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NOTE

from : Presidency
to : Strategic Committee on Immigration, Frontiers and Asylum

Subject : Programme of measures to combat illegal immigration across the maritime borders of the European Union

I. **Aims of the programme**

1. The purpose of this programme is to improve action taken to combat illegal immigration across the maritime borders of the European Union. The principal means of ensuring the success of any measures taken is enhanced international relations with the third countries from which illegal migration flows originate or through which they pass. The programme adopts the concept of the virtual maritime border in order to reinforce the legal borders of Member States by means of joint operations and specific measures in the places where illegal migratory flows originate or transit.

2. The intention of the proposed measures is to achieve coordinated and effective management of the maritime borders within a minimum time. The programme contains proposals for increasing port-to-port controls among Member States and in traffic with third countries. There are suggestions for operations in territorial waters and on the high seas. In addition to initiatives for patrols and information gathering and analysis, there are proposals for the treatment of immigrants found on board vessels which have been intercepted or prevented from leaving. The conclusion of agreements with the countries of origin or transit of illegal immigration is advocated, as well as a single management structure for maritime coordination centres. Lastly, particular attention is paid to identifying sources of Community funding.

II. Background

3. The Tampere European Council held on 15 and 16 October 1999 underlined the need for a balanced approach to migration, calling for reinforcement of border control systems together with the adoption of policies to develop and guarantee human rights in third countries and stressing the need for more efficient management of migration flows. Partnerships with third countries was seen as a key element for the success of that policy. The European Council also called for the development of programmes for cooperation and assistance in the transfer of technology used by the border control services.
4. The Laeken European Council held on 14 and 15 December 2001 laid the foundations for the introduction, the following February, of the comprehensive plan to combat illegal immigration and trafficking in human beings in the European Union. The plan identifies the management of external borders as a common Union activity and as the principal means of preventing illegal immigration and trafficking in human beings. It contains a specific paragraph on sea borders, mentioning the need to improve controls by the adoption of operational and legislative measures.

5. On the basis of a Commission communication, the JHA Council of 13 June 2002 approved the plan for the integrated management of the external borders of the Member States of the European Union, which clearly states that the external borders of the Europe constitute a system for the protection of the area of freedom, security and justice of the European Union. The plan advocates joint operations between Member States via the creation of a network of coordination centres. A key role is assigned to the Common Unit of External Border Practitioners, which has the task of implementing the operational measures suggested in the Action Plan. As a consequence, further to decisions taken in the Strategic Committee on Immigration, Frontiers and Asylum cooperation was initiated between the Member States to carry out major joint operations at the sea borders: the Ulysses, Rio IV, Pegasus, Triton, Orca and Neptune operations.
6. The Seville European Council held on 21 and 22 June 2002, applauding the Action Plan on the integrated management of the external borders, requested the Member States to implement the recommendations made in the plan and referred to the importance of stepping up cooperation with third countries in managing migration flows, including the prevention and combating of illegal immigration and trafficking in human beings.
7. In its conclusions, the General Affairs Council of 18 November 2002 called on the Community to consider including in future cooperation agreements with third countries a clause on readmission and management of migration flows, and identified nine countries with which cooperation in these areas should be stepped up as a priority.
8. In its communication for the Thessaloniki European Council on 3 June 2003, on the development of a common policy on illegal immigration, smuggling and trafficking of human beings, external borders and the return of illegal residents, the Commission emphasised the need for the objectives of a common policy on illegal immigration to be considered in the overall context of the European Union's relations with third countries.

9. The Thessaloniki European Council held on 19 and 20 June 2003 welcomed the Commission's guidelines and reiterated the urgency of a common policy on immigration based on integration and fair treatment of aliens legally residing in the Member States. At the same time, it affirmed the need for more effective integrated management of Europe's external borders, and for continuity and coherence of Community action in this field. Those guiding principles constituted the basis for the Italian Presidency's programme on immigration, borders and asylum.
10. In accordance with previous policy guidelines, the Thessaloniki European Council also called for integration of immigration policy into relations with third countries and systematic evaluation of effective cooperation by such States in combating illegal immigration.
11. In September 2003, as previously instructed by the JHA Council, the Commission presented the final report on the feasibility study on the control of the European Union's maritime borders carried out by CIVIPOL (11490/1/03 REV 1 FRONT 102 COMIX 458). The study singles out five priority areas: identification of illegal immigration routes; cooperation with – third countries of origin and transit; the introduction of effective operational structures for coordination between Member States; identification of the best technologies available; and the legal aspects of maritime border controls.
12. On the basis of the feasibility study, the European Council on 16 and 17 October 2003 emphasised the importance of acting as soon as possible and called on the JHA Council to carry out a programme of work on management of the Union's maritime borders by the end of 2003.

13. This programme concerns the present situation of illegal immigration by sea and takes into account the European Union guidelines summarised above and the further action proposed in the CIVIPOL report.

III. Broad outlines of lawfulness of checks at sea

14. Illegal migration flows by sea have become significant in scale since the 1980s. Mass exoduses from Vietnam involved the United Kingdom and Australian shipping authorities in a myriad of rescue operations in the South China Sea in 1979 and 1980. The US Coastguard has for years had to deal with migration flows from the waters of Cuba and Haiti, as well as more recently China. From the end of the cold war until a few years ago, Italy's shores served as a landing stage for throngs of people arriving by sea from Albania; they now face flows coming, in particular, from the eastern and central Mediterranean. The CIVIPOL final report gives a picture of the ways in which Europe's sea borders have in recent years been under pressure from migration flows.
15. The study distinguishes between illegal immigration flows involving coasts (focal routes or random routes) or ports, in the latter case with the use of specialist harbour areas (by means of cargo vessels, pleasure craft or fishing boats) or of regular shipping services (port-to-port routes). Use of makeshift craft (rubber dinghies and small or unseaworthy boats) gives rise to particular public concern, as they often sink with the loss of many lives. Illegal immigration on cargo vessels or fishing boats and, to a lesser extent, on pleasure craft or regular shipping services between Member States is perceived as less significant, being harder to detect and not gaining full public awareness. Yet it is a particularly widespread and insidious method of unlawful entry.

16. On the basis of the breakdown put forward by CIVIPOL, a distinction can be drawn between types of joint action to be taken, according to whether they involve measures on the high seas, in ports, within territorial waters or just outside them. It should be pointed out here that, under current international rules, the coastal state has full jurisdiction over vessels anchored within its internal waters. The same holds true for its territorial waters. The exception entailed by the right of innocent passage does not apply to vessels heading for its internal waters. Passage is otherwise deemed innocent if it is not prejudicial to the peace, good order or security of the coastal State. Illegal immigration comes within Article 19(2)(g) of the Montego Bay Convention on the Law of the Sea, which prohibits boarding or landing by "any ... person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State". Illegal immigration is also a matter for which the coastal State is allowed to exercise criminal jurisdiction in respect of occurrences on board a ship (Article 27(a) and (b) of the Montego Bay Convention). That State enjoys jurisdiction, for the purpose of preventing or punishing illegal immigration, in a "contiguous zone" (Article 33 of the Montego Bay Convention).
17. On the high seas, the Montego Bay Convention does not expressly allow for the shipping authorities of a State other than the flag State to intercept a ship and inspect it on illegal immigration grounds. However, it does make this possible where the vessel has no nationality or its nationality is in doubt (Article 110).
18. A further case in which inspection of vessels of another nationality on the high seas would be lawful is with the consent of the flag State, pursuant to the principle *volenti non fit iniuria* [no injury in the event of voluntary assumption]. In this way, the two States can also determine the subsequent action to be taken with regard to any illegal immigrants found on board. Consent may be given in writing or even orally. International practice shows some examples of such treaties: the exchange of notes of 23 September 1981 between Haiti and the United States of America; the exchange of notes of 25 March 1997 between Italy and Albania and the related Protocol of 2 April 1997.

19. The principle of flag State consent also lies behind the provisions, yet to come into force, laid down by the Protocol against the smuggling of migrants, supplementing the 2000 Palermo Convention against Transnational Organised Crime. The coastal State may request authorisation from a vessel's flag State to take appropriate measures, if it suspects that the vessel is carrying illegal immigrants (Article 8). The Protocol establishes arrangements for the designation of national liaison authorities, in order to facilitate communications between the States concerned.

20. A similar system is provided for in the 1998 IMO Circular on interim measures for combating the trafficking or transport of illegal migrants. Although this is a non-binding instrument, its significance should not be underestimated, as its recommendations would enable the arrangements laid down by the Palermo Protocol to be introduced straight away.

IV. Operational port-control measures

21. Checks in Member States' ports must be fully implemented, as laid down in the 1990 Schengen Convention. A prime target for checks should be shipping services between Member States, or between Member States and non-member countries, which intelligence work and objective comparisons show to involve a high illegal-immigration risk. Merchant shipping (cargo vessels), fishing boats and pleasure craft should also be included here.

22. Further to the provisions laid down in the Common Manual for border checks, there seems a pressing need to step up checks on merchant shipping and pleasure craft, with the use of inspection procedures not confined to cross-checking of crew and individual documentation for those on board, but also involving close inspection of such vessels. It would seem advisable for the operational arrangements for such checks to involve the relevant customs authorities as well.
23. Checks on vessels operating regular shipping services should be organised differently, according to their ports of origin and destination, i.e. depending on whether they are plying between a port in a non-member country and a port in a Member State or between ports in two Member States.
- (a) Checks on regular shipping services between a port in a non-member country and a port in a Member State
- Such checks require prior agreements with the authorities in non-member countries, in order to:
- accompany checks by the deployment of police from the countries concerned at the ports of origin and destination of services;
 - provide technical assistance and any necessary equipment for more effective checking of vessels on which illegal immigrants are wont to conceal themselves;
 - provide help in improving the security and quality of travel documents and in recognising forgeries;
 - exchange information needed for the detection of false documents, by establishing direct communication channels;

- pool experience and intelligence on criminal groups suspected of facilitating illegal immigration by sea;
- arrange for the presence on board, at sea, of police officers from both countries, to carry out advance border checks and observe passengers.

(b) Checks on regular shipping services between ports in two Member States

In such cases, checks should be aimed at detecting existing illegal immigrants, since passengers carried on vessels operating regular shipping services between Schengen States are exempt from border checks.

In any event, given the increasing use of such services by foreign nationals already unlawfully present within Member States, special operations should be organised to locate them and expel them from Member States.

If this is to be achieved, it would seem necessary to:

- conduct joint surveillance at vessels' ports of departure and destination;
- deploy police on board vessels, for observation and supervision purposes.

V. Operational coastline-control measures

24. Member States should endeavour to apply all existing international instruments for the prevention and punishment of illegal immigration by sea, while ensuring the safety of individuals and compliance with human rights provisions. Legal loopholes, as revealed by the CIVIPOL feasibility study, will have to be plugged by means of careful, coordinated action, with the fullest participation by Member States and the undertaking of specific initiatives by the Commission. Efforts to improve the current potential of international practice in this area, though, should not stand in the way of achieving as much as possible through the use of existing instruments.
25. If cooperation between Member States is to be uniform and more effective, there is an especial need to reaffirm the principle of solidarity in intercepting vessels carrying illegal immigrants, by means of meticulous application of the law of the sea for the immediate rescue of ships whose seaworthiness is in doubt.
26. International cooperation between Member States, as well as between them and non-member countries, will in particular have to involve stepping up "pre-border" checks and joint processing of illegal immigrants intercepted at sea. The main aspects of this are as follows:
- using the most sophisticated technical tools and the most effective operating methods, based on one another's experience and on information available among Member States;
 - providing non-member countries with technical and organisational assistance in stepping up surveillance of coasts from which illegal migrants leave;
 - joint sea patrols carried out by the navies of Member States and of non-member countries concerned by illegal migration flows;

- conducting naval operations to intercept and restrain vessels carrying illegal immigrants;
- ordering intercepted vessels into safe ports;
- arranging for immigrants found on board vessels to be processed and for traffickers to be brought to justice;
- organising holding centres for illegal immigrants at vessels' places of departure;
- carrying out the identification and repatriation of immigrants held;
- exchanging information for the purposes of combating criminal organisations and identifying methods of unlawful transport of illegal immigrants by sea.

27. The conclusion of readmission agreements with countries of origin or transit of illegal immigrants is to be encouraged. Provision should accordingly be made for the possibility of granting technical and organisational assistance. Suitable aid projects should likewise be devised for non-member countries which cooperate in applying measures for coastline control and processing of illegal immigrants detected (identification, repatriation of other countries' nationals etc.). Consideration should also be given to the possibility of encouraging non-member countries to cooperate by means of a targeted legal entry policy. The Commission has been given a remit to look into the matter and it is hoped that this can be done swiftly.

VI. Organisation and coordination procedures

28. If they are to be effective, the measures proposed in this programme need to be organised operationally on unified lines. The Plan for the integrated management of the external borders envisages a coordinating network. The Common Unit of External Border Practitioners has the task of implementing the measures set out in the Plan, promoting pilot projects and joint operations, monitoring and evaluating the results, identifying best practice and helping set up ad hoc centres (see JHA Council conclusions of 5 June 2003 and the Guidelines on the functioning of the Common Unit of 10 July 2003). This organisational model originates in the feasibility study for the setting up of a European border police of 30 May 2002; it will serve to achieve a series of objectives designed to strengthen Europe's external borders without encroaching on Member States' national sovereignty.
29. The Common Unit of External Border Practitioners should support the setting up of centres (open to Member States' membership) for coordinating the European Union's maritime borders; centres would be rationally organised according to criteria of functionality and area of geographical responsibility. Updated reports on the centres' operation will be sent to the Common Unit so that the following general objectives are achieved:
- ensuring coordinated management of controls of the EU's maritime borders in ports, along coasts and on the high seas, with the aim of preventing and punishing illegal immigration and trafficking in human beings;
 - encouraging the conclusion of agreements with third countries so as to strengthen international collaboration on containing the flow of illegal migrants and measures to combat criminal organisations;

- coordinating joint operations conducted by Member States and by Member States together with third countries;
 - liaising on a permanent basis with Community institutions and with the competent national and international bodies.
30. EU maritime borders coordinating centres should be supplied with relevant information by the network of Member States' immigration liaison officers (ILOs). To that end, ILOs should be stationed in the countries concerned so as to keep the situation under constant review.
31. Sea-borne illegal immigration calls for special attention from the Integrated Risk Analysis Centre, which should deploy appropriate resources for gathering, analysing and disseminating the information and data obtained.
32. EU maritime borders coordinating centres should have the capabilities to:
- plan, manage and evaluate joint surveillance of coasts and other sea areas;
 - plan, manage and evaluate initiatives set up with the participation of third-country authorities in order to carry out controls, share information, return illegal immigrants and combat criminal organisations;
 - collect, analyse and disseminate information in order to keep Member States and the Community institutions abreast of results achieved, difficulties that have emerged during operations, and future prospects;

- carry out analyses of the information collected, including analyses for investigative purposes, with the assistance of Europol and other international police cooperation bodies;
 - specific analyses of the risks of migration by sea carried out in agreement with the Integrated Risk Analysis Centre;
 - share information with the other Coordinating Centres;
 - compile best practice for technology, port control procedures, sea surveillance operations, intercepting vessels and dealing with illegal immigrants found on board.
33. The future external borders agency could develop the proposed coordination framework and constitute a further positive step towards operational integrated management of the maritime borders of the European Union also. This Community structure could provide back-up for initiatives coordinated by the Centres and facilitate dealings with the European institutions and the relevant bodies in the various Community sectors.

III. Financing

34. The CIVIPOL feasibility study underlines the lack of any detailed accounting in the Member States of the costs of border policing and controls. The disadvantages of that situation are compounded by the fact that combating illegal immigration by sea involves various types of organisation, including police and military bodies.

35. Maritime surveillance also involves the growing use of increasingly sophisticated equipment and technologies, which are useful in reducing the workload created by the massive use of staff and equipment also needed for other tasks such as shipping safety, protection of the marine environment, etc., which obviously restricts their availability for use in combating illegal immigration. These factors underline the need for *ad hoc* Community financing.
36. As there is no formula for sharing the costs of the staff, management and technical equipment involved in border controls, there must be an initial identification of the measures to be adopted to curb illegal immigration. In the case of the maritime borders in particular, experience acquired in past or current pilot projects could be built on by adopting new initiatives that effectively integrate those projects.
37. The communication from the Commission to the European Parliament and the Council for the European Council of Thessaloniki on the development of a common policy on illegal immigration, smuggling and the trafficking of human beings, external borders and the return of illegal residents contains a chapter on the possible financial contribution of the European Union in that specific sector. Underlining the need for mutual trust between Member States, the Commission affirms the importance of the principle of solidarity. That solidarity should be reflected also in operational cooperation with third countries, whose involvement is essential for curbing illegal immigration flows.

38. It is therefore necessary to consider the possibility of using the Community funds set aside for the period 2004-2006, by using the ARGO funds or budget heading B7-667, given the anticipated direct involvement of third countries in the cooperation process, which must aim not only to combat migratory flows through those States, but also to curb and manage them.
39. Bearing that in mind, the integration of migration issues into the European Union's relations with third countries is a key factor. The Commission has undertaken to take into account, by 2004, the priorities for the management of migratory flows, country by country, in the framework of more detailed programming which it is hoped can be implemented without delay.
40. Equally important is the provision of a separate instrument to assist a common return policy by *ad hoc* financing, assessing the advantages of granting incentives also to third countries which collaborate with the European Union to curb illegal migration across the Union's maritime borders, with a view to encouraging the return of illegal immigrants to their country of origin.
