



## **Joint briefing on the European Border and Coast Guard Regulation – International Commission of Jurists, ECRE and Amnesty International**

### **1. Introduction**

The International Commission of Jurists (ICJ), the European Council on Refugees and Exiles and Amnesty International (hereinafter the “three organizations” or the “undersigned organizations”) would like to present their joint briefing on the *Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No. 2007/2004, Regulation (EC) No. 863/2007 and Council Decision 2005/267/EC* (hereinafter “the draft Regulation”).

The three organizations are all members of the Consultative Forum of Fundamental Rights (CFFR) of Frontex<sup>1</sup> with extensive expertise on the issue of border management and human rights and submit their observations in light of the proposal’s importance for the respect, protection and fulfilment of the human rights of migrants, asylum-seekers and refugees at the borders of the EU.

#### *1.1. The legislative process*

The draft Regulation was presented by the European Commission on 15 December 2015 and is the subject of a speedy legislative procedure in the Council and in the European Parliament, prompted by the current political crisis at EU level relating to the increased arrival of refugees and migrants in Europe. The undersigned organizations acknowledge the urgent need to find a coherent response to these arrivals at EU level, including relevant legislative reform, but insist that this cannot be at the expense of sufficient safeguards in EU law with regard to effective access to international protection and human rights compliance. In the current legislative process, the three organizations look forward to contributing to the debate and hope that the relevant EU institutions will provide ample space for discussion, including with civil society, on the draft Regulation, which has profound implications for the role of the EU in border management and for the protection of human rights in this field.

#### *1.2. Shared responsibility*

The proposed Regulation introduces for the first time in EU legislation on border control the concept of “shared responsibility”, which derives from the very nature of the new European Border and Coast Guard system composed of the European Border and Coast Guard Agency (the ‘Agency’ - currently Frontex), and by the “national authorities of Member States which are responsible for border

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<sup>1</sup> The undersigned organizations submit this in their individual capacity and not in their capacity as CFFR members. The views expressed herein cannot be attributed to the CFFR or to any other of its members.

management, including coast guards to the extent that they carry out border control tasks".<sup>2</sup>

Responsibility sharing between Frontex, as an agent of the EU, and the Member States, has been a point of contention since the creation of the Agency. Although this would be the first time that it is expressly recognized in EU law, the concept of "shared" or indirect responsibility, most notably by aid and assistance, is already a central element of the work of Frontex, whose main competence is to coordinate and facilitate joint operations and assist Member States' border agencies. The undersigned organizations are concerned that, in the proposed Regulation, the division of responsibilities between the Agency and Member States remains unclear, which is illustrated by Frontex tasks being variously described as "coordination" "cooperation" "facilitation" or "support" without any clear definition of these terms. Because of the increase of the operational activities and remit of the proposed new Agency, such blurring of competences has stronger implications for the Agency's and Member States' accountability for human rights violations than under the current Frontex Regulation.

While certain provisions in the draft Regulation confirm that Member States retain "primary responsibility for the management of their section of the external borders",<sup>3</sup> the Agency is assigned a new set of competences that could trigger, through its actions or omissions, the EU's direct responsibility for violations of human rights.

The proposal provides that the Agency's Executive Director (ED) and Management Board (MB) can, on the basis of a vulnerability assessment (see below) direct Member States to implement measures to enhance border control in accordance with a deadline and with a binding decision. At the request of a Member State or of its own initiative, the Agency can organise and coordinate joint operations,<sup>4</sup> rapid border interventions,<sup>5</sup> and initiate return operations and return interventions.<sup>6</sup> The Agency sets out "an operational and technical strategy for the European integrated border management"<sup>7</sup> at the European level to which all Member States' strategies must adapt. Furthermore, where the measures directed by the MB are not implemented or in cases of 'disproportionate migratory pressure' jeopardizing the functioning of the Schengen area, the European Commission can, by means of an implementing act, identify "the measures to be implemented by the Agency and require the Member State concerned to cooperate with the Agency in the implementation of those measures,"<sup>8</sup> without prior State consent.<sup>9</sup> This would leave the Member States concerned without any discretion as to the implementation of such measures, including where their implementation could result in human rights violations.

The undersigned organizations are therefore concerned that the lack of clarity and detail in the division of competences and on the attribution of responsibility for human rights violations between the EU, through its Agency, and the Member States, risks creating in practice a legal vacuum in terms of accountability,

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<sup>2</sup> Article 3.1, *Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No. 2007/2004, Regulation (EC) No. 863/2007 and Council Decision 2005/267/EC* (hereinafter "draft Regulation").

<sup>3</sup> Recital 5, draft Regulation.

<sup>4</sup> Recital 14 and article 4.1.(c), draft Regulation.

<sup>5</sup> See, Recital 15, Article 4.1.(d), and Article 13.2b, draft Regulation.

<sup>6</sup> See, Recital 9, Recital 21, and Article 32, draft Regulation.

<sup>7</sup> Article 3.2, draft Regulation..

<sup>8</sup> Article 18.1, draft Regulation.

<sup>9</sup> See, Article 18, Article 12, and Recital 17, draft Regulation.

preventing victims of such violations from accessing effective remedies and redress. This is exacerbated by the fact that the EU has not yet acceded to the European Convention on Human Rights (ECHR). Under the current jurisprudence of the European Court of Human Rights,<sup>10</sup> direct responsibility of the EU in border control, through its Agency, may risk hindering persons subject to its authority or control in accessing to the European Court of Human Rights, with regard to human rights violations attributable to the Agency.

For these reasons, the undersigned organizations consider that more effective provisions are needed in the draft Regulation, setting clear standards to secure EU and Member States' obligations to respect, protect and fulfil human rights, and in particular the rights to an effective remedy and redress.

## **2. Need for stronger references to fundamental rights**

The undersigned organizations urge the EU institutions to make a careful assessment of the need for fundamental rights protection clauses and references throughout the draft Regulation since, in some provisions, their absence could lead to violations of human rights in border management.

For example, article 1, defining the subject matter of the proposal establishing the European Border and Coast Guard, states the principle that migration management must safeguard "the free movement of people" within the Union, one of the pillars of EU integration. However, the vitally important principles, as underlined by articles 2 and 6 of the Treaty on the European Union (TEU) and by the Charter of Fundamental Rights of the European Union (EU Charter), i.e. the respect, protection and fulfilment of fundamental rights, are not mentioned.

**The undersigned organizations recommend that article 1 refer to fundamental rights obligations together with the need to safeguard the free movement of people.**

Another example is article 15, which relates to operational plans for joint operations, a core activity of the future Agency as well as of Frontex today. Operational plans are binding,<sup>11</sup> and experience with Frontex-led joint operations shows that such plans are very detailed and prescriptive of the tasks of those involved in the operation and, therefore, are often seen in practice as the main guidance for their actions. However, no express obligation to insert fundamental rights clauses in operational plans is enshrined in the current draft article. It is therefore of the utmost importance that operational plans include a specific section on the fundamental rights implications of operations, on risks of fundamental rights violations and on the steps to be taken to ensure accountability and non-repetition for such violations, including the use of the Executive Director's powers to suspend or terminate an operation. **The undersigned organizations recommend including these requirements in article 15 in order to consolidate existing practice.**

**Finally, the undersigned organizations recommend that evaluations of joint operations and rapid border interventions, as foreseen in article 25, have a fundamental rights component. They further recommend that**

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<sup>10</sup> The jurisprudence of the European Court of Human Rights under *Bosphorus* (application no. 45036/98) and following cases affirms that the Court will dismiss a case challenging the validity of a EU policy or action, when this did not leave discretion of implementation to the state. It is based on the presumption that the EU legal system offers an equivalent human rights protection to that of the ECHR.

<sup>11</sup> Article 15.3, draft Regulation..

**references to the use of force, including lethal force, in article 39, explicitly refer to international human rights law and the EU Charter of Fundamental Rights.<sup>12</sup>**

### **3. Remedies and complaints**

#### *3.1. General liability*

With regard to access to courts for human rights violations, the Commission's draft reproduces the provisions of the current Frontex Regulation. According to article 41, when border and coast guards of Member States serving in a team are operating in a host Member State, that State is liable in accordance with its national laws for any damage caused by them during their operation.<sup>13</sup> In case of gross negligence or wilful misconduct, the host Member State may approach the home Member State for reimbursement of any sums it has paid to the victims or persons entitled on their behalf. In all other cases each Member State must waive its claims against the host Member State or any other Member State for any damage it has sustained. As for criminal liability of members of teams, article 42 states that they must be treated in the same way as officials of the host Member State.

The responsibility of both EU agencies and EU Member States is necessarily engaged, under the EU Charter, for human rights violations arising from their conduct when implementing EU law. The non-contractual liability of the EU for actions of its staff, and Agencies, is established by article 340.2 of the Treaty on the Functioning of the European Union (TFEU) and article 59 of the draft Regulation and can be enforced by bringing a case before the Court of Justice of the EU.

While, under the draft regulation, civil and criminal accountability fall within the host Member State's jurisdiction, members of teams deployed by the Agency remain subject to the disciplinary measures of their home Member State which must provide for appropriate disciplinary or other measures in accordance with its national law in case of violations of human rights or international protection obligations.<sup>14</sup>

The undersigned organizations consider that these standard provisions do not satisfy the requirements for an effective remedy and redress for human rights violations. Close collaboration with a State whose system does not provide an effective remedy and redress for human rights violations could trigger the EU's responsibility for complicity in violation of the right to an effective remedy, enshrined in article 47 EU Charter.

**The three organizations therefore recommend that a requirement be inserted in the draft Regulation for the Agency to evaluate the relevant civil and criminal laws and procedures of Member States before starting joint operations or returns. Finally, they recommend that the system of liability for the acts of the Agency staff at least require that information on its use, access to the Court of Justice of the EU and to legal aid are**

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<sup>12</sup> Including, but not limiting to, the European Convention on Human Rights, the International Covenant on Civil and Political Rights, the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Rights of the Child, and the Convention on the status of refugees of 1951 and its Additional Protocol.

<sup>13</sup> Article 41, draft Regulation.

<sup>14</sup> Article 20.5, draft Regulation.

**provided to potential victims of human rights violations in such operations, including returnees, migrants and asylum seekers stopped at the border including those subject to screening.**

### *3.2. The Complaint Mechanism*

The undersigned organizations believe that an accessible, co-ordinated complaint mechanism is needed to ensure that the Agency fully complies with its human rights obligations and in particular that there is an effective remedy for migrants, asylum-seekers and refugees whose human rights are violated in any operations in which it plays a role. In this regard, they welcome the introduction of a complaint mechanism in article 72 and recital 30 of the draft Regulation, and stress that this mechanism can only be complementary and not a substitute for a proper judicial remedy, whether before national courts or before the Court of Justice of the EU or other regional and international bodies. However, the current complaint mechanism, as it stands, is insufficient to ensure access to an effective remedy or compliance with the right to good administration, as required under articles 47 and 41 EU Charter.

First, the Fundamental Rights Officer (FRO) is only allowed to assess the admissibility of complaints,<sup>15</sup> while decisions on complaints relating to staff members of the Agency are the competence of the Executive Director (ED), who cannot, by definition, act with the independence and impartiality required.

Second, no criteria are established to guide the decision on disciplinary or other measures against officers who have violated human rights in the framework of operations coordinated by the Agency. The draft Regulation only requires that the ED, or respectively the State, will “ensure appropriate follow-up”.<sup>16</sup> It is not clear if, as far as the Agency is concerned, this ‘follow up’ refers to the EU staff regulations that govern disciplinary actions against EU staff members, and whether it refers to national disciplinary proceedings as far as the State is concerned. In the absence of further detailed regulation as regards such responsibility, the proposed article 72 does not provide victims of human rights violations resulting from actions or omissions of the Agency or during operations coordinated by the Agency with an effective remedy.

Third, the draft Regulation does not establish a link between the complaint mechanism and the powers of the ED or of the Agency to suspend or terminate operations in case of serious or persistent fundamental rights violations, or to suspend financing of return operations in case of fundamental rights breaches. Without a transparent and proportional system of reaction to corroborated human rights violations, the complaint mechanism lacks any enforcement, cannot trigger any structural changes and, therefore, cannot be effective in avoiding repetition of violations of human rights.

Fourth, it is not specified that the decision of the ED on the complaint must be in written form and state the reasons for the decision, a minimum requirement for an administrative complaint mechanism to allow for an appeal and thereby comply with the right to a fair hearing under international human rights law.<sup>17</sup>

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<sup>15</sup> See, article 72, para 4, draft Regulation.

<sup>16</sup> See, article 72, paras 5 and 6, draft Regulation.

<sup>17</sup> See, *Le Compte, Van Leuven and De Meyere v. Belgium*, ECtHR, Applications nos. 6878/75 and 7238/75, 23 June 1981, para. 51; *Zumtobel v. Austria*, ECtHR, Application no. 12235/86, 21 September 1993, paras. 29-32; *Bryan v. the United Kingdom*, ECtHR, Application no. 19178/91, 22 November 1995, para. 40; *Albert and Le Compte v. Belgium*, ECtHR, Applications nos. 7299/75 and 7496/76, 10 February 1983, para. 29; *Gautrin and Others v.*

Fifth, according to the draft Regulation, standardized forms for complaints are to be provided only in “the most common languages”. This may impede access to the mechanism for persons without knowledge of such “common languages” or lacking the skills to fill out such forms. The obligation to make information available on the existence of the complaint mechanism as well as to provide for guidance, assistance and explanation of the complaint procedure to persons affected by activities carried out by or coordinated by the Agency should be explicitly laid down in the Regulation.

Finally, the role of the FRO in this mechanism appears rather limited. It is acknowledged that the FRO does not have, at present, the capacity to manage a proper complaint mechanism. This, however, does not absolve the Agency from the obligation to establish a strong, effective and independent complaint mechanism. This would require either significantly increasing the resources and capacity of the FRO and entrusting the FRO with the required institutional independence and clear competence to assess the merits of complaints, or giving competence to another independent fundamental rights body with such competence and the necessary staff and resources. In this regard, whichever authority is in charge of the complaint mechanism should be required to present an annual report on complaints dealt with to the Consultative Forum and the European Parliament.

**The undersigned organizations therefore recommend that:**

- **the complaint mechanisms be entrusted to a body independent from the management structure of the Agency with sufficient resources to address the complaints and competence to decide on their admissibility and merits;**
- **its procedure outline the necessary steps not only at the admissibility stage, but also at the merits and reparation stages, including any steps for disciplinary proceedings for fundamental rights violations and the consequences for the triggering of the ED powers of suspension or termination of operations and interventions;**
- **any decision on admissibility and/or merits be in written form and reasoned;**
- **the obligation to make information available on the existence of the complaints mechanism as well as to provide for guidance, assistance and explanation of the complaint procedure to persons affected by activities carried out by or coordinated by the Agency be explicitly inserted in the Regulation;**
- **the complaint mechanism body be required to present an annual report on complaints dealt with to the Consultative Forum and the European Parliament.**

### *3.3 Suspension or termination of an operation*

As is already provided for in the current Frontex Regulation, under the proposed Regulation the Executive Director has the power to withdraw the financing of a joint operation or a rapid border intervention, or suspend or terminate such operations or interventions, if he or she considers that there are violations of

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*France*, ECtHR, Applications nos. 21257/93 and others, 20 May 1998, para. 57; *Ortenberg v. Austria*, ECtHR, Application no. 12884/87, 25 November 1994, para. 31. See also, articles 47 and 41 of the EU Charter of Fundamental Rights.

fundamental rights or international protection obligations that are of a serious nature or are likely to persist. Currently, the suspension or termination of operations by the ED remains at the discretion of the ED and lacks any transparency. The criteria leading to a decision to suspend or terminate an operation or its financing should be linked to the findings of the complaints mechanism, be transparent and set out in a public document.

**The undersigned organizations recommend that this power be linked to the assessment of the risks of human rights violations in operations, including within the framework of the vulnerability assessment, and to the complaint mechanism as discussed below.**

**The three organizations further recommend that an obligation to establish and publish a document laying down the criteria leading to a decision to suspend or terminate an operation or its financing be inserted in the Regulation.**

#### **4. Preventive mechanisms**

##### *4.1. Monitoring mechanism for fundamental rights*

The current article 26a.1 of Frontex Regulation provides that the "Agency shall put in place an effective mechanism to monitor the respect for fundamental rights in all the activities of the Agency." The draft Regulation simply says that the FRO contributes to the mechanism for monitoring fundamental rights<sup>18</sup> and affirms the role of the Coordinating Officer, present in every operation, in reporting to the Agency aspects related to the protection of human rights throughout the joint operation and rapid border intervention.<sup>19</sup> However, the obligation for the Agency to establish an effective monitoring system for human rights has disappeared.

The establishment of a fundamental rights monitoring mechanism within Frontex is still in its initial stages. The elimination of this obligation from the text of the Regulation would undermine all efforts previously undertaken to establish an effective monitoring mechanism, leaving an important gap in the tools available to the new Agency for the prevention of human rights violations.

**The undersigned organizations therefore recommend that the obligation to establish and run an effective fundamental rights monitoring mechanism, at least equivalent to that in article 26a.1 of the current Frontex Regulation, be included in the draft Regulation.**

##### *4.2. Vulnerability assessment*

Article 12 of the draft Regulation provides the Agency with the task to "assess the capacity of the Member States to face challenges at their external borders [and to] identify possible immediate consequences at the external borders and subsequent consequences on the functioning of the Schengen area"<sup>20</sup> by assessing their technical equipment, systems, capabilities, resources and contingency plans to address possible crises at the external borders. This so-called "vulnerability assessment", to be performed on a permanent basis and on top of what is required under the Schengen evaluation mechanism, can trigger

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<sup>18</sup> Article 71.2, draft Regulation.

<sup>19</sup> Article 21.3.d, draft Regulation.

<sup>20</sup> Recital 13 and Article 12, draft Regulation.

far-reaching consequences as it will provide the basis for the Executive Director setting out the necessary corrective measures to be taken by the Member State concerned. As noted above, in the absence of such measures in accordance with a decision by the Management Board, the Commission can oblige the State authorities concerned to implement measures and work with the Agency.

The three organizations have already expressed above their concern regarding this power and the consequences for ensuring an effective remedy and redress for human rights violations resulting from such measures under the direct responsibility of the EU. It is furthermore regrettable that this provision interprets the "vulnerability assessment" exclusively in terms of capacity of technical equipment, staff and financial resources, without taking into account either the human rights situation in the Member States or the capacity of the Member States to ensure full compliance with human rights at its external borders. To ensure that measures taken on the basis of the "vulnerability assessment" are human rights compliant it is essential to make the assessment of observance of human rights in practice an integral part of the mechanism laid down in article 12 of the proposed Regulation.

**The undersigned organizations recommend that the "vulnerability assessment" mechanism under article 12 include an assessment of observance of fundamental rights. This should include an assessment of the instruments in place to ensure access to information to migrants, asylum-seekers and refugees arriving at the border with regard to the possibility to apply for international protection, access to quality legal assistance, the identification and referral of asylum seekers, refugees and migrants to relevant procedures and access to effective remedies. The undersigned organizations further recommend that the methodology for such fundamental rights assessment as part of the "vulnerability assessment" should be established in consultation with the Fundamental Rights Agency, EASO and the Consultative Forum.**

## **5. Return**

The draft Regulation envisages the establishment of a Return Office whose task should be to carry out "return-related activities of the Agency, in accordance with the respect of fundamental rights and general principles of Union law as well as with international law, including refugee protection and human rights obligations."<sup>21</sup> The Office has a series of reinforced competences, including coordinating return activities, with the participation of relevant authorities of third countries and other relevant stakeholders,<sup>22</sup> coordinating the return-related activities of the Agency set out in the Regulation,<sup>23</sup> and providing information on third countries of return.<sup>24</sup>

With regard to this last competence, the undersigning organizations highlight that this information could have human rights implications, for instance where such information would be used by Member States to substantiate return decisions. Entrusting the Agency with a competence to provide such information seems inappropriate, in particular as the proposed Regulation does not specify any criteria for quality of standards or procedures for gathering such information, nor

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<sup>21</sup> Article 26, draft Regulation. See Recital 21, draft Regulation.

<sup>22</sup> Article 26.1a, draft Regulation.

<sup>23</sup> Article 26.1d, draft Regulation.

<sup>24</sup> Article 26.2.b, draft Regulation.

the specific purpose of such information. In any case, without such detail, the proposed framework risks involving the Agency in activities for which it has no expertise, to the detriment of the legitimacy of return operations, and potentially undermining respect of the principle of *non-refoulement*. **The undersigned organizations therefore recommend that this competence be excluded from the Regulation and that article 26.2.b be deleted.**

While the Agency will still be tasked with the coordination of joint return flights,<sup>25</sup> it will have the power to organise return flights either in joint return operations or for a single Member State. It will also be able to organise return interventions, stepping in for State authorities, for example for operations triggered by the vulnerability assessment.<sup>26</sup> The same concerns expressed above therefore apply for return interventions.

Furthermore, the Agency will be able to coordinate and organize return operations from third countries ("mixed return operations").<sup>27</sup> The only "safeguard" provided is that the third country that issued the return decision be bound by the ECHR. The undersigning organizations are alarmed at this new competence that could give rise to EU aid and assistance in possible violations of human rights. Third countries are not subject to EU law nor to remedies before the Court of Justice of the EU. This means that return decisions taken by third countries are not required to meet the standards laid down in the EU Return Directive and therefore the Agency could not possibly merely assume that return would occur in full respect of the principle of *non-refoulement*. The mere fact that a non-EU Member State has ratified the ECHR, a criterion that is insufficient to ensure human rights compliance according to the jurisprudence of the European Court of Human Rights on *non-refoulement*,<sup>28</sup> cannot in any way justify a presumption that cooperation with that State is therefore by definition human rights compliant. **The undersigned organizations therefore strongly recommend deletion of article 27.4 from the Regulation.**

## 6. Cooperation with third countries

The current draft Regulation provides for an increased cooperation with third countries, including the coordination of joint operations, deploying liaison officers, and cooperation on return, including as regards the acquisition of travel documents.

While the stated aim of such cooperation is the promotion of European border management and return standards, the Agency would be entrusted with new competences that bring its reach far beyond the Member States' territories and expand the cooperation at an operational level, with potentially serious implications for human rights. The broad competences listed above raise questions as regards the accountability for human rights violations occurring during the course of such operations. **The three organizations recommend that a fundamental rights assessment, based on information derived from a broad range of sources, including EU agencies, EEAS, non-governmental organizations, and inter-governmental organisations, be**

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<sup>25</sup> Article 27, draft Regulation.

<sup>26</sup> Article 32, draft Regulation..

<sup>27</sup> Article 27.4, draft Regulation.

<sup>28</sup> See *Hirsi Jamaa and Others v. Italy*, ECtHR, Application no. 27765/09, 23 February 2012, para. 128. *Muminov v. Russia*, ECtHR, Application No. 42502/06, 11 December 2008, para. 96; *Saadi v. Italy*, ECtHR, Application no. 37201/06, 28 February 2008, para. 147; *M.S.S. v. Belgium and Greece*, ECtHR, Application no. 30696/09, 21 January 2011, para. 353; *Yakubov v. Russia*, ECtHR, Application No. 7265/10, 8 November 2011, para. 93.

**provided and be part of the operational plan before the Agency engages in any operational cooperation with third countries.**

Transparency will also need to be ensured vis-a-vis the Agency's engagement with third countries. For instance, the wording of working arrangements remain vague and are open to extensive interpretation of the nature and scope of the envisaged cooperation, which may have important human rights implications. **Therefore, the undersigned organisations recommend amendment of article 53.2 to explicitly require that the scope, nature and purpose of the envisaged cooperation is described in detail and included in the working arrangements, which should all be public.**

## **7. Consultative Forum and Fundamental Rights Officer**

The draft Regulation does not include any changes to the role and functioning of the Consultative Forum of Fundamental Rights (CFFR), as is currently the case under the amended Frontex Regulation. Based on their experience as members of the Forum, but in their own individual capacity, the undersigned organizations call on the co-legislators to seize the opportunity of the negotiations on the current proposal to strengthen the Forum's role and capacity. A border Agency with expanded competences and increased resources requires a strong, functioning and independent Consultative Forum.

**Consequently, the undersigned organizations recommend that:**

- **the Forum be given the mandate to assist the Agency as a whole and not only the Executive Director and the Management Board;**
- **institutional independence of the Consultative Forum within the Agency be secured. This requires *inter alia* that the Consultative Forum must be able to decide on its own working methods without any interference of the governing bodies of the Agency and that it has exclusive ownership and control over its output and their publication;**
- **the Consultative Forum has effective access to all information relevant to its mandate and is the sole judge of what information is relevant to the respect for fundamental rights;**
- **the Consultative Forum is supported by a professional and independent secretariat and has full control over its own budget - which is a pre-requisite for its independent functioning - commensurate to the dimensions of the Agency and to the growth of its budget.**

The Fundamental Rights Officer (FRO) plays a key role in ensuring that Frontex's activities comply with fundamental rights. However, in the draft Regulation, the FRO's independence is undermined as the FRO is no longer "reporting" to the Consultative Forum but is merely "cooperating with" it. It is of crucial importance for the functioning of both the FRO and the Consultative Forum that the latter's supervisory role over the FRO is reinstated. Furthermore, the FRO staff needs to be increased considerably, commensurate to the growth of the Agency. **The undersigned organizations recommend that the supervisory role of the Consultative Forum on the FRO, the increase of FRO staff commensurate to the growth of the Agency and the power of the FRO office to have control of its own budget be established in the Regulation.**

Finally, it is noted that article 33.4 obliges the Agency to “take into account the reports of the Consultative Forum and the Fundamental Rights Officer”. In the experience of the undersigning organizations as members of the Consultative Forum, “taking into account” may simply amount to a mere reception of material. **The undersigned organizations recommend that a reporting obligation be imposed upon the Agency to disclose to the CFR and FRO and in its annual report if and how the reports of these two bodies have been taken into account in their activities and, where they do not comply with their recommendations and observations, to report the reasons why.**

## **8. The competence of migration management support teams**

According to article 17.3 of the draft Regulation, the European Border and Coast Guard Teams, the European Return Intervention Team and experts of the Agency’s staff may be entrusted with tasks relating to screening, the provision of information to persons in clear need of international protection and technical and operational assistance in the field of return.

In the view of the undersigning organizations, activities relating to screening of third country nationals upon arrival as well as the provision of information to persons in need of international protection do not belong to the core tasks of an EU border Agency but should be entrusted, if they are to be performed at a EU level, to the EU’s Asylum Agency, EASO. While cooperation between both agencies is needed at the external borders, it is important that activities that are crucial to ensure proper access to the asylum procedure such as the provision of information as well as activities relating to registration and the establishment of nationality are coordinated by EASO in light of its expertise in the area of country of origin information as well as information tools to ensure effective access to the asylum procedure. In this regard, it should be noted that the wording in article 17(3) limiting the provision of information “to persons in clear need of international protection” is highly inaccurate. The term is taken from the Council Decisions establishing emergency relocation mechanisms to the benefit of Italy and Greece but should not be replicated in the Regulation establishing the EBCG. The obligation to provide information applies with regard to every migrant, asylum-seeker or refugee arriving at the border and should not be distinguished on the basis of whether a person is in (clear) need of international protection or not. As the latter is the sole competence of the determining authorities of the Member States in accordance with article 4 of the recast Asylum Procedures Directive, it is by definition impossible for guest officers of the Agency and of EASO alike to make such distinction, which would therefore be in breach of article 18 of the EU Charter. **The undersigned organisations therefore recommend deletion of article 17.3(a) and (b) as these activities are within the remit of EASO’s mandate rather than that of the EBCG.**

## **9. The principle of *non-refoulement***

Article 33.1 of the draft Regulation refers to the principle of *non-refoulement* only in connection with international protection. However, under international law the principle has different implications depending on whether it refers to refugee law or international human rights law. Any inconsistencies with international law binding on EU Member States, including international human rights law, or with

other elements of EU law, including Regulation 656/2014<sup>29</sup> relating to external sea borders surveillance operations coordinated by Frontex, should be avoided.

**The undersigned organizations recommend that the reference to the principle of *non-refoulement* in article 33.1 be linked to international law in general, and not only to international protection, and that its definition be consistent with international law, including international human rights law, and with other EU laws, including Regulation 656/2014.**

## **10. The identification of team members**

The undersigned organizations are concerned that article 39.4 of the draft Regulation does not require members of teams to visibly wear marks (whether numbers, codes or names) that allow for their individual identification, whether directly or indirectly. Individual identification is essential to ensure accountability and an effective remedy for human rights violations occurring in an operation. Furthermore, no security or privacy reasons can be put forward against such arrangements, since systems of individual codes or numbers can well ensure the protection of these rights of the escort personnel.

**The undersigned organizations recommend that an obligation to wear marks allowing for individual identification be inserted in article 39.4.**

## **11. Consolidated recommendations**

The undersigned organizations recommend that:

- 1) article 1 refer to fundamental rights obligations together with the need to safeguard the free movement of people;
- 2) article 15 provide that operation plans include a specific section on the fundamental rights implications of operations, on risks of fundamental rights violations and on the steps to be taken to avoid such violations and ensure accountability and non-repetition for such violations, including the use of the Executive Director's powers to suspend or terminate an operation;
- 3) evaluations of joint operations and rapid border interventions, as foreseen in article 25, have a fundamental rights component;
- 4) references to the use of force, including lethal force, in article 39, explicitly refer to international human rights law and the EU Charter of Fundamental Rights;
- 5) a requirement be inserted in the draft Regulation for the Agency to evaluate the relevant civil and criminal laws and procedures of Member States before starting joint operations or returns;
- 6) the system of liability for the acts of the Agency staff at least require that information on its use, access to the Court of Justice of the EU or other regional and international bodies and to legal aid are provided to potential victims of human rights violations in its operations, including returnees, migrants or asylum seekers stopped at the border, including those who are subject to screening;
- 7) with regard to the complaint mechanism:

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<sup>29</sup> Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 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.

- i. the complaint mechanisms be entrusted to a body independent from the management structure of the Agency with sufficient resources to address the complaints and competence to decide on their admissibility and merits;
  - ii. its procedure outline the necessary steps not only at the admissibility stage, but also at the merits and reparation stages, including any steps for disciplinary proceedings for fundamental rights violations and the consequences for the triggering of the ED powers of suspension or termination of operations and interventions;
  - iii. any decision on admissibility and/or merits be in written form and reasoned;
  - iv. the obligation to make information available on the existence of the complaints mechanism as well as to provide for guidance, assistance and explanation of the complaint procedure to persons affected by activities carried out by or coordinated by the Agency be explicitly inserted in the Regulation;
  - v. the complaint mechanism body be required to present an annual report on complaints dealt with to the Consultative Forum and the European Parliament.
- 8) the power to suspend or terminate an operation or intervention be linked to the assessment of the risks of human rights violations in the operations, including within the framework of the vulnerability assessment, and to the complaints mechanism;
  - 9) an obligation to establish and publish a document laying down the criteria leading to a decision to suspend or terminate an operation or its financing be inserted in the Regulation;
  - 10) the obligation to establish and run an effective fundamental rights monitoring mechanism, at least equivalent to that in article 26a.1 of the current Frontex Regulation be included in the draft Regulation;
  - 11) the vulnerability assessment mechanism under article 12 include an assessment of observance of fundamental rights. This should include an assessment of the instruments in place to ensure access to information to migrants, asylum-seekers and refugees arriving at the border with regard to the possibility to apply for international protection, access to quality legal assistance, the identification and referral of asylum seekers, refugees and migrants to relevant procedures and access to effective remedies;
  - 12) the methodology for such fundamental rights assessment as part of the vulnerability assessment should be established in consultation with the Fundamental Rights Agency, EASO and the Consultative Forum;
  - 13) article 26.2.b be deleted;
  - 14) article 27.4 be deleted;
  - 15) a fundamental rights assessment, based on information derived from a broad range of sources, including EU agencies, EEAS, non-governmental organizations, and inter-governmental organisations, be provided and be part of the operational plan before the Agency engages in any operational cooperation with third countries;
  - 16) amendment of article 53.2 to explicitly require that the scope, nature and purpose of the envisaged cooperation is described in detail and included in the working arrangements, which should all be public;
  - 17) with regard to the Consultative Forum:
    - i. the Forum be given the mandate to assist the Agency as a whole and not only the Executive Director and the Management Board;

- ii. institutional independence of the Consultative Forum within the Agency be secured. This requires *inter alia* that the Consultative Forum must be able to decide on its own working methods without any interference of the governing bodies of the Agency and that it has exclusive ownership and control over its output and their publicity;
  - iii. the Consultative Forum has effective access to all information relevant to its mandate and is the sole judge of what information is relevant to the respect for fundamental rights;
  - iv. the Consultative Forum be supported by a professional and independent secretariat and has full control over its own budget - which is a pre-requisite for its independent functioning - commensurate to the dimensions of the Agency and to the growth of its budget;
- 18) the supervisory role of the Consultative Forum on the FRO, the increase of FRO staff commensurate to the growth of the Agency and the power of the FRO office to have control of its own budget be established in the Regulation.;
- 19) a reporting obligation be imposed upon the Agency to disclose to the CFFR and FRO and in its annual report if and how the reports of these two bodies have been taken into account in their activities and, where they do not comply with their recommendations and observations, to report the reasons why;
- 20) article 17.3(a) and (b) be deleted;
- 21) the reference to the principle of *non-refoulement* in article 33.1 be linked to international law in general, and not only to international protection, and that its definition be consistent with international law, including international human rights law, and with other EU laws, including Regulation 656/2014;
- 22) an obligation to wear marks allowing for individual identification be inserted in article 39.4.