



Besluit over de wijze waarop de Europese Commissie de gevolgen voor de mensenrechten heeft beoordeeld alvorens Afrikaanse landen steun te verlenen voor de ontwikkeling van bewakingscapaciteiten (zaak 1904/2021/MHZ)

Besluiten

Zaak 1904/2021/MHZ - **Geopend op** 30/11/2021 - **Besluit over** 28/11/2022 - **Betrokken instelling** Europese Commissie (Geen verder onderzoek gerechtvaardigd) |

De klagers, een reeks maatschappelijke organisaties, waren bezorgd dat de Europese Commissie geen beoordeling van de risico's voor de mensenrechten had gemaakt alvorens steun te verlenen aan Afrikaanse landen voor de ontwikkeling van bewakingscapaciteiten, met name in het kader van het Noodtrustfonds van de EU voor Afrika (EUTFA). De klagers betoogden dat de Commissie, alvorens in te stemmen met de ondersteuning van projecten met potentiële bewakingsimplicaties, zoals biometrische databases of technologieën voor het volgen van mobiele telefoons, vooraf risico- en effectbeoordelingen had moeten uitvoeren om ervoor te zorgen dat de projecten niet leiden tot schendingen van de mensenrechten (zoals het recht op privacy).

Op basis van het onderzoek concludeerde de Ombudsman dat de uitgevoerde maatregelen niet voldoende waren om ervoor te zorgen dat de gevolgen van EUTFA-projecten voor de mensenrechten naar behoren werden beoordeeld. Om de door haar vastgestelde tekortkomingen aan te pakken, deed de Ombudsman een suggestie voor verbetering om ervoor te zorgen dat, voor toekomstige Trustfonds-projecten van de EU, er een voorafgaande beoordeling is van de gevolgen voor de mensenrechten.

Background to the complaint

1. The EU Emergency Trust Fund for stability and addressing root causes of irregular migration and displaced persons in Africa (EUTFA) [1] was created in 2015. Programmes under the EUTFA are implemented in 26 partner countries across three regions of Africa: Sahel and Lake Chad, the Horn of Africa and North Africa.

2. The European Commission acts as the representative of the EU and is involved in the day-to-day management of the EUTFA, via a Commission staff member ('the EUTFA manager'). Initiatives funded under the EUTFA are implemented by the Commission either through direct management or through indirect management with partners, such as the International Organization for Migration, the UN High Commissioner for Human Rights and the International Labour Organization.



3. The complainants are civil society organisations [2] , which have raised concerns about EUTFA projects involving the transfer of surveillance capabilities (technologies, capacity building, training on surveillance techniques) to the partner countries.

4. Between September 2019 and June 2020, the Commission and one of the complainants had an exchange about these concerns. The complainant was interested, in particular, in projects on the development of secure civil registry systems and biometric databases for identity and travel documents.

5. The complainant took the view that, before deciding to fund such initiatives, the Commission should have carried out prior risk and impact assessments to ensure that any transfer of technology with potential surveillance capacity will not result in violations of human rights (such as the right to privacy).

6. The Commission explained in its replies that the EUTFA does not have its own legal framework and therefore it is subject to the same general rules and follow-up systems applicable to other EU-funded programmes in developing countries. The EUTFA civil registry programmes foresee a review of the legislative framework for data protection although, as is standard with other EU-funded programmes in developing countries, the EU cannot oblige partner countries to fully put in place EU-standard legislation as a pre-condition for providing elements foreseen under the programme, such as the software for the databases referred to by the complainant. The Commission also said that, after projects have been completed, the EUTFA does not have the mandate to monitor how the partner country uses any tools that may have been provided in the context of the project.

7. The complainants turned to the Ombudsman on 19 October 2021.
The inquiry

8. The Ombudsman opened an inquiry and asked the Commission: (a) whether it carries out any kind of human rights risk or impact assessments prior to approving initiatives under the EUTFA that support partner countries in developing surveillance capabilities; and (b) to explain what other measures it puts in place to protect human rights in the context of projects implemented under the EUTFA.

9. In the course of the inquiry, the Ombudsman received the reply of the Commission and, subsequently, the comments of the complainants in response to the Commission's reply. In their reply to the Ombudsman, the complainants submitted additional documents that the Commission had disclosed to them. The Ombudsman inquiry team also inspected [3] further documents held by the Commission concerning the matter.
Prior human rights risk/impact assessments and other measures

Arguments presented to the Ombudsman

10. The complainants referred to two kinds of projects covered by the EUTFA: (a) projects to create biometric databases by the administrations of the partner countries, including providing them with technical equipment for information and data analysis; and (b) projects



to provide to partner countries surveillance equipment [4] , along with knowledge on surveillance techniques and other equipment, to strengthen their border management.

11. The complainants claimed that no assessment was made of the potential human rights impact prior to the implementation of these projects. They argued that, according to the EU Treaties, the Commission should have conducted human rights impact assessments before approving the projects. [5]

12. They argued that there is a reasonable risk that, in countries where legislation on surveillance lacks essential safeguards required by international law, and with a recent history of corruption and violations of human rights, the authorities may abuse the biometric data and/or use knowledge and equipment transferred for purposes other than the project objectives. For example, they could use biometric data for unlawful tracking and monitoring individuals. Moreover, the technology used in identification systems is often fallible and inaccurate, leading to identification failures, which can have profound negative consequences for individuals. The use of indiscriminate surveillance equipment, techniques for monitoring mobile phone devices, and methods for investigating charities poses a serious threat to the rights and work of activists, journalists and others.

13. The complainants gave an example of a project under the EUFTA through which the authorities in Niger were provided with surveillance drones, surveillance cameras, surveillance software, a wiretapping centre and an international mobile subscriber identity catcher. The transfer of this equipment came in the context of a crackdown on activists in Niger. The complainants contended that Niger lacks essential safeguards required by international law to mitigate the human rights impacts of surveillance. The complainants also gave the example of another project under which the Libyan authorities were provided with patrol boats, radio-satellite communication devices and other equipment. This, they said, raised human rights concerns following allegations about how the Libyan Coast Guard had treated migrants.

14. In its reply to the Ombudsman, the Commission said that the EU Financial Regulation and EU Trust Funds Guidelines apply to EUTFA projects. Neither sets out a legal obligation to carry out a human rights impact assessment before the activities take place. Nevertheless, human rights are taken into account from the inception of the actions to their implementation. The Commission acknowledged that the Treaty on European Union (TEU) defines the general provisions on the Union's external action, of which the development and cooperation policies at issue form part; and these policies shall be guided by the principles inspiring the EU itself: democracy, rule of law, universality and indivisibility of human rights and fundamental freedoms, respect of human dignity.

15. Projects covered by the EUTFA include a preliminary analysis of the national legal framework, as well as capacity building for government staff working with civil registration, including on the use of computers and databases for registering population. All EU recommendations for legal frameworks in the partner countries are based on EU standards.

16. The details of each project proposed for funding under the EUFTA are set out in what is



called the *action document* [6] . The template for the action document identifies human rights as a *crosscutting issue* , and action documents " *may include*" an assessment of the impact on human rights. The risk assessment is normally limited to the risks related to the implementation of activities. In addition, for actions implemented in conflict-affected areas, a prior analysis of conflict sensitivity is required.

17. There is a multi-level procedure for approving projects. The EUTFA manager submits the action document relating to each proposed project to the Quality Review Group/Mechanism (QRM) [7] , which carries out an 'ex ante quality assessment'. Experts on the QRM evaluate whether *the action document* demonstrates that the project will ensure respect for EU values (including human and other rights, gender equality and the 'do-no-harm principle'), as well as whether it complies with the EU legal framework. This evaluation follows Commission guidelines on "a rights-based approach" to development cooperation [8] , EU standards on data protection and privacy, and international good practices in the area of human rights and digitalisation. Once cleared by the QRM, action documents are submitted to the operational committee responsible for the region concerned, which is composed of all donors as voting members (EU Member States, the UK, Norway and Switzerland), with representatives of partner countries and regional organisations as observers. The Commission chairs the operational committees.

18. The main responsibility for ensuring respect of human rights lies with the national governments in the partner countries. If, in the implementation of the projects covered by the EUTFA, they do not respect human rights, the Commission can suspend funding.

19. In their observations on the Commission's reply, the complainants disagreed with the Commission's view that the main responsibility for ensuring respect of human rights lies with the national governments. By providing these governments with surveillance capabilities that could result in human rights abuses, the Commission has a responsibility to ensure respect for human rights.

The Ombudsman's assessment

20. It is clear from the Commission's reply that it accepts that the Treaty on European Union (TEU) defines the general provisions on the Union's external action, which shall be guided by the principles inspiring the EU itself: democracy, rule of law, universality and indivisibility of human rights and fundamental freedoms, respect of human dignity. The Commission also accepts that human rights must be taken into account from the inception of the actions at issue to their implementation. It is also clear that human rights impact assessments are an important tool for ensuring/demonstrating that all relevant factors and circumstances have been taken into account.

21. Thus, the question before the Ombudsman is *not* a question as to whether surveillance capabilities should or should not have been transferred. The question is whether the Commission informs itself of and assesses fully and properly risks to human rights in that context. Principles of good administration require that the Commission carries out its tasks



with due diligence. [9]

22. The Ombudsman has said, in her inquiries concerning free trade agreements, that human rights impact assessments can identify the sources of risks at each stage. Such assessments can be preventive since, if negative impacts are identified, either the negotiated provisions need to be modified or mitigating measures have to be decided upon before the agreement is entered into.

23. Similar considerations apply in this case. The inquiry has identified a series of shortcomings (detailed below) in how the Commission assessed the human rights impact of projects covered by the EUTFA and how diligent it was in dealing with the matter.

24. Prior human rights impact assessments can also help the Commission to act transparently and better reply to public concerns, for example regarding the EU's involvement in the EUTFA and its relations with partner countries in the context of EUTFA projects. The details of most projects covered by the EUTFA are accessible online, but the details of the process by which they are adopted and implemented are not published. The Commission publishes on its website the EUTFA Risk Register. [10] Unfortunately, the register does not include human rights risks as such.

25. The EUTFA projects covered by the inquiry are implemented in countries with major governance issues and, in many cases, with poor human rights records. This increases the risk of human rights violations in the context of EUTFA projects. If the surveillance technologies and capacity transferred are used by the partner countries for purposes not foreseen under the project, there is a risk for human rights of individuals in these countries, as well as for the ability of the EU to fulfil or realise its human rights obligations. Indeed, in its reply to the Ombudsman, the Commission does not exclude such a possibility. However, it considers that the measures in place (multi-layer approval process of projects; use of specific documentation of projects - action documents; possible suspension of funds) are sufficient to mitigate the risks for human rights. The Ombudsman disagrees.

26. While the Commission could decide to suspend funding if it finds human rights violations in the implementation of EUTFA projects, this is a reactive measure and it appears it would be possible only with certain projects and not those related to technology or capacity transfers. The goal should instead be to prevent such violations, and prior human rights impact assessments can play an important role to this end.

27. Having examined the action documents of several EUTFA projects [11], the Ombudsman considers that they do not indicate that proper human rights impact assessments were carried out. First, because of the way in which they are drafted; second, because of the methodology applied; and third because the analytical elements pertaining to human rights impacts that were in the action documents were sporadic and unstructured.

28. The action documents include a section '*Risks and assumptions*'. However, in all examined documents, the analysis focused on logistical risks surrounding the implementation of the project as well as its envisaged successes, not on risks for human



rights. In some action documents, the human rights risks and corresponding mitigation measures were mentioned in this section, but either the concrete risks for human rights were not specified, or the mitigation measures were not conclusive. [12] In only three of the action documents examined by the Ombudsman inquiry team was a concrete risk for human rights clearly identified and corresponding mitigation measures proposed [13], thanks to the methodology used. [14]

29. The action documents also include a section '*Mainstreaming/crosscutting issues*', which should document human rights implications, along with other issues. The Commission's instructions on how to design actions [15] do not explicitly state the need to consider the possible impacts on human rights of the projects. Despite this lack of an explicit instruction, the need to conduct a human rights impact assessment as such was clearly identified in one of the action documents (albeit prior to the implementation of the project and not prior to its approval). [16] In another action document, the section 'cross-cutting issues' included a detailed analysis of human rights impacts in the implementation of the project, and the need for procedural safeguards and privileged treatment of vulnerable groups. [17] However, all other action documents mentioned human rights issues in a very limited manner without specifying the impact of the project on these rights.

30. The Ombudsman finds it regrettable that the EUTFAs projects in question were not subject to a clear human rights impact assessment, presented either as separate document or a separate section in the action documents. While some of the action documents contained elements that may be relevant to analyse the possible human rights impact, these elements were included in a sporadic and unstructured way, meaning it was not possible to evaluate properly the impact of the projects on human rights.

31. Regarding the multi-layer approval, the Ombudsman recognises that the participation of the Commission in the Operational Committee should ensure that human rights issues are at least discussed before the projects are approved, as the Commission must give its assent before decisions on the use of EUTFAs funds are adopted. [18] However, this is not a guarantee that the possible risks for human rights were always carefully considered and taken into account.

32. The Operational Committee should approve projects on the basis of an action document that is "*short*" [19] and "*as concise as possible*" [20], using a "*reduced version*" of the action document template. Moreover, even if the *action document* must be submitted first to the Quality Review Group/Mechanism (QRM) for evaluation, before it is submitted to the Operational Committee, the Commission's internal guidance says that "*one session* [of the QRM] *should be sufficient and answers to questions in the documents used should be as concise as possible*". [21] It is questionable if one "concise" session is sufficient for the thematic experts taking part in the QRM to review properly all potential human rights risks. [22] Furthermore, the Operational Committee may have as little as five working days to analyse the action document before its meeting. [23]

33. The Ombudsman is concerned that this swift and streamlined approval procedure may also apply to projects that, by their nature, require more in-depth scrutiny, and could even



require broader consultation concerning the human rights impact. From the documents examined by the Ombudsman inquiry team, there is no evidence of any consultation with civil society or stakeholders in the partner countries of the respective projects. [24] In addition, it would not appear possible to evaluate properly the national legal framework of the partner countries in relation to the projects (for example, data protection legislation) within this simplified procedure. It is also not clear if the projects may still receive approval even if recommendations for changes to national legislation have not yet been implemented.

34. In summary, the Commission has not been able to demonstrate that the measures in place ensure a coherent approach to assessing the potential human rights impacts of EUTFA projects. Since the Commission is responsible for the management of the EUTFA, this is a serious shortcoming.

35. The EUTFA represents a new aid mechanism and may establish a precedent for future EU development financing. [25] As such, the Ombudsman will make a suggestion that, for future EU Trust Funds projects, the Commission ensure that there is a meaningful prior human rights impact assessment, including the identification of measures on how to improve the positive impacts of the project on human rights or how to mitigate possible negative impacts.

Conclusion

Based on the inquiry, the Ombudsman closes this case with the following conclusion:

The Ombudsman has identified shortcomings in that the Commission was not able to demonstrate that the measures in place ensured a coherent and structured approach to assessing the human rights impacts of EUTFA projects.

To avoid similar issues with future EUTF projects, the Ombudsman makes the suggestion below.

The complainant and the European Commission will be informed of this decision .

Suggestion for improvement

The Commission's guidelines concerning the evaluation of EU Trust Fund projects, both in Africa and elsewhere, should require that an assessment of the potential human rights impact of projects be presented together with corresponding mitigation measures in a standalone document or as a separate, distinct section of each action document. The template of the 'action document' could be revised to reflect this.

Emily O'Reilly European Ombudsman

Strasbourg, 28/11/2022

[1] On 12 November 2015, the European Commission, 25 EU Member States, Norway and



Switzerland signed the Constitutive Agreement of EUTF. The EUTF receives 73% of its funding from the European Development Fund (EDF), 20% from different programmes under the general EU budget and 7% from Member State contributions and other donors:
https://ec.europa.eu/trustfundforafrica/index_en#:~:text=Our%20mission,contribute%20to%20better%2

[2] The complaint to the Ombudsman was submitted jointly by the following civil society organisations: Privacy International, Access Now, Border Violence Monitoring Network, Homo Digitalis, International Federation for Human Rights and Sea-Watch.

[3] The report on the inspection may be found at:
<https://www.ombudsman.europa.eu/en/doc/inspection-report/en/162252>

[4] For instance, phone interception systems.

[5] The complainants referred to: Article 2 of the Treaty on European Union (TEU); Article 3 TEU (the EU in " *its relations with the wider world*" must contribute to " *the protection of human rights*"); Article 21.1 TEU (among the principles inspiring the EU external action are " *the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity*"); Article 21.3 TEU (the EU has a duty to respect this principle in the development and in the implementation of the external aspects of its policies other than external action); and Article 205 of the Treaty on the Functioning of the EU.

[6] A template for this document, named ' *Action fiche* ', is included as an annex to the EUTF Constitutive Agreement.

[7] Quality Review Group/Mechanism is composed of the Commission's staff representing thematic and geographical units. The members of the QRM are the same as for other actions directly financed by the European Development Fund. ('EU Guidelines on EU Trust Funds' - the Commission attached the Guidelines to its reply to the Ombudsman).

[8] ' *Tool box: A rights based approach, encompassing all human rights for EU Development Cooperation* ' :

<https://europa.eu/capacity4dev/t-and-m-series/documents/rights-based-approach-encompassing-all-hu>

[9] Case T-59/05 *Evropaiki Dynamiki v Commission* , para 150

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=67851&pageIndex=0&doclang=en&...>

[10] https://ec.europa.eu/trustfundforafrica/sites/default/files/risk_register_eutf_0.pdf

[11] In the course of the inquiry, the Ombudsman inquiry team reviewed 20 actions from projects across the three regions. This included actions reviewed during the inspection (see the list of these projects in the report on the inspection

<https://www.ombudsman.europa.eu/en/doc/inspection-report/en/162252>). It also included documents provided by the complainants (T05-EUTF-NE-05 project in Niger; T05-EUTF-NOA-REG-05 project in Algeria, Egypt, Libya and Tunisia; T05-EUTF-HoA-REG-09 project in Djibuti, Somalia, and Sudan; T05-EUTF-NOA-REG-07 BMP project in Morocco and



Tunisia; T05-EUTF-SAH-C1-01 project in Ivory Coast; T05-EUTF-SAH-SN-07 project in Senegal; T05-EUTF-NOA-LY-04 project in Libya).

[12] For instance in the action document T05-EUTF-HOA-REG-78, the mitigation measure was simply " *assessing human rights risks* " .

[13] The action document T05-EUTF-HOA-REG-27 did identify the risk that the data collected could be misused, and proposed concrete corresponding mitigation measures.

[14] The *action document* T05-EUTF-SAH-GN-05 made a distinction between different categories of risks, which helped identify a concrete risk for human rights and the corresponding mitigation measure. In the *action document* T05-EUTF-HOA-SD-43, the human rights approach was more visible because *the Risks and assumptions* section was divided in two, with a part describing the human rights risks and corresponding concrete mitigation measures.

[15] *Companion to financial and contractual procedures applicable to the execution of the general budget of the EU and the European Development Fund* (6. 2 Identification phase and 6.3 Formulation phase)

[16] Action document T0-5-EUTF-HoA-SO-03

[17] Action document T05-EUTF-HOA-ET-52

[18] Guidelines on EUTF, page 10.

[19] Article 6.6.4 of the Agreement establishing the European Union Emergency Trust Fund for Stability and Addressing Root Causes of Irregular Migration and Displaced persons in Africa and its internal rules: " *Each proposed action shall be described in a short document (Action fiche) containing key information, such as the implementation modalities, schedule, estimated budget etc.*"

[20] *Companion to financial and contractual procedures applicable to the execution of the general budget of the EU and the European Development Fund* (Part 10.4.1 Identification and formulation; preparation of decisions of the Operational Committee on financing).

[21] Idem

[22] In its reply, the Commission said that its thematic experts review action documents following the '*Tool box: A rights based approach, encompassing all human rights for EU Development Cooperation*' :

<https://europa.eu/capacity4dev/t-and-m-series/documents/rights-based-approach-encompassing-all-hu>

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[23] Idem: " *the EUTF Manager prepares an action document for each project proposal to be submitted to the Operational Committee at least one week (five working days) in advance.*"



[24] Point 6.1 of the 'Companion to financial and contractual procedures applicable to the execution of the general budget of the EU and the European Development Fund' states that the "*design of EU actions should align with EU policy priorities and ensure partners' ownership of EU support. To this end, close consultation with the authorities of the partner country and with key stakeholders shall be ensured and documented through the design phase (...)*". In the action document T05-EUTF-HOA-REG-78, the 'Specific objectives' section includes a statement that national human rights institutions have an essential role in monitoring and addressing reported and detected human rights violations or other kinds of abuses.

[25] Companion to financial and contractual procedures applicable to the execution of the general budget of the EU and the European Development Fund (Part 10 'Guidelines on EU Trust Funds').