* ~~is~~ *may be* carrying persons ~~intending~~ *who intend* to circumvent checks at border crossing points or is engaged in the smuggling of migrants by sea:
  - (a) requesting information and documentation on ownership, registration and elements relating to the voyage *of the vessel*, and on the identity, nationality and other relevant data on persons on board;

- (b) stopping, boarding and searching the ~~ship~~ *vessel*, its cargo and persons on board, and questioning persons on board;
- (c) making persons on board aware that they may not be authorised to cross the border and that persons directing the ~~craft~~ *vessel* may face penalties for facilitating the voyage;
- (d) seizing the ~~ship~~ *vessel* and apprehending persons on board;
- (e) ordering the ~~ship~~ *vessel* to ~~modify~~ *alter* its course outside of or towards a destination other than the territorial sea or the contiguous zone, including escorting the vessel or steaming nearby until ~~the ship is heading on such course~~ *it is confirmed that the vessel is keeping to that given course*;
- (f) conducting the ~~ship~~ *vessel* or persons on board to ~~the host Member State or to another Member State participating in the operation, or to the coastal Member State.~~

**Any measures taken in accordance with this paragraph shall be proportionate and shall not exceed what is necessary to achieve the objectives of this Article.**

2. The host Member State or a ~~the~~ *neighbouring* participating Member State on whose territorial sea the interception takes place ~~shall may~~ authorise *one or more of* the measures referred to in paragraph 1 ~~and it~~. *The host Member State* shall instruct the participating unit appropriately through the International Coordination Centre.

The participating unit shall inform the host Member State, through the International Coordination Centre, whenever the master of the ~~ship~~ *vessel* requests that a diplomatic agent or a consular officer of the flag State be notified.

3. Where there are reasonable grounds to suspect that a *stateless vessel* ~~ship without nationality or one that may be assimilated to a ship without nationality~~ is carrying persons intending to circumvent the checks at border crossing points or is engaged in the smuggling of migrants by sea, the host Member State or the *neighbouring* participating Member State in whose territorial sea the stateless ~~ship~~ *vessel* is intercepted ~~shall may~~ authorise *that it be stopped and that* ~~and instruct the participating unit to stop it and to take any one or more of the measures laid down in paragraph 1~~ *be taken. The host Member State shall instruct the participating unit appropriately through the International Coordination Centre.*

4. Any operational activities in the territorial sea of a Member State that is not participating in the sea operation shall be conducted in accordance with the authorisation of that Member State. ~~The International Coordination Centre shall be informed of any communication with that Member State and of the subsequent course of action authorised by that Member State.~~ *The host Member State shall instruct the participating unit through the International Coordination Centre based on the course of action authorised by that Member State.*



Article 7

Interception on the high seas

1. On the high seas, the participating units ~~shall~~**may** take one or more of the following measures when there are reasonable grounds to suspect that a ~~ship~~ **vessel** is engaged in the smuggling of migrants by sea subject to the authorisation of the flag State in accordance with the Protocol against the Smuggling of Migrants, **and where relevant, national and international law, and in accordance with the instructions of the host Member State:**
  - (a) requesting information and documentation on ownership, registration and elements relating to the voyage **of the vessel**, and on the identity, nationality and other relevant data on persons on board;
  - (b) stopping, boarding and searching the ~~ship~~ **vessel**, its cargo and persons on board, and questioning persons on board;
  - (c) making persons on board aware that they ~~are~~**may** not be authorised to cross the border and that persons directing the **vessel** ~~craft~~ may face penalties for facilitating the voyage;
  - (d) seizing the ~~ship~~ **vessel** and apprehending persons on board;
  - (e) ordering the ~~ship~~ **vessel** to ~~modify~~**alter** its course ~~outside of or~~**towards** a destination other than the territorial sea or the contiguous zone, including escorting the vessel or steaming nearby until the ~~ship~~ **vessel** is heading on such course;
  - (f) conducting the ~~ship~~**vessel** or persons on board to a third country or otherwise handing over the ~~ship~~**vessel** or persons on board to the authorities of a third country;
  - (g) conducting the ~~ship~~ **vessel** or persons on board to the host Member State or to another **neighbouring** Member State participating in the operation.

**Any measures taken in accordance with this paragraph shall be proportionate and shall not exceed what is necessary to achieve the objectives of this Article.**

2. Where the ~~ship~~ **vessel** is flying the flag or displays the marks of registry of the host Member State or of a participating Member State, that Member State ~~shall~~**may**, after confirming the nationality of the ~~ship~~**vessel**, authorise **one or more of** the measures laid down in paragraph 1. **The host Member State shall then instruct the participating unit appropriately through the International Coordination Centre.**

3. Where the ~~ship~~ *vessel* is flying the flag or displays the marks of registry of a Member State that is not participating in the sea operation or of a third country, the host Member State or a participating Member State, depending on whose participating unit has intercepted this ~~ship~~ *vessel*, shall notify the flag State, it shall request confirmation of registry and, if nationality is confirmed, ***it shall request that the flag State take action to suppress the use of its vessel for smuggling of migrants. If the flag State is unwilling or unable to do so either directly or with the assistance of the Member State to whom the participating unit belongs, the latter ~~it~~*** shall request authorisation from the flag State to take any of the measures laid down in paragraph 1. The host Member State or the participating Member State shall inform the International Coordination Centre of any communication with the flag State and of the *intended actions or* measures authorised by the flag State. ***The host Member State shall then instruct the participating unit appropriately through the International Coordination Centre.***
4. Where, though flying a foreign flag or refusing to show its flag, there are reasonable grounds to suspect that the ~~ship~~ *vessel* is, in reality, of the same nationality as a participating unit, that participating unit shall verify the ~~ship~~ *vessel's* right to fly its flag. To this end, it may approach the suspected ~~ship~~ *vessel*. If suspicion remains ~~after the documents have been checked~~, it shall proceed to a further examination on board the ~~ship~~ *vessel*, which must be carried out with all possible consideration. ~~The participating Member State of which the ship is allegedly flying the flag shall be contacted through the appropriate channels.~~
5. Where, though flying a foreign flag or refusing to show its flag, there are reasonable grounds to suspect that the ~~ship~~ *vessel* is, in reality, of the nationality of the host Member State or another participating Member State, the participating unit shall verify the ~~ship~~ *vessel's* right to fly its flag ~~upon authorisation of that host Member State or that other participating Member State.~~
6. Where, in the cases referred to in paragraphs 4 or 5, the suspicions regarding the nationality of the ~~ship~~ *vessel* prove to be founded, ~~thate~~ host Member State or ~~thate~~ participating Member State ~~shall~~ ***may*** authorise ***one or more of*** the measures laid down in paragraph 1. ***The host Member State shall then instruct the participating unit appropriately through the International Coordination Centre.***
7. Pending or in the absence of authorisation of the flag State, the ~~ship~~ *vessel* shall be surveyed at a prudent distance. No other measures shall be taken without the express authorisation of the flag State, except those necessary to relieve imminent danger to the lives of persons or those measures which derive from relevant bilateral or multilateral agreements.

8. Where there are reasonable grounds to suspect that a ~~ship~~ *stateless vessel* without nationality or one that may be assimilated to a ship without nationality is engaged in the smuggling of migrants by sea, the participating unit ~~may board and stop the ship with a view to verifying its statelessness of the host Member State or a participating unit having a border guard from the host Member State on board~~ may board and stop search the ship vessel with a view to verifying its statelessness. ~~Where the participating unit is not of the host Member State or does not have a border guard from the host Member State on board, the host Member State shall instruct one of its own participating units to proceed to the vessel, and it may board and search the vessel with a view to verifying its statelessness.~~ If, ~~in both cases,~~ suspicions prove to be founded ~~the participating unit shall inform the host Member State which may take, directly or with the assistance of the Member State to whom the participating unit belongs,~~ further appropriate measures as laid down in paragraph 1 ~~may be taken~~ in accordance with ~~the~~ national ~~law of the host Member State~~ and international law.
9. A Member State that has taken any measure in accordance with paragraph 1 shall promptly inform the flag State of the results of that measure.
10. The national official representing the host Member State or a participating Member State at the International Coordination Centre shall be ~~designated under national law as an authority for the~~ *responsible to facilitate communications with the relevant authorities of the flag State in seeking* authorisation to verify ~~the~~ right of a ~~ship~~ *vessel* to fly the flag of the Member State concerned or to take any of the measures laid down in paragraph 1.
11. Where the grounds for suspecting that a ~~ship~~ *vessel* is engaged in the smuggling of migrants on the high seas prove to be unfounded or the participating unit does not have jurisdiction to act, but there remains a reasonable suspicion that the ~~ship~~ *vessel* is carrying persons intending to reach the border of a Member State and to circumvent checks at border crossing points, that ~~ship~~ *vessel* shall continue to be monitored. The International Coordination Centre shall communicate information about the ~~ship~~ *vessel* to the National Coordination Centre of the Member States towards which it is directed.

## Article 8

### Interception in the contiguous zone

1. In the zone contiguous to the territorial sea of a Member State, which is a host Member State or a *neighbouring* participating Member State, the measures laid down in Article 6(1) shall be taken in accordance with Article 6(2). *Such authorisation may only be given for measures that are necessary to prevent the infringement of laws and regulations within that Member State's territory or territorial sea.*

2. The measures laid down in Article 6(1) shall not be taken in the contiguous zone of a Member State that is not participating in the sea operation without the authorisation of that Member State. The International Coordination Centre shall be informed of any communication with that Member State and of the subsequent course of action authorised by that Member State. *If that Member State does not give its authorisation and where there is a reasonable suspicion that the vessel is carrying persons intending to reach the border of a Member State, Article 7(11) shall apply.*
3. Where a stateless-ship vessel is transiting the contiguous zone, Article 7(8) shall apply.

## Article 9

### Search and rescue situations

1. During a sea operation, *Member States shall ~~ensure that their participating units shall comply with the~~ observe their obligation to* render assistance to any ship vessel or person in distress at sea *and shall ensure that their participating units comply with that obligation, in accordance with international law and in respect of fundamental rights.* They shall do so regardless of the nationality or status of such a person or the circumstances in which that person is found.
  2. *For the purpose of dealing with search and rescue situations that may occur during a sea operation, the operational plan may contain details adapted to the circumstances of the sea operation concerned, as referred to in Articles 3a(1) and 8e(1) of Regulation (EC) No 2004/2007, and it shall contain, in accordance with relevant international law governing including that on search and rescue, at least the following elements:*
    - 2-(a) When facing, in the course of a sea operation, a situation of uncertainty, alert or distress as regards a ship vessel or any person on board, the participating units shall *consider and promptly* forward as soon as possible all available information to the Rescue Coordination Centre responsible for the search and rescue region in which the situation occurs *and they shall place themselves at the disposal of that Rescue Coordination Centre.*
    - (b) *The participating units shall inform the International Coordination Centre as soon as possible of any contact with the Rescue Coordination Centre and of the course of action taken by them.*
3. ~~A ship or the persons on board shall be considered to be in a situation of uncertainty in particular when:~~
  - (a) ~~doubt exists as to the safety of a ship or the persons on board; or~~
  - (b) ~~there is lack of information concerning progress or position of a ship.~~

4. ~~A ship or the persons on board shall be considered to be in a situation of alert in particular when:~~
- ~~(a) apprehension exists as to the safety of a ship or the persons on board because of information that serious difficulties exist, but not to the extent that a distress situation is likely; or~~
  - ~~(b) there is continued lack of information concerning progress or position of a ship.~~
5. ~~A ship or the persons on board shall be considered to be in a situation of distress in particular when:~~
- ~~(a) positive information is received that a ship or a person on board is in danger and needs immediate assistance; or~~
  - ~~(b) attempts to establish contact with the ship fail and unsuccessful inquiries point to the probability that the ship is in distress; or~~
  - ~~(c) information is received which indicates that the operating efficiency of the ship has been impaired to the extent that a distress situation is likely.~~
- 6.(bc) ~~When assessing~~ ***For the purpose of considering whether the vessel is in the situation of uncertainty, alert or distress*** for the purposes of paragraphs subparagraphs 3 to 5 participating units shall ***forward*** ~~take~~ all relevant ***information and observations to the responsible Rescue Coordination Centrelements into account***, including:
- ~~(a i)~~ the existence of a request for assistance, ***although such a request shall not be the sole factor for determining the existence of a distress situation;***
  - ~~(b ii)~~ the seaworthiness of the ~~ship~~ ***vessel*** and the likelihood that the ~~ship~~ ***vessel*** will not reach its final destination;
  - ~~(c iii)~~ the number of ***persons on board*** ~~passengers~~ in relation to the type and condition of the ~~ship-vessel~~;
  - ~~(d iv)~~ the availability of necessary supplies such as fuel, water, food to reach a shore;
  - ~~(e v)~~ the presence of qualified crew and command of the ~~ship~~ ***vessel***;
  - ~~(f vi)~~ the availability and capability of safety, navigation and communication equipment;
  - ~~(g vii)~~ the presence of ~~passengers~~ ***persons on board*** in urgent need of medical assistance;

~~(h-viii)~~ the presence of deceased ~~passengers~~ **persons on board**;

~~(i-ix)~~ the presence of pregnant women or children;

~~(j-x)~~ the weather and sea conditions, including weather and marine forecasts.

7.~~(ed)~~ ~~Participating units shall promptly communicate their assessment of the situation to the responsible Rescue Coordination Centre. While awaiting instructions from the Rescue Coordination Centre, participating units shall take all the appropriate measures to ensure the safety of the persons concerned.~~

8.~~(de)~~ ~~The existence of a distress situation shall not be exclusively dependent on or determined by an actual request for assistance. Where, despite a ship *vessel is considered* being perceived to be in a *situation of uncertainty, alert or distress* situation, *but* the persons on board refuse to accept assistance, the participating unit shall inform the *responsible* Rescue Coordination Centre and *follow its instructions. The participating unit shall* continue to fulfil a duty of care by surveying the ~~ship vessel~~ *at a prudent distance* and by taking any measure necessary for the safety of the persons concerned, while avoiding to take any action that might aggravate the situation or increase the chances of injury or loss of life.~~

9.~~(ef)~~ ~~Where the Rescue Coordination Centre of the third country responsible for the search and rescue region does not respond to the notification transmitted by the participating unit, the latter shall contact the Rescue Coordination Centre of the host Member State *unless that participating unit considers that another the* Rescue Coordination Centre *of a participating Member State* is better *placed able* to assume coordination of the search and rescue situation.~~

~~*The operational plan may also contain further details adapted to the circumstances of the sea operation concerned.*~~

10.3. ~~*The participating units shall inform the International Coordination Centre as soon as possible of any contact with the Rescue Coordination Centre and of the course of action taken by them.*~~

11.43. ~~Where the ship cannot or can no longer be considered as being in a distress situation or the search and rescue *situation* operation has been concluded, the participating unit shall, in consultation with the International Coordination Centre, resume the sea operation.~~

## Article 10

### Disembarkation

1. **The operational plan may contain details adapted to the circumstances of the sea operation concerned and it, as referred to in Articles 3a(1) and 8e(1) of Regulation (EC) No 2004/2007, shall contain, in accordance with international law and in respect of fundamental rights, at least the following modalities for the disembarkation of the persons intercepted or rescued in a sea operation: ~~coordinated by the Agency~~ shall be set out in the operational plan. Those modalities for disembarkation shall not have the effect of imposing obligations on Member States not participating in the sea operation unless they expressly provide authorisation for measures to be taken in their territorial sea or contiguous zone in accordance with Article 6(4) or Article 8(2).**
  
- ~~2-(a)~~ In the case of interception in the territorial sea or the contiguous zone as laid down in Article 6(2) *or* (4) or in Article 8(1) *or* (2), disembarkation shall take place ~~in the host Member State, or in the participating Member State in whose territorial waters sea or contiguous zone the interception takes place, or in the coastal Member State, without prejudice to Article 6(1)(e) and Article 7(1)(e).~~  
  
~~In the case of interception in the territorial sea or the contiguous zone as laid down in Article 6(4) or Article 8(2), disembarkation shall take place in the Member State in whose territorial waters or contiguous zone the interception takes place.~~
  
- ~~3-(b)~~ Subject to the application of Article 4, in the case of interception on the high seas as laid down in Article 7, disembarkation may take place in the third country from which the ~~ship~~ *vessel is assumed to have* departed. If that is not possible, disembarkation shall take place in the host Member State.
  
- ~~4-(c)~~ In the case of search and rescue situations as laid down in Article 9 *and without prejudice to the responsibility of the Rescue Coordination Centre to identify the most appropriate place for disembarking the rescued persons*, the ~~participating units~~ *host Member State and the participating Member States* shall cooperate with the responsible Rescue Coordination Centre to *identify a place of safety and, when the responsible Rescue Coordination Centre designates such a place within their territory as being the place of safety as being within their territory, they shall* ~~[provide make available a suitable port or place of safety for the rescued persons and to ensure their that the rescued persons are rapidly and effectively disembarked~~ *ation*.

~~Without prejudice to the responsibility of the Rescue Coordination Centre, the host Member State and the participating Member States shall as soon as possible ensure that a port or place of safety is identified taking into account relevant factors, such as distances to the closest ports or places of safety, risks and the circumstances of the case.~~

~~In case w~~**Where, exceptionally, If it is not possible to arrange for the participating unit to be is not** released of its obligation, referred to in Article 9(1), as soon as reasonably practicable, taking into account the safety of the rescued persons and that of the participating unit itself, it shall ~~, after consulting the International Coordination Centre,~~ be authorised to disembark the rescued persons in the host Member State.

~~The operational plan may also contain further details adapted to the circumstances of the sea operation concerned.~~

*These modalities for disembarkation shall not have the effect of imposing obligations on Member States not participating in the sea operation unless they expressly provide authorisation for measures to be taken in their territorial sea or contiguous zone in accordance with Article 6(4) or Article 8(2).*

5. 2. The participating units shall inform the International Coordination Centre of the presence of any persons within the meaning of Article 4(1), and the International Coordination Centre shall convey that information to the competent national authorities of the country where disembarkation takes place. ~~On the basis of that information, t~~ The operational plan should ~~shall~~ determine which follow-up measures may be taken and it shall contain the contact details of those competent national authorities, which shall take appropriate follow-up measures. after disembarkation.

#### Article 10a

#### Amendments to Regulation (EC) No 2007/2004

**Regulation (EC) No 2007/2004 is hereby amended as follows:**

**(1) in Articles 3a(1) and 8e(1), at the end of point (j) respectively, the following phrase is added:**

**"in that regard the operational plan shall be established in accordance with the provisions of the Regulation (EU) No .../2014~~3~~ of the European Parliament and of the Council of ... establishing rules for 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 of the European Union (OJ L ...)"**;



CHAPTER IV

FINAL PROVISIONS

*Article 10b*

*Effects of Decision 2010/252/EU*

*Decision 2010/252/EU shall cease to produce effects from the date of entry into force of this Regulation.*

*Article 11*

Entry into force

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaties.

Done at Brussels,

*For the European Parliament*

*For the Council*

The President    The President

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