



Brussels 03/03/2021

**Subject: The nature and extent of Frontex’s obligations in the context of its implementation of joint maritime operations at the Union’s external sea borders**

## **I. Introduction**

On 15 January 2021, the Working Group on Fundamental Rights and Legal Operational Aspects of Operations (the “Working Group”) established by the Management Board of the European Border and Coast Guard Agency (“Frontex”) put forward a number of questions to the Commission.

It needs to be emphasised that an authoritative interpretation of EU law is reserved to the European Court of Justice. This note therefore obviously cannot substitute for and is without prejudice to such an authoritative interpretation.

The questions asked by the Working Group are the following:

- (1) Having regard to the recent case law of the European Court of Human Rights in *N.D and N.T*<sup>1</sup>, under what conditions can Frontex apply Article 6(2)(b) of Regulation (EU) 656/2014 in a manner that ensures compliance with Article 4(3) of that same regulation?
- (2) To what extent are the provisions and formal requirements for a refusal of entry within the meaning of Article 14 and Annex V of Regulation (EU) 2016/399<sup>2</sup> (the “Schengen Borders Code”) or under national law applicable during measures taken according to Article 6 of Regulation (EU) 656/2014?

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<sup>1</sup> *N.D and N.T*, App Nos. 8675/15 and 8697/15, judgment of 13 February 2020.

<sup>2</sup> Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ L 77, 23.3.2016, p. 1).

## II. Legal Framework

### 1. Regulation (EU) 656/2014

The Working Group seeks an interpretation of the obligations of border surveillance teams in circumstances where the facts could justify the assumption that interception relates to a detected attempt of unauthorised border crossing (as opposed to situations where a vessel is in distress). The Working Group also seeks guidance on the interpretation of these requirements in the context of the EU-Turkey Statement.<sup>3</sup>

Regulation (EU) 656/2014 regulates Frontex operations in different geographical contexts. As set out in the 2013 Commission proposal<sup>4</sup>, the Regulation has as an objective to overcome previous differences in interpretations of international law that the Member States are subject to, and therefore to increase the efficiency of cross-border cooperation (see also e.g. recital 53 of Regulation (EU) 2019/1896). The obligations imposed on Frontex by Regulation (EU) 656/2014 essentially mirror the obligations of Member States under international law and the Charter of Fundamental Rights.

Whereas Article 6 of the Regulation governs interception in Member States' territorial seas, Article 7 regulates interception on the high seas. Insofar as the Working Group's first question relates specifically to Article 6 of Regulation (EU) 656/2014 and given the scope of the Group's mandate, it is considered to concern detections and interceptions by Frontex-coordinated border surveillance teams in the *territorial sea* of the Member States. This note therefore does not cover interceptions outside the territorial waters of an EU Member State or in the high seas.

**Article 5** of Regulation (EU) 656/2014 sets out the procedure to be followed in cases where, during a joint operation, a Frontex-coordinated border surveillance team ("border surveillance team") detects a vessel suspected of carrying persons circumventing or suspected or intending to circumvent checks at border crossing points or of being engaged in the smuggling of migrants by sea.

**Article 6** of Regulation (EU) 656/2014 establishes a **two-step procedure** for engaging with the vessel detected. Article 6(1) of Regulation (EU) 656/2014 lists a number of measures that may, but do not in all cases have to be, applied cumulatively. The measures listed in Article 6(1) may, but need not necessarily, involve contacts with each person on board the intercepted vessel, for instance where information requested on ownership, registration and elements relating to the voyage of the vessel suffices to dispel the initial suspicion. Nor does Article 6(1) as such require that persons on board the intercepted vessel be brought on board of the participating unit.<sup>5</sup>

Pursuant to Article 6(2) of Regulation (EU) 656/2014, in case evidence confirms the border surveillance team's suspicions, those teams may be authorised to take one or more of the measures listed in that article, including ordering the vessel to alter its course outside of or towards a destination other than the territorial sea.

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<sup>3</sup> Statement of 18 March 2016 accessible at <https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/>.

<sup>4</sup> COM(2013)197.

<sup>5</sup> However, in this regard, border surveillance teams remain subject to obligations resulting from other norms, including, in particular, the asylum *acquis*.

The specific rules laid down in Article 6 of Regulation (EU) 656/2014 are subject to the “general rules” on respect for fundamental rights that are laid down in Articles 3 and 4 of that same regulation.

**Article 3** states that measures taken for the purpose of a sea operation shall always be conducted in a way to ensure the safety of the persons that are intercepted or rescued, of the participating teams and of third parties.

**Article 4(1)** enshrines general obligations flowing from the principle of *non-refoulement*. These obligations are to be applied taking into account case-specific circumstances.

In all cases, **Article 4(2)** spells out the obligation of the host Member State, in the context of planning a sea operation, to take into account, in coordination with the participating Member States and Frontex, the general situation in a third country when considering the possibility of disembarkation in that third country.

**Article 4(3)** of Regulation (EU) 656/2014 requires an *individualised assessment* of the personal circumstances of each intercepted or rescued person. It imposes an obligation on border surveillance teams in relation to such persons before they are disembarked in, forced to enter, conducted to or otherwise handed over to the authorities of a third country: Border surveillance teams shall use all means to identify the intercepted or rescued persons, assess their personal circumstances, inform them of their destination in a way that those persons understand or may reasonably be presumed to understand and 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*.

Furthermore, all vulnerable persons have to receive special attention, as set out in Article 4(4).

The existence of the **EU-Turkey statement** in the context of addressing irregular migration between Greece and Turkey is one of the relevant factors to be taken into account when assessing the general situation in that third country.

Given that the irregular crossing of sea borders in unseaworthy vessels is difficult to control, this Statement is one of the measures to prevent loss of lives and endangering public safety by such crossings. The ultimate objective is to replace risky irregular journeys by orderly and regulated migratory movements using legal pathways, such as resettlement or sponsorships.

Pursuant to point 1 of the Statement, all returns to Turkey are to “take place in full accordance with EU and international law, thus excluding any kind of collective expulsion. All migrants will be protected in accordance with the relevant international standards and in respect of the principle of *non-refoulement*.”

In view of the nature of the rules and criteria mentioned above, it is essential that **each case be judged on its own merits**, taking into account all circumstances governing the concrete situation at sea.

## 2. Impact of the ECHR's jurisprudence on the interpretation of Regulation 656/2014

In its judgment in *N.D and N.T.*, the Grand Chamber of the European Court of Human Rights (“ECtHR”) ruled, in the context of Ceuta and Melilla, that Article 4 of Protocol No 4 to the Convention did not preclude in certain circumstances the summary removal of migrants who sought to unlawfully scale border fences – without individualised assessments – in circumstances where the “genuine and effective” means of legal entry existed for the purposes of submitting claims for international protection and migrants did not make use of them without cogent reasons.

Pursuant to Article 52(3) of the Charter, rights under the Charter that correspond to provisions of the ECHR are to have the same meaning and scope as those laid down in the Convention. Since Article 19(1) of the Charter corresponds to Article 4 of Protocol No 4 of the ECHR, the judgment in *N.D and N.T.* forms part of the legal framework applicable to Frontex and national border guards, in particular, as regards the application of Article 19(1) of the Charter, including in the context of border surveillance operations at the Union’s external sea borders.

That being said, this judgment cannot be directly applied to all situations, for a number of reasons, including the following:

- (1) This judgment assessed the situation only from the point of view of obligations under Article 4 of Protocol No 4 of the ECHR and could not consider the specific obligations applicable in the Union legal order as regards in particular Regulation (EU) 656/2014 and the EU’s asylum and return acquis.
- (2) This judgment related to a specific situation at a land border and not at sea borders.
- (3) This judgment related to the specific situation at the border with a specific third country (Morocco) and the situation, notably as regards compliance with relevant international standards and possibilities for legal pathways to enter the EU, is different in each country and may also change over time.
- (4) The principle of *non-refoulement* was not at stake in that judgment as the applicants’ claims concerning a breach of Article 3 ECHR were rejected as inadmissible in their individual circumstances.

## 3. Refusal of entry

By its second question, the Working Group inquires in essence about the extent to which measures taken pursuant to Article 6 of Regulation (EU) 656/2014 would trigger the provisions and formal requirements for a refusal of entry within the meaning of Article 14 and Annex V of the Schengen Borders Code (SBC).

At the outset, it is observed that pursuant to **Article 14 SBC**, third country nationals must be refused entry when they do not fulfil all the entry conditions laid down in Article 6(1) SBC and do not belong to the categories of persons referred to in Article 6(5) of that Code. **Article 13 SBC** (Border Surveillance) provides that a person who has crossed a border illegally and who has no right to stay on the territory of the Member State concerned shall be apprehended and made subject to procedures respecting Directive 2008/115/EC.

It therefore depends on the circumstances (apprehension in conduct of border checks at a border crossing point or apprehension in the context of border surveillance) which type of measure may be taken:

**a) At a border crossing point:** According to Annex V, part B of the Schengen Borders Code, refusals of entry within the meaning of Article 14 Schengen Borders Code shall be issued at border crossing points only. Such decision shall be adopted in line with all procedural requirements set out in the Schengen Borders Code, using the standard form set out in its Annex V.

In these conditions, the refusal is subject to the specific provisions laid down in Article 14 of the Schengen Borders Code, including in particular, the requirements of Annex V. Pursuant to these requirements, the decision is to be substantiated, stating the precise reasons for the refusal and must be able to be subject to an appeal.

However, it should also be underlined that it follows from the terms of Article 14 of the Schengen Borders Code, that a refusal can only take place *after* the competent authorities have evaluated that a third country national does not fulfil the entry conditions, and in particular, does not belong to the categories of person referred to in Article 6(5) of the Schengen Borders Code. Third country nationals who may have a right to be admitted pursuant to point (c) of Article 6(5) of the Schengen Borders Code include persons seeking access on humanitarian grounds, including as a result of international obligations.

Furthermore, pursuant to the second sentence of Article 14(1) of the Schengen Borders Code, refusal shall be without prejudice to the application of special provisions concerning the right of asylum and to international protection.

**b) In the context of border surveillance:** Article 13 of the Schengen Borders Code prescribes that in the case of irregular entries discovered in the context of border surveillance, “procedures respecting Directive 2008/115/EC” shall be applied. This means that either a return procedure in accordance with that Directive shall be launched or that Member States may have recourse to simplified national return procedures and arrangements covered by its Article 2(2)(a).

Article 2(2)(a) of Directive 2008/115/EC allows for the Directive’s provisions not to be applied to third country nationals who are apprehended or intercepted by the competent authorities in connection with the irregular crossing by land, sea or air of the external border of a Member State and who have not subsequently obtained an authorisation or a right to stay in that Member State. However, Article 4(4) of that Directive obliges Member States that make use of the derogation and adopt simplified national return measures instead of “full” return decisions under the Directive to provide for a certain minimum level of treatment and protection, including the right to protection against *refoulement*.

Where a person subject to a return procedure (full return procedure under Directive 2008/115/EC or national procedure covered by Article 2(2)(a) of the Directive) asks for international protection and as a result enjoys a right to remain, pending the examination of that application, return procedures shall be stopped or suspended.