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COMMISSION OF THE EUROPEAN COMMUNITIES

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Proposal for a

COUNCIL DECISION

supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of the operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

1.1. Background

In 2007 the Commission produced a study analysing the international legal framework for surveillance of the external maritime border and the obstacles to its effective implementation. The Commission then commissioned an informal group consisting of experts from the Member States, Frontex, the Office of the UN High Commissioner for Refugees and the International Organisation for Migration to produce guidelines for Frontex's maritime operations.

The JHA Council in September 2007 expressed its support for the group. It invited "the Commission, Frontex and Member States to complete as a matter of priority the analysis of the law of the sea as relevant for Frontex joint operations, and [requested] the Commission to report back to the Council before the end of the year".

The Group met on five occasions between July 2007 and April 2008 and produced the "Draft guidelines for Frontex operations at sea". The participants failed to agree on issues such as the implications of human rights and refugees' rights, the role of Frontex and the prior identification of the places of disembarkation for the migrants.

In the belief that the differences between the Member States would make it impossible to establish guidelines, the Commission prepared a draft decision based on the results of the informal drafting group. The draft was based on Article 12 of the Schengen Borders Code, which allows the Commission to adopt rules on border surveillance in accordance with the comitology procedure (regulatory committee with the European Parliament exercising the right of scrutiny).

1.2. Consultation of the Schengen Borders Code Committee

The draft decision was presented to the Schengen Borders Code Committee for discussion on 23-24 February 2009. Several Member States strongly opposed the draft, largely on the grounds that it went beyond the powers conferred on the Commission by the Schengen Borders Code. Other Member States, however, expressed firm support, particularly as regards the protection of human rights and the rights of refugees. Some Member States had still not completed their internal consultations, but also had reservations about the draft.

In the light of the conclusions of the European Council of June 2009, which underlined the need for "strengthened border control operations coordinated by Frontex, clear rules of engagement for joint patrolling and the disembarkation of rescued persons", the Commission decided to pursue the comitology procedure. A revised version of the draft decision, taking into account some of the concerns expressed by the Member States, was put to the Committee on 19 October. The main changes were as follows:

- The guidelines were reproduced in full in an annex that would form part of the operational plan established by the participating Member States and by the Frontex Agency.
- The principle of non-refoulement was reformulated and would apply to cases where there were substantial grounds for believing that the individuals would be subjected to persecution or other forms of inhuman or degrading treatment.

- The provision on interceptions and search and rescue in the context of surveillance operations was simplified.
- The draft gives priority to disembarkation in third countries (subject to compliance with the principle of non-refoulement); failing this, disembarkation should take place in the geographically closest place.

At the meeting of 19 October the Committee was asked to give a formal opinion on the draft decision. Eight Member States voted in favour of the draft, making a total of 67 votes. Seven Member States voted against, making a total of 116 votes. Four Member States abstained. Five Member States were not represented. The threshold required for issuing a Committee opinion (223 votes) was not reached.

2. REASONS AND OBJECTIVES

This proposal represents the next stage of the comitology procedure, which requires the Commission to present a proposal for a Council decision to the Council and the European Parliament, without delay, containing the text of the draft that was put to the vote in the Committee.

The aim of the proposal is to ensure that the international rules relevant to the maritime border surveillance operations carried out under the operational cooperation coordinated by the Frontex Agency (Convention on the Law of the Sea, conventions on safety at sea and search and rescue, international law on refugees and fundamental rights) are uniformly applied by all the Member States taking part in these operations. It also seeks to create the regulatory basis needed to enable one Member State to carry out surveillance of another Member State's maritime border.

The need 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" was mentioned once again in the conclusions of the European Council of 29-30 October 2009.

The draft specifically aims to provide an answer to the following problems:

- Some Member States, Members of the European Parliament, academics and associations have questioned whether fundamental rights and the rights of refugees are being respected during the Frontex operations (particularly as regards the prohibition on refoulement and access to asylum procedures). They wonder what law applies in such situations, particularly on the high seas, and what guarantees there are that these rights are actually respected. There is indeed a duty to respect fundamental rights when implementing the Schengen Code, but it is not stated explicitly in relation to surveillance operations. As regards the principle of non-refoulement, there are differences in the Member States' interpretations of this principle of international law, with some Member States, for example, contesting its applicability in international waters.
- The proposal aims to make the duty to respect fundamental rights and the rights of refugees explicit in Frontex Agency surveillance operations. Finally, the proposal introduces a prohibition on refoulement of those in danger of persecution or other forms of inhuman or degrading treatment. This prohibition would apply regardless of the status of the waters the people were in.

- The proposal for a decision creates a legal basis in Community law for exercising a range of powers necessary for the effective application of Article 12 of the Schengen Borders Code, such as searching and intercepting vessels. It then specifies the conditions under which such measures can be taken in the different maritime areas, including international waters. These conditions include the relevant rules of international law, thereby contributing to their effective and uniform implementation in Frontex operations (authorisation of the coastal State, verification of the flag the ship is flying, authorisation of the flag State, vessels without flags, etc.).
- Most of the maritime operations coordinated by Frontex turn into search and rescue operations. However, Frontex is not an SAR agency; its job is to help implement the rules on border controls. In practice, the fact that the operations become search and rescue operations removes them from the scope of Frontex coordination and Community law. The obligation to render assistance at sea and the responsibilities of SAR authorities are regulated by international law, but these rules are not interpreted or applied uniformly by the Member States.
- The proposal for a decision aims to ensure respect for this international obligation to render assistance and the application of the SAR system. It establishes the principle of cooperation with the SAR authorities even before an operation begins. It also specifies which SAR authority is to be contacted in cases where the authority responsible does not respond, so that all the units taking part in the operation contact the same SAR authority.
- Another difference between Member States relates to how they identify a situation requiring assistance: for some Member States the vessel must be on the point of sinking; for others it is sufficient for the vessel to be unseaworthy; some Member States require the people on board to request assistance, while others do not. The proposal is based on the SAR system and stipulates that as soon as there is any question about the safety of a vessel or a person the SAR authorities must be contacted and given all the information they need to determine whether or not this is an SAR situation.
- Deciding where the people rescued should be taken is a difficult question and is seen as one of the weaknesses of the SAR system. The 2004 amendments require all states to cooperate in resolving SAR situations; the state responsible for the SAR region must, with their cooperation, decide where those rescued will be taken. One Member State did not accept these amendments. A particular point of contention was where those rescued should be disembarked if the state responsible for the SAR region failed to fulfil its obligations in this respect. Some Member States are reluctant to take part in operations because they fear that they will end up having to take those rescued to their own country. The proposal for a decision aims to resolve such situations by specifying that where disembarkation in a third country is not possible it will take place in the Member State hosting the operation.

3. LEGAL ELEMENTS OF THE PROPOSAL

3.1. Legal basis

The legal basis of the proposal is Article 12(5) of 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)¹, which authorises the Commission to adopt additional rules governing surveillance in accordance with the regulatory procedure with the European Parliament exercising the right of scrutiny.

The proposal applies to surveillance of the maritime border in the context of the operations of Frontex, which has a mandate that includes facilitating operational cooperation between the Member States in the implementation of the Schengen Borders Code. These are operations covered by the Borders Code, coordinated by a Community agency and paid for by the Community budget. The adoption of additional rules governing surveillance, under the comitology procedure, is expressly provided for in Article 12 of the Code. When surveillance applies to maritime borders it is self-evident that the international law of the sea and international maritime law must be respected. Similarly, such operations cannot be conducted in violation of human rights, including the rights of refugees, as already provided for in the Code. The proposal scrupulously complies with this international legal framework: it aims to enhance respect for these principles in the conduct of operations, while at the same time introducing a degree of uniformity into the application of the legal framework by all the operational units participating in such operations.

3.2. Subsidiarity and proportionality

The proposal for a decision relates to a matter that does not fall within the exclusive competence of the Community and is therefore subject to the principle of subsidiarity. It must also comply with the principle of proportionality.

The objectives of the proposal cannot be achieved by the Member States acting individually and require the adoption of Community rules.

The proposal applies to surveillance of the maritime border in the context of operational cooperation coordinated by the Frontex agency, and does not concern surveillance activities carried out by Member States individually or cooperating outside that framework.

3.3. Choice of instruments

Proposed instrument: Council decision.

The decision was chosen as legal instrument because the proposal aims to create obligations for the Member States to which it is addressed, particularly when they carry out surveillance of the external border in the context of the operational cooperation coordinated by Frontex.

3.4. Content

Article 1 states that the surveillance of the maritime border in the context of Frontex operations must take place in accordance with the guidelines laid down in the annex, which should be incorporated into the operational plan for each operation.

- A brief description of the content of the Annex may be found in Section 2.

¹ OJ L 105, 13.4.2006, p. 9.

4. COHERENCE WITH OTHER COMMUNITY POLICIES

The proposal is consistent with other Community policies, and particularly the European Union's external policy and the common transport policy. It is also consistent with the European Union's integrated maritime policy.

5. CONSULTATION AND IMPACT ASSESSMENT

5.1. External consultations

The proposal for a decision is based to a large extent on the results of the informal drafting group organised by the Commission in 2007 and 2008 and containing experts from Member States, Frontex, the Office of the UN High Commissioner for Refugees and the International Organisation for Migration.

5.2. Impact assessment

No impact assessment was carried out because the proposal mainly reproduces and clarifies international and Community rules that already exist.

6. EVALUATION

No evaluation of the implementation of the decision is planned.

7. FINANCIAL STATEMENT AND ASSESSMENT OF FRAUD RISKS

The measure does not impose any financial and administrative burden on the Community. The proposal therefore has no impact on the Community budget.

8. SPECIAL POSITION OF CERTAIN MEMBER STATES AND ASSOCIATED COUNTRIES

This proposal builds on the Schengen acquis. The following consequences in relation to the various protocols therefore have to be taken into account:

- **United Kingdom and Ireland:** This proposal aims to build on the Schengen acquis, in which the United Kingdom and Ireland do not participate, 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 and Council Decision 2002/192/EC of 28 February 2002 concerning Ireland's request to take part in some of the provisions of the Schengen acquis. These Member States are not taking part in the adoption of this Decision and are not bound by it or subject to its application.
- **Denmark:** This proposal will replace Regulation (EC) No 562/2006. Given that the Regulation aims to build on the Schengen acquis under the provisions of Title IV of Part Three of the Treaty establishing the European Community, Denmark, in accordance with Article 5 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty establishing the European Community, notified the transposition of this Regulation into its national law, by letter of 8 June 2006. It is therefore bound under international law to implement this Decision.

- **Norway and Iceland:** This proposal 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 their association with the implementation, application and development of the Schengen acquis².
- **Switzerland:** This proposal constitutes a development of the provisions of the Schengen acquis within the meaning of the Agreement signed by the European Union, the European Community and the Swiss Confederation on the latter's association with the implementation, application and development of the Schengen acquis³.
- **Liechtenstein:** This proposal constitutes a development of the provisions of the Schengen acquis within the meaning of the Protocol 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.

² OJ L 176, 10.7.1999, p. 36.

³ OJ L 53, 27.2.2008, p. 52.

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community,

Having regard to 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)⁴, and in particular Article 12(5) thereof,

Having regard to the proposal from the Commission,

Whereas:

- (1) The purpose of border surveillance is to prevent unauthorised border crossings, to counter cross-border criminality and to apprehend or take other measures against persons who have crossed the border illegally. Border surveillance should be effective in preventing and discouraging persons from circumventing the checks at border crossing points, and in detecting the unauthorised crossing of the external borders.
- (2) The European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union ("the Agency") is responsible for the coordination of operational cooperation between Member States to facilitate the application of Community law, including with regard to border surveillance. Additional rules are necessary with regard to border surveillance activities carried out by maritime and aerial units of one Member State at the sea border of other Member States in the context of the operational cooperation coordinated by the Agency, and to further strengthen such cooperation.
- (3) In accordance with Regulation (EC) No 562/2006 and with general principles of Community law, measures taken in the course of the surveillance operation should be proportionate to the objectives pursued and fully respect fundamental rights and the rights of refugees and asylum seekers, including in particular the prohibition of *refoulement*. Member States are bound by the provisions of the asylum acquis, and in particular of Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee

⁴ OJ L 105, 13.4.2006, p. 1.

status⁵, with regard to applications for asylum made in the territory, including at the border or in the transit zones of Member States.

- (4) At its meetings of 18 and 19 June and of 29 and 30 October 2009, the European Council underlined the need for strengthened border control operations coordinated by the Agency and for clear rules of engagement for joint patrolling and the disembarkation of rescued persons.
- (5) Account should be taken of the fact that border surveillance operations coordinated by the Agency are conducted in accordance with an operational plan agreed by participating Member States and by the Agency and with the schedule and instructions issued by a coordination centre in which participating Member States and the Agency are represented, and that one or more host Member States are identified before the start of the operation, the border of which will be surveyed. The guidelines provided for in this Decision should be incorporated into that operational plan.
- (6) The implementation of this Decision should not affect obligations of Member States under 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 on Human Rights and other relevant international instruments.
- (7) In accordance with international law, every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, 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. This Decision does not affect the responsibilities of search and rescue authorities, including for ensuring that coordination and cooperation occur so that the persons rescued can be delivered to a place of safety.
- (8) This Decision respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union, notably human dignity, prohibition of torture and of inhuman or degrading treatment or punishment, right to liberty and security, non-refoulement, non discrimination and the rights of the child. This Decision should be applied by the Member States in accordance with these rights and principles.
- (9) Since the objectives of the action to be taken, namely the adoption of additional 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 legislations and practices, and can therefore, by reason of the multinational character of the operations, be better achieved at Community level, the Community 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

⁵ OJ L 326, 13.12.2005, p. 13.

proportionality, as set out in that Article, this Decision does not go beyond what is necessary in order to achieve those objectives.

- (10) In accordance with Article 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark did not take part in the adoption of Regulation (EC) No 562/2006 and is therefore not bound by it nor subject to its application. However, given that Regulation (EC) No 562/2006 builds upon the Schengen *acquis* under the provisions of Title IV of Part Three of the Treaty establishing the European Community, Denmark in accordance with Article 5 of the Protocol, notified by letter of 8 June 2006 the transposition of this Regulation in its national law. It is therefore bound under international law to implement this Decision.
- (11) As regards Iceland and Norway, this Decision constitutes a development of 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 latter's association with the implementation, application and development of the Schengen *acquis*⁶ which fall within the area referred to in Article 1, point A, of Council Decision 1999/437/EC⁷ on certain arrangements for the application of that Agreement.
- (12) As regards Switzerland, this Decision constitutes a development of provisions of the Schengen *acquis* within the meaning of 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*⁸, 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 on the conclusion of that Agreement⁹.
- (13) As regards Liechtenstein, this Decision constitutes a development of 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*, 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 2008/261/EC on the signature and provisional application of certain provisions of that Protocol¹⁰.
- (14) This Decision constitutes a development of 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*¹¹. The United Kingdom is therefore not taking part in its adoption and is not

⁶ OJ L 176, 10.7.1999, p. 36.

⁷ OJ L 176, 10.7.1999, p. 31.

⁸ OJ L 53, 27.2.2008, p. 52.

⁹ OJ L 53, 27.2.2008, p. 1.

¹⁰ OJ L 83, 26.3.2008, p. 3.

¹¹ OJ L 131, 1.6.2000, p. 43.

bound by it or subject to its application. This Decision should therefore not be addressed to the United Kingdom.

- (15) This Decision constitutes a development of 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 Ireland's request to take part in some of the provisions of the Schengen *acquis*¹². Ireland is therefore not taking part in its adoption and is not bound by it or subject to its application. This Decision should therefore not be addressed to Ireland.
- (16) The Schengen Borders Code Committee, consulted on 19 October 2009, did not deliver an opinion, which required that the Commission, in accordance with Article 5a (4) point a) of Decision 1999/468/EC, submitted a proposal relating to the measures to be taken to the Council and forwarded it to the European Parliament at the same time,

HAS ADOPTED THIS DECISION:

Article 1

The surveillance of the sea external borders in the context of the operational cooperation between Member States 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") shall take place in accordance with the guidelines laid down in the annex. These guidelines shall form part of the operational plan as drawn up by the Agency and the participating Member States for each operation coordinated by the Agency.

Article 2

This Decision is addressed to the Kingdom of Belgium, the Republic of Bulgaria, the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, the Republic of Hungary, the Republic of Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, Romania, the Republic of Slovenia, the Slovak Republic, the Republic of Finland and the Kingdom of Sweden.

Done at Brussels,

For the Council

The President

¹² OJ L 64, 7.3.2002, p. 20.

Guidelines for Frontex operations at sea

1. GENERAL PRINCIPLES

- 1.1 Measures taken for the purpose of the surveillance operation should be conducted in a way that does not put at risk the safety of the persons intercepted or rescued as well as of the participating units.
- 1.2 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 should be considered throughout all the operation.
- 1.3 These guidelines should be applied by Member States in accordance with fundamental rights. Member States should ensure that border guards participating in the surveillance operation are trained with regard to relevant provisions of human rights and refugee law, and are familiar with the international regime on search and rescue.

2. INTERCEPTION

- 2.1 Upon detection, the ship or other sea craft ("ship") should be approached in order to observe its identity and nationality and, pending further measures, should be surveyed at a prudent distance. Information about the ship should be communicated immediately to the coordination centre established in the context and for the purposes of the Frontex coordinated sea operation.
- 2.2 If the ship is about to enter or it has entered the contiguous zone or the territorial waters of a Member State that does not participate in the operation, information about the ship should be communicated to the coordination centre, which will convey the information to the Member State concerned.
- 2.3 Information about any ship suspected of being engaged in illegal activities at sea outside the scope of the operation should be communicated to the coordination centre, which will convey the information to the Member State or Member States concerned.
- 2.4 Measures taken in the course of the surveillance operation against ships or other sea craft with regard to which there are reasonable grounds for suspecting that they carry persons intending to circumvent the checks at border crossing points may include:
 - (a) requesting information and documentation on ownership, registration and elements relating to the voyage, and on the identity, nationality and other relevant data on persons on board;
 - (b) stopping, boarding and searching the ship, its cargo and persons on board, and questioning persons on board;

- (c) making persons on board aware that they are not authorised to cross the border and that persons directing the craft may face penalties for facilitating the voyage;
- (d) seizing the ship and apprehending persons on board;
- (e) ordering the ship to modify its course outside of or towards a destination other than the territorial waters or contiguous zone, escorting the vessel or steaming nearby until the ship is heading on such course;
- (f) conducting the ship or persons on board to a third country or otherwise handing over the ship or persons on board to the authorities of a third country;
- (g) conducting the ship or persons on board to the host Member State or to another Member State participating in the operation.

2.5. Measures laid down in paragraph 2.4 should be taken under the following conditions:

2.5.1. Territorial waters and contiguous zone

Measures referred to in paragraph 2.4 should be taken upon authorisation and in accordance with the instructions from the host Member State transmitted to the participating unit via the coordination centre. To that end, the participating unit should communicate to the host Member State, via the coordination centre, whether the master of the intercepted vessel has requested that a diplomatic agent or consular officer of the flag State be notified.

2.5.2. Exclusive Economic Zone and the High Seas

2.5.2.1. If the ship flies the flag or displays the marks of registry of the nationality of a Member State participating in the operation, measures referred to in paragraph 2.4 should be taken upon authorisation of the flag State. The national official representing that Member State at the coordination centre should be entitled to grant or to transmit such authorisation.

2.5.2.2. If the ship flies the flag or displays the marks of registry of a Member State that does not participate in the operation or of a third country, confirmation of registry should be requested from the flag State through the appropriate channels and, if nationality is confirmed, authorisation should be requested from the flag State to take the measures referred to in paragraph 2.4.
The coordination centre should be informed of any communication with the flag State.

2.5.2.3. If, though flying a foreign flag or refusing to show its flag, there are reasonable grounds for suspecting that the ship is, in reality, of the same nationality as the participating unit, the participating unit should proceed to verify the ship's right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it should proceed to a further examination on board the ship, which must be carried out with all possible consideration. The country of which the ship is allegedly flying the flag should be contacted through the appropriate channels.

2.5.2.4. If, though flying a foreign flag or refusing to show its flag, there is reasonable ground for suspecting that the ship is, in reality, of the nationality of another Member State participating in the operation, verification of the ship's right to fly its flag should be conducted upon authorisation of that Member State. The national official representing that Member State at the coordination centre should be entitled to grant or to transmit such authorisation.

If the suspicions regarding the nationality of the ship prove to be founded, measures referred to in paragraph 2.4 should be taken under the conditions laid down in paragraph 2.5.2.1.

2.5.2.5. If there are reasonable grounds for suspecting that the ship is without nationality or may be assimilated to a ship without nationality, the patrol unit should proceed to verify the ship's right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it should proceed to a further examination on board the ship, which should be carried out with all possible consideration.

Measures referred to in paragraph 2.4 should be taken if the suspicions that the ship is without nationality prove to be founded and that there are reasonable grounds to suspect that the ship is engaged in the smuggling of migrants by sea in accordance with the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime.

It should be considered that a ship is without nationality or may be assimilated to a ship without nationality when the 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.

2.5.2.6. Pending or in the absence of authorisation of the flag State, the ship should be surveyed at a prudent distance. No other measures should be taken without the express authorisation of the flag State, except those necessary to relieve imminent danger to the lives of persons as set out in part 3 or those measures which derive from relevant bilateral or multilateral agreements, or unless the ship has entered the contiguous zone.

2.6. Any operational activities in the territorial waters of a Member State that does not participate in the operation or of a third country should be conducted in accordance with the authorisation and instructions of the coastal State. The coordination centre should be informed of any communication with the coastal State and of the subsequent course of action.

3. SEARCH AND RESCUE SITUATIONS ARISING IN THE COURSE OF THE OPERATION

3.1. Participating units shall provide assistance to any vessel or person in distress at sea. They shall do so regardless of the nationality or status of such a person or the circumstances in which that person is found.

3.2. When facing in the course of the operation a situation in which uncertainty or apprehension exists as to the safety of a ship or of any person on board, the

participating unit should forward as soon as possible all available information to the Rescue Coordination Centre responsible for the search and rescue region where the situation is taking place.

In cases 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 should contact the Rescue Coordination Centre of the host Member State that is geographically the closest to the emergency.

While awaiting instructions from the Rescue Coordination Centre, participating units should take all the appropriate measures to ensure the safety of the persons concerned.

3.3. Participating units should take all relevant elements into account and communicate their assessment to the responsible Rescue Coordination Centre, including in particular:

- (a) the existence of a request for assistance,
- (b) the seaworthiness of the ship and the likelihood that the ship will not reach its final destination,
- (c) the number of passengers in relation to the type of ship (overloading),
- (d) the availability of necessary supplies (fuel, water, food, etc.) to reach a shore,
- (e) the presence of qualified crew and command of the ship,
- (f) the availability of safety, navigation and communication equipment,
- (g) the presence of passengers in urgent need of medical assistance,
- (h) the presence of deceased passengers,
- (i) the presence of pregnant women or children,
- (j) the weather and sea conditions.

3.4. The existence of an emergency should not be exclusively dependent on or determined by an actual request for assistance.

In cases where, despite a ship being perceived to be in a state of emergency, the persons on board refuse to accept assistance, the participating unit should inform the Rescue Coordination Centre and continue to fulfil a duty of care, taking any measure necessary to the safety of the persons concerned, while avoiding taking any action that might aggravate the situation or increase the chances of injury or loss of life.

3.5. The coordination centre of the operation should be informed as soon as possible of any contact with the Rescue Coordination Centre and of the course of action taken by the participating unit.

- 3.6. If the ship cannot or can no longer be considered as being in a state of emergency or the search and rescue operation has been concluded, the participating unit should, in consultation with the coordination centre of the operation, resume the operation in accordance with part 2.

4. DISEMBARKATION

- 4.1. The operational plan should spell out the modalities for the disembarkation of the persons intercepted or rescued, in accordance with international law and any applicable bilateral agreements.

Subject to section 4.2, priority should be given to disembarkation in the third country from where the persons departed or through the territorial waters or search and rescue region of which the persons transited or, if this is not possible, to disembarkation in the geographically closest place where the safety of the persons can be ensured.

- 4.2. No person should be disembarked in or otherwise handed over to the authorities of a country with regard to which there are substantial grounds for believing that he or she would be subjected to persecution or to torture or to other forms of inhuman or degrading treatment or punishment, or from which there is a risk of expulsion or return towards such a country. The persons intercepted or rescued must be informed in an appropriate way so that they can express any reasons for believing that they would be subject to such treatment in the proposed place of disembarkation.
- 4.3. The coordination centre should be informed of the presence of persons within the meaning of paragraph 4.2, and should convey that information to the competent authorities of the host Member State.