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**Contribution by the Committee on Migration, Refugees and Displaced Persons to the public consultation in the context of the European Ombudsman's own-initiative inquiry on Frontex**

1. The Committee on Migration, Refugees and Displaced Persons of the Parliamentary Assembly of the Council of Europe at its meeting on Friday 14 September 2012 in Paris declassified this memorandum in order to present it as contribution to the public consultation in the context of the European Ombudsman's own-initiative inquiry into the implementation by Frontex of its fundamental rights obligations.
2. It should be noted that this memorandum is a working document issued by the rapporteur within the preparation of his report on the issue. As such, the text is not the final report which will be adopted later in the year by the Committee.

## **Frontex: the need to improve its human rights role and capabilities**

### **Memorandum**

Committee on Migration, Refugees and Displaced Persons

Rapporteur: M. Mikael Cederbratt, Sweden, EPP/CD

#### **1. Frontex: required but not at any cost**

1. The European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (EU), known as FRONTEX, was established in October 2004 by Council Regulation (EC) 2007/2004. This agency is a major tool for implementing the Common Immigration and Asylum Policy which aims at making migration safe and legally controlled. Frontex has two main purposes: to coordinate cooperation between Member States in border control activities and to help detect criminal networks behind the smuggling and trafficking of human beings. It is also responsible for maintaining a centralised record of technical equipment that Member States are prepared to share with other Member States.

2. We are all well aware of the challenges the EU has to face in terms of managing migration. Frontex provides an opportunity for EU Member States to better coordinate their activities and to learn from each other's experience in this respect. It can also enhance harmonisation of the practices at the European Union's borders.

3. Admittedly, the balance between migration control and human rights is always a delicate exercise for the authorities. The two however have to go together and Frontex represents a real opportunity to enhance the respect of human rights at the borders. This opportunity should not be missed.

### 1.1. Structure and activities

4. Frontex is a European Union agency with a legal identity and operational and budgetary autonomy. It is governed by a Management Board consisting of one representative from each Member State and two representatives from the European Commission. The agency is managed by an Executive Director who is appointed by the Management Board on the proposal of the European Commission for five years renewable once. Gen. Brig. Ilkka Laitinen was re-appointed for a second mandate as Frontex's Executive Director in 2010.

5. After two fact-finding missions (one to Brussels and one to the Frontex headquarters in Warsaw), I became fully aware that Frontex does not carry out its activities only on the ground. The agency is also an intelligence centre which aims to develop a common integrated risk analysis model. Joint operations at the EU land, sea and air borders are launched based on this analysis. Frontex can also assist Member States in organising joint return operations for individuals staying irregularly in the EU. Furthermore, Frontex trains national border guards, and facilitates research and development in the area of border security.

6. The agency is independent has full legal, administrative and financial autonomy. The Frontex budget has seen constant growth. In Frontex' first year, the budget was 6.2 million EUR; in 2006, it was twice amended by the budgetary authority to give a final sum of 19.2 million EUR. For 2012, the projected budget amounts to 84.96 million EUR.<sup>1</sup> This growth indicates that border security is one of the top priorities of EU Member States.

### 1.2. Frontex and human rights

7. Frontex is a young agency that has been criticised for not carrying out its operations in full respect of European human rights obligations.

8. Indeed, there had been serious shortcomings, based *inter alia* on a lack of transparency and an unclear distribution of responsibilities. This prompted a reaction at EU level and, in June 2011, the European Council, the European Parliament, and the European Commission came to a political agreement on proposals to ensure the full respect of fundamental rights during Frontex's activities and to reinforce its legal framework. The main modification included in Regulation 1168/2011 is to strengthen provisions for the protection of fundamental rights by designating a Fundamental Rights Officer and by setting up a Consultative Forum on Fundamental Rights. Moreover, the "Non-refoulement principle" has been explicitly added to the regulation of Frontex to ensure it is respected.<sup>2</sup> These elements will be considered in more detail later in this report.

## 2. Types of operations and human rights concerns

9. According to international organisations and NGOs, concerns about the human rights implications of Frontex's activities appear both at structural and operational levels<sup>3</sup>. In this report, I will address the main concerns coming from civil society and how Frontex is facing them.

<sup>1</sup> [http://www.frontex.europa.eu/gfx/frontex/files/budget/budgets/final\\_budget\\_2012.pdf](http://www.frontex.europa.eu/gfx/frontex/files/budget/budgets/final_budget_2012.pdf)

<sup>2</sup> According to Article 2, paragraph. 1a of Regulation 2007/2004: "In accordance with Union and international law, no person shall be disembarked in, or otherwise handed over to the authorities of, a country in contravention of the principle of non-refoulement, or from which there is a risk of expulsion or return to another country in contravention of that principle. The special needs of children, victims of trafficking, persons in need of medical assistance, persons in need of international protection and other vulnerable persons shall be addressed in accordance with Union and international law."

<sup>3</sup> Amnesty International and European Council on Refugees and Exiles "Briefing on the Commission proposal for a Regulation amending Council Regulation (EC) 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX)". [www.ecre.org/component/downloads/downloads/58.html](http://www.ecre.org/component/downloads/downloads/58.html); Migreurop "Frontex Agency: Which guarantees for Human Rights?". <http://www.migreurop.org/IMG/pdf/Frontex-PE-Mig-ENG.pdf> ; Jesuit Refugee Service Europe, "Safe and Secure: How do refugees experience Europe's Borders?" <http://www.jrs.net/Assets/Publications/File/JRSRefugeesEUBorder122011.pdf>; Human Rights Watch, "TROLLER Simon, 'On the Borders of Legality'", 8 February 2011 <http://www.hrw.org/news/2011/02/08/borders-legality>; United Nations High Commissioner for Refugees, UNHCR's observations on the European Commission's proposal for a Regulation of the European Parliament and the Council amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX), COM (2010) 61 final. <http://www.aedh.eu/plugins/fckeditor/userfiles/file/Asile%20et%20immigration/UNHCR%20comments%20Frontex%20mandate%20review.pdf>

10. Frontex's operational activities concern joint operations with Member States. The unit is divided into four sectors: land, air and sea borders, and one sector responsible for providing assistance to Member States with organising return operations.

### 2.1. Sea Border Operations

11. Sea border operations deal with border checks and border surveillance at sea. I was informed that Frontex's coordinated joint operations at sea are mainly search and rescue (SAR) operations. Every year thousands of migrants and asylum seekers attempt to reach the EU by sea in terrible conditions. The last report of the Parliamentary Assembly of the Council of Europe on *Lives lost in the Mediterranean Sea: who is responsible?* gives a tragic example of such attempts (Doc. 12895). In these cases, Frontex aims to save lives at sea and intercept both migrants, refugees and the people who smuggle them.

12. I would like to give a concrete example of this sort of sea border control. An operation called *Hermes* led by Frontex took place from 20 February 2011 to 31 March 2012. This operation, requested by Italy, aimed to implement coordinated sea border activities to control irregular migration flows from Tunisia towards the south of Italy, mainly Lampedusa and Sardinia. The Italian government requested assistance to strengthen the surveillance of the European Union's external borders by deploying naval and aerial means. At the same time, Italy asked for a risk analysis on the possible scenarios linked to the Arab Spring in North Africa. For that matter, Frontex deployed screening and debriefing experts to gather information needed to analyse migrants' nationalities, and to detect and prevent possible criminal activities. The host country for this operation was Italy and the participating countries were Austria, Belgium, France, Germany, Greece, Hungary, Netherlands, Poland, Portugal, Romania, Switzerland and Spain. The budget amounted to 12,158,959 Euros.

13. Issues of concern: The conduct of these operations in territorial waters of third countries poses a range of problems. For example, according to Migreurop<sup>4</sup>, these kind of deployment operations which involve the interception of migrants in territorial waters of a third country may be an obstacle to the right to leave one's country. This right is laid down in Article 13.2 of the Universal Declaration of Human Rights of 10 December 1948: "*Everyone has the right to leave any country, including his own, and to return to his country*", and in Article 12.2 of the International Covenant on Civil and Political Rights: "*Everyone shall be free to leave any country including his own.*"

14. There exists a legal vacuum regarding the location of Frontex's sea operations. Frontex's operations most often take place in the exclusive economic zone or in the high seas. The Schengen Borders Code is used to cover operations taking place in that area although this Code only concerns territorial seas and contiguous zones. According to Article 1 of Regulation No. 2007/2004, the Agency was created to implement the Schengen Borders Code, established by Regulation (EC) No. 562/2006, at the "*external borders of the Member States*" that is to say across the land and sea territory of Member States<sup>5</sup> and not in international territories or the territorial waters of third countries.

15. Another problem is that of states responsibilities when they are working outside their own territorial waters in the territorial waters of others. The issue was however dealt with clearly by the European Court of Human Rights in the case *Hirsi v. Italy* on 23 February 2012 when it had to deal with the issue of collective expulsion of aliens intercepted at sea. The Court stated that collective expulsion is prohibited even if it involves the removal of aliens to a third State carried out outside national territory. The Court decided that Article 4 of Protocol No. 4 does not in itself pose an obstacle to its extra-territorial application. This article states that "*Collective expulsion of aliens is prohibited*" and does not contain any reference to territory. Thus, this article applies to extra-territorial actions. Frontex and Member States must therefore take into account this new judgement.

16. A further major problem is the need to ensure that in any Frontex interception at sea that persons intercepted have access to international protection. Indeed, no Frontex report refers to the presence of asylum seekers or vulnerable individuals such as lone minors. According to Amnesty International and the European Council on Refugees and Exiles (ECRE), Frontex does not know whether any asylum applications are submitted during interception operations as it does not collect the data.<sup>6</sup> Interception operations and

<sup>4</sup> MIGREUROP, "Frontex Agency: Which guarantees for Human Rights?", p.13.

<http://www.migreurop.org/IMG/pdf/Frontex-PE-Mig-ENG.pdf>

<sup>5</sup> Article 1a of Council Regulation (EC) No. 2007/2004 of 26 October 2004

<sup>6</sup> Amnesty International and ECRE, "Briefing on the Commission proposal for a Regulation amending Council Regulation (EC) 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX)".

treatment of individuals who may need international protection are unclear and may infringe fundamental rights. During sea operations, Frontex has to ensure disembarkation of those intercepted at sea to a place where they are not only physically safe but where their rights, including their right to seek asylum, are respected.

## 2.2. Land Operations

17. Land operations consist of checking borders at road and rail points of entry to the EU. As for all other Frontex activities, land operations are based on risk analysis reports.

18. I was told that some joint operations can evolve and take place at sea and land. For example, Joint Operation *Poseidon* was, since its inception, purely a Rapid Border Intervention Team (RABIT)<sup>7</sup> operation in 2010 replaced by a sea-based operation patrolling the coastal waters between Greece and Turkey. Today, the *Poseidon* operation has been Frontex's main operational activity in the Mediterranean region. Since the beginning of 2010, *Poseidon* has also been made up of a land-based operation covering the Greek and Bulgarian land borders with Turkey, which is today the main country of transit for irregular migration into the European Union. In this case, the land component was initially a temporary measure but it became a permanent fixture of Frontex. It was designed to control the Greek-Turkish and Bulgarian-Turkish borders as well as the Greek-Albanian borders. The official aim of this deployment was to "coordinate the EU Member States operational solidarity in tackling the current situation of irregular migration towards Greece including preparedness for relevant reaction against displacement effect towards Bulgaria."<sup>8</sup> On these borders, activities include border surveillance and checks at border crossing points as well as interviewing and debriefing intercepted persons. These operations can be dangerous for intercepted persons but also for border guards. On 20 May 2011, four Greek border guards deployed under the Frontex joint operation *Poseidon* reported having been fired at by migrant smugglers in the Evros region of the Greek-Turkish border.<sup>9</sup>

19. Issues of concern: Regarding these type of operations, the question again is to know how human rights are effectively respected on the ground. How are refugees and asylum seekers considered by the border guards? What happens when they are intercepted? Do these vulnerable people fleeing their home countries have the opportunity to seek asylum when they are apprehended by Frontex? These questions remain without a clear response as Frontex does not have a monitoring system to ensure the respect of these fundamental rights on the ground. This is more than just a question of the willingness of Frontex management to give all the necessary guarantees that human rights are being respected; it also seems to be a matter of financial and material resources.

## 2.3. Air operations

20. Regarding air operations, Frontex activities are more technical. Indeed, irregular migrants usually enter Member States in a legal manner with a visa and then overstay, or they enter with the help of criminal facilitators who can provide false documents. Frontex tries to identify these networks by gathering information, analysing new methods of trafficking and using technology to detect forged documents.

21. Issues of concern: Certain air operations target specific national groups. For instance, the Frontex General Report 2007 accounts for Operation *Hydra* which took place at 22 airports in 16 Member States. 291 Chinese nationals were arrested in April-May 2007 as the operation aimed to tackle "illegal Chinese immigration by air".<sup>10</sup> This type of targeted intervention has to be handled sensitively as it raises potential questions of racial discrimination in the agency's operations.

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[www.ecre.org/component/downloads/downloads/58.html](http://www.ecre.org/component/downloads/downloads/58.html)

<sup>7</sup> A RABIT operation aims to create teams of national experts that can provide rapid technical and operational assistance to Member States which are under urgent and exceptional pressure and requests aid. The pressure usually refers to a large number of third-country nationals trying to enter the territory of the Member State.

<sup>8</sup> <http://www.frontex.europa.eu/operations/archive-of-accomplished-operations/182>

<sup>9</sup> Frontex Border Guards shot on Greek-Turkish border

[http://www.dur.ac.uk/ibru/news/boundary\\_news/?itemno=12174&rehref=%2Fibru%2Fnews%2F&resubj=Boundary+news%20Headlines](http://www.dur.ac.uk/ibru/news/boundary_news/?itemno=12174&rehref=%2Fibru%2Fnews%2F&resubj=Boundary+news%20Headlines)

<sup>10</sup> MIGREUROP, *Ibid*, p. 21 and Frontex Report 2007, p. 32.

[http://www.frontex.europa.eu/gfx/frontex/files/justyna/frontex\\_general\\_report\\_2007\\_final.pdf](http://www.frontex.europa.eu/gfx/frontex/files/justyna/frontex_general_report_2007_final.pdf)

## 2.4. Return operations

22. Return operations concern third country nationals who receive a return decision from a Court or an administrative body forcing them to return to their country of origin. Some refuse to comply and are returned by force. I will not go into detail about this practice as Ms Virolainen has been appointed as rapporteur on Effective and fair returns of irregular migrants and failed asylum seekers (Doc 12771) and I am sure she will provide us with all relevant information. However, I would like to point out that Frontex can organise such joint return operations with the participation of national border guards of Member States of the European Union.

23. Frontex can co-ordinate returns by air when several non-European Union nationals from several Member States are put on a flight. During these operations, each Member State should respect a manual of best practices drafted by Frontex. They have the legal obligation to provide a monitoring system to ensure that the EU Charter on Fundamental Rights is respected.

24. It is Frontex's responsibility to put a Project Manager on the flight to the destination country to ensure that the operation is compliant with the Code of Conduct for return flights drafted by Frontex. Moreover, medical personnel are always on board in case of an emergency.

25. Issues of concern: These return operations have raised many concerns from Human Rights organisations. One concern is that the right to the protection of personal data included in Article 8 of the European Convention of Human Rights is not always respected by Frontex. Indeed, personal data are collected for organising joint return operations for foreign nationals deported by air from EU territory. The European Data Protection Supervisor (EDPS) is in charge of the follow-up of these operations. In that matter, there is a lack of transparency as the migrants have no access to their own data although the right of access to personal data is protected in the European Union. Ill-treatment has been alleged to have occurred during return flights coordinated by Frontex<sup>11</sup>. Furthermore, there is no proper monitoring of return operations by outside agents. In addition there are many open questions about responsibilities when there are grouped return flights with many countries involved alongside Frontex.

## 3. Concerns of a structural nature

### 3.1. Lack of transparency

26. Many NGOs underline the lack of transparency regarding the nature of the operations led on the ground and their impact on human rights as a real threat for the respect of fundamental rights. A study by the European Parliament on the implementation of the European Union Charter of Fundamental Rights points out that Frontex's "*coercive policy linked with a culture of secrecy and lack of transparency exacerbates the vulnerable status of the individuals*"<sup>12</sup> who try to cross the European frontiers in order to get a better life in Europe. This study clearly talks about a "*profound knowledge gap*" regarding the nature of the operations, their impact on the ground and their compatibility with the European Union legal framework. This lack of transparency produces a weak democratic and public accountability. Therefore, great improvement is needed.

27. Until now there has not been a monitoring body in Frontex to assess the impact of these operations on human rights. Frontex plans to appoint a Fundamental Rights Officer in September 2012. His main tasks will be to put in place a monitoring system and to report every possible infringement of Human Rights.

28. When it comes to transparency, not only procedures must change but mentalities must evolve. Having myself been a police officer for 25 years, I am well placed to know that there is a risk of sub-cultures of secrecy developing in law enforcement institutions.

### 3.2. Lack of clarity in terms of responsibility and liability

29. The Frontex legal framework is unclear about responsibility but also accountability. For all types of operations, the legal framework does not state who is responsible for each activity: Member States, Frontex or the European Union? There is no clear rule for attributing actions liable to cause damage. Human Rights

<sup>11</sup> MIGREUROP, *Ibid*, p. 18.

<sup>12</sup> EP Study on "Implementation of EU Charter of Fundamental Rights and its impact on EU Home Affairs Agencies". 2011, p. 8.

[http://www.europarl.europa.eu/RegData/etudes/etudes/libe/2011/453196/IPOL-LIBE\\_ET\(2011\)453196\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/libe/2011/453196/IPOL-LIBE_ET(2011)453196_EN.pdf)

Watch underlines the failure of the regulation to create a mechanism to hold Frontex accountable for rights violations.<sup>13</sup>

30. According to Article 1 of Regulation No. 2007/2004 creating Frontex, Member States are legally responsible for the control and surveillance of external borders. Nonetheless, the same text gives Frontex a legal personality and allows it to enter into arrangements with third countries or international organisations. These statements demonstrate the lack of clarity regarding accountability.

31. During my fact-finding mission, Frontex expressed its reservations regarding the inclusion of a complaint mechanism for persons affected by its activities as an effective means to monitor fundamental rights. According to Frontex, as it only coordinates the operations of EU Member States and Schengen Associated Countries, activities that can affect a person's rights can only be performed by the authorities of Member States hosting or participating in the operation. For Frontex, a person who feels their rights have been violated should use both national and EU mechanisms to file a complaint.<sup>14</sup> Moreover, Frontex does not have the right to investigate cases.

32. I have my doubts about this restrictive interpretation. Indeed, Frontex regularly claims to "only" coordinate activities, and therefore not be in charge or responsible. This is a shortcut which, I believe, would not stand up under a Court's assessment. For instance, coordination involves giving instructions. Thus, when Frontex coordinates, it is also responsible for many aspects. Frontex needs to recognise its responsibility as owner of the projects it coordinates (and finances).

33. Since the adoption of the Lisbon Treaty, the "CJEU is fully competent to revise the legality or provide interpretation to guide the acts of the EU Agencies (Articles 263, 265 and 267 TFEU)". Frontex is thus accountable for certain kinds of behaviour before the Court (actions for failure to act, preliminary rulings concerning the validity of acts). Nevertheless, compensation for damage during operations is not addressed. In addition, the Treaty of Lisbon does not extend the jurisdiction of the CJEU to cover the responsibility of agencies. However, Article 19 of Council Regulation (EC) No. 2007/2004 provides that Frontex should assume its non-contractual responsibility before the Court of Justice for all disputes concerning the damages caused by the Agency's departments or their staff in the performance of their duties. In such circumstances, the Court has jurisdiction over disputes concerning damages. According to Migreurop, the problem here is to know who should answer for the behaviour on a case by case basis, and where are the limits of the agency's accountability. What about cases involving other people whose responsibility is not covered by this provision? At what point should responsibility be shared by the host country, participating country and the agency? All these questions remain today unanswered.

34. Besides, regarding RABITs, neither Regulation No. 2007/2004 nor Regulation No. 863/2007 states which party, the States or the Agency, should be responsible, nor which court has jurisdiction in extraterritorial waters.

35. This lack of clarity is not acceptable. In case of alleged problems, it opens the doors wide to a "blame game" between the EU (its Agency) and its Member States, and vice-versa. Not only does it dent Frontex's credibility but it also contradicts the basic principles of rule of law.

### 3.3. Agreements with third countries

36. I was told in Warsaw that Frontex's main interest in concluding agreements with third countries lies with accession or pre-accession countries, as well as with countries of transit and of origin.

37. So far, Frontex has concluded cooperation agreements with Albania, Croatia, "the former Yugoslav Republic of Macedonia", Serbia, Bosnia and Herzegovina, Montenegro, Moldova, Belarus, Ukraine, Russia, Georgia, Armenia, Turkey, USA, Canada, Nigeria and Cape Verde. Negotiations are on-going with Azerbaijan, Libya, Egypt, Tunisia, Morocco, Mauritania, Senegal and Brazil.

38. Cooperation is supposed to be practical and operational. The new regulation allows Frontex to finance capacity-building activities in third countries. This should not only consist of giving money and materials but also in providing training. Such agreements can also contain provisions on returns.

39. There is a certain lack of clarity on the extent covered by such agreements, and cooperation with certain countries raises concerns. Given the treatment reserved to migrants, refugees and asylum seekers

<sup>13</sup> TROLLER Simon, "On the Borders of Legality", 8 February 2011. <http://www.hrw.org/news/2011/02/08/borders-legality>

<sup>14</sup> Frontex's response to the European Ombudsman's inquiry, p. 2.

and the fact that Libya has not ratified the 1951 Geneva Convention relating to the Status of Refugees, returns to that country, for instance, risk not being in compliance with obligations under the European Convention on Human Rights.

40. It is also my understanding that, although the European Parliament has a right to see such agreements, thus far none have been submitted.

#### **4. EU's answer to these concerns: inclusion of a greater human rights perspective**

41. There have been three main responses. On 25 October 2011, Regulation (EU) No. 1168/2011 of the European Parliament and of the Council changed Frontex rules in order to explicitly include the protection of fundamental rights in the Frontex legal framework. Before this regulation, on 31 March 2011, the Frontex Management Board endorsed a Fundamental Rights Strategy. As a follow up, on 6 March 2012, the European Ombudsman launched an own-initiative inquiry into how Frontex implements its fundamental rights obligations in relation to this Fundamental Rights Strategy. According to what the EU Ombudsman told me at our meeting on 26 June 2012, this initiative is not the result of any specific suspicion of wrongdoing.

42. In analysing the different human rights concerns, I would like to thank Frontex for having shared with me a copy of its reply to the EU Ombudsman, prior to its publication, as it gives a detailed insight into Frontex's position on fundamental rights.

##### *4.1. Adoption of the Fundamental Rights Strategy on 31 March 2011*

43. This strategy was elaborated thanks to a consultative process which involved representatives of Member States, the European Commission and Frontex, and international organisations such as the United Nations High Commissioner for Refugees, the International Organization for Migration and the European Union Agency for Fundamental Rights.

44. According to Article 26a of the Council Regulation (EC) No. 2007/2004 added by the Regulation (EU) No. 1168/2011 of the European Parliament and of the Council of 25 October: *"the Agency shall draw up and further develop and implement its Fundamental Rights Strategy. The Agency shall put in place an effective mechanism to monitor the respect for fundamental rights in all the activities of the Agency."*

45. The implementation of this strategy should be possible partly through the Fundamental Rights Action Plan drafted by the same actors and adopted by the Frontex Management Board on 29 September 2011.<sup>15</sup> The Action Plan presents in twenty actions how Frontex can implement this strategy regarding operational activities (risk analysis, joint operations and joint return operations), capacity building (training, research and development) and horizontal activities (such as external relations, communication and dissemination). I was told that a Fundamental Rights Progress report should be drafted this year.

46. On 21 March 2011, Frontex also endorsed a Code of Conduct for all participants in its activities. This entails provisions on the respect of fundamental rights and international protection. A separate Code of Conduct will be prepared for joint return activities.

##### *4.2. Council Regulation 1168/2011 Strengthening Frontex and Human Rights provisions*

47. According to Council Regulation 1168/2011, a Consultative Forum shall be established by the Agency to assist the Executive Director and the Management Board in matters of fundamental rights. This Consultative Forum will invite the participation of the European Asylum Support Office, the Fundamental Rights Agency, the UNHCR and other relevant organisations. The Consultative Forum should prepare an annual report of its activities to be made publicly available. Furthermore, a Fundamental Rights Officer shall be designated by the Management Board to report on a regular basis and contribute to the mechanism for monitoring fundamental rights. The Fundamental Rights Officer and the Consultative Forum shall have access to all the activities of the Agency. Finally, a mechanism to monitor the impact of the operational activities on human rights should be set up.

48. In addition to this, Frontex risk analysis and joint operations must take into account the particular situation of persons seeking international protection, and the particular circumstances of vulnerable individuals or groups in need of protection or special care (separated and unaccompanied children, women,

<sup>15</sup> Frontex's response to the European Ombudsman's inquiry, p. 1.

victims of trafficking, and persons with medical needs).<sup>16</sup> For that matter, Frontex should seek advice from its external partners on the relevant instructions or guidelines for officers taking part in Frontex activities. These instructions should be integrated into each operational plan in order to identify people in need of international protection, including potential victims of trafficking. Frontex should also respect the principle of non-refoulement, non discrimination and effective data protection.

49. Moreover, Frontex should put in place an effective reporting system to ensure that any incidents or serious risks regarding fundamental rights are immediately reported by participating officers or Frontex staff members, and thus can be acted upon. These reports and monitoring systems are specifically needed for return operations. Finally, as a last resort, Frontex might terminate a joint operation if the conditions guaranteeing the respect of fundamental rights are not met; or in case of persisting violations of fundamental rights or international protection in cases of serious or persisting violations of fundamental rights; or violation of international protection obligations in the course of joint operations or pilot projects.

50. However, this regulation does not clarify under which circumstances Frontex is accountable. Indeed, Article 1 of the Fundamental Rights Strategy provides that *"Respect for fundamental rights is an essential part of the integrated border management and, more broadly, of EU Migration and Security Policies. The implementation of this Fundamental Rights Strategy shall strengthen the commitment of Frontex and the entire EU border-guard community to respect and promote the fundamental rights in their activities."* However, the same text says that Frontex does not assume any responsibility in this area. Indeed, according to Article 13 of the Fundamental Rights Strategy, *"Member States remain primarily responsible for the implementation of the relevant international, EU or national legislation and law enforcement actions undertaken in the context of Frontex coordinated joint operations and therefore also for the respect of fundamental rights during these activities."* while also stating that *"This does not relieve Frontex of its responsibilities as the coordinator and it remains fully accountable for all actions and decisions under its mandate. Frontex must particularly focus on creating the conditions for ensuring compliance with fundamental rights obligations in all activities."*

#### 4.3. Cooperation arrangement with external partners

51. To ensure the identification of vulnerable people by border guards, cooperation agreements were signed with the Fundamental Rights Agency (FRA) on 26 May 2010, and the United Nations High Commissioner for Refugees (UNHCR) on 13 June 2008. The first working agreement with FRA consists of ensuring external expertise and training for border guards to help them to identify vulnerable people. In addition, the FRA should draw up lists of best practices for the various phases of return operations.

52. The second working agreement signed with the UNHCR consists of providing regular consultation, exchange of information and input into the training of border officials on international human rights and refugee law. The UNHCR has posted a liaison officer in Warsaw in order to work closely together with the agency. UNHCR has been able to participate in two joint operations in an effort to help identify vulnerable children. This is considered a breakthrough in cooperation. Hopefully, Frontex will increasingly accept the presence during its joint operations of external partners in an advisory but also in an observer capacity.

53. Other working arrangements are under negotiation with organisations such as the Joint Research Centre and the European Asylum Support Office.

54. Despite these promising steps, some obstacles remain to an effective partnership. No evaluation of the impact of training is possible as the UNHCR has little information on joint operations and not all the staff is trained, but only those who work on the ground. A mechanism should be put in place to evaluate the impact of the training on operations on the ground.

#### 4.4. Implementation of the Fundamental Rights Strategy

55. This Fundamental Rights Strategy suffered from a lack of transparency for months, but after my first visit to Brussels in March 2012, and the launching of the EU Ombudsman's inquiry on 6 March 2012, Frontex made some announcements about the implementation and effectiveness since its adoption last year.

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<sup>16</sup> Article 14 of Frontex Fundamental Rights Strategy <http://www.frontex.europa.eu/news/management-board-endorses-frontex-fundamental-rights-strategy-FBIEQL>

56. The Fundamental Rights Officer (FRO) has not yet been appointed but should be appointed in autumn 2012.<sup>17</sup> Frontex published the relevant vacancy notice for this position on 27 April 2012. However, I was told that the appointment of the FRO would be postponed to later this year as the budget has not yet been amended to include the position.

57. The FRO is supposed to be an independent staff member tasked with monitoring the respect of fundamental rights and reporting to the Management Board, the Consultative Forum and the Executive Director. I would like to underline a weakness of this process. As I said, the FRO has to be independent but this objective cannot be reached if he is an ordinary staff member and if he does not have a team with which to monitor Frontex activities. Indeed, an individual alone will not be able to do this effectively. Furthermore, the Regulation is vague as regards the FRO's competencies. Will the FRO be able to receive complaints? From whom? What is the chain of reporting? Will this information be made available? If the FRO were to report directly to the Consultative Forum only instead of also to the Management Board, this would be a first step towards better guaranteeing his independence. The vacancy notice states that the FRO will also report to the Executive Director. If that report is substantial, and not only administrative, concerns of independency are again raised. The vacancy notice also states that the FRO shall commit him/herself "to act independently in Frontex' interest". This requirement seems to be contradictory: if the FRO is supposed to act independently, it might not always be in Frontex' direct interest. To date, it is unclear whether the FRO will be able to receive complaints from individuals.

58. Two main types of organisations have been invited to participate in the Consultative Forum: nine civil society organisations and international organisations including UNHCR, FRA, the European Asylum Support Office, but also the Organisation for Security and Co-operation in Europe, the International Organization for Migration and the Council of Europe. On 25 May 2012, Frontex launched a public call to civil society organisations to apply for seating in the Forum and the Forum will have its first inaugural meeting in September 2012.<sup>18</sup> The Consultative Forum is expected to offer strategic recommendations and a pool of information on how Frontex can structurally improve respect for fundamental rights in its various activities.<sup>19</sup> However, the Forum will not have a monitoring role.

59. The 2011 regulation foresees a mechanism of suspension or termination of joint operations and pilot projects in cases of serious violations of fundamental rights or international protection obligations. It is interesting to note that Frontex already has a standard reporting system for each operation. Indeed, operation plans adopted by Frontex for joint operations, pilot projects and rapid interventions stipulate standard operating procedures for Serious Incident Reporting. This is a report form online which is sent via national validation directly to the Frontex incident centre. Nevertheless, a new reporting system should be adopted and made public. Suspected violations of fundamental rights are supposed to be immediately reported by all participants in an operational activity, following the standard operating procedures. Based on these reports, the Executive Director shall suspend or terminate joint operations and pilot projects if he or she considers that violations of fundamental rights or of international protection obligations have occurred.<sup>20</sup> He or she can also reduce the financing for an operation. I was ensured that this procedure will be set as soon as possible and that the drafting of a standard operating procedure is ongoing. In the reply to the EU Ombudsman, Frontex however states that no criteria have been developed as "violations of human rights cannot be predicted before they actually happen". Here again, a clear mechanism with criteria still has to be put in place.

60. Frontex will have to face a dilemma in using the Serious Incident Reporting mechanism. In certain countries it is common knowledge that human rights are not always respected at the borders. How shall Frontex react to a serious incident report? By not getting involved and staying clear, or by trying to improve the situation with a risk of becoming a tacit witness of human rights violations? This dilemma is reflected in Frontex's reply to the EU Ombudsman as follows: "*Due to the complexity of the operations which largely involve Member States and are linked to significant political and operational issues, it shall not be always appropriate to suspend or terminate the operation.*"

61. Monitoring is only going to be credible and useful if it is independent. The independence of the different mechanisms which, according to Frontex, constitutes its effective monitoring mechanism as foreseen in Art. 26 of the 2011 Regulation, do not so far provide sufficient guarantees in this respect. And to monitor effectively, one has to know who is responsible and have access to information on the operations. It all starts and ends with transparency.

<sup>17</sup> Frontex's response to the European Ombudsman's inquiry, p. 5.

<sup>18</sup> *Idem.*

<sup>19</sup> Frontex's response to the European Ombudsman's inquiry, p. 4.

<sup>20</sup> *Idem.*, p. 9.

#### 4.5. Frontex – a potential wider trainer for the local border guards?

62. Frontex officers operating on the ground are all trained in human rights matters. Although I highlighted earlier that there is a need for a rigorous assessment of the impact of this training in practice, I believe that Frontex officers have a knowledge to share with the local staff. It is a good start that Frontex officers are trained, but it is far too little. Frontex officers are not numerous, and often there is only one Frontex officer present. Local staff needs to be made much more aware of their obligations with respect to human rights. In this member states have a clear responsibility.

63. When I visited the Greek border with a delegation from the Swedish Parliament in 2011, I had the opportunity to speak with both local border guards and with the Frontex officer on the spot. It became evident to me that the only one who had a certain knowledge in terms of human rights was the Frontex officer. I am sure that local staff could improve their human rights knowledge.

64. I was told while in Warsaw that Frontex's good influence on the practice in Greece is starting to become visible. I was also however told that progress is slower than expected.

65. In compliance with the Lisbon Treaty, which not only states that the respect of human rights is one of the EU's core values, but also that promoting human rights is one of the EU's main objectives, Frontex should be much more used to sharing knowledge and good practices in terms of respecting human rights at Europe's borders. The development of the core curriculum is a step in the right direction, as well as the training sessions and the training of trainers already organised in cooperation with UNHCR. However, there is still a very long way to go in this respect.

#### 5. How to make Frontex a sharper tool for the protection of human rights

66. I stated at the beginning of this report that Frontex is a required agency. I am sincerely respectful and grateful for the commitment of Frontex's staff members in ensuring the protection and surveillance of our borders. They are currently under great pressure from civil society and they are making efforts to respect fundamental rights on the ground. I am aware of these efforts. Frontex feels uneasy about the attention given to its activities and their compliance with human rights by a growing number of actors, including the EU Ombudsman and the Council of Europe. It is normal that Frontex tries to protect itself.

67. Frontex has to face the difficulty of having two masters: the EU and its Member States. In Brussels, the Member States might be very keen on respecting human rights. However, back in their capitals and on the borders, they may be less so. Furthermore, Member States never like being monitored. Frontex is in an uneasy situation and I can sympathise with this.

68. The situation on the ground is not easy either, as the host countries have quite different laws and procedures. More harmonisation is needed. Communication between Frontex officers and those of the host countries is also sometimes arduous, as many of the latter do not have a sufficient command of English (the common language of Frontex officers).

69. I would like to give some recommendations to improve the respect of human rights at European borders and I would like to recall that protection of human rights is not an option it is an obligation.

70. What we have seen so far are very well intentioned announcements, but little in terms of implementation. We cannot yet assess whether the measures taken will prove efficient. Furthermore, still too little is known as to what actually happens on the ground.

##### 5.1. Democratic scrutiny

71. In order to ensure an efficient democratic scrutiny, a monitoring process should be set up to control the implementation of the Frontex Fundamental Rights Strategy. This mechanism should be external, transparent and independent. Moreover, Frontex should present a list of individuals who were intercepted and in need of international protection during its operations. Finally, reports on the outcome of the training delivered by international organisations such as the UNHCR and the FRA should be drawn up and made public.

72. The institution of the Fundamental Rights Officer, the setting up of the Consultative Forum as well as the current design of the Serious Incident Reporting are all steps in the right direction. However, contrary to what I was told by Frontex, they cannot be considered sufficient to constitute an effective monitoring system

as foreseen in Art. 26 of the 2011 Regulation. The lack of independence and of means of the FRO, as well as the extremely vague mandate, the purely advisory capacity of the Consultative Forum, the lack of transparency on the criteria to suspend an operation under the Serious Incident Reporting mechanism are shortcomings enough to clearly indicate that the system is not yet mature. One may say that it remains to be seen in practice as none of these elements are yet operational. Nevertheless one can already say that the framework for an independent monitoring system is not provided for at this stage.

### *5.2. Liability*

73. Frontex's accountability needs to be clarified within its legal framework for each type of operation: joint operations, RABITs, coordination of return flights and cooperation with third countries. Moreover, the European Parliament should exercise its power to control Frontex and call on member states to work with Frontex to ensure that fundamental rights are protected.

### *5.3. Effectiveness of Human Rights*

74. Every member of Frontex's staff (not only staff on the ground) should benefit from training on the protection of human rights delivered by appropriate bodies such as UNHCR, FRA, etc. Frontex staff should know the conditions of detainees in the centres where the irregular migrants are sent. If the centres do not fulfil human rights standards, detention of irregular migrants in these centres should be prohibited.

75. Regarding the right to the protection of personal data, irregular migrants should have the right to access the data given to border guards. In this matter, transparency should be more greatly respected.

76. Cooperation with third countries should be accepted only if the third state respects fundamental rights such as the right to asylum, the prohibition of inhuman and degrading treatment, and the right to leave one's country.

77. Obligations as regards international protection and the respect of the principle of non-refoulement can only be ensured if operating procedures reflect those obligations in practical, clear guidelines to border personnel (at land, sea and air borders). Border personnel need to be given specific and practical knowledge to be able to identify those in need of international protection and to respond effectively to any request for asylum.

### *5.4. Frontex potential influence to improve respect of human rights on the ground*

78. As stated in my introductory remarks, Frontex operations can also serve as an opportunity to further harmonise practices on Europe's borders and to familiarise further the national border guards with their human rights obligations. Frontex officers are trained and should share this knowledge as widely as possible. More training sessions should be organised on the ground for local staff.

### *5.5. Towards a stronger cooperation with the Council of Europe*

79. In order to ensure an effective protection of human rights on the ground, the Council of Europe should be more attentive to Frontex's operations. In this context, I welcome the fact that the Council of Europe will sit in the Consultative Forum.

80. The Council of Europe should actively take part in the design of the training curricula, making sure that all relevant Council of Europe standards are taken into account. The Council of Europe could also contribute to the training session as such. It should also have close links with the Fundamental Rights Officer when appointed.

81. Finally, the Council of Europe could be part of the monitoring mechanism on the implementation of the Fundamental Rights Strategy.