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NOTE

From: Greek, Spanish, French, Italian, Cyprus and Maltese delegations

To: Working Party on Frontiers/Mixed Committee
(EU-Iceland/Liechtenstein/Norway/Switzerland)

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
- Position on Articles 9 and 10

Further to the discussions which took place within the Working Party on Frontiers on the Proposal on sea border operations coordinated by Frontex, and with a view to the elaboration of the Council position on this Proposal, below is the position of Cyprus, France, Greece, Italy, Malta and Spain in relation to Articles 9 and 10 of the said Proposal.

Articles 9 and 10, which relate to search and rescue situations and disembarkation respectively, raise several serious concerns as they stand in the Commission's proposal. Regulation of search and rescue and disembarkation in an EU legislative instrument is unacceptable for legal and practical reasons set out below. These provisions should therefore be revised and this constitutes a red line.

Firstly, search and rescue and disembarkation are already regulated extensively at international law, through the United Nations Convention on the Law of the Sea (UNCLOS); the IMO International Convention on Maritime Search and Rescue (SAR Convention); and the IMO International Convention on the Safety of Life at Sea (SOLAS Convention). Moreover, additional guidelines and interpretation are set out in related IMO instruments, such as the International Aeronautical and Maritime Search and Rescue (IAMSAR) Manual.

Secondly, within this international framework, maritime search and rescue and disembarkation are the competence of the Member States. As stated in the draft Council Declaration that was agreed to unanimously by Member States and which will be made at the formal adoption of the EUROSUR Regulation by the Council:

The Council recalls that search and rescue at sea is a competence of the Member States which they exercise in the framework of international conventions.

In its judgement on Council Decision 252/2010/EC, the Court of Justice of the European Union did not examine the question as to whether the EU has competence to legislate on matters of search and rescue and disembarkation. The fact that the Court maintained the effects of the annulled Decision cannot therefore be considered as automatic confirmation that such competence exists. It is considered that the EU does not have the competence to legislate on search and rescue and disembarkation in detail, as the Commission's Proposal seeks to do. At best, such competence is highly questionable.

Against this background, it is not necessary for EU legislation to be adopted alongside the international regime and should any further specification of this regime be necessary, it would be pursued under the auspices of the IMO, involving all signatories of the relevant international conventions, rather than within the EU.

Besides, any rules that depart from those in the international regime would be unacceptable, as we would effectively be creating an EU regime that runs in parallel with the international regime but which would be applied in Frontex-coordinated joint operations and insofar as no third countries are involved in the case. This will create serious difficulties for those Member States and their officers on the ground who must deal with these situations and implement the rules, as a different set of rules would apply depending on whether there is a Frontex operation and whether third countries are involved. This would clearly complicate matters rather than simplify them, whereas the very nature of the situations addressed require utmost efficiency if the lives of persons in distress are to be saved.

Finally, it should be borne in mind that with the 2011 amendments to the Frontex Regulation, the Operational Plan is a legally binding instrument and the Frontex Regulation specifically provides in Article 3a(j) that it must include

regarding sea operations, specific information on the application of the relevant jurisdiction and legislation in the geographical area where the joint operation or pilot project takes place, including references to international and Union law regarding interception, rescue at sea and disembarkation.

The operational plan must be agreed to by the Frontex Executive Director and the host Member State, in consultation with participating Member States. There is therefore no doubt that these matters would be clearly determined before the joint operation is launched, reinforcing the fact that it is unnecessary to have these matters regulated in the legislation. In fact, regulating these matters in legislation defeats the purpose of Article 3a(j) and the requirement for the operational plan to contain this information.

Furthermore, it must be acknowledged that joint operations differ depending on the geographical area in which they are undertaken. In providing that these details must be established in the operational plan, the Frontex Regulation allows for flexibility, such that the specific nature of the joint operation in question can be taken into account. Establishing these details in the legislation would completely eliminate this flexibility, bringing about a rigidity which would be entirely inappropriate and which would in any case have no added value. The fact that the operational plan will establish these details should address any concerns that Member States interested in participating in joint operations may have.

As Member States with considerable operational experience both in terms of Frontex-coordinated joint operations and in terms of search and rescue operations more generally, we consider it essential to ensure that the international framework on search and rescue and disembarkation is not in any way undermined; that no confusion or diverging rules are adopted when considering the sensitive nature of these operations; and that a degree of flexibility is retained so that Frontex-coordinated joint operations do not become too rigid to be of any assistance to the Member States that require that assistance.

In line with above reasoning, it is suggested that Articles 9 and 10 of the Proposal should be shortened to refer directly to international law and to the operational plan, as follows:

Article 9:

During a sea operation, Member States shall instruct their participating units ~~shall~~ to comply with the obligation to render assistance to any ship or person in distress at sea, in accordance with applicable provisions of international Conventions governing search and rescue and 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.

Article 10:

For the purposes of sea operations coordinated by the Agency, the modalities for the disembarkation of the persons intercepted or rescued in a sea operation shall be set out in the operational plan, and shall be in accordance with international law and relevant bilateral agreements which comply with international law.