

Meijers Committee

Standing committee of experts on international immigration, refugee and criminal law

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To (by email) European Parliament
Civil Liberties, Justice and Home Affairs Committee
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Reference CM1308
Regarding Note on the Proposal for a Regulation establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by Frontex (COM(2013) 197 final)
Date 23 May 2013

Dear members of the Civil Liberties, Justice and Home Affairs Committee,

Please find attached a note by the Meijers Committee on the Proposal for a Regulation establishing rules for the surveillance of the external sea borders in the context of operations coordinated by Frontex (COM(2013) 197 final). The Meijers Committee is pleased to note that the proposal meets several key criticisms of Council Decision 2010/252/EU, which was annulled by the Court of Justice and is now being replaced by the current proposal.

However, the Meijers Committee is of the opinion that the proposal fails to deal with several issues satisfactorily and recommends:

- in case of disembarkation in a third country, guarantees must be included pertaining to the presence of legal advisors and interpreters and the availability of a remedy before an independent authority with suspensive effect;
- interception measures should be brought in conformity with the provisions on entry conditions and refusals of entry in the Schengen Borders Code;
- the relationship with the recast of the Asylum Procedures Directive should be clarified;
- to align the interception competences in respect of vessels found in the contiguous zone which have not previously entered the territorial sea with those that apply to vessels found in the high seas;
- to include the provisions of the proposal on search and rescue, interception competences and fundamental rights in Annex VI of the Borders Code, so that they will apply to all maritime controls.

We hope you will find these comments useful. Should any questions arise, the Meijers Committee is prepared to provide you with further information on this subject.

Yours sincerely,



Prof. dr. C.A. Groenendijk
Chairman

CC The European Commission and the Council of the European Union.

• Commissie Meijers
Permanente commissie van deskundigen in internationaal vreemdelingen-, vluchtelingen- en strafrecht

• Comité Meijers
Comité permanent d'experts en droit international de l'immigration, des réfugiés et du droit pénal

• Meijers-Ausschuss
Ständiger Ausschuss von Experten im internationalen Ausländer-, Flüchtlings- und Strafrecht

Note on the Proposal for a Regulation establishing rules for the surveillance of the external sea borders in the context of operations coordinated by Frontex (COM(2013) 197 final)

The Meijers Committee would like to raise a few specific concerns with respect to the proposal for a Regulation establishing rules for the surveillance of the external sea borders in the context of operations coordinated by Frontex (COM(2013) 197 final). The proposal should replace Council Decision 2010/252/EU that was annulled by the Court of Justice upon request of Parliament.¹ The Court found that the Decision contained measures which alter essential elements of the Schengen Borders Code that require political choices and therefore fall within the legislative reserve of Parliament. The Meijers Committee welcomed the Court's ruling, for the measures on maritime controls had the potential to interfere with fundamental rights. They also questioned the integrity of the Union's rules on external border control.

1. New elements of the proposal

Although the proposal largely reiterates the measures contained in the annulled decision, it is responsive to several key criticisms of that decision.

Firstly, the Meijers Committee welcomes the more extensive provisions on search and rescue situations (Article 9), which embody a much wider understanding of situations of distress and concomitant duties to engage in search and rescue operations.

Secondly, the Meijers Committee welcomes that the proposal restricts the possibility of disembarking intercepted migrants in a third country to interceptions on the high seas.

Thirdly, instead of merely alluding to the prohibition of returning asylum seekers to an unsafe country (*non-refoulement*) without setting forth how that prohibition should be guaranteed in practice, as was done in Decision 2010/252/EU, the proposal sets forth a number of substantive and procedural guarantees with a view to ensuring that disembarkation of intercepted or rescued persons complies with relevant human rights. The proposal takes account in this respect of the landmark judgment in *Hirsi v Italy* of the European Court of Human Rights (ECtHR) that was rendered at the time the action for annulment was still pending.² In that judgment, the ECtHR found the summary return to Libya by Italy of a group of migrants from Eritrea and Somalia, without having examined their personal circumstances, to violate the prohibitions of inhuman treatment and collective expulsion (Articles 3 ECHR and 4 Protocol No. 4 ECHR). The new guarantees contained in Article 4 of the proposal see *inter alia* to the obligations, in case of disembarkation in a third country, to take account of the human rights situation in the third country, to identify the persons on board, to inform the persons on board and to allow them to express reasons for believing that disembarkation would violate the prohibition of *refoulement*.

Fourthly, the proposal clarifies the concept of 'border surveillance', by indicating that it not only covers the detection of irregular border crossings, but also interception measures, search and rescue situations and the return of persons to a third country.³

2. Incomplete incorporation of the *Hirsi* judgment

However, the Meijers Committee is of the opinion that the proposal fails to deal with several issues satisfactorily. The guarantees against the summary return of migrants contained in Article 4 of the proposal fall short of those laid down in the *Hirsi* judgment. In *Hirsi*, the ECtHR not only underlined the importance of interviewing intercepted persons and allowing them the opportunity to express reasons for refraining from return, but also considered that effective remedies should be in place to enable migrants to obtain a thorough and rigorous assessment of their requests before the removal measure is enforced. In this respect, the Court pointed to the absence of interpreters and legal advisers amongst the Italian personnel. Further, the Court considered that the migrants should have had access to a remedy with suspensive effect, i.e. access to an independent authority before removal is enforced.⁴

These guarantees also stem from Article 47 of the Charter of Fundamental Rights of the European Union. Since Frontex operations clearly fall within the scope of Union law, possible violations of Union law must according to that provision be amenable to an effective remedy, which includes entitlement to a fair and

¹ CJEU 5 September 2012, Case C-355/10, *European Parliament v Council of the European Union*.

² ECtHR 23 February 2012, *Hirsi Jamaa a.o. v Italy*, no. 27765/09.

³ Articles 5-10.

⁴ See paras. 202, 205 and 206 of the *Hirsi* judgment.

public hearing by an independent and impartial tribunal, and to be granted the possibility of being advised, defended and represented.

The Meijers Committee observes that in case of disembarkation in a third country, guarantees pertaining to the presence of legal advisors and interpreters and the availability of a remedy before an independent authority with suspensive effect are absent in the proposal and recommends to include them.

3. Defeat of essential purpose of the Schengen Borders Code

The Meijers Committee notes that the measures that may be taken in the course of interception (in the territorial sea, contiguous zone as well as on the high seas) defeat the essential purpose of the Schengen Borders Code. The Schengen Borders Code distinguishes between measures of 'border checks' and measures of 'border surveillance'. Border checks are the checks on persons carried out at border crossing points to ensure that persons fulfil the conditions for entry.⁵ The purpose of border surveillance is to prevent unauthorised border crossings, to counter cross-border criminality and to take measures against persons who have crossed the border illegally.⁶ The proposal employs a very broad concept of border surveillance that includes *inter alia* the checking of the identity, nationality and other relevant data on persons on board; the questioning of persons on board; the apprehension of persons on board; ordering the vessel to modify its course; and, in case of interceptions on the high seas, conducting the persons on board to a third country.⁷

This broad conception of border surveillance not only transgresses the definition of border checks in the Schengen Borders Code – that already includes the verification of identities, travel documents and means of transport and objects in the possession of persons⁸ – it also covers issues that currently fall outside the scope of the Schengen Borders Code, namely detention and the removal of third-country nationals to another Member State or to a third country.

Most problematic however, is the ground for undertaking these far-reaching measures against migrant vessels. The proposal sets forth that measures of interception may be taken "when there are reasonable grounds to suspect that a ship is carrying persons intending to circumvent checks at border crossing points (in case of interception in the territorial sea) or is engaged in the smuggling of migrants by sea (in case of interception in the territorial sea and on the high seas)".⁹ Accordingly, the proposal would codify the possibility to subject boat migrants to a range of highly intrusive coercive measures, not on the basis of a failure to meet the entry conditions of the Borders Code, but on the basis of the vague notion of suspicion of circumventing border checks or being engaged in migrant smuggling. This results in a state of affairs where persons who may in fact be entitled to cross the external border are turned away on the basis of ill-defined suspicions.

The Meijers Committee would recommend therefore, that instead of circumventing and thus defeating the essential rules on entry conditions and refusals of entry as laid down in the Schengen Borders Code, interception measures in the territorial sea as well as on the high seas must i) have the purpose of verification of the entry conditions laid down in Article 5 of the Schengen Borders Code (and are conducted in compliance with the provisions on border checks in the meaning of Article 7 of the Schengen Borders Code) and ii) may only involve the taking of further coercive measures after the issuing of a refusal of entry in the meaning of Article 13 of the Schengen Borders Code. As noted above, further coercive measures such as apprehension and return to a third country should be aligned to the standards of the Returns Directive (2008/115/EC) and all the requirements of the *Hirsi* judgment. These guarantees should apply irrespective of whether a person seeks international protection.

4. Unclear relationship with recast of the Asylum Procedures Directive

The Meijers Committee wonders how the interception measures that may be taken in the territorial sea relate to the recast of the Asylum Procedures Directive which is currently in the final stage of negotiations.¹⁰ Article

⁵ Art. 2(10), 6 and 7 Regulation No 562/2006.

⁶ Art. 2(11) and 12 Regulation No 562/2006.

⁷ Articles 6 and 7.

⁸ Article 7 Regulation No 562/2006.

⁹ Articles 6(1) and 7(1).

¹⁰ Council document 7695/13 of 22 March 2013.

3 of the recast stipulates that the directive also applies to asylum applications made in territorial waters and contains specific guarantees for ensuring that such applications are promptly dealt with. Further, Article 4(5) of the recast makes clear that asylum applications made in a Member State to the authorities of another Member State carrying out border or immigration controls there shall be dealt with by the Member State in whose territory the application is made. This provision potentially interferes with some of the interception measures that according to the proposed regulation may be taken in the territorial sea (Article 6); in particular the measures amounting to the ordering of the ship to modify its course (Article 6(1)(e)) and conducting the ship or persons on board to another Member State than the coastal Member State (Article 6(1)(f)).

The Meijers Committee would advise to include a reference to the relevant provisions of the Asylum Procedures Directive in Article 6 of the proposal to the effect that the interception measures do not jeopardize the guarantees of the Asylum Procedures Directive.

5. Measures in contiguous zone in violation of the Law of the Sea

The proposal presumes that the competence to intercept migrant vessels in the contiguous zone (which extends 24 nautical miles from the coast) equals the competence to intercept vessels in the territorial sea and that, accordingly, such measures do not require authorization of the flag State (Article 8). Under the Law of the Sea however, the competences of the coastal state are considerably more limited in respect of the contiguous zone as compared to the territorial sea. The exclusive competence of the coastal State (absent authorization of the flag State) in the contiguous zone pertains only to the exercise of immigration control if necessary to either prevent infringements of immigration laws or to punish infringements of immigration laws committed within its territory or territorial sea.¹¹ It is at the least questionable whether the competence to prevent infringements of immigration laws enlivens a power to board ships, apprehend persons on board or force a vessel to change course without authorization of the flag state.¹² The European Commission in its 2007 Study on the international law instruments in relation to illegal immigration by sea had considered in respect of the contiguous zone that:

“In the case of vessels that come from the territory or territorial sea of the coastal State, where they have committed an offense, the State may exercise jurisdiction to arrest and punish the perpetrators thereof. Contrariwise, if the ship has not yet entered the territorial sea of the coastal State, it seems impossible that this State may, in addition to the right to approach the vessel for verification and to prevent its entry into the territorial sea, arrest the vessel or escort it to a port.”¹³

The Meijers Committee wonders why the European Commission has not followed up on its earlier findings (that appear to properly reflect the relevant provisions on the contiguous zone in the Law of the Sea), but now presumes that measures of boarding, apprehension and conducting the ship to a port may also be taken in respect of vessels that have not yet entered a Member State’s territorial sea, without authorization of the flag State. The Meijers Committee notes that the Migrant Smuggling Protocol also presumes that any interdicting activity of a State in respect of ships suspected of migrant smuggling require prior authorization of the flag State.¹⁴

The Meijers Committee recommends therefore, to align the interception competences in respect of vessels found in the contiguous zone which have not previously entered the territorial sea with those that apply to vessels found in the high seas.

6. No clarification of rules for non-Frontex operations

The Meijers Committee observes that the proposal applies only to maritime operations under the coordination of Frontex and does not concern control activities carried out by Member States individually or cooperating outside that framework. The prevailing legal loopholes and differences in Member States’ domestic laws and practices pertaining to maritime controls have contributed to widely reported regrettable

¹¹ Article 33 United Nations Convention on the Law of the Sea.

¹² Rothwell and Stephens, *The International Law of the Sea*, Oxford: Hart Publishing (2010), p. 427.

¹³ Study on the international law instruments in relation to illegal immigration by sea, SEC(2007) 691, para 4.2.4 (original in French).

¹⁴ Article 8 of The Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the Convention against Transnational Organised Crime.

incidents during sea crossings. The rules pertaining to search and rescue, interception competences under the Law of the Sea and protection from *refoulement* are not only relevant for Frontex operations, but for all operations of maritime control that fall under the scope of the Schengen Borders Code. The suggestion in the proposal's explanatory memorandum that adopting rules solely for Frontex operations complies with the principles of subsidiarity and proportionality fails to convince in that respect.¹⁵

The Meijers Committee notes that in a 2009 letter to the LIBE Committee, Mr Jacques Barrot, Vice-President of the European Commission, considered the Schengen Borders Code to apply to the unilateral Italian interdictions undertaken on the high seas.¹⁶ The Meijers Committee agrees with that conclusion. Indeed, Annex VI, para. 3 of the Schengen Borders Code already provides for specific rules for controlling the sea border. In that Annex, rather than employing the broad concept of border surveillance as is done in the current proposal, it is laid down that border checks may be carried out during crossings or, upon the ship's arrival or departure, in the territory of a third country.¹⁷ The Annex thus presumes that border checks in the meaning of Articles 2(10) and 7 of the Schengen Borders Code may also be undertaken in the different maritime zones.

The Meijers Committee wonders how the proposal relates to the specific rules for maritime traffic that are already contained in Annex VI of the Schengen Borders Code. The Meijers Committee also points to Article 18 of the Schengen Borders Code, which provides that the specific rules set out in Annex VI shall apply to the checks carried out at the various types of border and on the various means of transport used for crossing border crossing points. That provision furthermore provides that these specific rules may contain derogations from Articles 5 and 7 to 13. However, that Annex currently does not provide for such derogations.

It would follow from the above that, if the proposed regulation is adopted in its current form, all maritime operations coordinated by Frontex are labelled as 'border surveillance' and hence governed by a specialized regime that derogates from the ordinary terms of the Schengen Borders Code. However, operations outside the Frontex framework continue to be governed by the ordinary terms of the Code, from which it follows that controlling activity that is to be defined as border checks must be undertaken in accordance with Articles 5, 7 and 13 of the Code.

The Meijers Committee advises to clarify the rules on search and rescue, interception competences and fundamental rights guarantees for all maritime controls that fall within the scope of the Schengen Borders Code. It is highly undesirable that Frontex operations are governed by a different set of rules than other maritime controls. The Meijers Committee recommends therefore, to include the proposal's provisions on search and rescue, interception competences and fundamental rights in Annex VI of the Borders Code, so that they apply to all maritime controls. The specific provisions of the proposal dealing with the multinational character of Frontex operations and the division of responsibilities between Frontex and the Member States can either be taken up in a separate paragraph in Annex VI, or be included in the Frontex Regulation (Reg No 2007/2004 as amended by Reg No 1168/2011).

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¹⁵ Paragraph 5.

¹⁶ Letter of 15 July 2009 from Mr Jacques Barrot, Vice-President of the European Commission to the President of the European Parliament Committee on Civil Liberties, Justice and Home Affairs.

¹⁷ Annex VI, Para. 3.1.1. Regulation No 562/2006.