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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 Member States of the European Union**

## EXPLANATORY MEMORANDUM

### 1. CONTEXT OF THE PROPOSAL

#### 1.1. Procedure and adoption of Council Decision 2010/252/EU<sup>1</sup>

In October 2009, the Commission was invited by the European Council to present proposals which would establish “*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>2</sup> This was again confirmed in the Stockholm Programme of December 2009, where the European Council requested the Commission to put forward proposals no later than 2010 to clarify and enhance the role of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (‘the Agency’) and to prepare “*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>3</sup>

In 2010, the Council adopted Decision 2010/252/EU (‘the decision’) as a response to these calls by the European Council to strengthen border surveillance operations coordinated by the Agency and to establish clear rules of engagement for joint patrolling and the disembarkation of intercepted or rescued persons in order to ensure the safety of those seeking international protection and to prevent loss of life at sea. The Commission had chosen to present its proposal under the comitology procedure based on Article 12(5) of the Schengen Border Code<sup>4</sup> considering the decision as being an additional measure governing border surveillance.

The decision was considered to be necessary and appropriate to implement the objective of border surveillance, namely to prevent unauthorised border crossings. In this regard, it was considered that surveillance not only encompasses the notion of detection but extends to steps such as intercepting vessels trying to enter the Union unlawfully. The link of search and rescue to border surveillance was based on actual practice – migrants travelling in unseaworthy vessels are sometimes in a distress situation upon detection.

The decision incorporated, within a single legal instrument, existing provisions of EU and international law. The aim was to overcome the different interpretations of international maritime law adopted by Member States and their diverging practices to ensure the efficiency of sea operations coordinated by the Agency. There was a risk that in a sea operation different rules, sometimes even conflicting ones, would apply to the same situation. Amidst this legal uncertainty, Member States’ participation in sea operations coordinated by the Agency was low in terms of contributing craft, vessels and human resources. This, in turn, hindered the effectiveness of the operations and undermined efforts of EU solidarity.

The decision intended to reinforce the protection of fundamental rights and to guarantee respect for the principle of *non-refoulement* in sea operations. Some Member States, Members of the European Parliament, human rights organisations and academics had questioned

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<sup>1</sup> Council Decision 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 European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 111, 4.5.2010 p. 20.

<sup>2</sup> European Council, Presidency Conclusions 29-30 October 2009.

<sup>3</sup> See point 5.1 of the Stockholm Programme, “Integrated management of the external borders”, OJ C 115, 4.5.2010, p. 1.

<sup>4</sup> 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), OJ L 105, 13.4.2006, p. 1.

whether fundamental rights and the rights of refugees were being respected during sea operations coordinated by the Agency, particularly on the high seas. The decision aimed to address these concerns by establishing a number of guarantees to ensure the respect of these rights, such as the requirement to inform the intercepted or rescued persons of the place of disembarkation, special consideration for the needs of vulnerable persons and the requirement for border guards to be trained in relevant provisions of fundamental rights and refugee law.

The decision was adopted on 26 April 2010 as a Council decision in accordance with the regulatory procedure with scrutiny. The European Parliament considered that the decision should have been adopted in accordance with the ordinary legislative procedure and not the comitology procedure. Therefore, it brought an action before the Court of Justice of the European Union ('the Court') against the Council requesting the annulment of the decision.

## **1.2. C-355/10: European Parliament v. Council<sup>5</sup>**

The European Parliament considered that the decision exceeded the implementing powers conferred under Article 12(5) of the Schengen Borders Code because: (i) it introduced new essential elements into the Schengen Borders Code; (ii) it altered essential elements of the Schengen Borders Code; and (iii) it altered the content of Regulation (EC) No 2007/2004.<sup>6</sup> The Council pleaded the inadmissibility of the action, and in the alternative, considered the action to be without merit. The Commission, as the only intervening party, acted in support of the Council.

The Court delivered its judgment on 5 September 2012. It annulled the decision on the first ground insofar as it considered that the provisions on interception measures, rescue and disembarkation are essential elements to the basic act, namely the Schengen Borders Code. It did not examine whether the decision alters essential elements of the Schengen Borders Code or whether it alters the content of Regulation (EC) No 2007/2004.

The Court decided to maintain the effects of the decision until it is replaced by new rules within a reasonable time.

## **2. RESULTS OF CONSULTATIONS WITH THE INTERESTED PARTIES AND IMPACT ASSESSMENTS**

When assessing the need to carry out an impact assessment, the following considerations were taken into account.

Firstly, the adoption of Council Decision 2010/252/EU had been preceded by a significant amount of preparatory work. In 2005, the Council had requested the Commission to examine the legal framework applicable to border surveillance operations at sea and to subsequently prepare rules at Union level. In 2007, the Commission presented a study in which it analysed the international legal framework as regards surveillance of the external sea borders and the obstacles to its effective implementation.<sup>7</sup> In the same year, the Commission set up an informal group of experts from Member States, the Agency, the Office of the UN High Commissioner for Refugees and the International Organisation for Migration to draw up

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<sup>5</sup> C-355/10: European Parliament v. Council of the European Union at <http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=C-355/10&td=ALL#> (not yet published in the European Court Reports).

<sup>6</sup> Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 349, 25.11.2004, p. 1.

<sup>7</sup> Commission Staff Working Document: Study on the international law instruments in relation to illegal immigration by sea, SEC(2007) 691.

guidelines for sea operations coordinated by the Agency. The results of this informal group were used by the Commission as a basis for its draft proposal presented under the comitology procedure.

Secondly, in view of preparing this proposal, the Commission consulted Member States and the Agency through an Expert Group on External Borders to determine to what extent this proposal should reflect the content of the decision. In general, Member States considered that this proposal should build upon the decision, keeping its scope limited to sea operations coordinated by the Agency, strengthening the provisions on the protection of fundamental rights, clarifying the distinction between interception measures and rescue, addressing the issue of disembarkation and ensuring consistency with international obligations, while taking into account legal and judicial developments at EU and international level.

Thirdly, on annulling Council Decision 2010/252/EU, the Court required that the decision be replaced within a reasonable time. Although the concept of ‘reasonable time’ is not defined in the judgment, it is understood that in view of possible difficult and lengthy discussions between the two EU legislators, the Commission should act expeditiously.

Consequently, it was considered that this proposal need not be accompanied by an impact assessment.

### **3. LEGAL ELEMENTS OF THE PROPOSAL**

This proposal is based on Article 77(2)(d) of the Treaty on the Functioning of the European Union. With a view to develop an external border policy, including ensuring efficient surveillance of the external borders as set out in Article 77(1), Article 77(2)(d) 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 Union policy in the field of the EU 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 ships suspected of trying to gain entry to the Union without submitting to border checks, as well as arrangements intended to address situations such as search and rescue that may arise during a sea operation and arrangements intended to bring such an operation to a successful conclusion.

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 on European Union.

In accordance with the principle of proportionality, as set out in Article 5 of the Treaty on European Union, this Regulation does not go beyond what is necessary in order to achieve those objectives.

It is on the basis of these principles that, as was the case for the decision, this proposal applies only in the context of operational cooperation coordinated by the Agency and it does not concern surveillance activities carried out by Member States individually or cooperating outside that framework.

#### **4. BUDGETARY IMPLICATION**

This proposal does not impose any financial or administrative burden on the Union. Therefore it has no impact on the Union budget.

#### **5. OPTIONAL ELEMENTS**

##### **5.1. Comparison between this proposal and Council Decision 2010/252/EU**

The scope and content of this proposal are similar to those of the decision. The changes presented in the proposal when compared to the decision are based on legal and judicial developments, such as the amendments to Regulation (EC) No 2007/2004<sup>8</sup> and the judgment of the European Court of Human Rights in *Hirsi Jamaa and Others v. Italy*,<sup>9</sup> on the need to ensure clarity as regards the concepts of interception and rescue, and on the practical experiences of Member States and the Agency when implementing the decision.

##### *5.1.1. Form*

The choice of legal instrument and the decision-making procedures are different. This is a proposal for a Regulation addressed to all Member States in accordance with the Treaties and it is to be adopted in accordance with the ordinary legislative procedure. Its form reflects the choice of legal instrument consisting of a preamble (citations and eighteen recitals) and eleven articles divided into four chapters. It shall be binding in its entirety and directly applicable in Member States. On the other hand, the decision had been adopted as an implementing measure using the regulatory procedure with scrutiny. It consists of a preamble (citations and eighteen recitals), two articles and an Annex divided into two parts. Part I of the Annex sets out rules for sea border operations coordinated by the Agency whereas Part II of the Annex consists of non-binding guidelines for search and rescue situations and for disembarkation in the context of sea operations coordinated by the Agency.

##### *5.1.2. Content*

The scope of application of this proposal is the same as that of the decision, namely border surveillance operations at sea carried out by Member States under the coordination of the Agency (Article 1). Although in the decision, the concept of 'border surveillance' was understood as including interception measures and arrangements for rescue arising during border surveillance operations, there was still doubt as to whether these measures did in fact fall under the concept of border surveillance as defined in the Schengen Borders Code. This proposal explicitly covers this broader concept of border surveillance by indicating that border surveillance is not limited to the detection of attempts at irregular border crossing but equally extends to steps such as interception measures, and arrangements intended to address

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<sup>8</sup> Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 304, 22.11.2011, p. 1.

<sup>9</sup> Judgment of the European Court of Human Rights (Grand Chamber) of 23 February 2012 (Application No 27765/09); at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109231#{"itemid":\["001-109231"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109231#{)

situations such as search and rescue that may arise during a sea operation and arrangements intended to bring such an operation to a successful conclusion (recital 1 and Chapter III).

When revisiting the decision, the amendments to Regulation (EC) No 2007/2004 needed to be taken into account. The Agency is now also entrusted with assisting 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. This means that although the Agency neither becomes a search and rescue body nor does it take up the functions of a rescue coordination centre, during a sea operation it assists Member States to fulfil their obligation under international maritime law to render assistance to persons in distress and this proposal sets out rules on how to deal with these situations in a sea operation coordinated by the Agency (recital 2 and Article 9).

With the amendments to Regulation (EC) No 2007/2004, the operational plan became a legally binding instrument with regard to all operations coordinated by the Agency and not only as regards rapid interventions. The content of the operational plan is listed in Articles 3a and 8e of Regulation (EC) No 2007/2004 which also refer specifically to sea operations. The rules laid down in this proposal are intended to form part of the operational plan drawn up in accordance with Regulation (EC) No 2007/2004, taking into account the requirements for sea operations.

The legal and judicial developments concerning the protection of fundamental rights are also taken into account in this proposal. Article 4, which deals with the protection of fundamental rights and the principle of *non-refoulement* in sea operations, addresses concerns raised by the European Court of Human Rights in its ruling in *Hirsi Jamaa and Others v. Italy* as regards disembarkation of intercepted or rescued persons in third countries, both in terms of relations between Member States and third countries, and the obligations of Member States vis-à-vis the individual. This article concerns the practical implementation of the principle of *non-refoulement* as enshrined in Article 19(2) of the Charter of Fundamental Rights of the European Union. In case of disembarkation in a third country, the persons intercepted or rescued must be identified and their personal circumstances must be assessed to the extent possible before disembarkation. They must also be informed of the place of disembarkation in an appropriate way and they must be given an opportunity to express any reasons for believing that disembarkation in the proposed place would be in violation of the principle of *non-refoulement*. This guarantees that the migrants are informed about their situation and the proposed place of disembarkation thereby allowing them to express any objections.

Under Chapter III, this proposal clearly distinguishes between detection, interception and rescue. As regards interception, this proposal while retaining the same set of measures as in the decision, distinguishes between the measures that may be taken in the territorial sea (Article 6), on the high seas (Article 7) and in the contiguous zone<sup>10</sup> (Article 8), thus clarifying the conditions under which these measures may be taken and the jurisdictional basis on which action may be taken particularly as regards stateless ships. Based on the Protocol against the Smuggling of Migrants by Land, Sea and Air, interception of ships on the high seas is now clearly linked to the requirement of having a reasonable suspicion that the ship is

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<sup>10</sup> The contiguous zone is regulated in Article 33 of the United Nations Law of the Sea Convention. It is a zone adjacent to the territorial sea and it may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured. It constitutes a part of the exclusive economic zone or the high seas, depending on whether the coastal State has proclaimed an exclusive economic zone, and it is a zone where the freedom of navigation applies. Although it is not part of the territorial sea, the coastal State may exercise the necessary control to prevent and punish the infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea.

engaged in the smuggling of migrants. As in the decision, the exercise of jurisdiction on the high seas must always be based on the authorisation of the flag State.

As regards search and rescue situations, the text in this proposal remains similar to the decision (Article 9). The wording is aligned to that used in the 1979 International Convention on Maritime Search and Rescue and the International Aeronautical and Maritime Search and Rescue Manual (IAMSAR). Also, on the basis of these international instruments, the proposal includes criteria as to when a ship is considered to be in a situation of uncertainty (Article 9(3)), alert (Article 9(4)) and distress (Article 9(5)) as well as a definition of a rescue coordination centre (Article 2(12)).

This proposal, differently from the decision, addresses the issue of disembarkation in terms of interception and rescue (Article 10). As regards interception in the territorial sea or in the contiguous zone, disembarkation takes place in the coastal Member State. As regards interception on the high seas, subject to guaranteeing the protection of fundamental rights and the principle of *non-refoulement*, disembarkation may take place in the third country from which the ship departed. If this is not possible, then disembarkation takes place in the host Member State.

As regards disembarkation following a rescue operation, this proposal refers to the concept of ‘place of safety’ as defined in the Guidelines on the Treatment of Persons Rescued at Sea issued by the International Maritime Organisation,<sup>11</sup> taking into account aspects of fundamental rights<sup>12</sup> (Articles 2(11) and 10(4)), and requires Member States to cooperate with the responsible rescue coordination centre to provide a suitable port or place of safety and to ensure rapid and effective disembarkation. This proposal takes into account the fact that at this stage the maritime and aerial units would be acting under the coordination of the rescue coordination centre, which determines the appropriate port or place of disembarkation. However, it also recognises the possibility for the maritime units to disembark in the host Member State if they are not released of their obligation to render assistance to persons in distress as soon as reasonably practicable, taking into account the safety of the rescued persons and that of the maritime unit itself.

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<sup>11</sup> Resolution MSC.167(78), adopted on 20 May 2004.

<sup>12</sup> Resolution 1821(2011) of the Parliamentary Assembly of the Council of Europe.

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 ships suspected of trying to gain entry to the Union without submitting to border checks, as well as arrangements intended to address situations such as search and rescue that may arise during a border surveillance operation at sea and arrangements intended to bring such an operation to a successful conclusion.
- (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>13</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 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.

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<sup>13</sup> OJ L 349, 25.11.2004, p. 1.

- (3) The establishment of the European Border Surveillance System (EUROSUR) established by Regulation (EU) No [...] of the European Parliament and of the Council of [...] 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 irregular migration, for combating cross-border crime and for contributing to protect and save 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.
- (4) During border surveillance operations, Member States and the Agency should respect their obligations 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 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.
- (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>14</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 Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status<sup>15</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*.
- (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 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

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<sup>14</sup> OJ L 105, 13.4.2006, p. 1.

<sup>15</sup> OJ L 326, 13.12.2005, p. 13.

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.
- (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 takes place, including references to international and Union law, regarding interception, rescue at sea and disembarkation. In turn, this Regulation governs the issues of interception, rescue at sea and disembarkation in the context of sea border surveillance operations coordinated by the Agency.
- (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 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 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 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 association of those two States with the implementation, application and development of the Schengen *acquis*<sup>16</sup> which fall within the area referred to in Article 1, point A, of Council Decision 1999/437/EC<sup>17</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 the association of the Swiss Confederation with the implementation, application and development of the Schengen *acquis*,<sup>18</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>19</sup>
- (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*, which fall within the area referred to in Article 1, point A, of Decision 1999/437/EC<sup>20</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>21</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>22</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>23</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>16</sup> OJ L 176, 10.7.1999, p. 36.

<sup>17</sup> OJ L 176, 10.7.1999, p. 31.

<sup>18</sup> OJ L 53, 27.2.2008, p. 52.

<sup>19</sup> OJ L 53, 27.2.2008, p. 1.

<sup>20</sup> OJ L 176, 10.7.1999, p. 31.

<sup>21</sup> OJ L 160, 18.6.2011, p. 19.

<sup>22</sup> OJ L 131, 1.6.2000, p. 43.

<sup>23</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, but which is not a host Member State;
5. 'participating unit' means a maritime or aerial unit of the host Member State or of a participating Member State;
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 [.../...];
8. 'ship' means a boat, vessel or any other craft used at sea;
9. 'stateless ship' means a ship without nationality or 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;
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;
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.

## 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.

#### *Article 4*

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

1. No person shall be disembarked in, 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 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*.
2. Before deciding on disembarkation in a third country, the participating units shall take into account the general situation in that third country 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 disembarkation in a third country, the participating units shall identify the intercepted or rescued persons and assess their personal circumstances to the extent possible before disembarkation. They shall inform the intercepted or rescued persons of the place of disembarkation in an appropriate way and 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 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.

## CHAPTER III

### SPECIFIC RULES

#### *Article 5*

##### Detection

1. Upon detection, the participating units shall approach a ship suspected of crossing or intending to cross the border in an irregular manner to observe its identity and nationality and, pending further measures, it shall be surveyed at a prudent distance. The participating units shall communicate information about the ship immediately to the International Coordination Centre.
2. Where the ship 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 information about the ship 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 information about any ship 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 participating Member State, the participating units shall take one or more of the following measures when there are reasonable grounds to suspect that a ship is carrying persons intending 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, 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 may not be 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 sea or the contiguous zone, including escorting the vessel or steaming nearby until the ship is heading on such course;
  - (f) conducting the ship or persons on board to the host Member State or to another Member State participating in the operation, or to the coastal Member State.
2. The host Member State or the participating Member State on whose territorial sea the interception takes place shall authorise the measures referred to in paragraph 1 and it 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 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 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 participating Member State in whose territorial sea the stateless ship is intercepted shall authorise and instruct the participating unit to stop it and to take any of the measures laid down in paragraph 1.
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.

#### *Article 7*

##### Interception on the high seas

1. On the high seas, the participating units shall take one or more of the following measures when there are reasonable grounds to suspect that a ship 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:
  - (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 may not be 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 sea or the contiguous zone, including 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. Where the ship 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, after confirming the nationality of the ship, authorise the measures laid down in paragraph 1.
3. Where the ship 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, shall notify the flag State, it shall request confirmation of registry and, if nationality is confirmed, 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 measures authorised by the flag State.

4. Where, though flying a foreign flag or refusing to show its flag, there are reasonable grounds to suspect that the ship is, in reality, of the same nationality as a participating unit, that participating unit shall verify the ship's right to fly its flag. To this end, it may approach the suspected ship. If suspicion remains after the documents have been checked, it shall proceed to a further examination on board the ship, 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 is, in reality, of the nationality of the host Member State or another participating Member State, the participating unit shall verify the ship's right to fly its flag upon authorisation of that Member State.
6. Where, in the cases referred to in paragraphs 4 or 5, the suspicions regarding the nationality of the ship prove to be founded, the host Member State or the participating Member State shall authorise the measures laid down in paragraph 1.
7. Pending or in the absence of authorisation of the flag State, the ship 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 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. If suspicions prove to be founded further appropriate measures as laid down in paragraph 1 may be taken in accordance with national law 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 authorisation to verify the right of a ship 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 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 is carrying persons intending to reach the border of a Member State and to circumvent checks at border crossing points, that ship shall continue to be monitored. The International Coordination Centre shall communicate information about the ship 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 participating Member State, the measures laid down in Article 6(1) shall be taken in accordance with Article 6(2).
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.
3. Where a stateless ship is transiting the contiguous zone, Article 7(8) shall apply.

#### *Article 9*

##### Search and rescue situations

1. During a sea operation, participating units shall render assistance to any ship 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.
2. When facing, in the course of a sea operation, a situation of uncertainty, alert or distress as regards a ship or any person on board, the participating unit shall 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.
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. When assessing the situation for the purposes of paragraphs 3 to 5, participating units shall take all relevant elements into account, including:
  - (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 and condition of the ship;
  - (d) the availability of necessary supplies such as fuel, water, food to reach a shore;
  - (e) the presence of qualified crew and command of the ship;
  - (f) the availability and capability 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, including weather and marine forecasts.
7. 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. The existence of a distress situation shall not be exclusively dependent on or determined by an actual request for assistance. Where, despite a ship being perceived to be in a distress situation, the persons on board refuse to accept assistance, the participating unit shall inform the Rescue Coordination Centre and continue to fulfil a duty of care by surveying the ship 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. 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 another Rescue Coordination Centre is better placed to assume coordination of the search and rescue situation.
  10. 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. Where the ship cannot or can no longer be considered as being in a distress situation or the search and rescue operation has been concluded, the participating unit shall, in consultation with the International Coordination Centre, resume the sea operation.

#### *Article 10*

##### Disembarkation

1. The modalities for the disembarkation of the persons intercepted or rescued in a sea operation 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. In the case of interception in the territorial sea or the contiguous zone as laid down in Article 6(2) or Article 8(1), disembarkation shall take place in the host Member State or in the participating Member State in whose territorial waters or contiguous zone the interception takes place.

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. 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 departed. If that is not possible, disembarkation shall take place in the host Member State.

4. In the case of search and rescue situations as laid down in Article 9, the participating units shall cooperate with the responsible Rescue Coordination Centre to provide a suitable port or place of safety for the rescued persons and to ensure their rapid and effective disembarkation.

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.

Where the participating unit 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 be authorised to disembark the rescued persons in the host Member State.

5. 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. On the basis of that information, the operational plan should determine which follow-up measures may be taken.

## CHAPTER IV

### FINAL PROVISIONS

#### *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*  
*The President*

*For the Council*  
*The President*