

Meijers Committee

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

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To (by email)

European Court of Justice
Cabinet Advocate-General Mengozzi
AN/06LB0687.1
L- 2925 Luxembourg

Reference Regarding

CM1111
Proposal for a Regulation amending the Schengen Borders Code
(COM(2011)118 final)

Date

21 September 2011

Dear Mr Mengozzi,

Please find attached a note of the Meijers Committee on the proposal for a Regulation amending the Schengen Borders Code (COM(2011)118 final), particularly on ensuring access to asylum procedures in the course of operations of border control. As this note touches upon issues that may be subject of discussion in case C-355/10 in which you are advising the European Court of Justice we hope that this note is useful to you.

The Meijers Committee is pleased to note that the proposal foresees in an explicit legal framework for joint border crossings under bilateral agreements with third countries, including rules on international protection for persons claiming asylum (Annex VI). We are concerned however, that not all forms of joint border control are explicitly governed by the proposed amendments, in particular controls at sea, outside the Member States' territorial waters, which may undermine the effectiveness and uniform application of the Schengen Borders Code.

The Meijers Committee would consider the Commission's proposal as a welcome opportunity to address these lacunae and suggests to clarify both the term "border surveillance" in Article 12 of the Code (point 1 of our note) and its territorial scope (point 2). Moreover, it is suggested to insert an obligation for the Member States to notify all arrangements on border control with third countries to the Commission, regardless of its status under international law (point 3). Finally, in point 4 of the note the Meijers Committee advises to refer explicitly to the obligation to provide access to the asylum procedure for persons claiming international protection in the course of border controls.

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

Yours sincerely,



Prof. dr. C.A. Groenendijk
Chairman

Note of the Meijers Committee on the proposal for a Regulation amending the Schengen Borders Code (COM(2011)118 final)

1. Clarifying “border surveillance”

The Meijers Committee proposes a clarification of the term “border surveillance” in Article 12 of the Code to the effect that it expressly excludes activity which amounts to effectuating *de jure* or *de facto* refusals of entry. The question of how to distinguish between controls amounting to “border checks” (Articles 2(10) and 7) and “border surveillance” (Articles 2(11) and 12) is the subject of the pending action brought by the European Parliament for annulment of Council Decision 2010/252/EU that supplements the Schengen Borders Code with respect to surveillance of the sea external borders in Frontex operations (case C-355/10). This Council Decision lays down rules governing *surveillance*, including inter alia the boarding of ships, the checking of identities of persons on board and the handing over of the ship or persons on board to the authorities of a third country (Annex, Part I, para. 2). The Meijers Committee is in full agreement with the position of the Parliament that rules on “interception”, “search and rescue” and “disembarkation” are beyond the scope of “surveillance” as defined by Article 12 of the Schengen Borders Code. The matter is of considerable importance, since activity amounting to border checks and refusals of entry is governed by a number of essential safeguards laid down in the Code, including on asylum, while border surveillance is not.

The Meijers Committee is of the opinion that when surveillance activity amounts to border checks or refusing entry, the safeguards of Articles 7-11 and 13 of the Code apply. Further, the Meijers Committee does not consider the Schengen Borders Code to provide a legal basis for activity amounting to ‘seizing the ship and apprehending persons on board’; ‘ordering the ship to modify its course outside of or towards a destination other than the territorial waters or contiguous zone’; or ‘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’, as listed in point 2.4 (d-f) of Part I of the Annex of Council Decision 2010/252/EU and expects the CJEU to annul these provisions without preserving their effect.

The Meijers Committee proposes the following amendment, in line with paragraph 2.3(e) of Part Three of the Schengen Handbook (C(2006) 5186 final):

In Article 12, a new paragraph 6 is added:

“Persons who have crossed, tried to cross or are suspected of intending to cross the border illegally shall be stopped and brought to the nearest border guard station. Checks on persons and the issuing of refusals of entry in the course of surveillance activities shall under all circumstances be conducted in accordance with Articles 7 to 11 and 13, without prejudice to Article 18.”

2. Territorial scope of the Schengen Borders Code

The Meijers Committee considers it necessary, furthermore, to specify that the safeguards of the Borders Code on border checks and refusals of entry, apply equally to border controls that are not undertaken at the Schengen border, i.e. at sea and in third countries. The extraterritorial application of the Code is already recognised in Annex VI of the Code, but still there appears to be

dispute whether, for example, the procedural standards of Article 7 (border checks) and Article 13 (refusals of entry) also apply to extraterritorial operations of border control. In order to prevent such controls from circumventing the standards safeguarded in the Code, the Meijers Committee proposes the following amendment:

In Article 7, a new paragraph 8 is added:

“Subject to the provisions in this chapter, border checks may be carried out in other areas than at external borders, in particular at the High Seas and in the territorial waters or the territory of third countries with which the Member States or the Union have concluded agreements to this effect. Such checks and agreements shall respect the obligations of Member States under the Law of the Sea, in particular the United Nations Convention on the Law of the Sea.”

3. Notification of bilateral border control agreements to Commission

The Meijers Committee welcomes the insertion of point 1.1.4.4. in Annex VI under which bilateral agreements with a third country on joint border crossing points should include safeguards on international protection and are to be notified before being concluded or amended to the Commission with a view to ascertaining their compatibility with the Borders Code. Yet, the Meijers Committee is concerned that this new provision does not cover all relevant bilateral agreements on border control. It is well documented, in particular, that some Member States have concluded far-stretching sea border control arrangements with countries such as Morocco, Mauritania, Senegal, Cape Verde, Algeria, and Libya.¹ The fact that the large majority of these agreements is not publicly accessible hinders democratic control, transparency and the scrutiny of their compatibility with international law and EU law, including the Borders Code. The Meijers Committee therefore proposes that all arrangements with third countries relating to border control, thus not only on joint border crossing points, but also on border checks and border surveillance as defined in Articles 2(10) and 2(11) of the Borders Code are notified to the Commission. As it has been reported that some of these arrangements are concluded directly between border guard authorities or via memoranda of understanding, the obligation of notification should include administrative arrangements without binding legal status under international law. The Meijers Committee proposes the following amendments:

In Annex VI, point 1.1.4.4. is amended as follows:

*“Before concluding or amending any bilateral agreement, **regardless of its status under international law**, on joint border crossing points with a neighbouring third country, the Member State concerned shall consult the Commission as to the compatibility of the agreement with this Regulation.”*

In Annex VI, point 3.1.1., the second sentence is replaced by the following:

*“Member States may conclude bilateral agreements according to which checks **and/or surveillance** may also be carried out during crossings or, upon the ship’s arrival or departure, in the territory of a third country, respecting the principles set out in point 1.1.4 **and***

¹ See in particular the contributions of A. di Pascale and P. García Andrade in: B. Ryan and V. Mitsilegas, *Extraterritorial Immigration Control, Legal Challenges*, Leiden/Boston: Martinus Nijhoff 2010.

the basic principles and guarantees of Chapter II of this Regulation.”

In Annex VI, point 3.1.1., a third and fourth sentence are added:

“Before concluding or amending any bilateral agreement, regardless of its status under international law, on border checks or border surveillance during crossings or in the territory of a third country, the Member State concerned shall consult the Commission as to the compatibility of the agreement with this Regulation.

If the Commission considers the agreement to be incompatible with this Regulation, it shall notify the Member State concerned. The Member State shall take all appropriate steps to amend the agreement within a reasonable period in such a way as to eliminate the incompatibilities established.”

4. Access to the asylum procedure

Lastly, the Meijers Committee recommends to include an explicit reference in the Schengen Borders Code to the obligation to provide access to the asylum procedure for persons claiming international protection in the course of border controls. This would correspond to the most recent recast of the Asylum Procedures Directive (COM(2011) 319 final) which provides in Article 6, paragraph 2, that “Member States shall ensure that a person who wishes to make an application for international protection has an effective opportunity to lodge the application as soon as possible.” The Meijers Committee proposes the following amendment, to ensure that border guards act in conformity with that obligation:

In Article 13, paragraph 1, a second sentence is added:

“The border guards shall ensure that a person who wishes to make an application for international protection has an effective opportunity to lodge the application as soon as possible, in accordance with Directive 2005/85/EC and in conformity with the obligation of non-refoulement.”

In addition Annex II of the Schengen Borders Code should be amended so as to require the registration of the number of people making a claim for international protection and registration of the authorities to which these people have been referred to following such claim.

The standard form for refusal laid down in Annex V of Schengen Borders Code should be amended so as to contain a check box stating:

“The person refused entry has not applied for international protection”

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