

Comments of the Commission on a suggestion for improvement from the European Ombudsman

Complaint 1904/2021/AMF submitted by Privacy International (PI); Access Now, Border Violence Monitoring Network (BVMN); Homo Digitalis (HD); International Federation for Human Rights (FIDH); and Sea-Watch

1. BACKGROUND

The complaint relates to the human rights impact assessments of the Commission before supporting non-EU countries in developing surveillance capabilities under the *EU Emergency Trust Fund for stability and addressing root causes of irregular migration and displaced persons in Africa* (hereinafter: EUTF for Africa).

EUTF for Africa was launched by the European and African partners at the Valletta Summit on Migration in November 2015. On 12 November 2015, the Constitutive Agreement to officially establish the EUTF for Africa, was signed by the European Commission, 25 EU Member States, Norway and Switzerland.

The EUTF for Africa was established to deliver an integrated and coordinated response to the diverse causes of instability, irregular migration and forced displacement.

The EUTF for Africa supports vulnerable and marginalised population groups at the forefront. Principal target beneficiaries include migrants and forcibly displaced people, their origin and host communities, and victims of trafficking in human beings and migrant smuggling. Potential migrants, and notably women and young people are strongly supported by a large range of actions.

At institutional level, national and local authorities, civil society groups and community-based organisations also benefit from EUTF for Africa actions and play a crucial role in the identification and implementation of programmes. They also benefit from support through capacity building and training activities.

2. THE COMPLAINT

The complainants submit that EU institutions are under an obligation to conduct human rights risk and impact assessments before engaging in any form of transfer of surveillance equipment.

The complainants believe that prior risk and impact assessments are needed to ensure that any surveillance transfer will not result in violations of the right to privacy or that it will not facilitate other human rights abuses. The complainants submitted that according to their research in most of these cases, no prior human rights risk and impact assessments seem to have been carried out before engaging with authorities of third countries. The complainants believe that such practices raise significant concerns about the institutions' compliance with their obligations under EU law and could amount to instances of maladministration.

3. EUROPEAN OMBUDSMAN CLOSING DECISION AND THE SUGGESTION FOR IMPROVEMENT

In its Closing decision of 28 November 2022, the Ombudsman has decided to close the case with the following conclusion and suggestion for improvement:

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 EUTF projects.

To avoid similar issues with future EUTF projects, the Ombudsman makes the following suggestion:

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.

4. COMMISSION'S COMMENTS

4.1 Commission's comments on the Closing decision

As a preliminary point, the Commission would like to emphasize that the Ombudsman suggestion is based on an analysis of 18 action documents specifically related to the migration component of the EU Trust Fund.

The Commission understands that the Ombudsman is extending its recommendation to any future programmes or projects prepared under the EUTF for Africa and future EU Trust Funds to include a prior human rights impact assessment.

The Commission however notes that the end date for committing operational funds and contracting new programmes or projects under the EUTF for Africa and other Trust Funds, was December 2021 and the end date of implementation is 31 December 2025, while the closing period will extend until June 2027.

The Commission hence considers that the suggestion for improvement is not applicable in the framework of the EUTF for Africa, where no new programmes will be committed and no new projects will be contracted.

The ongoing projects funded by the EUTF for Africa will however continue to be monitored and evaluated on a regular basis and their potential impact on human rights assessed periodically. Safeguard measures (described in greater details below) will be enforced should any breach of an obligation relating to respect for human rights, democratic principles and the rule of law be noticed.

On the impact of EUTF for Africa programmes on human rights and related assessment, the Commission would like to highlight the following:

- The EU is firmly committed to the promotion and protection of human rights, whether civil, political, economic, social or cultural rights, and of democratic principles and rule of law. These values are essential elements of the EU's partnerships and

cooperation agreements with partner countries. The EU and Member States have integrated the human rights-based approach, encompassing human rights, into development programmes and actions including the EU Trust Funds. The protection and promotion of the human rights of migrants is also at the core of the EUTF for Africa programmes.

- Since its inception, the EUTF for Africa has considered the human rights dimension from different angles, as reflected in the Valletta Action Plan. Pillar 4 “Prevention of and fight against irregular migration, migrant smuggling and trafficking in human beings”, provides for support in drafting and implementing appropriate legislative and institutional frameworks mainstreaming the human rights and fundamental rights dimensions in its capacity building projects and protection of victims among other.
- Should human rights not be respected in the implementation of EUTF for Africa programmes, the Commission can take the necessary steps and suspend activities in line with contractual agreements concluded with implementing partners and with beneficiary countries (for budget support programmes). To this end, the Commission headquarters and the EU Delegations in partner countries are regularly in contact with implementing partners of EUTF for Africa programmes. Moreover, the Commission relies on the outcome of project monitoring and evaluation missions undertaken by external experts, who report on whether the conditions on the ground are conducive to achieving the planned objectives, in the respect of international human rights standards.
- Regarding the specific case of civil registry programmes:
 - The design of projects funded by the EUTF for Africa is based on a preliminary assessment of the existing national legislation and the existing databases.
 - These projects also assess whether there are any gaps in the legislation, including on data protection and privacy. They also support partner governments in drafting legislation, which provides legal basis for biometric databases, as well as the necessary institutional frameworks, in particular data protection authorities.
 - The EUTF for Africa projects contributing to the creation of secured national civil registry systems in Senegal, Mali, Côte d’Ivoire and Ghana support the consolidation of the already existing national biometric identity databases. The EUTF, through implementing partners, provides hardware and software, as well as capacity building to officials and support to the governance regarding data protection. These projects operate in the areas of modernisation and civil registries and fight against documentary fraud. They do not provide surveillance systems and have no surveillance implications.

The Commission would furthermore like to provide clarifications on the following points raised in the Ombudsman’s decision.

- 1) Concerning Ombudsman’s understanding of action documents in point 16 of the Decision, the Commission reiterates that the action documents present the details of programmes proposed for funding under the EUTF for Africa and where human rights is considered a cross-cutting issue. Each programme is then further detailed and implemented via one or several projects. Prior to the signature of project/contract and later during the contracts’ regular monitoring and evaluation,

further assessments are conducted with specific attention given to the principles of full respect of human rights, human rights-based approach, gender equality and compliance with the do-no-harm principle.

- 2) The following is stated in point 24 of the Decision: *The details of most projects covered by the EUTF 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 EUTF Risk Register. Unfortunately, the register does not include human rights risks as such.*

The details of the process by which EUTF programmes are adopted and implemented is generally described under the ‘About’ and ‘How do we work’ pages of the EUTF for Africa website. In addition, the Constitutive Agreement of the EUTF for Africa available on the same website fully describes the Trust Fund’s governance under its part II. The annual reports available on the website list the operational programmes approved during the reporting year and include a chapter on “management and internal control”.

In addition, the risk register included on the website refers to the risks identified at the level of the overall EUTF for Africa. As such it is not meant to include each of the risks that can be identified at programme and at project levels.

- 3) Regarding the observations on the mitigation measures indicated in points 25-26 of the Ombudsman’s decision, they are used by the Commission at different times in the programming and implementation processes. The “multi-layer approval process” and “use of specific documentation of projects” are used during the identification and formulation phases of the programme and then of the projects (including via the risk assessments mentioned above). The “possible suspension of funds” is a last resort measure decided by the Commission in reaction to unforeseen breaches, including human rights violations, in the implementation of the contract agreement. In the framework of EU development cooperation, financing agreements include a general clause (Article 26.1 of the General conditions) that enables the Commission to suspend or to terminate the agreement in case of breach of an obligation relating to respect for human rights, democratic principles and the rule of law. This applies to all agreements without exceptions. The Commission makes every effort to prevent such unforeseen events from happening by ensuring proper risk assessments prior to the endorsement of the programme and then the signature of the contracts for each project implementation.
- 4) The Commission takes note of the shortcomings of the analytical elements pertaining to human rights impact identified by the Ombudsman in some of the action documents examined, as pointed out in points 27-30 of the Ombudsman’s decision.

The Commission would like to specify that the 18 actions documents examined ⁽¹⁾ only represent 7% of the total number of programmes approved under the EUTF for

⁽¹⁾ Cf. footnote 11 of the EO Decision: “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). 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 Djibouti, Somalia, and Sudan; T05-EUTF-NOA-REG-07 BMP

Africa. In addition, only 7 of the 18 ⁽²⁾ action documents reviewed are the object of the original complaint of Privacy International to the Ombudsman.

Additionally, the narrow sample used in the analysis concerns only decisions/programmes (not contracts) specifically focused on migration. Using this narrow sample to provide a general conclusion for the whole EUTF for Africa might not be representative. Out of these 18 action documents, the Ombudsman considers that 5 of them (28%) identified a concrete risk for human rights and related mitigation measures. ⁽³⁾

The Ombudsman considers the other 13 actions mention human rights issues “in a very limited manner”. The Commission acknowledges that human rights issues could have been addressed in more details in these 13 action documents focused on the migration objective. Notwithstanding this limitation, the Commission recalls that further risk assessments are carried out prior to the signature of the projects/contracts implementing each specific action document and during the implementation and monitoring of these contracts (including via regular progress reports and result oriented monitoring missions or project evaluation carried out by external experts).

- 5) Regarding Ombudsman’s observations on multi-layer approval in points 31-32 of the Decision, the Commission reiterates that the thematic units taking part in the internal approval process, review action documents following the human rights-based approach as indicated in the Ombudsman decision. The action documents are provided in advance to the thematic units, allowing sufficient time for their review. Comments, suggestions or recommendations of the thematic units are duly accounted for in internal discussions and consultations with EU Delegations, services at headquarters and stakeholders on the ground and included in the final document (please also refer to the comments on point 33 of the Decision).

Specifically, in point 32 of the Decision, the Ombudsman expresses concern that the review process may be insufficient because “*the Operational Committee may have as little as five working days to analyse the action document before its meeting.*”

According to the Constitutive Agreement of the EUTF for Africa, five days is the minimum period to be given to review action documents or their substantial addenda for approval. However, in practice, the Operational Committees would usually have around 10 working days depending on the number of action documents presented. The Commission recalls that Operational Committee members can ask for any additional information they deem necessary during the Operational Committee meetings. The request is then answered in due time, in writing, by the EUTF teams.

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-LY04 project in Libya”.

⁽²⁾ Two of the seven documents provided by the complainants and reviewed by the Ombudsman are also included in the list of 13 action documents reviewed by the Ombudsman during the inspection. The total number of different action documents reviewed by the Ombudsman is hence 18.

⁽³⁾ T05-EUTF-HOA-REG-27; T05-EUTF-SAH-GN-05 ; T05-EUTFHOA-SD-43 ; T0-5-EUTF-HoA-SO-03 ; T05-EUTF-HOA-ET-52

Action documents are presented in a synthetic format to facilitate the analysis of Operational Committee members at decision level.

- 6) In point 33 of the Decision, the following is stated: *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.*

In relation to this, the Commission would like to point out that in the identification and formulation of EUTF Africa programmes, a wide consultation is done in parallel with the formal process. At the country level, EU delegations coordinate dialogues with relevant stakeholders, such as national and local authorities, civil society organisations, representatives of Member States agencies and with other donors. At headquarters level, the EUTF teams consult and exchange regularly with the EU Delegations, other EU services and stakeholders including implementing partners. Following these dialogues, programmes are then jointly formulated by the EUTF for Africa teams based in Commission headquarters and by the EU Delegations.

- 7) Finally, the Commission would like to stress that in the 2022+ Work Programme of the European Court of Auditors, a performance audit is planned to assess whether projects implemented through the EU Trust Fund for Africa have achieved their intended results while respecting basic human rights. This takes place as part of the EU policy area on resilience to threats to the EU's security, and respect for the European values of freedom, democracy and rule of law. The performance audit will start in the first half of 2023.

The Commission is available for the European Ombudsman to clarify any of the above and/or answer additional questions that may remain following the present note.

4.2 Commission reply to suggestions for improvements of action documents under the EU Trust Fund projects

The Commission takes due note of the suggestion of the European Ombudsman in relation to the assessment of the potential human rights impacts of projects when preparing action documents under 'EU Trust Fund projects, both in Africa and elsewhere'.

The Commission considers that the suggestion for improvement is not applicable in the framework of the EUTF for Africa, where no new programmes will be committed and no new projects will be contracted. The Commission does however consider the concerns from the Ombudsman to be relevant to any international cooperation programmes.

These concerns are already addressed in the Neighbourhood, Development and International Cooperation Instrument (NDICI) – Global Europe, which is the main financial instrument of the EU's international cooperation under the Multiannual Financial Framework 2021-2027. Article 8.2. of NDICI-Global Europe Regulation requires for the instrument to apply a rights-based approach. Article 8.8 further requires for human rights to be mainstreamed through a comprehensive analysis – of context, capacities, risks and vulnerabilities for each action proposed for funding.

In this context, and in line with the Action Plan on Human Rights and Democracy for 2020-2024, the Commission has adopted in 2021 an updated toolbox on "Applying the Human

Rights Based Approach (HRBA) to International Partnerships”.⁴ The new HRBA Toolbox reflects new EU and global policy commitments, including the SDGs, starting from the identification and formulation of actions to their implementation, including monitoring and evaluation, and includes working principles in conflict and/or fragile contexts. Commission staff is regularly trained in applying the HRBA.

Furthermore, the quality review system in place within the Commission, ensures that new proposals and actions are screened in order to strengthen the HRBA.

In particular, the Action Document template has been updated (see Annex I) and includes a section on mainstreaming of cross-cutting issues, where consideration of human rights implications is mandatory for all actions, including actions related to support to law enforcement agencies or to migration management and security programmes. The responsible unit carries out this analysis, supported by the robust internal quality control system in place in the relevant DGs (INTPA, NEAR, FPI).

Furthermore, and as a new feature under NDICI-GE, each Action Document must include a mandatory annex (see Annex II) in order to further ensure the mainstreaming of cross-cutting issues, including human rights. This annex presents a set of guiding questions, including on human rights risks analysis and related mitigating measures, and empowerment and participation of right-holders.

This comprehensive and strengthened approach to ensure adequate consideration of cross-cutting issues is fully reflected in the Commission’s strategic and quality governance system.

5. CONCLUSION

The Commission considers that the suggestion for improvement is not applicable in the framework of the EUTF for Africa, where no new programmes will be committed and no new projects will be contracted. The ongoing projects funded by the EUTF for Africa will however continue to be monitored and evaluated on a regular basis and their potential impact on human rights assessed periodically.

In so far as the Ombudsman’s suggestion concerns other international cooperation programmes, Ombudsman’s concerns have been addressed in the Neighbourhood, Development and International Cooperation Instrument (NDICI) – Global Europe, the updated toolbox on “Applying the Human Rights Based Approach (HRBA) to International Partnerships”, and the updated Action Document template.

For the Commission

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⁴ Commission Staff Working Document SWD(2021)179 final of 30.6.2021 “Applying the Human Rights Based Approach to international partnerships - An updated Toolbox for placing rights-holders at the centre of EU’s Neighbourhood, Development and International Cooperation”.