

**FRA Opinion – 5/2018**  
**[EBCG]**

Vienna, 27 November 2018

# The revised European Border and Coast Guard Regulation and its fundamental rights implications

Opinion of the  
European Union Agency for Fundamental Rights

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## Acronyms

the Agency	European Border and Coast Guard Agency, formerly known as Frontex
CJEU	Court of Justice of the European Union (CJEU is also used for the time predating the entry into force of the Lisbon Treaty in December 2009)
CPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EDPS	European Data Protection Supervisor
ETIAS	European Travel Information and Authorisation System
EU	European Union
Europol	European Union Agency for Law Enforcement Cooperation
Eurosur	European Border Surveillance System
FRA	European Union Agency for Fundamental Rights
IBM	Integrated Border Management
IT system	Information technology system
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UNHCR	United Nations High Commissioner for Refugees
UNTS	United Nations Treaty Series

THE EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS (FRA),

Bearing in mind the Treaty on European Union (TEU), in particular Article 6 thereof,

Recalling the obligations set out in the Charter of Fundamental Rights of the European Union (the Charter),

In accordance with Council Regulation (EC) No. 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights (FRA), in particular Article 2 with the objective of FRA *“to provide the relevant institutions, bodies, offices and agencies of the Community and its EU Member States when implementing Community law with assistance and expertise relating to fundamental rights in order to support them when they take measures or formulate courses of action within their respective spheres of competence to fully respect fundamental rights”*,

Having regard to Article 4 (1) (d) of Council Regulation (EC) No. 168/2007, with the task of FRA to *“formulate and publish conclusions and opinions on specific thematic topics, for the Union institutions and the EU Member States when implementing Community law, either on its own initiative or at the request of the European Parliament, the Council or the Commission”*,

Having regard to Recital (13) of Council Regulation (EC) No. 168/2007, according to which *“the institutions should be able to request opinions on their legislative proposals or positions taken in the course of legislative procedures as far as their compatibility with fundamental rights are concerned”*,

Having regard to the Cooperation Arrangement between the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union and the European Union Agency for Fundamental Rights concluded on 26 May 2010,

Having regard to the request of the European Parliament of 23 November 2018 to FRA for an opinion *“on the fundamental rights implications of the proposals”*,

SUBMITS THE FOLLOWING OPINION:

## Opinions

### 1. Adjusting the framework to protect fundamental rights

#### FRA Opinion 1: Promoting fundamental rights enshrined in the Charter

Article 5 (4) contains a horizontal provision on fundamental rights which has remained unchanged in spite of the expansion of the Agency's activities and mandate.

***To reflect the duty deriving from Article 51 (1) of the Charter and to extend the safeguards beyond the Agency's activities at the external borders, the EU legislator should amend proposed Article 5 (4) along the following lines: "The Agency shall contribute to the continuous and uniform application of Union law, including the Union acquis on fundamental rights, and promote the application of the Charter of Fundamental Rights of the European Union in all its activities. Its contribution shall include the exchange of good practices."***

#### FRA Opinion 2: Reflecting the duty to protect stateless persons

As the subject matters covered by the Regulation impact on issues that are regulated in international law, Recital (16) clarifies that it does not affect the obligation of EU Member States under relevant international law instruments, specifically listing selected conventions. It does, however, not expressly mention the relevant instrument to protect stateless persons.

***In Recital (16), the EU legislator should consider adding to the list of international instruments the 1954 United Nations Convention Relating to the Status of Stateless Persons.***

#### FRA Opinion 3: Making the governance of the pool of forced return monitors independent

The Return Directive (Directive 2008/115/EC), which sets out EU standards in relation to return monitoring, requires that Member States set up an effective return monitoring system. This means that the same authority which carries out the returns cannot be in charge of monitoring itself. The same standard should apply to the Agency.

***To ensure its effectiveness, the EU legislator should revise Article 52 to entrust an independent actor to manage the pool of forced return monitors. In this regard, consideration could be given to involving an international body with relevant human rights monitoring expertise. A specific and adequate budget should be provided to the responsible body.***

#### FRA Opinion 4: Formalising the existing cooperation with FRA

Article 10 of the proposal identifies five EU agencies for operational cooperation with the Agency. The provision, however, does not mention the European Union Agency for Fundamental Rights (FRA). Reflection of the multi-faceted forms of cooperation between the Agency and FRA, in proposed Article 10 on the tasks of the Agency, would ensure that the Agency makes full use of existing EU-level fundamental rights expertise.

***In light of Article 5 (4) of the proposal and to ensure the continuation of the operational cooperation between the Agency and FRA, the EU legislator should add the following point***

***to proposed Article 10: “cooperate with the European Union Agency for Fundamental Rights, to ensure the continuous and uniform application of the Union acquis on fundamental rights in all its activities.”***

## **FRA Opinion 5: Enhancing the role of an independent Fundamental Rights Officer**

The Fundamental Rights Officer is an essential component of the Agency’s fundamental rights protection framework. If the significant increase in the Agency’s staff and the expansion of its activities is not accompanied by a stronger Fundamental Rights Officer, the ability to carry out the tasks assigned to her or him by the Regulation in an independent manner will be seriously undermined. At the same time, Recital (48) of Regulation (EU) No. 2016/1624, which underlined that the Fundamental Rights Officer should be provided with adequate resources and staff corresponding to its mandate and size, has been removed.

***To ensure that the Fundamental Rights Officer is provided with the necessary capacity and independence to carry out her or his tasks, the EU legislator should:***

- ***complement Article 107 of the proposal by inserting an additional paragraph (4) providing the Fundamental Rights Officer with full administrative autonomy, including the possibility of unannounced visits, and with sufficient staff and resources to fulfil the tasks in full independence. Such provision should be included in the operational part of the Regulation and not confined to a Recital as is the case in Regulation (EU) No. 2016/1624, Recital (48);***
- ***replace, throughout the Regulation, the “Fundamental Rights Officer” with a “Fundamental Rights Office” and provide for a Deputy Fundamental Rights Officer, to have an arrangement to cover extended absences of the Fundamental Rights Officer. The Deputy should have the necessary qualifications and experience in the field of fundamental rights.***

***Furthermore, the preventive role of the Fundamental Rights Officer should encompass all relevant activities of the Agency. Therefore, the second line in Article 107 (3) should read “in accordance with Articles 39, 40, 41, 43, 51, 54, and 75 as well as on pilot projects and technical assistance projects in third countries.”***

***Finally, the Fundamental Rights Officer should be tasked to present an annual report about the main challenges and achievements in protecting fundamental rights within the Agency. This report could be combined with the report on the functioning of the complaints mechanism suggested in FRA Opinion 6.***

## **FRA Opinion 6: Adjusting the complaints mechanism**

The complaints mechanism is an important component of the Agency’s fundamental rights protection framework. The expansion of the Agency’s tasks significantly enhances the importance of having an effective complaints mechanism, particularly for persons whose fundamental rights have been breached during activities in third countries, where access to judicial remedies in EU Member States may not be possible due to lack of jurisdiction. Therefore, measures should be taken to strengthen it.

***The EU legislator should strengthen the complaints mechanism in proposed Article 108 by:***

- ***enabling the Fundamental Rights Officer to initiate complaints ex officio;***
- ***inserting in paragraph (5) the possibility for complainants to appeal an inadmissibility decision by the Fundamental Rights Officer to the European***

*Ombudsman, as well as the option for the Fundamental Rights Officer to reopen the case if the complainant submits new evidence;*

- *in paragraph (4), insert the words “for further action in line with their mandate” after “inform the relevant authority or body competent for fundamental rights in a Member State” so as to enable national ombuds bodies or similar institutions to follow up on the information received;*
- *either inserting in paragraph (7) a deadline expressed in a number of working or calendar days for EU Member States to report back on the findings and follow-up made in response to the complaint or providing for other mechanisms to promote effective follow-up, for example, by asking the Fundamental Rights Officer to report to the Management Board on follow-up that is outstanding for more than a certain period of time, for example six months or one year;*
- *tasking the Fundamental Rights Officer in paragraph (9) to produce an annual public report on the operation of the complaints mechanism and delete the last sentence of the paragraph.*

FRA Opinion 7: Avoiding the use of the term “illegal”

The proposal uses interchangeably the terms “irregular migration” and “illegal migration”. The systematic use of “irregular” can help prevent the deprivation of migrants’ fundamental rights.

***The EU legislator should replace the word “illegal(y)” with the term “irregular(ly)” throughout the proposal.***

## **2. Operationalising fundamental rights protection in the Agency’s activities**

FRA Opinion 8: Clarifying inter-agency cooperation in integrated border management

One of the components of Integrated Border Management as laid out in Article 3 (e) of the proposal is inter-agency cooperation. The proposal expressly mentions cooperation with national authorities “responsible for border control or for other tasks carried out at the border”, authorities responsible for return, as well as EU-level cooperation. It does not specify that such inter-agency cooperation should also include entities in charge of fundamental rights protection. This can lead to a different understanding among practitioners.

***To strengthen compliance with fundamental rights in respect to “inter-agency cooperation”, the EU legislator should add the words “including national and international bodies in charge of protecting fundamental rights” after “or for other tasks carried out at the border” in proposed Article 3 (e).***

FRA Opinion 9: Mainstreaming fundamental rights in strategic risk analysis

The proposal envisages a multiannual strategic policy cycle and enhances the Agency’s work in the field of risk analysis, creating synergies between the “vulnerability assessments” and the “Schengen evaluation mechanism”. The relevant provisions in the proposal, however, do not mention fundamental rights, creating a risk that fundamental rights will not be adequately reflected.

***To ensure that fundamental rights are adequately considered in the multiannual strategic policy cycle for European Integrated Border Management and in risk analysis more generally, the EU legislator should:***

- ***in Recital (14) add the words “and in full compliance with fundamental rights” after “in a coherent manner”;***
- ***at the end of Article 8 (2) insert an additional sentence providing that the multiannual strategic policy cycle and the integrated planning regulated in Article 9 must comply with Union law and with the 1951 Convention relating to the Status of Refugees, as well as with other relevant international human rights instruments;***
- ***in Article 33 on vulnerability assessment, insert a new paragraph between paragraphs (5) and (6), along the following lines: “In the vulnerability assessment, the Agency shall pay particular attention to fundamental rights”, similarly to Recital 14 of Regulation (EU) No. 1053/2013 on the Schengen evaluation mechanism;***
- ***following the approach taken in the Regulation on the Schengen evaluation mechanism, in Article 8 (4) consider adding “and on risk analysis requested from other relevant agencies, when appropriate” after the wording “referred to in Article 30 (2)” to enable the European Commission to seek the views of other EU agencies, including FRA, when appropriate.***

FRA Opinion 10: Extending the non-discrimination clause to cover all Charter grounds

Article 44 (4) of the proposal requires that team members deployed by the Agency fully respect fundamental rights and act in a non-discriminatory manner. However, the non-discrimination provision does not cover all grounds, if compared to Article 21 of the Charter. Team members should also pay particular attention to vulnerable persons.

***The EU legislator should amend the last sentence of Article 44 (4) to cover all the relevant non-discrimination grounds listed in Article 21 of the Charter. The EU legislator should also amend the first sentence of Article 44 (4) to prescribe that members of the teams pay particular attention to vulnerable persons.***

FRA Opinion 11: Clarifying the humanitarian exception to migrant smuggling

In light of the implications of activities to combat migrant smuggling on humanitarian assistance, consideration could be given to strengthening the reference to the humanitarian exception listed in Recital (34).

***To promote a fundamental rights compliant approach to anti-migrant smuggling activities carried out by the Agency, the EU legislator should reformulate the last sentence in Recital (34) along the following lines: “In light of the humanitarian exception included in Article 1 (2) of Council Directive 2002/90/EC, the Agency should remind EU Member States of the fundamental rights implications when they consider imposing sanctions where the aim of the behaviour is to provide humanitarian assistance to migrants.”***

FRA Opinion 12: Defining cross-border crime in a strict manner

The proposal contains a vague definition of cross-border crime, further expanded to include attempts to commit a crime. In light of the increased emphasis on the Agency’s operations, including in third countries, this creates fundamental rights risks.

*The EU legislator should specify the scope of the term “serious crime with a cross-border dimension” in Article 12 (2), such as by referring to an Annex providing an exhaustive list.*

*In addition, Article 89 (2) (e) should read: “in specific cases, where the Agency becomes aware that transmission of personal data processed in the fulfilment of its tasks to law enforcement authorities of the Member States is strictly necessary ~~to law enforcement authorities~~ for the purposes of preventing, detecting, investigating or prosecuting serious crime.”*

## FRA Opinion 13: Embedding fundamental rights in migration management support teams

The proposal contains indications as to activities that would be carried out in controlled centres. The relevant provisions are, however, not specific enough to prevent fundamental rights risks. As a minimum, the proposal should provide for solutions for persons who need protection and/or assistance besides international protection applicants, underline the need to respect procedural safeguards and discourage protracted stay in controlled centres. Moreover, migration management support teams require sufficient expertise in fundamental rights.

*With regard to controlled centres, the EU legislator should:*

- *add to Recital (44) a sentence similar to the last sentence in Recital 47 according to which “The Commission, in cooperation with the relevant Union agencies, should ensure that activities in [controlled centres] comply with relevant Union law”;*
- *insert in Recital (45) and Article 41 (5) the words “and are not entitled to other legal grounds to stay” after the words “application for international protection is rejected” (for Recital (45)) and “final decision” (for Article 41 (5));*
- *extend Article 41 (4) (b) to include also victims of trafficking in human beings, unaccompanied children, persons in a vulnerable situation as provided for in Article 39 (3) (l) for joint operations;*
- *replace in Recital (44) “access to protection” with “access to protection and assistance”;*
- *either delete Recital (48) completely or amend it by qualifying that the entire or part of the procedure for international protection and/or return should only be carried out in controlled centres, when procedural safeguards, including effective provision of information, legal and linguistic support can be guaranteed and provided that it does not result in protracted stay of third-country nationals in the controlled centre.*

*The EU legislator could consider increasing the potential availability of fundamental rights expertise in support of migration management support teams. This could be achieved, for example, by amending Article 41 (1) specifically mentioning that the European Commission should transmit a Member State’s request also to the EU Agency for Fundamental Rights which may decide to deploy an expert to support migration management support teams. Proposed Recital (46) and proposed Article 2 (19) could be amended accordingly.*

## FRA Opinion 14: Enhancing the effectiveness of training

Whereas Article 62 of the proposal contains strong obligations for the Agency to ensure that the officers it deploys have the necessary qualifications, the question emerges as to how this can be best achieved in practice. National academies should remain the backbone for

the training of border guards, promoting the highest standards and best practices in the implementation of EU border management and return legislation, including a strong fundamental rights component, as envisaged in Article 62 (5) of the proposal. The specific training relevant to the tasks and powers of members of the European Border and Coast Guard standing corps should be provided centrally, in order to foster a common European understanding of how to apply Union law during their deployments.

***To foster a common European understanding of what fundamental rights compliance in the area of border management means, the EU legislator could consider centralising at EU level the development and implementation of specific fundamental rights training to be provided to members of the European Border and Coast Guard standing corps, by amending Article 62 of the proposal. This should be without prejudice to ensuring the provision of fundamental rights-related training to national border guards of Member States through common core curricula and training of national instructors.***

### **3. Reducing fundamental rights risks when supporting returns**

FRA Opinion 15: Ensuring future involvement of international monitoring bodies

The Agency will increasingly rely on its own technical equipment to carry out return operations. This means that external monitoring bodies which operate on the basis of Member States' treaty obligations will not anymore be in a position to exercise their monitoring role effectively.

***The EU legislator should include in the proposal a mechanism for the cooperation between the Agency and the Council of Europe's Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT). This would enable the CPT to exercise its mandate on aircrafts and ships the Agency owns or leases and to formulate recommendations directly addressing the activities the Agency conducts.***

FRA Opinion 16: Reducing risks when sharing personal data with third countries

The proposal, as well as the proposed recast of the Return Directive, designate return as an important issue of substantial public interest. Without adequate safeguards, this designation may be perceived as giving the green light for a blanket sharing with the third country of all information that may be considered relevant for returns.

***If the EU legislator considers that it is justified to maintain return being "an important issue of substantial public interest", reliance on "substantial public interest" as a legal ground for the processing of personal data must be accompanied by adequate safeguards, such as defining exhaustively the concerned data categories, and providing for further measures to prevent data protection breaches. This could include a requirement for the Agency to carry out an impact assessment before personal data, in particular sensitive biometric data, are shared with a third country for identification purposes.***

***The EU legislator should also:***

- remind in Recital (67) that the other elements of Article 4 of Regulation (EU) 2018/1725 – proportionality to the aim pursued, respecting the essence of the right to data protection, and the existence of suitable and specific measures to safeguard the fundamental rights and the interests of the data subject – must continue to be met;***

- ***rephrase Article 49 (1) (e) to avoid contacts with asylum applicants' country of origin as long as no final decision on the application for international protection has been taken. This could, for example, be achieved by adjusting the language as follows: "provide technical and operational assistance to the EU Member States in the identification of third-country nationals and the acquisition of travel documents, including by means of consular cooperation. In the case of applicants for international protection, such assistance should only be provided when the application has been rejected in the final instance and without disclosing information relating to the fact that an application for international protection has been made; organise and coordinate return operations and provide support with voluntary departures in cooperation with the Member States."***

***To be effective, similar safeguards would need to be introduced in proposed recast of Directive 2008/115/EC (Return Directive).***

FRA Opinion 17: Reflecting the principle of *non-refoulement* and rights of the child

The proposal requires that the Agency's activities in the field of return are conducted in accordance with the respect for fundamental rights and general principles of Union law as well as for international law, including refugee protection and children's rights. It does not, however, specifically refer to the principle of *non-refoulement*. It also does not mainstream the requirement of involving specific child protection expertise in its return-related activities.

***The EU legislator should add an explicit reference to the principle of non-refoulement in Article 49 (1).***

***In Article 53, the EU legislator should add an explicit requirement for the return teams to include officers with specific expertise in child protection.***

FRA Opinion 18: Clarifying the Agency's role in the preparation of return decisions and other pre-return and return-related activities

The proposal contains a general reference to assisting pre-return and return-related activities of the EU Member States, without setting out the scope of such assistance and introducing relevant safeguards. Furthermore, proposed Article 49 (1) (a) pertaining to returns in general, as well as proposed Article 49 (2) (c) and Article 41 (4) (c) relating to migration management support teams, envisage a supportive role of the Agency in the preparation of return decisions. Such role is, however, not clearly defined and may, therefore, raise fundamental rights and accountability issues.

***The EU legislator should specify the reference to "other pre-return and return-related activities of the Member States" in Article 49 (1) (a) and Recital 69.***

***The EU legislator should clarify the scope of Articles 7 (2), 41 (4) (c), 49 (1) (a), 49 (2) (c), as well as Recital (69), as regards the degree and nature of the Agency's assistance to EU Member States in the preparation of return decisions in order to ensure accountability and strict compliance with fundamental rights obligations.***

FRA Opinion 19: Framing national return management systems

The Agency will be entrusted with the task to support EU Member States in developing national return management systems, which should be compatible with the Agency's information systems and applications, so as to allow for automated transfer of data. Without

further safeguards, this may lead to data protection violations and to the sharing of confidential information from the asylum file.

***The EU legislator should specify in Recital (70) and Article 50 that the central return management system does not contain any personal data. If, on the contrary, personal data is to be included (for example, data the Agency requires to organise return flights), Article 50 should specify which categories of data can be processed for which purpose and clearly define the data recipients. Such processing would need to comply with the rules for the processing of personal data applicable to the Agency, including the principles of purpose limitation and data minimisation.***

***Article 50 should furthermore expressly stipulate that the return management system should not contain any information obtained during the personal interview carried out on the basis of Article 15 of Directive 2013/32/EU (Asylum Procedures Directive).***

## **4. Reducing risks when cooperating with third countries**

### **FRA Opinion 20: Supporting rights-compliant EU Member States' cooperation**

As a result of the merger of the European Border and Coast Guard Regulation and the Eurosur Regulation, the safeguard limiting the sharing of information included in Article 20 (5) of the Eurosur Regulation would only apply to personal data, thus significantly restricting its scope.

***The EU legislator should move the provision included in Article 90 (4) to Article 76 to ensure that this safeguard applies also to non-personal data, consistent with the current Eurosur Regulation.***

### **FRA Opinion 21: Strengthening safeguards for the Agency's cooperation with third countries**

Cooperation with third countries must comply with EU law, including fundamental rights and the EU migration and asylum *acquis*, also when cooperation takes place on the territory of third countries.

***To reduce the risk of fundamental rights violations, the EU legislator should:***

- in Recital (72) and Article 74 (2), consider explicitly referring not only to non-refoulement but also to the prohibition of arbitrary detention and to the prohibition of torture, inhuman or degrading treatment or punishment, so as to give visibility to those rights that are likely to be at stake most frequently;***
- in Recital (75), include a reference to the need for a status agreement as a legal basis whenever the teams the Agency's deploys to third countries exercise executive powers, so as to mirror Article 74 (3), thus avoiding possible misunderstandings;***
- clarify that Article 39 (listing the components to be included in the operational plan) as well as the other relevant parts of Section 7 (in particular the safeguards set out in Articles 44, 47 and 48) also apply when the Agency cooperates with third countries under Articles 74 and/or 75 of the proposal.***

### **FRA Opinion 22: Taking preventive measures**

The proposed Regulation does not envisage any formal preventive measure for the Agency, documenting that it is acting in good faith when it engages in operational cooperation with a third country.

***Before initiating any operation in third countries where team members will exert executive powers, the EU legislator should require the Agency in Article 74 to carry out an assessment of the general situation in the third country similarly to what is provided for maritime operations in Article 4 (2) of Regulation (EU) No. 656/2014. Such assessment should involve the Fundamental Rights Officer and should be based on information derived from a broad range of sources. It should be documented and include all relevant information on the fundamental rights situation in the country.***

FRA Opinion 23: Enabling the Agency to take measures in case of unlawful instructions by the third country

Team members deployed by the Agency in third countries will receive instructions from the third country authorities. Stronger safeguards should be provided in the Regulation to reduce the risk that the Agency may be associated with fundamental rights violations.

***In proposed Article 74, the EU legislator should consider inserting a clause calling on the Agency to deploy a person with fundamental rights expertise whenever the deployment entails the exercise of executive powers as provided for in Article 74 (3). Such a person should be part of the team working with the Fundamental Rights Officer to whom it should report directly. The fundamental rights expert should have access to all information concerning the operation. She or he should also be entrusted to monitor the general situation in the third country and update the assessment proposed in FRA Opinion 22.***

FRA Opinion 24: Avoiding removals from third countries

Entrusting the Agency to remove migrants in an irregular situation who are in a third country would raise significant fundamental rights issues, exposing the Agency to constant risk of operating in violation of the principle of *non-refoulement* enshrined in Articles 18 and 19 of the Charter.

***Therefore, the EU legislator should limit the Agency's support to third countries in the field of return to technical assistance by:***

- ***removing the words "and operational" in relation to third countries from Recital (3), Recital (71) and Article 54 (2);***
- ***modifying Article 2 (29) and 2 (30) as well as Article 88 (1) (b) to exclude operational assistance to and return operations from third countries;***
- ***removing the words "or to a third country" and "or from a third country", respectively, from Article 2 (28);***
- ***deleting Article 75 (4).***

FRA Opinion 25: Inserting safeguards for risks associated with third country observers in the Agency's operations

Third-country observers may participate under certain conditions in the Agency's operation. This creates both opportunities and fundamental rights risks, which should be minimised.

***To avoid that the presence of third-country observers creates protection risks for migrants who have requested international protection or may wish to do so, the EU legislator should add the words "or pose risks to fundamental rights" at the end of the first sentence of Article 79 (2).***

## Introduction

This Opinion by the European Union Agency for Fundamental Rights (FRA) aims to inform the European Parliament's position on the legislative proposal on the European Border and Coast Guard (EBCG) presented by the European Commission on 12 September 2018.<sup>1</sup> Throughout the text, this opinion refers to the legislative text using the wording "the proposal" or "the Commission proposal".

On 26 October 2004, the EU established the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, commonly known as Frontex.<sup>2</sup> Frontex founding regulation was revised in 2011.<sup>3</sup> At that time, a strong framework to protect fundamental rights in Frontex activities was established. It set up the Frontex Consultative Forum on fundamental rights and created an internal independent Fundamental Rights Officer, among other things.<sup>4</sup>

In September 2016, the Frontex Regulation was replaced by Regulation (EU) No. 2016/1624 on the European Border and Coast Guard.<sup>5</sup> Frontex was renamed the 'European Border and Coast Guard Agency' (the Agency). The European Border and Coast Guard (EBCG) encompasses the Agency as well as the national authorities of Member States, which are responsible for border management.

The 2018 proposal revises significant parts of Regulation (EU) No. 2016/1624 and incorporates the European Border Surveillance System (Eurosur) into the EBCG Regulation. Eurosur is the framework for information exchange and cooperation between the Agency and Member States in the field of border management, set up by Regulation (EU) No. 1052/2013.<sup>6</sup>

In the Explanatory Memorandum, the European Commission clarified that due to the urgent need to act upon the European Council conclusions,<sup>7</sup> the proposal is not accompanied by an

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<sup>1</sup> European Commission (2018), *Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Council Joint Action n°98/700/JHA, Regulation (EU) No. 1052/2013 of the European Parliament and of the Council and Regulation (EU) n° 2016/1624 of the European Parliament and of the Council*, Brussels, 12 September 2018, 2018/0330(COD); COM(2018)631 final.

<sup>2</sup> Council Regulation (EC) No. 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 349, 25.11.2004, pp. 1–11.

<sup>3</sup> Regulation (EU) No. 1168/2011 of the European Parliament and of the Council of 25 October 2011 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, OJ L 304, 22.11.2011, pp. 1–17.

<sup>4</sup> Regulation (EU) No. 1168/2011 of the European Parliament and of the Council of 25 October 2011 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, OJ L 304, 22.11.2011, pp. 1–17, Article 26 (a).

<sup>5</sup> Regulation (EU) No. 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC, OJ L 251, 16.9.2016, pp. 1–76.

<sup>6</sup> Regulation (EU) No. 1052/2013 of the European Parliament and of the Council of 22 October 2013 establishing the European Border Surveillance System (Eurosur), OJ L 295, 6.11.2013, pp. 1–26.

<sup>7</sup> European Council Conclusions of 28 June 2018.

impact assessment.<sup>8</sup> The European Commission did, however, evaluate Eurosur. The evaluation report, as well as an assessment of the impact of Eurosur on fundamental rights that the Commission entrusted FRA to prepare, was published together with the proposal.<sup>9</sup>

The Agency's activities in the field of border management and return significantly impact on fundamental rights. Therefore, as part of its inter-agency work, FRA has been supporting Frontex on fundamental rights issues since 2009. In May 2010, FRA and Frontex signed a cooperation arrangement.<sup>10</sup> In 2013, as part of a larger research project on fundamental rights at the external borders, FRA published an analysis of the fundamental rights challenges concerning Frontex operational activities.<sup>11</sup> FRA is also a permanent member of the Frontex Consultative Forum on fundamental rights. The views set out in this Opinion build on FRA's extensive knowledge of the Agency's activities accumulated over the last nine years. It also relies on FRA's extensive work on return and border management, including in relation to the cooperation with third countries.<sup>12</sup>

From a fundamental rights point of view, the most important changes the Commission proposal introduces are:

- an expanded mandate and scope of the Agency's activities without adjusting the fundamental rights protection framework, in particular the complaints mechanism, the pool of forced return monitors and the Fundamental Rights Officer;
- the multiannual strategic policy cycle without embedding fundamental rights;
- the larger use of migration management support teams, whose deployment is not anymore limited to situations of disproportionate migratory challenges;
- the enhanced role of the Agency in the field of returns, including activities in third countries;
- the enhanced operational cooperation with third countries;
- the increased possibility to process personal data, including the limitations to important data subject rights.

Due to the short deadline, this FRA Opinion focuses only on four sets of issues. Chapter 1 makes suggestions on how to strengthen the overall fundamental rights protection framework, while Chapter 2 contains specific suggestions on how to address fundamental

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<sup>8</sup> European Commission (2018), *Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Council Joint Action n°98/700/JHA, Regulation (EU) No. 1052/2013 of the European Parliament and of the Council and Regulation (EU) n° 2016/1624 of the European Parliament and of the Council*, Brussels, 12 September 2018, 2018/0330(COD); COM(2018)631 final, Explanatory Memorandum, p. 14.

<sup>9</sup> European Commission (2018), *Report from the Commission to the European Parliament and the Council on the evaluation of the European Border Surveillance System (EUROSUR)*; European Commission (2018), Commission Staff Working Document, *Evaluation of the Regulation (EU) No 1052/2013 of the European Parliament and of the Council of 22 October 2013 establishing the European Border Surveillance System (Eurosur)*; FRA (2018), *How the Eurosur Regulation affects fundamental rights*, Luxembourg, Publications Office.

<sup>10</sup> The cooperation arrangement is available on FRA's website at: <http://fra.europa.eu/en/cooperation/eu-partners/eu-agencies>.

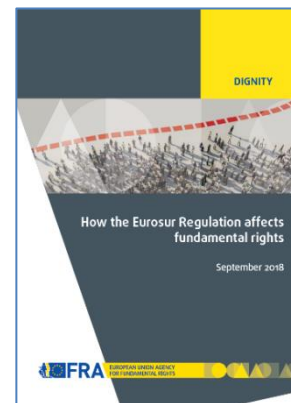
<sup>11</sup> FRA (2013), *EU solidarity and Frontex: fundamental rights challenges*, Luxembourg, Publications Office.

<sup>12</sup> See for example: FRA (2018), *How the Eurosur Regulation affects fundamental rights*, Luxembourg, Publications Office; FRA (2016), *Guidance on how to reduce the risk of refoulement in external border management when working in or together with third countries*, Luxembourg, Publications Office; FRA (2016), *Scope of the principle of non-refoulement in contemporary border management: evolving areas of law*, Luxembourg, Publications Office; FRA (2013), *EU solidarity and Frontex: fundamental rights challenges*, Luxembourg, Publications Office.

rights risks in specific aspects of the Agency's operation, excluding returns. Chapter 3 discusses the Agency's activities in the field of return of third-country nationals and Chapter 4 examines the challenges relating to the enhanced role of the Agency in third countries. This FRA Opinion, therefore, does not cover all fundamental rights issues that the proposal may raise. For example, it does not analyse the deployments of liaison officers and their role with regard to respect for fundamental rights (particularly as the proposal removes safeguards limiting the deployment of liaisons officers to third countries) or cover questions of criminal liability of deployed team members.

One important area that this FRA Opinion only covers to a limited degree (in Opinions 12, 16 and 19) is the protection of personal data, given that the European Data Protection Supervisor will submit a separate opinion. Concerning data protection, proposed Articles 87-89 blur the responsibilities between the Agency and the Member States and do not distinguish sufficiently well the different purposes for data processing, listing which data can be processed for which purpose. The proposal also contains inconsistencies: for example, the scope of proposed Article 88 (1) (a) which allows the Agency to process personal data to perform its tasks of organising and coordinating joint operations and other activities seems to overlap with Article 88 (1) (f). Provisions in proposed Articles 88 (1) (c), 89 (2) (a) and 89 (3) regulating the exchange of personal data between EU agencies are formulated in a broad manner raising the question of whether it is necessary, for example, to envisage exchanges of personal data with EASO and Eurojust, and if so, for which purpose. Furthermore, Article 87 (3) and Recital (85) propose significant limitations affecting the right to restriction of processing, limiting access rights and allowing for restrictions to the right to correct inaccurate data related to persons subject to return. These limitations can have major impact on the rights of these persons, going beyond the right to the protection of personal data, also in light of the significant amount of inaccurate data contained in existing EU IT systems, documented by FRA in past reports. The co-legislator would need to show that the proposed restrictions to these core data subject rights meet the strict requirements of Article 52 of the Charter.

Furthermore, this FRA Opinion does not examine in detail the provisions relating to Eurosur. Following a request by the European Commission, FRA has already reviewed the fundamental rights issues which emerged from the implementation of the Eurosur Regulation. The involvement of FRA from the outset helped in addressing some of the fundamental rights issues upfront. A summary of the relevant FRA conclusions from its evaluation is attached to this Opinion as Annex 1.<sup>13</sup> Only Opinion 19 relates to a fundamental rights safeguard in Eurosur, which FRA understands has been wrongly placed when incorporating the Eurosur provisions into the proposal.



Finally, in its Opinion on the revised Visa Information System, FRA pointed to the need to establish a 24/7 support centre whom carriers could contact and receive a real-time reply whenever they obtain a "NOT OK" to board a passenger through the carrier gateway. In that opinion, FRA suggested that carriers should be able to contact a functioning support centre where they can receive a reply within minutes when they have queries on a "NOT OK" to board. Although this point is not covered in this FRA Opinion, the revision of the European

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<sup>13</sup> FRA (2018), *How the Eurosur Regulation affects fundamental rights*, Luxembourg, Publications Office.

Border and Coast Guard Regulation could be an opportunity to discuss the appropriateness to establish such a centre at the EU level.<sup>14</sup>

This FRA Opinion contains 25 individual opinions which relate to various fundamental rights enshrined in the Charter (which is “addressed to the institutions, bodies, offices and agencies of the Union”)<sup>15</sup>. It touches on the following rights, namely:

- the right to human dignity (Article 1 of the Charter);
- the right to the integrity of the person (Article 3 of the Charter);
- the prohibition of torture, inhuman and degrading treatment or punishment (Article 4 of the Charter);
- the prohibition of trafficking in human beings (Article 5 (3) of the Charter);
- the right to liberty (Article 6 of the Charter);
- the right to respect for private and family life (Article 7 of the Charter) and the right to protection of personal data (Article 8 of the Charter);
- the right to asylum (Article 18 of the Charter);
- the protection in the event of removal, expulsion or extradition (Article 19 of the Charter);
- equality before the law (Article 20 of the Charter);
- non-discrimination (Article 21 of the Charter);
- the rights of the child (Article 24 of the Charter);
- the right to good administration (Article 41 of the Charter);
- the right to an effective remedy and to fair trial (Article 47 of the Charter).

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<sup>14</sup> FRA (2018), *The revised Visa Information System and its fundamental rights implications*, FRA Opinion – 2/2018 [VIS], Vienna, 30 August 2018, Opinion No. 17.

<sup>15</sup> See Art. 51 of the [Charter of Fundamental Rights of the European Union](#), OJ C 326, 26.10.2012, p. 391-407; FRA (2018), [Challenges and opportunities for the implementation of the Charter of Fundamental Rights](#), Opinion 4/2018.

# 1. Adjusting the framework to protect fundamental rights

Recital (20) of the proposal underlines that “[t]he extended tasks and competence of the Agency should be balanced with strengthened fundamental rights safeguards and increased accountability.” This FRA Opinion aims to operationalise this provision. In this first chapter, the Opinion suggests ways to strengthen existing horizontal fundamental rights safeguards to reinforce them in light of the expansion of the Agency’s mandate and activities.

## 1.1. Promoting fundamental rights enshrined in the Charter

Proposed Article 5 (4) requires the Agency to contribute to the “uniform application of Union law, including the Union *acquis* on fundamental rights, at all external borders”. Although this horizontal provision is included in Chapter I on European Border and Coast Guards, it only relates to tasks and activities at the external borders. It does not cover the role of the Agency in relation to irregular secondary movements across internal Schengen borders and its role in returns.

With enlarged mandate and activities, the impact of the Agency’s work on the ground will increase. This should also entail a broader responsibility with regard to fundamental rights. Under Article 51 of the Charter, institutions and bodies of the Union as well as EU Member States must promote the application of the Charter in accordance with their respective powers. Conscious of this requirement, the Fundamental Rights Strategy indicates that “respect and promotion of fundamental rights are unconditional and integral components of effective integrated border management”.<sup>16</sup> The emphasis on promoting fundamental rights in all of the Agencies’ activities should also be reflected in the regulation itself.

### FRA Opinion 1

Article 5 (4) contains a horizontal provision on fundamental rights which has remained unchanged in spite of the expansion of the Agency’s activities and mandate.

***To reflect the duty deriving from Article 51 (1) of the Charter and to extend the safeguards beyond the Agency’s activities at the external borders, the EU legislator should amend proposed Article 5 (4) along the following lines: “The Agency shall contribute to the continuous and uniform application of Union law, including the Union *acquis* on fundamental rights, and promote the application of the Charter of Fundamental Rights of the European Union in all its activities. Its contribution shall include the exchange of good practices.”***

## 1.2. Reflecting the duty to protect stateless persons

Proposed Recital (16) clarifies that the implementation of the proposed regulation does not affect the obligations of EU Member States under various international law instruments. It lists expressly several conventions, including the 1951 Convention Relating to the Status of Refugees and the 1950 European Convention of Human Rights.

In recent times, the international community has given increased attention to the situation and protection of stateless persons. The displacement of stateless population groups, such as Rohingya from Myanmar, Kurds from Syria, Bidoons from Kuwait and Palestinians from

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<sup>16</sup> [Frontex Fundamental Rights Strategy](#), endorsed by the Frontex Management Board on 31 March 2011, Preamble. See also the Frontex – European Border and Coast Guard Agency, [Programming document](#), 10 December 2017, p. 62 Strategic Action Area point 14, pp. 51-52 on Fundamental Rights.

the Middle East, has raised challenging questions on how to handle stateless persons in the context of border management and returns.

At the United Nations level, the protection and treatment of stateless persons is regulated in the 1954 Convention Relating to the Status of Stateless Persons, which has meanwhile been ratified by the large majority of EU Member States.<sup>17</sup> Added to this, at the September 2012 UN High Level Rule of Law Meeting during the General Assembly in New York, the EU and the Member States pledged that all Member States not yet parties to the 1954 Statelessness Convention would ratify this international instrument and the EU would develop a framework for raising issues of statelessness with third countries.<sup>18</sup>

## FRA Opinion 2

As the subject matters covered by the Regulation impact on issues that are regulated in international law, Recital (16) clarifies that it does not affect the obligation of EU Member States under relevant international law instruments, specifically listing selected conventions. It does, however, not expressly mention the relevant instrument to protect stateless persons.

***In Recital (16), the EU legislator should consider adding to the list of international instruments the 1954 United Nations Convention Relating to the Status of Stateless Persons.***

### 1.3. Making the governance of the pool of forced return monitors independent

Monitoring of forced returns is a key safeguard against fundamental rights violations during return operations. Similar to Article 29 of Regulation (EU) No. 2016/1624, the proposal envisages a pool of forced return monitors provided by EU Member States and managed by the Agency. The monitors are entrusted with forced-return monitoring activities in accordance with Article 8 (6) of Directive 2008/115/EC (Return Directive).

The Return Directive requires that Member States have in place an effective return monitoring system. The notion of effectiveness is further elaborated in the Return Handbook which provides guidance to national authorities competent for carrying out return-related tasks. According to the Handbook, it is problematic when the monitoring role is assigned to a branch of the same body that carries out returns.<sup>19</sup> As FRA regularly highlights in its reporting on forced return monitoring systems in EU Member States, monitoring by the same authority that carries out the returns is not sufficiently independent to qualify as 'effective' under Article 8 (6) of the Return Directive.<sup>20</sup> Relevant expertise and sufficient budgetary resources to conduct monitoring in an independent manner and with sufficient frequency are further important elements of effectiveness.

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<sup>17</sup> As of November 2018, 24 EU Member States are Party to the 1954 Convention. See at the [UN Treaty Collection](#).

<sup>18</sup> [Pledges of the European Union and its Member States to be made on the occasion of the forthcoming High-Level Meeting on the Rule of Law of 24 September 2012](#) (19 September 2012), Section A. (Strengthening the rule of law at the international level), point 4 and Section B. (Strengthening the rule of law at the national level), point 3.2.

<sup>19</sup> European Commission (2017), [Annex to the Commission Recommendation establishing a common "Return Handbook" to be used by Member States' competent authorities when carrying out return related tasks](#), C(2017) 6505, 27 September 2017, pp. 42-43.

<sup>20</sup> See FRA (2018), [Fundamental Rights Report 2018](#), Luxembourg, Publications Office, pp. 140-141.

Although the Return Directive is only directly binding upon the Member States, its core principles should apply also in case of return operations supported or conducted by the Agency to ensure at least an equivalent level of safeguards. This would imply the need to consider a different model of governance of the pool of forced return monitors.

### FRA Opinion 3

The Return Directive (Directive 2008/115/EC), which sets out EU standards in relation to return monitoring, requires that Member States set up an effective return monitoring system. This means that the same authority which carries out the returns cannot be in charge of monitoring itself. The same standard should apply to the Agency.

***To ensure its effectiveness, the EU legislator should revise Article 52 to entrust an independent actor to manage the pool of forced return monitors. In this regard, consideration could be given to involving an international body with relevant human rights monitoring expertise. A specific and adequate budget should be provided to the responsible body.***

#### 1.4. Formalising the existing cooperation with FRA

Article 10 of the proposal lists the tasks of the Agency. The proposed list of tasks includes also the cooperation with selected EU agencies, namely Europol and Eurojust (paragraph 19), the EU Agency for Asylum (paragraph 20) and the European Fisheries Control Agency and the European Maritime Safety Agency (paragraph 21). The proposal singles out these five EU agencies among the longer list of agencies the European Border and Coast Guard Agency should cooperate with that are listed in proposed Article 69 (1). Presumably, the rationale of singling out these five agencies is to give a stronger weight to the duty of the European Border and Coast Guard Agency to cooperate with them and to underline the operational nature of such cooperation.

In practice, during the past nine years, FRA has extensively cooperated with the Agency not only on an institutional and capacity building level, but also operationally. In addition to the fundamental rights support FRA has provided to the Agency in the context of deployments to the hotspots, FRA is listed as a partner agency in the operational plans of operations like Indalo and Hera; it has actively contributed to the past Vega Children operations and has played a central role in developing the pool of forced return monitors. Additionally, due to its significant expertise in the field of large-scale IT systems and fundamental rights, FRA indicated its availability to support the Agency in the establishment of the ETIAS Central Unit. Thematically, one of the focus areas of FRA's cooperation with the Agency is the identification, protection and treatment of vulnerable people.

### FRA Opinion 4

Article 10 of the proposal identifies five EU agencies for operational cooperation with the Agency. The provision, however, does not mention the European Union Agency for Fundamental Rights (FRA). Reflection of the multi-faceted forms of cooperation between the Agency and FRA, in proposed Article 10 on the tasks of the Agency, would ensure that the Agency makes full use of existing EU-level fundamental rights expertise.

***In light of Article 5 (4) of the proposal and to ensure the continuation of the operational cooperation between the Agency and FRA, the EU legislator should add the following point to proposed Article 10: "cooperate with the European Union Agency for Fundamental Rights, to ensure the continuous and uniform application of the Union acquis on fundamental rights in all its activities."***

## 1.5. Enhancing the role of an independent Fundamental Rights Officer

Since mid-December 2012, an independent Fundamental Rights Officer has been working within the Agency to promote respect of fundamental rights. The Fundamental Rights Officer is a first essential component of the Agency's fundamental rights protection framework together with the Consultative Forum, the complaints mechanism, the fundamental rights strategy, the codes of conduct and the cooperation with FRA. The provision on the Fundamental Rights Officer in Article 107 of the proposal remains unchanged compared to Article 71 of Regulation (EU) No. 2016/1624.

The increasing number of activities by the Agency, the running of the complaints mechanism, the increased activities of the pool of forced return monitors and the implementation of new tasks, such as those linked with the ETIAS Central Unit, has significantly increased the workload of the Fundamental Rights Officer. Although the Agency has recruited additional staff to support the Fundamental Rights Officer, as of mid-November 2018, this included only junior staff. As a result of insufficient capacity, in recent years it has been extremely challenging for the Fundamental Rights Officer to fulfil the tasks assigned to her by the Regulation.<sup>21</sup> Moreover, there is no arrangement for a deputy function, which would ensure continuity in case of extended absence of the Fundamental Rights Officer, in an independent manner. The revision of the Regulation offers a good opportunity to address this.

A second point concerns the scope of the Fundamental Rights Officer's tasks. According to proposed Article 107 (3), the fundamental rights officer "shall be consulted on the operational plans drawn up in accordance with Articles 39, 43, 54 (4) and 75 (3)". This consultation plays an important preventive role, enabling the Agency to have a fundamental rights check before an operation starts. This preventive function does, however, not cover operational plans drawn up based on proposed Article 51 (return operations), and Article 54 (2) (return interventions in third countries). Furthermore, it excludes technical assistance projects and "pilot projects". Considering that pilot projects often involve innovative activities or action in new areas, a preventive fundamental rights scrutiny is even more important, there. Such preventive role could also be enhanced by giving the Fundamental Rights Officer a full autonomy for unannounced visits.

A third point concerns the lack of transparency of the Fundamental Rights Officer's work, which could be addressed by requiring the Fundamental Rights Officer to prepare a public annual report describing the activities and main challenges.

### FRA Opinion 5

The Fundamental Rights Officer is an essential component of the Agency's fundamental rights protection framework. If the significant increase in the Agency's staff and the expansion of its activities is not accompanied by a stronger Fundamental Rights Officer, the ability to carry out the tasks assigned to her or him by the Regulation in an independent manner will be seriously undermined. At the same time, Recital (48) of Regulation (EU) No. 2016/1624 which underlined that the Fundamental Rights Officer should be provided with adequate resources and staff corresponding to its mandate and size, has been removed.

***To ensure that the Fundamental Rights Officer is provided with the necessary capacity and independence to carry out her or his tasks, the EU legislator should:***

- ***complement Article 107 of the proposal by inserting an additional paragraph (4) providing the Fundamental Rights Officer with full administrative autonomy,***

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<sup>21</sup> See e.g. Frontex Consultative Forum on Fundamental Rights, [Fifth Annual Report – 2017](#), Warsaw, 2018, pp. 5-6.

***including the possibility of unannounced visits, and with sufficient staff and resources to fulfil the tasks in full independence. Such provision should be included in the operational part of the Regulation and not confined to a Recital as is the case in Regulation (EU) No. 2016/1624, Recital (48);***

- ***replace, throughout the Regulation, “Fundamental Rights Officer” with a “Fundamental Rights Office” and provide for a Deputy Fundamental Rights Officer, to have an arrangement to cover extended absences of the Fundamental Rights Officer. The Deputy should have the necessary qualifications and experience in the field of fundamental rights.***

***Furthermore, the preventive role of the Fundamental Rights Officer should encompass all relevant activities of the Agency. Therefore, the second line in Article 107 (3) should read “in accordance with Articles 39, 40, 41, 43, 51, 54, and 75 as well as on pilot projects and technical assistance projects in third countries.”***

***Finally, the Fundamental Rights Officer should be tasked to present an annual report about the main challenges and achievements in protecting fundamental rights within the Agency. This report could be combined with the report on the functioning of the complaints mechanism suggested in FRA Opinion 6.***

## **1.6. Adjusting the complaints mechanism**

A second important component of the Agency’s fundamental rights protection framework is the complaints mechanism. This is regulated in Article 72 of Regulation (EU) No. 2016/1624, which the proposal keeps essentially unchanged in Article 108, except for small adjustments to align Article 108 (8) with the proposed deployment schemes. The revision of the European Border and Coast Guard Regulation would offer a unique opportunity to enhance the effectiveness of the complaints mechanism. Adjustments could be made to five aspects.

First, certain categories of people will face practical difficulties to submit a complaint unless they are supported by a lawyer. This concerns in particular new arrivals, as they will typically have only limited information on how to submit a complaint or may not even be aware about that possibility. Particularly affected are unaccompanied children, as at this initial stage in most cases they do not yet have a (temporary) guardian who can support them. At the same time, it is usually during the first days after arrival that the work of the Agency is more intense and that team members deployed by the Agency carry out most of their activities, such as registration, screening, and fingerprinting. Although the proposal envisages the possibility for “any party representing” a person whose fundamental rights have been breached to submit a complaint, in many cases new arrivals do not yet have a lawyer. One way to mitigate the consequences of this situation could be for the Fundamental Rights Officer to initiate a complaint *ex officio*.

Second, under proposed Article 108 (5) complainants have no remedy against the decision by the Fundamental Rights Officer that the complaint is not admissible. This should be addressed.

Third, when the complaint relates to host or participating Member States staff (and not a staff member of the Agency), pursuant to proposed Article 108 (5) the Fundamental Rights Officer forwards the complaint to the home Member State and informs the relevant national authority or body competent for fundamental rights. However, for this to trigger an effective follow up, national Ombudsmen or similar institutions should be given the possibility to act on the information they have received.

Fourth, the relevant Member State has a duty under proposed Article 108 (7) to report back on the follow up it has given to the complaint. However, such duty to report back is not

subject to strict deadlines but has to report back “within a determined time period, and if necessary, at regular intervals”. This could lead to significant delays.

Fifth, whereas under proposed Article 108 (9) the Fundamental Rights Officer must report on the findings and follow up given to complaints to the Executive Director and to the Management Board, it is the Agency – and not the Fundamental Rights Officer – who is tasked to report publicly on complaints mechanisms. This creates an inconsistency that should be addressed.

## FRA Opinion 6

The complaints mechanism is an important component of the Agency’s fundamental rights protection framework. The expansion of the Agency’s tasks significantly enhances the importance of having an effective complaints mechanism, particularly for persons whose fundamental rights have been breached during activities in third countries, where access to judicial remedies in EU Member States may not be possible due to lack of jurisdiction. Therefore, measures should be taken to strengthen it.

***The EU legislator should strengthen the complaints mechanism in proposed Article 108 by:***

- ***enabling the Fundamental Rights Officer to initiate complaints ex officio;***
- ***inserting in paragraph (5) the possibility for complainants to appeal an inadmissibility decision by the Fundamental Rights Officer to the European Ombudsman as well as the option for the Fundamental Rights Officer to reopen the case if the complainant submits new evidence;***
- ***in paragraph (4), insert the words “for further action in line with their mandate” after “inform the relevant authority or body competent for fundamental rights in a Member State” so as to enable national ombuds bodies or similar institutions to follow up on the information received;***
- ***either inserting in paragraph (7) a deadline expressed in a number of working or calendar days for EU Member States to report back on the findings and follow up made in response to the complaint or providing for other mechanisms to promote effective follow-up, for example, by asking the Fundamental Rights Officer to report to the Management Board on follow-up that is outstanding for more than a certain period of time, for example six months or one year;***
- ***tasking the Fundamental Rights Officer in paragraph (9) to produce an annual public report on the operation of the complaints mechanism and delete the last sentence of the paragraph.***

## 1.7. Avoiding the use of the term “illegal”

In the framework of its work, the Agency should be sensitive to the negative connotations and detrimental effects language and expressions can have on the fulfilment of fundamental rights.

The term 'irregular' is preferable to 'illegal' in the context of migration because the latter carries a criminal connotation, even though entering a country in an irregular manner, or staying with an irregular status, is not necessarily a criminal offence but an infraction of administrative regulations. Migrants lacking permits to stay may often be unfairly seen as criminals, which makes them more vulnerable to exploitation and abuse.

Sensitive to the impact of language on society as a whole, the European Commission has abandoned the use of the term ‘illegal migrant’, in favour of the more neutral terminology

‘irregular migrant’ or ‘migrant in an irregular situation’. Such language underlines that all persons have rights, including migrants who enter or stay in the EU without permission.<sup>22</sup> The same approach should be applied to “illegal migration”.

### FRA Opinion 7

The proposal uses interchangeably the terms “irregular migration” and “illegal migration”. The systematic use of “irregular” can help prevent the deprivation of migrants’ fundamental rights.

***The EU legislator should replace the word “illegal(y)” with the term “irregular(ly)” throughout the proposal.***

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<sup>22</sup> See: European Migration Network (2018), [Asylum and Migration – Glossary 6.0](#), pp. 226 – 227.

## 2. Operationalising fundamental rights protection in the Agency's activities

Chapter 2 covers specific points relating to the Agency's activities, except return, which is discussed in Chapter 3. It includes specific comments relating to integrated border management, risk analysis, operations, and training.

### 2.1. Clarifying inter-agency cooperation in integrated border management

The EU adopts an integrated approach to border management. Article 4 of Regulation (EU) No. 2016/1624 defines the components of European Integrated Border Management. Earlier in 2018, the European Commission listed the main elements for developing the European Integrated Border Management Strategy, noting that the "European Integrated Border Management should guarantee the full respect of fundamental rights, with a specific focus on vulnerable groups and minors, in all border management and return activities, including the respect of the *non-refoulement* principle".<sup>23</sup>

The proposal reproduces the components of Integrated Border Management (IBM) in Article 3. Increased attention is given to inter-agency cooperation (a new component concerning cooperation at EU level is added in paragraph (f) of the same Article) and limitations to cooperation with third countries are removed. To make IBM truly 'integrated' and all-encompassing, inter-agency cooperation should also include cooperation with national authorities and international bodies, which are responsible for the protection of fundamental rights in the context of border management. This should be made explicit in Article 3.

#### FRA Opinion 8

One of the components of Integrated Border Management as laid out in Article 3 (e) of the proposal is inter-agency cooperation. The proposal expressly mentions cooperation with national authorities "responsible for border control or for other tasks carried out at the border", authorities responsible for return as well as EU-level cooperation. It does not specify that such inter-agency cooperation should also include entities in charge of fundamental rights protection. This can lead to a different understanding among practitioners.

***To strengthen compliance with fundamental rights in respect to "inter-agency cooperation", the EU legislator should add the words "including national and international bodies in charge of protecting fundamental rights" after "or for other tasks carried out at the border" in proposed Article 3 (e).***

### 2.2. Mainstreaming fundamental rights in strategic risk analysis

Risk analysis supports strategic and operational planning and decision-making. Fundamental rights-sensitive risk analysis provides officers in charge of planning and decision-making with the information they need to act in compliance with fundamental rights. To give a simple example, an analysis of irregular border crossing data by sex and age enables border guards to design their operations taking into account the specific needs that women and children have. This will allow border guards to plan their work assigning, for example, sufficient female officers or persons with expertise on working with children to specific

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<sup>23</sup> European Commission (2018), *Annex to the Communication from the Commission to the European Parliament, The European Council and the Council Progress report on the Implementation of the European Agenda on Migration, ANNEX 6 – The main elements for developing the European Integrated Border Management Strategy*, COM(2018) 250 final – ANNEX 6, Brussels, 14.3.2018, p. 1.

operations, thus reducing the risk of gender-based violence and support child protection at borders. Risk analysis has thus great significance for fundamental rights protection. For this reason, FRA cooperates closely with Frontex on the methodologies for risk analysis.

The proposal enhances risk analysis in different ways. Proposed Article 8 introduces a multiannual strategic policy cycle for European Integrated Border Management. The provisions on the strategic policy cycle do not contain any reference to fundamental rights or mechanisms to ensure that fundamental rights are adequately reflected in the multiannual strategic policy cycle.

The multiannual strategic policy to be adopted by the European Commission under proposed Article 8 will be based on a strategic risk analysis prepared by the Agency according to proposed Article 30 (2). The results of the vulnerability assessment regulated in proposed Article 33 and those of the Schengen evaluation mechanism (with which proposed Article 34 creates more synergies) will feed significantly into the Agency's risk analysis work.

Recital (14) of Regulation (EU) No. 1053/2013 of 7 October 2013 establishing an evaluation and monitoring mechanism to verify the application of the Schengen *acquis* emphasises that the evaluation and monitoring mechanism must pay particular attention to respect for fundamental rights. The corresponding provisions on vulnerability assessments in the proposal, namely proposed Article 33 and Recital (38) do not contain such a requirement. This asymmetry should be addressed.

## FRA Opinion 9

The proposal envisages a multiannual strategic policy cycle and enhances the Agency's work in the field of risk analysis, creating synergies between the "vulnerability assessments" and the "Schengen evaluation mechanism". The relevant provisions in the proposal, however, do not mention fundamental rights, creating a risk that fundamental rights will not be adequately reflected.

***To ensure that fundamental rights are adequately considered in the multiannual strategic policy cycle for European Integrated Border Management and in risk analysis more generally, the EU legislator should:***

- ***in Recital (14) add the words "and in full compliance with fundamental rights" after "in a coherent manner";***
- ***at the end of Article 8 (2) insert an additional sentence providing that the multiannual strategic policy cycle and the integrated planning regulated in Article 9 must comply with Union law and with the 1951 Convention relating to the Status of Refugees, as well as with other relevant international human rights instruments;***
- ***in Article 33 on vulnerability assessment, insert a new paragraph between paragraphs (5) and (6), along the following lines: "In the vulnerability assessment, the Agency shall pay particular attention to fundamental rights", similarly to Recital 14 of Regulation (EU) No. 1053/2013 on the Schengen evaluation mechanism;***
- ***following the approach taken in the Regulation on the Schengen evaluation mechanism, in Article 8 (4) consider adding "and on risk analysis requested from other relevant agencies, when appropriate" after the wording "referred to in Article 30 (2)" to enable the European Commission to seek the views of other EU agencies, including FRA, when appropriate.***

## 2.3. Extending the non-discrimination clause to cover all Charter grounds

Proposed Article 44 regulates the instructions that the Member State hosting an Agency's operation can give to team members deployed by the Agency. It applies to border management teams, return teams and migration management support teams.

Paragraph (4) of this article relates to the duty of team members to fully respect fundamental rights in the performance of their tasks and in the exercise of their powers. It also contains a provision prohibiting discriminatory treatment. However, the proposed sentence is not aligned with Article 21 of the Charter, as it prohibits discrimination against persons only based on some of the grounds listed in the Charter. In particular, it does not include discrimination on the ground of "colour", as well as "language" or "social origin", which are all protected characteristics under Article 21 of the Charter. Moreover, it is not required that team members pay particular attention to vulnerable persons.

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Article 44 (4) of the proposal requires that team members deployed by the Agency fully respect fundamental rights and act in a non-discriminatory manner. However, the non-discrimination provision does not cover all grounds, if compared to Article 21 of the Charter. Team members should also pay particular attention to vulnerable persons.

***The EU legislator should amend the last sentence of Article 44 (4) to cover all the relevant non-discrimination grounds listed in Article 21 of the Charter. The EU legislator should also amend the first sentence of Article 44 (4) to prescribe that members of the teams pay particular attention to vulnerable persons.***

## 2.4. Clarifying the humanitarian exception to migrant smuggling

Proposed Recital (34) deals with the role of the Agency in contributing to prevent and detect serious crime with a cross-border dimension, in particular migrant smuggling and trafficking in human beings. On migrant smuggling, the last sentence of Recital (34) refers to the EU Facilitation Directive<sup>24</sup> indicating that it "allows Member States not to impose sanctions where the aim of the behaviour is to provide humanitarian assistance to migrants". As FRA has repeatedly underlined, one of the main fundamental rights risks relating to the EU facilitation *acquis* is the limited material scope of the humanitarian exception listed in Article 1 (2) of the Facilitation Directive,<sup>25</sup> coupled with its optional character.

In July 2018, the European Parliament formulated guidelines for Member States to prevent humanitarian assistance from being criminalised.<sup>26</sup> The Agency's duty to promote the application of fundamental rights under Article 51 of the Charter requires that the Agency not only acknowledges the fact that EU law allows for an exemption from punishment, but

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<sup>24</sup> Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence, OJ L 328, 5 December 2002, pp. 17-18.

<sup>25</sup> FRA (2014), *Criminalisation of migrants in an irregular situation and of persons engaging with them*, pp. 8-11 and 15-16; FRA (2013), *Fundamental rights at Europe's southern sea borders*, Luxembourg, Publications Office, p. 10 and Chapter 2; FRA (2011) *Fundamental rights of migrants in an irregular situation in the European Union*, Luxembourg, Publications Office, p. 12 and Chapter 5. See also European Commission (2017), *Refit evaluation of the EU legal framework against facilitation of unauthorised entry, transit and residence: the Facilitators Package (Directive 2002/90/EC and Framework Decision 2002/946/JHA)*, SWD (2017) 117 final, Brussels, 22 March 2017, pp. 2, 20-23, 35-36.

<sup>26</sup> European Parliament, *European Parliament resolution of 5 July 2018 on guidelines for Member States to prevent humanitarian assistance from being criminalised (2018/2769(RSP))*.

actively promotes that Member States apply the humanitarian exception, where appropriate. The last sentence of Recital (34) should therefore be rephrased.

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In light of the implications of activities to combat migrant smuggling on humanitarian assistance, consideration could be given to strengthening the reference to the humanitarian exception listed in Recital (34).

***To promote a fundamental rights compliant approach to anti-migrant smuggling activities carried out by the Agency, the EU legislator should reformulate the last sentence in Recital (34) along the following lines: "In light of the humanitarian exception included in Article 1 (2) of Council Directive 2002/90/EC, the Agency should remind EU Member States of the fundamental rights implications when they consider imposing sanctions where the aim of the behaviour is to provide humanitarian assistance to migrants."***

### 2.5. Defining cross-border crime in a strict manner

Proposed Article 2 (12) continues to rely on a vague definition of cross-border crime, referring to "serious crime with a cross-border dimension". In comparison to the definition found in Regulation (EU) No. 2016/1624, it also includes "attempted crimes".

It is not clear whether the definition of cross-border crime in the proposal corresponds to the list of "particularly serious crime with a cross-border dimension" in Article 83 (1) of the TFEU (terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime) or if its scope is conceived more broadly. This leads to a lack of clarity as regards the extent of the Agency's mandate, for example, to process personal data during joint operations, pilot projects and rapid border interventions and by migration management support teams under Article 89 (1) of the proposal. Given that the proposal foresees an increase of these operations in the future, in the territory of both Member States and third countries, the impact of this lack of clarity will be significant.

This absence of a clear definition raises a number of questions, including which authority would decide whether a certain activity qualifies as a cross-border criminal act or an attempt to commit one, and under which jurisdiction. This question is particularly delicate in case of operations implemented in third countries, where serious crimes may be defined in a broad manner, possibly including acts that would not fall under the definition of serious crime under the laws of EU Member States. Criminalisation of attempts to commit a crime would further increase the onus of responsibility placed on the Agency to guarantee the protection of fundamental rights in the performance of its tasks, stipulated in Article 81 (1) of the proposal.

Such risk could be minimised if the proposal contained a clear definition of cross-border crime, for example by including a list of relevant forms of serious crime which is a solution used in the Europol Regulation.<sup>27</sup>

Furthermore, Article 89 (2) (e) of the proposal authorises the Agency to process (assumingly meaning 'to transmit') personal data to law enforcement authorities for the purposes of preventing, detecting, investigating or prosecuting serious crime. Given that the proposal, in

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<sup>27</sup> Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA, OJ L 135/53, Annex I.

comparison with the present text of the Regulation, enhances the emphasis on cooperation with third countries, it should be clarified that such data can only be transferred to law enforcement authorities of EU Member States, not third countries.

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The proposal contains a vague definition of cross-border crime, further expanded to include attempts to commit a crime. In light of the increased emphasis on the Agency's operations, including in third countries, this creates fundamental rights risks.

***The EU legislator should specify the scope of the term “serious crime with a cross-border dimension” in Article 12 (2), such as by referring to an Annex providing an exhaustive list.***

***In addition, Article 89 (2) (e) should read: “in specific cases, where the Agency becomes aware that transmission of personal data processed in the fulfilment of its tasks to law enforcement authorities of the Member States is strictly necessary ~~to law enforcement authorities~~ for the purposes of preventing, detecting, investigating or prosecuting serious crime.”***

## 2.6. Embedding fundamental rights in migration management support teams

The proposal amends the rules on migration management support teams. These are essentially mixed teams deployed by different EU agencies to provide operational support to EU Member States. Under proposed Article 41, migration management support teams should be deployed “in particular, at hotspot areas and controlled centres”. Member States will no longer need to show that they are facing “disproportionate migration challenges at particular hotspot areas of its external borders” to request their deployment, a pre-condition which is required under the law currently in force.<sup>28</sup>

### *Controlled centres and hotspots areas*

The proposal also introduces the concept of “controlled centres” first mentioned in the European Council Conclusions of 28 June 2018<sup>29</sup> defining them in Article 2 (24). These are centres established by EU Member States where relevant Union agencies support the host country in carrying out security checks and in processing new arrivals through speedy asylum and/or return procedures. The proposal does not define whether controlled centres are open facilities or centres where persons are deprived of liberty, nor does it determine the procedure to apply, which – for returns – is set out in Chapter V of the proposed recast Return Directive.<sup>30</sup> This FRA Opinion, therefore, does not discuss the full range of fundamental rights issues that the concept of controlled centres may raise, but only those aspects which emerge from the wording of the proposed EBCG Regulation.

First, for hotspot areas, the proposal contains a sentence in Recital (47) whereby “The Commission, in cooperation with the relevant Union agencies, should ensure that activities in hotspot areas comply with relevant Union law.” A similar safeguard is missing in Recital (44) on controlled centres.

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<sup>28</sup> See [Regulation \(EU\) No. 2016/1624](#) of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC, Article 18(1).

<sup>29</sup> [European Council Conclusions of 28 June 2018](#), para. I.6.

<sup>30</sup> European Commission (2018), [Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals \(recast\)](#), COM(2018) 634 final, 12.9.2018.

Second, controlled centres focus on persons in need of international protection and on those to be returned, disregarding the fact that there are also other categories of persons who need protection and/or assistance. To be compliant with Article 1 (human dignity), Article 4 (prohibition of trafficking), Article 7 (respect for private and family life), Article 19 (non-refoulement) and Article 24 (rights of the child) of the Charter, controlled centres must ensure that all categories of persons in need of protection – and not only asylum applicants – are directed to the competent national authorities for appropriate assistance. However, the type of technical and operational support that migration management support teams may provide only includes screening, first registration, security checks, referral of asylum applicants and return-related assistance. There is no provision for the referral of victims of trafficking in human beings, unaccompanied children and other persons in a vulnerable situation (for example those who need hospitalisation) as provided for in proposed Article 39 (3) (l) for joint operations.

In addition, the wording of Recital (45) and of Article 41 (5) assumes that every person whose application for international protection has been rejected should be returned. According to Article 6 of the Return Directive, Member States may decide at any moment to grant an authorisation to stay to a third-country national staying illegally in their territory. For victims of trafficking in human beings who agree to cooperate with the authorities, the granting of an authorisation to stay may be compulsory under Directive 2004/81/EC.<sup>31</sup> In other cases, authorities may be under an obligation to authorise the person to stay pursuant to Article 8 of the European Convention on Human Rights, which guarantees the right to protection of private and family life. National law may also require EU Member States to grant a right to stay to unaccompanied children at risk in accordance with the principle of the best interests of the child. The proposal needs to allow Member States to grant an authorisation to stay in these circumstances.

Third, Recital (48) describes the activities that Union agencies should carry out in controlled centres when requested by Member States. It provides that in such centres it should be possible to carry out the entire procedure for international protection and/or return. Whereas this may be reasonable in some cases, such provision could be used to limit the onward transfer from controlled centres to other facilities when the asylum procedure will take more time or when the removal cannot be implemented within a short period of time. Past experience from Lampedusa or the hotspots in Greece show that protracted stay in first reception facilities leads to significant fundamental rights risks. As FRA pointed out in its Opinion on hotspots, swift onward movement of new arrivals to other locations avoids overcrowding and is an essential pre-condition for their dignified treatment in line with the requirements of the Charter.<sup>32</sup> Therefore, the entire part of the asylum or return procedure should only be carried out in controlled centres, when it can be swiftly completed in full respect of the procedural safeguards, including effective provision of information, legal and linguistic support.

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<sup>31</sup> [Council Directive 2004/81/EC](#) of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities, OJ L 261, 6.8.2004, pp. 19–23. The same applies optionally to those who have been the subject of migrant smuggling. Ten EU Member States have made use of this option. See European Commission (2014), [Communication from the Commission to the Council and the European Parliament on the application of Directive 2004/81/EC on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities](#), COM(2014) 635 final, Brussels, 17.10.2014, p. 3.

<sup>32</sup> FRA (2016), [FRA Opinion on fundamental rights in the 'hotspots' set up in Greece and Italy](#), Luxembourg, Publications Office, p. 4.

### *FRA's role*

Migration management support teams are composed of staff deployed by the Agency, the European Asylum Support Office, Europol and other relevant agencies as well as by Member State staff.

Recital (47) reminds that relevant EU actors should ensure that activities in hotspot areas comply with relevant Union law. This can only be operationalised by deploying staff with the necessary fundamental rights knowledge. According to Article 18 of Regulation (EU) No. 2016/1624, which is kept unchanged in proposed Article 41 (6), migration management support teams must, "where necessary, include staff with expertise in child protection, trafficking in human beings, protection against gender-based persecution and/or fundamental rights".

In practice, since 2016, FRA has been present in the hotspots in Greece and regularly visiting the hotspots in Italy providing EU agencies and the European Commission with expert advice on fundamental rights. Upon request, in November 2016, FRA presented the main fundamental rights challenges in the hotspots to the European Parliament.<sup>33</sup>

The explanatory note of the European Commission on the hotspot approach mentions that EU agencies can use FRA for input on how to address fundamental rights challenges.<sup>34</sup> However, there is no specific legal or policy document that invites the European Commission and relevant EU agencies to use FRA's expertise in similar situations not covered by the hotspots approach.

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The proposal contains indications as to activities that would be carried out in controlled centres. The relevant provisions are however not specific enough to prevent fundamental rights risks. As a minimum, the proposal should provide for solutions for persons who need protection and/or assistance besides international protection applicants, underline the need to respect procedural safeguards and discourage protracted stay in controlled centres. Moreover, migration management support teams require sufficient expertise in fundamental rights.

***With regard to controlled centres, the EU legislator should:***

- ***add to Recital (44) a sentence similar to the last sentence in Recital 47 according to which "The Commission, in cooperation with the relevant Union agencies, should ensure that activities in [controlled centres] comply with relevant Union law";***
- ***insert in Recital (45) and Article 41 (5) the words "and are not entitled to other legal grounds to stay" after the words "application for international protection is rejected" (for Recital (45)) and "final decision" (for Article 41 (5));***
- ***extend Article 41 (4) (b) to include also victims of trafficking in human beings, unaccompanied children, persons in a vulnerable situation as provided for in Article 39 (3) (l) for joint operations;***
- ***replace in Recital (44) "access to protection" with "access to protection and assistance";***

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<sup>33</sup> FRA (2016), *FRA Opinion on fundamental rights in the 'hotspots' set up in Greece and Italy*, Luxembourg, Publications Office.

<sup>34</sup> European Commission (2015), *Explanatory note on the "Hotspot" approach*, p. 1.

- ***either delete Recital (48) completely or amend it by qualifying that the entire or part of the procedure for international protection and/or return should only be carried out in controlled centres, when procedural safeguards, including effective provision of information, legal and linguistic support can be guaranteed and provided that it does not result in protracted stay of third-country nationals in the controlled centre.***

***The EU legislator could consider increasing the potential availability of fundamental rights expertise in support of migration management support teams. This could be achieved, for example, by amending Article 41 (1) specifically mentioning that the European Commission should transmit a Member State's request also to the EU Agency for Fundamental Rights which may decide to deploy an expert to support migration management support teams. Proposed Recital (46) and proposed Article 2 (19) could be amended accordingly.***

## 2.7. Enhancing the effectiveness of training

Under Article 62 (1)-(4) of the proposal, the Agency must ensure that border guards it deploys as part of the European Border and Coast Guard standing corps proposed in Article 55 have received adequate training in international and EU law, including fundamental rights. This is a challenging task, considering the amount of people to train.

Basic training of border guards at the Member State level is carried out by national border/police academies according to common curricula developed by the Agency, which also trains the national instructors delivering these trainings. These curricula also cover fundamental rights and are essential to promoting them as an integral element of border guard work at the Member State level.

Nevertheless, in practice significant differences still remain in the way training on fundamental rights is provided to border guards at national level. This leads to a different understanding of what compliance to core fundamental rights – such as the principle of *non-refoulement*, the protection of unaccompanied children in accordance with the principle of the best interests of the child, or the right to protection of personal data – entails for the daily work of border guards and how fundamental rights should be operationalised in the specific activities carried out by different profiles of staff. This might negatively impact on the uniform application of EU law by the European Border and Coast Guard standing corps during its operations.

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Whereas Article 62 of the proposal contains strong obligations for the Agency to ensure that the officers it deploys have the necessary qualifications, the question emerges as to how this can be best achieved in practice. National academies should remain the backbone for the training of border guards, promoting the highest standards and best practices in the implementation of EU border management and return legislation, including a strong fundamental rights component, as envisaged in Article 62 (5) of the proposal. The specific training relevant to the tasks and powers of members of the European Border and Coast Guard standing corps should be provided centrally, in order to foster a common European understanding of how to apply Union law during their deployments.

***To foster a common European understanding of what fundamental rights compliance in the area of border management means, the EU legislator could consider centralising at EU level the development and implementation of specific fundamental rights training to be provided to members of the European Border and Coast Guard standing corps, by amending***

***Article 62 of the proposal. This should be without prejudice to ensuring the provision of fundamental rights-related training to national border guards of Member States through common core curricula and training of national instructors.***

### 3. Reducing fundamental rights risks when supporting returns

The proposal seeks to expand the mandate and capacities of the Agency in the field of return, including increased emphasis on providing technical and operational assistance to Member States in return procedures; developing a central system for return case management connected to the systems of individual EU Member States; increasing the Agency's capacity in terms of technical equipment such as aircraft or vessels; strengthening cooperation with and support to third countries; and enhancing the mandate to process personal data, including the transfers of such data to third countries.

#### 3.1. Ensuring future involvement of international monitoring bodies

Article 51 (1) of the proposal envisages the provision of assistance and ensuring coordination of the organisation of return operations, including through the chartering of aircrafts. Under Article 63, the Agency would be also authorised to acquire or lease, including for the purpose of return operations, technical equipment such as aircraft or vessels. According to paragraph 4 of the same article, such aircraft or vessels acquired or leased by the Agency must be registered in one of the Member States.

The option of using charter or its own equipment is available to the Agency already at present. However, as underlined in Recitals (61) and (62), lack of financial resources have hindered the Agency in using this possibility. Thus, the Agency relies heavily on assets provided by the Member States. The Commission has, therefore, earmarked a significant amount of resources under the 2021-2027 multiannual financial framework for the Agency to acquire, maintain and operate the necessary technical equipment, highlighting that the Agency's own equipment "should ultimately become the backbone of [its] operational deployments with additional contributions of Member States to be called upon in exceptional circumstances."<sup>35</sup> This suggests that in the future, a significant share of return operations coordinated by the Agency would take place using the Agency's own or leased assets, such as chartered aircrafts.

In light of the overall expansion of the Agency's mandate in the field of return, these possibilities are likely to have a substantially different impact in the future, leading to new potential fundamental rights challenges. One of these challenges relates to the practical exercise of jurisdiction of bodies based on international obligations that Member States have assumed under international instruments to which the EU – and therefore the Agency – is not a party.

This is, for example, the case of the Council of Europe's Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) whose jurisdiction is based on the 1987 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. In the field of return, the CPT conducts *ad hoc* monitoring of return flights as part of its broader mandate to examine the treatment of

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<sup>35</sup> European Commission (2018), *Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Council Joint Action n°98/700/JHA, Regulation (EU) n° 1052/2013 of the European Parliament and of the Council and Regulation (EU) n° 2016/1624 of the European Parliament and of the Council A contribution from the European Commission to the Leaders' meeting in Salzburg on 19-20 September 2018* COM(2018)631 final, Brussels, 12 September 2018, Explanatory Memorandum, p. 16.

persons deprived of their liberty under aliens' legislation of the States.<sup>36</sup> Guidance developed by the CPT in this field have been reflected in the "Twenty Guidelines on Forced Return" adopted by the Committee of Ministers of the Council of Europe in May 2005.<sup>37</sup> The CPT forced return monitoring represents an important additional layer of fundamental rights expertise and control that cannot be replaced by monitoring activities at the national level.

Under international law, jurisdiction over cases of torture or ill-treatment committed on board of an aircraft or vessel is not affected by the degree or type of the Agency's involvement, as it is determined by the rule of the flag.<sup>38</sup> Relying on customary international law and treaty provisions, the ECtHR has repeatedly confirmed that on board of aircrafts or at high seas, individuals are *de jure* under the jurisdiction of the State where the aircraft or ship is registered.<sup>39</sup> Furthermore, the United Nations Convention against Torture, which governs this very subject matter and to which all EU Member States are a party, clearly stipulates in Article 5 (1) (a) the jurisdiction of a State over any such offences committed on board a ship or aircraft registered in that State. Registration in a Member State pursuant to Article 63 (4) of the proposal determines the jurisdiction of that Member State as a flag State and therefore the applicability of international obligations binding upon that Member State, including the jurisdiction of international monitoring bodies, such as the CPT as well as the ECtHR.

An increasing use of the Agency's own equipment and its enhanced involvement in the actual organisation of return flights will nevertheless require new modalities of cooperation between the Agency and external monitoring bodies, such as the CPT. The CPT has been monitoring joint return operations by air coordinated and co-financed by the Agency since 2013. During these monitoring missions, however, the main partner and interlocutor to CPT, has always been the organising EU Member State, not the Agency itself, to whom the CPT cannot directly issue recommendations. In the future, the Member State responsible for cooperation with the CPT on a given flight (i.e. the Member State of registration of the aircraft under the 1944 Chicago Convention on International Civil Aviation) might not at all be directly involved in the return operation. It will, therefore, be necessary to establish procedures for the practical implementation of CPT (and possibly other monitoring bodies) activities during return operations carried out by the Agency on its own, including clarifying the role of the Agency itself in this process, as well as channels of communication and reporting.

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The Agency will increasingly rely on its own technical equipment to carry out return operations. This means that external monitoring bodies which operate on the basis of Member States' treaty obligations will not anymore be in a position to exercise their monitoring role effectively.

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<sup>36</sup> [European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment](#), ETS No.126, Article 2.

<sup>37</sup> Council of Europe, Committee of Ministers, [Twenty Guidelines on Forced Return](#), doc. CM(2005)40 final, 4 May 2005.

<sup>38</sup> For this rule under the international law of the sea, see Articles 91-94 of the [1982 United Nations Convention on the Law of the Sea](#) (UNTS vol. 1833, No. 31363, p. 3); while in international air law, it is established under Articles 17-18 of the [1944 Chicago Convention on International Civil Aviation](#) (UNTS vol. 15, No. 295).

<sup>39</sup> See e.g. European Commission for Human Rights, *Cyprus v. Turkey*, Nos. 6780/74 and 6950/75, 26 May 1975; ECtHR, *Banković and Others v. Belgium and Others [GC]*, No. 52207/99, 12 December 2001, para. 73; ECtHR, *Medvedyev and Others v. France [GC]*, No. 3394/03, 29 March 2010, para. 65.

***The EU legislator should include in the proposal a mechanism for the cooperation between the Agency and the Council of Europe's Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT). This would enable the CPT to exercise its mandate on aircrafts and ships the Agency owns or leases and to formulate recommendations directly addressing the activities the Agency conducts.***

### 3.2. Reducing risks when sharing personal data with third countries

According to Article 87 of the proposed Regulation, the Agency may transfer personal data to an authority of a third country or to an international organisation insofar as such transfer is necessary for the performance of the Agency's tasks in the area of return activities. In this context, two issues should be addressed.

First, Recital (67) indicates that return is an "important issue of substantial public interest". The same notion is included in Recital (46) of the proposed recast of Directive 2008/115/EC (Return Directive).<sup>40</sup>

Such designation is relevant in light of the general rules on processing of personal data applicable to EU institutions, bodies, offices and agencies. These rules are currently enshrined in Regulation (EC) No. 45/2001<sup>41</sup> which is in the process of being replaced by Regulation (EU) 2018/1725 entering into force on 20 December 2018.<sup>42</sup>

According to the new regulation, "reasons of substantial public interest" can be exceptionally invoked to permit the processing of sensitive data, namely personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation, the processing of which is otherwise prohibited.<sup>43</sup>

Under Article 50 (1) (d) and Article 50 (3) of Regulation (EU) 2018/1725 "important reasons of public interest" recognised in EU law constitute an exception which may be used to justify a transfer of personal data to a third country or an international organisation even in the absence of an adequacy decision by the European Commission or other appropriate safeguards, which would otherwise be required for such transfers. However, Article 50 of the new Regulation (EU) 2018/1725 is a derogation from the general principle according to which personal data may only be transferred to third countries if an adequate level of protection is provided for in the third country or if appropriate safeguards have been given. Consequently, the aforesaid provision must be interpreted restrictively. The derogation whereby the Agency relies on "important reason of public interest" must not become the rule.

The designation of returns in Recital (67) as an important issue of substantial public interest may be perceived as authorising the Agency to use the derogation of "public interest" to transfer personal data considered necessary for identification, including sensitive biometric

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<sup>40</sup> European Commission (2018), [Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals \(recast\)](#), COM(2018) 634 final, 4.5.2016.

<sup>41</sup> [Regulation \(EC\) No. 45/2001](#) of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, OJ L 8/1.

<sup>42</sup> [Regulation \(EU\) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation \(EC\) No. 45/2001 and Decision No 1247/2002/EC](#), OJ L 295/39.

<sup>43</sup> *Ibid.*, Article 10 (2) (g).

data to third countries, without assessing whether all data processing requirements are fulfilled. Without clearly listing the data items that can fall under this exception, defining the recipients and establishing other safeguards to ensure that the processing remains lawful and fair, there is a serious risk that the proposal may not be compatible with Article 8 of the Charter on the protection of personal data.

The processing of some categories of core personal data necessary for identification and documentation of returnees (namely name, date and place of birth, travel document details, and, depending on the situation, fingerprints) may be justified in specific circumstances using the derogation of “important reason of public interest”. However, this certainly does not justify the sharing of all data or documents that may be useful for identification purposes, particularly those directly or indirectly revealing sensitive personal data.

In line with the well-established principle of confidentiality under international refugee law,<sup>44</sup> EU law already contains a prohibition to share information with the country of origin disclosing that a person applied for international protection,<sup>45</sup> which is reaffirmed in proposed Article 49 (1) (e). As FRA pointed out in its Opinion on Eurodac, personal data which can allow the country of origin to deduce directly or indirectly that a person has applied for asylum in another country is extremely sensitive as it can expose the person concerned and/or his or her family members remaining in the country of origin to retaliation measures.<sup>46</sup> This sensitivity concerns not only the information that a person has applied for international protection but also data revealing political opinions, religious or philosophical beliefs. Their wrong handling may also create a *sur place* refugee claim.<sup>47</sup> In *F.N. and Others v. Sweden*, the ECtHR concluded that the set of documents the Swedish authorities shared with Uzbekistan to facilitate the return of a rejected asylum applicant family were likely to raise suspicion that they had been possibly involved in the anti-government protests and other activities, leading at a minimum to questioning the applicants upon their return by the authorities. The ECtHR concluded that the applicants’ return would violate Article 3 of the ECHR (prohibition of torture, inhuman or degrading treatment or punishment).<sup>48</sup> Following this approach, Article 37 (2) of the proposed recast Eurodac Regulation, bans the transfer of personal data to third countries if there is a real risk that as a result of such transfer the data subject may be subjected to torture, inhuman and degrading treatment or punishment or any

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<sup>44</sup> See e.g. UNHCR (2003), *Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, HCR/GIP/03/05, 4 September 2003, para. 33; UNHCR (2006), *Guidelines on International Protection No. 7: The application of Article 1A (2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked*, HCR/GIP/06/07, 7 April 2006, para. 42; and consider also in its entirety, UNHCR (2005), *UNHCR Advisory Opinion on the Rules of Confidentiality Regarding Asylum Information*, 31 March 2005.

<sup>45</sup> See Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (OJ L 180, 29.6.2013, pp. 60–95), Article 30 (relating to collection of information on individual cases); European Commission (2016), *Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)* COM(2016)270 final/2 - 2016/0133 (COD), 4.5.2016, Article 38 (3).

<sup>46</sup> FRA (2016), *Opinion of the European Union Agency for Fundamental Rights on the impact of the proposal for a revised Eurodac Regulation on fundamental rights*, FRA Opinion – 6/2016 [Eurodac], Vienna, 22 December 2016, Section 3.1.

<sup>47</sup> This concerns persons who leave their own country for non-refugee related reasons but acquire a well-founded fear of persecution once they are already in the host country. See UNHCR (2007), *Refugee Protection and International Migration*, Rev.1, 17 January 2007, paras. 20–21.

<sup>48</sup> See e.g. ECtHR, *F.N. and Others v. Sweden*, No. 28774/09, 18 March 2013, paras. 73–79.

other violation of his or her fundamental rights. This is an important safeguard, which is also relevant for data that are not stored in Eurodac.

The mere designation of an objective to be of “important public interest” does not automatically mean that the processing of sensitive personal data is necessary for achieving the objective. The other elements of Article 4 of the new Regulation (EU) 2018/1725 – proportionality to the aim pursued, respecting the essence of the right to data protection, and the existence of suitable and specific measures to safeguard the fundamental rights and the interests of the data subject – also need to be met in every individual case.

The absence of an adequacy decision or an EU readmission agreement (both of which should arguably serve as an argument for more stringent rules on personal data transfer rather than their relaxation), does not absolve the controller from the duty to respect the fundamental rights and freedoms enshrined in the Charter, including the protection of personal data. Under Article 52 (1) of the Charter, any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law and must respect the essence of those rights and freedoms. With due regard to the principle of proportionality, limitations may be imposed on the exercise of those rights and freedoms only if they are necessary and if they genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others.

A second question concerns the time of the data sharing. Sharing personal data of an applicant for international protection with the country of origin to initiate a return procedure before the asylum claim has been rejected in the final instance may create significant protection risks. If the person is sought by the country of origin, it may use the information received to put pressure on family members back home or, in extreme cases, take persecutory measure in the country where the person sought asylum. Therefore, sharing personal data pending a final decision on an asylum application should be avoided. Risks would be significantly reduced with a ban to share personal data for return purposes as long as the asylum procedure is not decided in final instance.

## FRA Opinion 16

The proposal, as well as the proposed recast of the Return Directive, designate return as an important issue of substantial public interest. Without adequate safeguards, this designation may be perceived as giving the green light for a blanket sharing with the third country of all information that may be considered relevant for returns.

***If the EU legislator considers that it is justified to maintain return being “an important issue of substantial public interest”, reliance on “substantial public interest” as a legal ground for the processing of personal data must be accompanied by adequate safeguards, such as defining exhaustively the concerned data categories, and providing for further measures to prevent data protection breaches. This could include a requirement for the Agency to carry out an impact assessment before personal data, in particular sensitive biometric data, are shared with a third country for identification purposes.***

***The EU legislator should also:***

- remind in Recital (67) that the other elements of Article 4 of Regulation (EU) 2018/1725 – proportionality to the aim pursued, respecting the essence of the right to data protection, and the existence of suitable and specific measures to safeguard the fundamental rights and the interests of the data subject – must continue to be met;***
- rephrase Article 49 (1) (e) to avoid contacts with asylum applicants’ country of origin as long as no final decision on the application for international protection***

***has been taken. This could, for example be achieved by adjusting the language as follows: “provide technical and operational assistance to the EU Member States in the identification of third-country nationals and the acquisition of travel documents, including by means of consular cooperation. In the case of applicants for international protection, such assistance should only be provided when the application has been rejected in the final instance and without disclosing information relating to the fact that an application for international protection has been made; organise and coordinate return operations and provide support with voluntary departures in cooperation with the Member States.”***

***To be effective, similar safeguards would need to be introduced in proposed recast of Directive 2008/115/EC (Return Directive).***

### 3.3. Reflecting the principle of *non-refoulement* and rights of the child

The proposal envisages an enhanced focus on providing technical and operational assistance to EU Member States in the return process. Proposed Article 49 (1) requires that the Agency’s activities in this field are conducted in accordance with the respect for fundamental rights and general principles of Union law as well as for international law, including refugee protection and children's rights. It does not specifically list the principle of *non-refoulement* which is given special attention in some other parts of the proposal, including Article 81 that sets out the key fundamental rights standards applicable to the activities of the Agency.

Furthermore, although the provision refers specifically to children’s rights, this is not equally reflected in the requirements set out for the different types of support provided by the Agency to the Member States. Under Article 52 (4), child protection expertise is required when it provides forced-return monitors for return operations involving children. This requirement is specifically spelt out also outside the field of return, in case of migration management support teams in Article 41 (6). On the other hand, no such requirement is present in Article 53 which regulates the deployment of return teams, although it specifically refers also to large inward mixed migratory flows or taking in third-country nationals rescued at sea, i.e. situations where there is a considerable likelihood of the presence of children and therefore the need for child protection expertise. This represents a reduction of the current standard under Article 31 (4) of the present Regulation where the Agency has to ensure that return specialists whom it makes available for any return operations involving children have specific expertise in child protection.

#### FRA Opinion 17

The proposal requires that the Agency’s activities in the field of return are conducted in accordance with the respect for fundamental rights and general principles of Union law as well as for international law, including refugee protection and children's rights. It does not, however, specifically refer to the principle of *non-refoulement*. It also does not mainstream the requirement of involving specific child protection expertise in its return-related activities.

***The EU legislator should add an explicit reference to the principle of non-refoulement in Article 49 (1).***

***In Article 53, the EU legislator should add an explicit requirement for the return teams to include officers with specific expertise in child protection.***

### 3.4. Clarifying the Agency's role in the preparation of return decisions and other pre-return and return-related activities

As part of the enhanced focus on providing technical and operational assistance to EU Member States in the return process, the Agency will play an increasing role in preparatory activities for return, such as identification of third-country nationals and the acquisition of travel documents. In Article 49 (1) (a), the proposal further refers to providing assistance to "other pre-return and return-related activities of the Member States", without further specifying these. This potentially offers the Agency a very broad mandate throughout the entire return process, without setting out the scope of this assistance, and specific safeguards applicable in such cases.

One specific activity which is expressly mentioned in the proposal is the Agency's support in the preparation of return decisions, which is included in proposed Article 49 (1) (a) pertaining to returns in general, as well as in proposed Article 49 (2) (c) and Article 41 (4) (c) relating to migration management support teams. The scope of this support is unclear. Proposed Article 7 (2) merely states that EU Member States retain the responsibility for issuing return decisions (as well as the measures pertaining to the detention of returnees) in accordance with the Return Directive. The proposal leaves considerable room for interpretation as to the extent of the Agency's support and the conditions under which it can be requested. Moreover, the Agency's involvement in national return procedures will also raise accountability questions.

Should such support include, for example, the drafting of substantive parts of return decisions to be subsequently issued by national authorities, the question arises how members of teams deployed by the Agency – who generally originate from other Member States and will not be familiar with the national legal framework of the supported Member State, nor in some cases speak the host country language – would be able to ensure compliance with the strict requirements of national law adopted in transposition of the Return Directive as regards, among others, the form and content of return decisions or the assessment of bars to removal flowing from the right to respect for family life or the assessment of the risk of *refoulement*. In such situations, it is difficult to see how the requirement of Article 49 (1) of the proposal that return-related activities are carried out in respect of fundamental rights and general principles of Union law as well as for international law, could be guaranteed in practice.

#### FRA Opinion 18

The proposal contains a general reference to assisting pre-return and return-related activities of the EU Member States, without setting out the scope of such assistance and introducing relevant safeguards. Furthermore, proposed Article 49 (1) (a) pertaining to returns in general, as well as in proposed Article 49 (2) (c) and Article 41 (4) (c) relating to migration management support teams envisage a supportive role of the Agency in the preparation of return decisions. Such role is, however, not clearly defined and may, therefore, raise fundamental rights and accountability issues.

***The EU legislator should specify the reference to "other pre-return and return-related activities of the Member States" in Article 49 (1) (a) and Recital 69.***

***The EU legislator should clarify the scope of Articles 7 (2), 41 (4) (c), 49 (1) (a), 49 (2) (c), as well as Recital (69), as regards the degree and nature of the Agency's assistance to EU Member States in the preparation of return decisions in order to ensure accountability and strict compliance with fundamental rights obligations.***

### 3.5. Framing national return management systems

According to Article 50 of the proposal, the Agency should set up, operate and maintain a central system for processing information and data which Member States automatically communicate to it. This concerns information and data which the Agency requires to provide technical and operational assistance in the field of return. It should allow for exchanging personal data. In addition, under Article 49 (1) (a), (c) and (d), the Agency will support Member States to achieve an integrated system of return management.

Besides the reference to “information and data [...] necessary for the Agency to provide technical and operational assistance in accordance with Article 49”, the proposal does not specify the categories and type of data that should be (automatically) communicated by the EU Member States to the Agency. For example, it does not specify whether it concerns (also) personal data of returnees and if so, which data. Any processing of personal data would need to comply with applicable data protection legislation and be governed by data protection principles – lawfulness, fairness and transparency; purpose limitation; data minimisation; accuracy; storage limitation; integrity and confidentiality; and accountability of the data controller.<sup>49</sup>

The principles of purpose limitation and data minimisation deserve special attention in the context of the return management system. Under the principle of purpose limitation, mirrored also in Article 8 (2) of the Charter, personal data may only be collected for specified, explicit and legitimate purposes and must not be further processed in a manner that is incompatible with those purposes. Under the principle of data minimisation, personal data must be “adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed”.

Considering the increasing emphasis placed on linking more closely the asylum and return procedures,<sup>50</sup> the proposal also does not specify whether the central system will contain information related to (past or even ongoing) asylum procedures. The efforts to increase synergies between the asylum and the return procedures should not result in undermining the confidentiality of asylum information as stipulated in Articles 15 and 48 of the Asylum Procedures Directive.<sup>51</sup> Though addressed to Member States, the principle of confidentiality must remain equally applicable to the Agency when it supports Member States in the field of return. In practice, in FRA’s view this means that only information about the identity, the travel route and the state of the asylum procedure may be utilised for return purposes. Information collected during the personal interview under Article 15 of the Asylum Procedures Directive should under no circumstances be used for return purposes. This would undermine the trust that is necessary to allow applicants for international protection to

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<sup>49</sup> These principles are stipulated in the adopted text of regulation replacing the current Regulation (EC) No. 45/2001 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data. See [Regulation \(EU\) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation \(EC\) No 45/2001 and Decision No 1247/2002/EC](#), OJ L 295, 21.11.2018, p. 39–98.

<sup>50</sup> European Commission (2018), [Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals \(recast\)](#), COM(2018) 634 final, 2018/0329 (COD), Brussels, 12 September 2018, Explanatory Memorandum pp. 2-3.

<sup>51</sup> [Directive 2013/32/EU](#) of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, OJ L 180, 29.6.2013, pp. 60–95.

present the grounds for their applications in a comprehensive manner as required by the Article 15 (3) of that directive.

### FRA Opinion 19

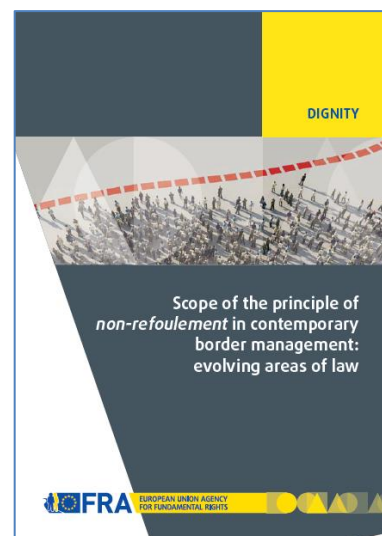
The Agency will be entrusted with the task to support EU Member States in developing national return management systems, which should be compatible with the Agency's information systems and applications, so as to allow for automated transfer of data. Without further safeguards, this may lead to data protection violations and to the sharing of confidential information from the asylum file.

***The EU legislator should specify in Recital (70) and Article 50 that the central return management system does not contain any personal data. If, on the contrary, personal data is to be included (for example, data the Agency requires to organise return flights), Article 50 should specify which categories of data can be processed for which purpose and clearly define the data recipients. Such processing would need to comply with the rules for the processing of personal data applicable to the Agency, including the principles of purpose limitation and data minimisation.***

***Article 50 should furthermore expressly stipulate that the return management system should not contain any information obtained during the personal interview carried out on the basis of Article 15 of Directive 2013/32/EU (Asylum Procedures Directive).***

## 4. Reducing risks when cooperating with third countries

Cooperation with third countries is a core component of European Integrated Border Management. Operational cooperation with third countries raises, however, particular accountability challenges and entails serious risks of violating fundamental rights. In December 2016, FRA published guidance to support the EU and its Member States when implementing integrated border management measures with the assistance of third countries.<sup>52</sup> Such guidance, although primarily addressed to EU Member States, is based on a larger report describing concrete operational activities carried out in or together with third countries, such as joint border patrolling or the deployment of immigration liaison officers entrusted with operational tasks.<sup>53</sup> The report analyses 10 concrete scenarios, and each of them presents arguments against and in support of a possible EU Member State responsibility in case a conduct results in *refoulement* or in a violation of the prohibition of torture, inhuman or degrading treatment and punishment. As such, it can illustrate possible practical questions which may emerge once the Agency implements operational activities in third countries.



The cooperation with third countries is regulated in Articles 72-79 of the proposal, under Section 11 (Cooperation). These articles cover the cooperation of Member States with third countries as well as that of the Agency. Under proposed Article 72 (3), the Agency and the Member States must comply with “Union law, including norms and standards which form part of the Union *acquis*” also when the cooperation takes place on the territory of third countries.

This Chapter covers six different issues, whereby the first section relates to cooperation between Member States and third countries and the other five sections cover fundamental rights issues which emerge from the cooperation between the Agency and third countries.

### 4.1. Supporting rights-compliant EU Member States’ cooperation

Under proposed Article 73 (1)-(2), Member States’ cooperation with third countries relating to border management and return must be based on (existing or new) bilateral or multilateral agreements. Proposed Article 73 (3) reaffirms the duty deriving also from Protocol No. 23 to the TEU/TFEU that agreements concluded by Member States in this field must respect Union law and other relevant international agreements on fundamental rights and international protection.<sup>54</sup> It also provides that when implementing such agreements, Member States must continuously assess and take into account the general situation in the third country. This is an important safeguard which allows Member States to be aware of developments, including those relating to human rights, which may require adjustments to

<sup>52</sup> FRA (2016), *Guidance on how to reduce the risk of refoulement in external border management when working in or together with third countries*, Luxembourg, Publications Office.

<sup>53</sup> FRA (2016), *Scope of the principle of non-refoulement in contemporary border management: evolving areas of law*, Luxembourg, Publications Office.

<sup>54</sup> Consolidated version of the Treaty on the Functioning of the European Union, Protocol (No 23) on External Relations of the Member States with regard to the Crossing of the External Borders, OJ C 202, 7.6.2016, pp. 1-303.

the content or the extent of the cooperation, also to avoid accountability risks in case of serious human right breaches.

According to proposed Article 77 (2), the Commission will prepare model provisions to support Member States when they negotiate agreements with third countries. Such model agreements offer a practical way to support that agreements and working arrangements concluded by Member States with third countries comply with EU law and in particular with the requirements of the Charter. FRA indicated its readiness to support the European Commission in this initiative with its fundamental rights expertise in reviewing such model provisions to ensure adequate fundamental rights safeguards.

Proposed Article 76 regulates the information exchange with third countries in the context of Eurosur and it applies to Member States as well as to the Agency. It reproduces parts of Article 20 of the Eurosur Regulation.<sup>55</sup> Article 20 (5) of the Eurosur Regulation contains an important fundamental rights safeguard, prohibiting the exchange if it “provides a third country with information that could be used to identify persons or groups of persons whose request for access to international protection is under examination or who are under a serious risk of being subjected to torture, inhuman and degrading treatment or punishment or any other violation of fundamental rights”.

The purpose of the safeguards in Article 20 (5) of the Eurosur Regulation is to avoid situations in which the information shared by an EU Member State enables a third country to violate a person’s fundamental rights. Such a risk would exist, for example, when information is shared which gives a neighbouring third country the opportunity to stop a group of dissidents who have a well-founded fear of persecution from reaching safety. Under Article 20 (5) of the Eurosur Regulation, an EU Member State should refrain from sharing information on third-country nationals trying to reach the EU’s external land or sea border, when there are substantial grounds for believing that the third-country authorities will intercept the persons concerned and subject them to persecution or ill-treatment.<sup>56</sup>

In the proposal, such safeguard has been moved to Article 90 (4) which concerns the processing of personal data under Eurosur. In this way, the material scope of this safeguard is significantly restricted as the sharing of non-personal data would not anymore be subject to this safeguard. This would also depart from the Eurosur Handbook, which provides guidance on how to implement the Eurosur Regulation: the best practice listed in the Eurosur Handbook clearly refers to information generally, and not to personal data only.<sup>57</sup>

## FRA Opinion 20

As a result of the merger of the European Border and Coast Guard Regulation and the Eurosur Regulation, the safeguard limiting the sharing of information included in Article 20 (5) of the Eurosur Regulation would only apply to personal data, thus significantly restricting its scope.

***The EU legislator should move the provision included in Article 90 (4) to Article 76 to ensure that this safeguard applies also to non-personal data, consistent with the current Eurosur Regulation.***

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<sup>55</sup> Regulation (EU) No. 1052/2013 of the European Parliament and of the Council of 22 October 2013 establishing the European Border Surveillance System (Eurosur), OJ L 295, 6.11.2013, pp. 11–26.

<sup>56</sup> FRA (2018), *How the Eurosur Regulation affects fundamental rights*, Luxembourg, Publications Office, p. 24.

<sup>57</sup> European Commission, *Annex to the Commission Recommendation adopting the Practical Handbook for implementing and managing the European Border Surveillance System (EUROSUR Handbook)*, 15 December 2015, C(2015) 9206 final, p. 10.

## 4.2. Strengthening safeguards for the Agency's cooperation with third countries

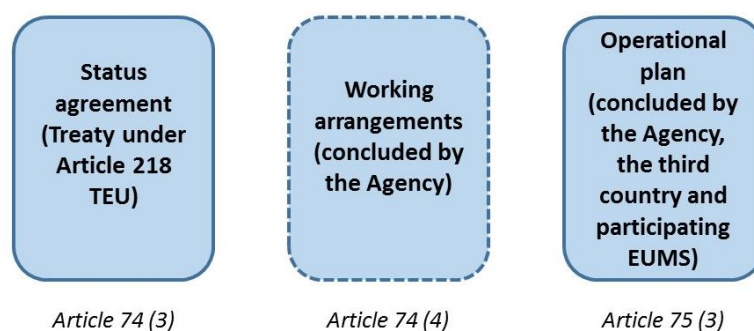
The proposal further strengthens the ability of the Agency to act in third countries, including through operational deployments. The Explanatory Memorandum introducing the proposal indicates that “[s]ignificantly more operational staff from the standing corps will be required [...] to support [...] activities on the ground in third countries including on return.”<sup>58</sup> It further notes that “[i]n view of deployment of teams from the European Border and Coast Guard standing corps in the territory of third countries, the Agency should develop the capabilities for their own command and control structures.”<sup>59</sup>

Cooperation with third countries of an operational nature raises new significant fundamental rights challenges for the Agency. Third countries are not bound by the same legal framework and standards as EU Member States. EU law does not apply to them and their obligations under international human rights law and national law may differ significantly from those of EU Member States.

It is commendable that the proposal gives significant importance to the respect for the principle of *non-refoulement*, when implementing operational activities in third countries (see proposed Articles 72 (2) and 74 (2) as well as Recital (72) which refer to it). In practice, one of the main fundamental rights challenges when operating in third countries relates to the inhuman or degrading conditions in facilities in which migrants and refugees are deprived of liberty. However, there is no specific mention to the prohibition of torture, inhuman or degrading treatment or punishment (Article 4 of the Charter) and to the prohibition of arbitrary detention (Article 6 of the Charter) in the relevant provisions of the proposal. Both fundamental rights should be explicitly mentioned.

The Agency's cooperation with third countries must be based on an institutional arrangement to which the third country has agreed to. This arrangement may take different forms as illustrated in Figure 1.

**Figure 1: Arrangements governing operational deployments in third countries under proposed Articles 74 (3) and 75**



Note: Arrangements in dotted line are not necessarily required. The articles are those in the European Commission proposal.

Source: FRA, 2018

<sup>58</sup> European Commission (2018), *Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Council Joint Action n°98/700/JHA, Regulation (EU) No. 1052/2013 of the European Parliament and of the Council and Regulation (EU) n° 2016/1624 of the European Parliament and of the Council*, Brussels, 12 September 2018, 2018/0330(COD); COM(2018)631 final, 12.09.2018, Explanatory Memorandum, p. 6. See also Recital 56.

<sup>59</sup> *Ibid.* at p. 15.

Pursuant to proposed Article 74 (3), whenever staff or officers deployed by the Agency to a third country exert executive powers, a full-fledged international treaty must be concluded in the name of the Union in accordance with Article 218 TFEU. The treaty ('status agreement') must set out the "scope of the operation, civil and criminal liability, and the tasks and powers" of the deployed officers. Such a status agreement can (but does not need to) be complemented by working arrangements concluded directly by the Agency with the third country concerned (proposed Article 74 (4)).

Under proposed Article 75 (3), the specific operation itself will be defined in the operational plan. The operational plan is binding for the Agency and the concerned Member States (pursuant to proposed Article 39 (3)). Presumably, the operational plan will have to contain all the elements listed in proposed Article 39, which, in line with proposed Article 54 (4), also applies to return interventions. This means that the operational plan should include also the fundamental rights related aspects listed under points (d), (h), (i), (j) and in particular point (l) on referral mechanisms and point (m) on complaints of proposed Article 39 (3). This is also reflected in more general terms in Article 3 (2) of the Status Agreement concluded between the EU and Albania, whereby the operational plan must set out "the provisions in respect of fundamental rights including personal data protection".<sup>60</sup> Nevertheless, an express reference indicating that the operational plan must cover all relevant elements listed in proposed Article 39 would avoid a different reading. Similarly, it would be necessary to clarify that all other relevant provisions in Section 7 – in particular proposed Article 44 (instructions to the teams), Article 47 (suspension and termination of activities) and Article 48 (evaluation of activities) – apply also to joint operations, pilot projects, rapid border interventions and return interventions which take place in third countries under proposed Articles 74 and 75.

Recital (75) on cooperation with third countries does not indicate that the Agency's cooperation must be based on a status agreement whenever it involves the exercise of executive powers. This divergence between the Recital and the substantial provision in Article 74 should be remedied.

## FRA Opinion 21

Cooperation with third countries must comply with EU law, including fundamental rights and the EU migration and asylum *acquis* also when cooperation takes place on the territory of third countries.

***To reduce the risk of fundamental rights violations, the EU legislator should:***

- ***in Recital (72) and Article 74 (2), consider explicitly referring not only to non-refoulement but also to the prohibition of arbitrary detention and to the prohibition of torture, inhuman or degrading treatment or punishment, so as to give visibility to those rights that are likely to be at stake most frequently;***
- ***in Recital (75), include a reference to the need for a status agreement as a legal basis whenever the teams the Agency's deploys to third countries exercise executive powers, so as to mirror Article 74 (3), thus avoiding possible misunderstandings;***
- ***clarify that Article 39 (listing the components to be included in the operational plan), as well as the other relevant parts of Section 7 (in particular the safeguards***

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<sup>60</sup> See Annex to the [Proposal for a Council Decision on the conclusion of the status agreement between the European Union and the Republic of Albania on actions carried out by the European Border and Coast Guard Agency in the Republic of Albania](#), COM(2018)458 final, 2018/0241 (NLE), 13.6.2018.

**set out in Articles 44, 47 and 48) also apply when the Agency cooperates with third countries under Articles 74 and/or 75 of the proposal.**

### 4.3. Taking preventive measures

To reduce the risk that the Agency becomes accountable for or associated with violations of fundamental rights when it operates in third countries, preventive measures could be envisaged. In the FRA guidance on how to reduce the risk of *refoulement* in external border management when working in or together with third countries, the first of the ten practical measures FRA proposes is to conduct a prior assessment before starting the operation and monitor the fundamental rights situation as it evolves.

Article 4 (2) of Regulation (EU) No. 656/2014 on maritime operations coordinated by the Agency<sup>61</sup> offers an example of such a preventive approach. A prior assessment would enable the Agency to evaluate possible fundamental rights implications and calibrate its planned activities to avoid or reduce the risk of participation in conduct which could violate human rights.

### FRA Opinion 22

The proposed Regulation does not envisage any formal preventive measure for the Agency, documenting that it is acting in good faith when it engages in operational cooperation with a third country.

***Before initiating any operation in third countries where team members will exert executive powers, the EU legislator should require the Agency in Article 74 to carry out an assessment of the general situation in the third country similarly to what is provided for maritime operations in Article 4 (2) of Regulation (EU) No. 656/2014. Such assessment should involve the Fundamental Rights Officer and should be based on information derived from a broad range of sources. It should be documented and include all relevant information on the fundamental rights situation in the country.***

### 4.4. Enabling the Agency to take measures in case of unlawful instructions by the third country

The authority to give instructions to the teams deployed by the Agency to a third country is regulated in the status agreement. The status agreement with Albania – the only one concluded by November 2018 – stipulates in Article 4 (3) that

*“Members of the team may only perform tasks and exercise powers in the territory of the Republic of Albania under instructions from and, as a general rule, in the presence of border guards or other relevant staff of the Republic of Albania. The Republic of Albania shall issue, where appropriate, instructions to the team in accordance with the Operational Plan. The Republic of Albania may exceptionally authorise members of the team to act on its behalf.”<sup>62</sup>*

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<sup>61</sup> Regulation (EU) No. 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 189, 27.6.2014, pp. 93–107.

<sup>62</sup> Proposal for a Council Decision on the [conclusion of the status agreement between the European Union and the Republic of Albania on actions carried out by the European Border and Coast Guard Agency in the Republic of Albania](#), COM/2018/458 final - 2018/0241 (NLE), 13.6.2018, Annex.

This provision follows the model status agreement the European Commission published in November 2016.<sup>63</sup> The model status agreement requires that the details of the operation, including “the coordination, command, control, communication and reporting structure” be regulated in an operational plan (Article 3).

It appears from the status agreements and from the proposed Regulation that command and control authority will be handled in the same way, regardless of whether an operation is carried out in an EU Member State or in a third country. As third countries are not bound by the Charter – whereas officers who are part of teams deployed by the Agency are – it is possible that the third country issues instructions to the deployed teams which, though being lawful under the law applicable to the third country, contradict Union law and can lead to violations of fundamental rights.

Under proposed Article 44, the host Member State issues instructions to teams deployed by the Agency. The Agency can communicate its views on the instructions given by the host Member State, which the host Member State “shall take into consideration and follow them to the extent possible”. When such instructions are not in compliance with the operational plan – which instructions contradicting Union law would always be – the Coordinating Officer must report to the Executive Director of the Agency for possible further action.

Whereas instructions which are blatantly violating EU law (such as an order to use force in the absence of necessity or proportionality) would be easy to identify for the Coordinating Officer, in many cases, determining whether an order would comply with the Charter or other EU law provisions regulating fundamental rights (such as the EU data protection *acquis*) may be challenging for a non-expert. For example, one could imagine that the third country uses restraint measures which are not applied in EU Member States but where it is not clear to a non-expert whether it would amount to a violation of the right to dignity or the integrity of the person; or whether it qualifies as inhuman treatment under Article 3 of the ECHR and Article 5 of the Charter. In such cases, it would be helpful if the Coordinating Officer could rely on fundamental rights expertise. For this purpose, the teams the Agency deploys should have the necessary fundamental rights expertise to identify when instructions given by the host country contradict the Charter or fundamental rights enshrined elsewhere in Union law.

## FRA Opinion 23

Team members deployed by the Agency in third countries will receive instructions from the third country authorities. Stronger safeguards should be provided in the Regulation to reduce the risk that the Agency may be associated with fundamental rights violations.

***In proposed Article 74, the EU legislator should consider inserting a clause calling on the Agency to deploy a person with fundamental rights expertise whenever the deployment entails the exercise of executive powers as provided for in Article 74 (3). Such a person should be part of the team working with the Fundamental Rights Officer to whom it should report directly. The fundamental rights expert should have access to all information concerning the operation. She or he should also be entrusted to monitor the general situation in the third country and update the assessment proposed in FRA Opinion 22.***

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<sup>63</sup> European Commission, Communication from the Commission to the European Parliament and the Council, *Model status agreement as referred to in Article 54 (5) of Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard*, COM(2016) 747 final, Brussels, 21 November 2016; Annex, Article 4 (3).

## 4.5. Avoiding removals from third countries

Article 75 (4) of the proposal would allow the Agency to return migrants in an irregular situation from third countries. If accepted, it would increase significantly the risk of the Agency to carry out removals in violation of the principle of *non-refoulement* making the Agency accountable under EU law.

The Agency has no mandate to issue return decisions or to assess their validity. When the Agency organises return operations from an EU Member State, it limits itself to verify that the returnee has been issued a return decision that is final and enforceable. It is up to EU Member States to ensure that they respect the procedural and substantial safeguards included in the Return Directive. When they issue a return decision, EU Member States must also make sure that the removal of the person would not violate the Charter, and in particular the principle of *non-refoulement*. The Agency presumes that the return decision has been issued in a lawful manner and relies on the assumption that the concerned Member State acts in good faith. This is confirmed by Article 51 (1) of the proposal which stipulates that when supporting return operations, the Agency does not enter into the merits of return decisions. This assumption is only possible based on the principle of sincere cooperation in Article 4 (3) of the Treaty on European Union.

The CJEU has clarified in the context of the Dublin system that even where cooperation between EU Member States is based on mutual confidence and a presumption of compliance, such presumption cannot be conclusive, since it does not preclude the existence of circumstances in the state in question leading to a substantial risk of treatment in a manner incompatible with fundamental rights.<sup>64</sup> In such cases, an absolute reliance on mutual confidence and the presumption of compliance would in fact be incompatible with the prohibition laid down in Article 4 of the Charter. Furthermore, the CJEU repeatedly underlined that such system based on mutual confidence and the presumption of compliance needs to be accompanied by appropriate safeguards. Its legality is subject to granting, *inter alia*, of the right to an effective remedy before a court against that decision, the scope of which covers both the factual and legal circumstances surrounding it.<sup>65</sup>

Third countries are not bound by the EU legal framework, including the Charter and by the common standards for return procedures set out in the Return Directive. In the absence of this common framework, the principle of mutual confidence and the presumption of compliance cannot be applied. This means that the Agency has no legal and practical instruments to ensure that its activities in support of third countries are lawful and do not violate the principle of *non-refoulement* as well as a number of procedural rights of the returnees. It is difficult to imagine a system of safeguards which would protect the Agency from becoming involved in operations which violates international law and ensure that the Agency itself acts in compliance with EU *acquis*. Given the seriousness of this risk, assistance to third countries in the field of return should, therefore, be limited to technical assistance and capacity building, strictly excluding operational support.

## FRA Opinion 24

Entrusting the Agency to remove migrants in an irregular situation who are in a third country would raise significant fundamental rights issues, exposing the Agency to constant risk of operating in violation of the principle of *non-refoulement* enshrined in Articles 18 and 19 of the Charter.

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<sup>64</sup> CJEU, C-411/10 and C-493/10, *N.S. and M. E and Others*, paras. 79-86.

<sup>65</sup> CJEU, C-578/16, *C.K. and Others*, paras 60-65; CJEU, C-201/16, *Shiri*, paras. 44-46.

**Therefore, the EU legislator should limit the Agency's support to third countries in the field of return to technical assistance by:**

- **removing the words "and operational" in relation to third countries from Recital (3), Recital (71) and Article 54 (2);**
- **modifying Article 2 (29) and 2 (30) as well as Article 88 (1) (b) to exclude operational assistance to and return operations from third countries;**
- **removing the words "or to a third country" and "or from a third country", respectively, from Article 2 (28);**
- **deleting Article 75 (4).**

#### **4.6. Inserting safeguards against risks associated with third country observers in the Agency's operations**

Pursuant to proposed Article 79 (2), the Agency may invite observers from third countries to participate in its activities, provided the concerned Member States agree. This, under the condition that their presence "does not affect the overall safety" of the activities.

The participation of third-country observers in the Agency's activities may promote the sharing of good practices, including as regards the respect for fundamental rights. It does, however, also create risks, particularly when third-country observers may gain information on their own nationals who are in need of international protection. It would, therefore, not be appropriate to allow third-country observers to be present during border surveillance, registration, screening, or fingerprinting when it concerns migrants from their own country or to use their presence in the operation to collect information about their own nationals. In the past, FRA observed third-country officers being present at points of disembarkation where they moved around freely. While this incident has been addressed, a stronger language in proposed Article 79 (2) would prevent this from reoccurring in the future.

#### **FRA Opinion 25**

Third-country observers may participate under certain conditions in the Agency's operation. This creates both opportunities and fundamental rights risks which should be minimised.

**To avoid that the presence of third-country observers creates protection risks for migrants who have requested international protection or may wish to do so, the EU legislator should add the words "or pose risks to fundamental rights" at the end of the first sentence of Article 79 (2).**

## Annex 1: Overview of FRA conclusions on Eurosur

In FRA's 2018 report *How the Eurosur Regulation affects fundamental rights*, FRA included several conclusions, some relating to implementation issues and five conclusions that relate to the legal framework. These are listed in the table below.

FRA Conclusion	Corresponding safeguards in the new proposal
<b>1.4. Provision on the need to ensure that algorithms used in the context of Eurosur are based on objective and evidence-based criteria</b>	Some of the activities listed in Article 29 (2) are partly based on the use of algorithms, for example, the tracking of vessels. Article 81 contains a horizontal fundamental rights safeguards which also covers – but does not expressly include – non-discrimination.
<b>2.1. Include an express clause on the respect of fundamental rights in cooperation agreements with third countries</b>	According to Article 73 (3): agreements must comply with Union and international law on fundamental rights and on international protection, including the Charter, the ECHR and the Convention Relating to the Status of Refugees, in particular the principle of <i>non-refoulement</i> . The model agreement proposed in Article 77 (2), to support Member States when they negotiate agreements with third countries offers an opportunity to develop such a standard clause.
<b>2.2. Ensure that core data protection safeguards at least comparable to Council of Europe Convention No. 108 are included in cooperation agreements with third countries</b>	Article 9 (1), (3) and (5) contains specific data protection safeguards in case Member State process personal data in the national Eurosur picture, including restriction of sharing personal data with third countries. The model provisions on agreements with third countries in Article 77 (2) offer an opportunity to develop adequate safeguards.
<b>2.3. To ensure that no information is shared with third countries which could be used by the third country to violate fundamental rights, EU Member States should be obliged to undertake a general assessment of the situation in the third country, similarly to what is envisaged in Article 4 (2) of Regulation (EU) No. 656/2014 for Frontex coordinated sea operations</b>	Under Article 73 (3), when implementing such agreements, Member States must continuously assess and take into account the general situation in the third country. There is, however, no express duty for Member States to document that such assessment was carried out.
<b>2.3 Make it compulsory to include regular updates on the situation of asylum-seekers and migrants in third countries in the European Situational Picture</b>	Article 25 (1) (c) requires that Eurosur situational pictures include an analysis layer containing, among other things, “key developments and indicators, analytical reports, and other relevant supporting information”. It is, however not specified that this includes also information and developments relating to the fundamental rights situation.

Note: The numbering in the first column correspond to the sections in the report FRA (2018), *How the Eurosur Regulation affects fundamental rights*, Luxembourg, Publications Office.

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