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FRA EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS

PLANNED RETURN HUBS IN THIRD COUNTRIES

EU FUNDAMENTAL RIGHTS LAW ISSUES

POSITION PAPER

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Preamble

The European Union Agency for Fundamental Rights,

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),

Recalling Council Regulation (EC) No 168/2007 of 15 February 2007, as amended by Council Regulation (EU) 2022/555 of 5 April 2022, establishing a European Union Agency for Fundamental Rights (FRA),

In accordance with Article 2 of Council Regulation (EC) No 168/2007 (as amended) which entrusts FRA with the objective 'to provide the relevant Union institutions, bodies, offices and agencies and the EU Member States when implementing Union 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 (as amended), which tasks FRA to 'formulate and publish conclusions and opinions on specific thematic topics, for the Union institutions and the Member States when implementing Union law, either on its own initiative or at the request of the European Parliament, the Council or the Commission',

Having regard to FRA Opinion – 5/2018 [EBCG] on the proposed revised European Border and Coast Guard Regulation and its fundamental rights implications,

Having regard to FRA Opinion – 1/2019 [Return] on the proposed recast Return Directive and its fundamental rights implications,

Considering the joint letter to the European Commission by 15 EU Member States in May 2024 that called for exploring 'potential cooperation with third countries on return hub mechanisms, where returnees could be transferred to while awaiting their final removal',

Considering the letter by the President of the European Commission of 14 October 2024 [Ares(2024)7288990], presenting ways forward to address EU challenges relating to asylum and migration, which proposes a common approach on returns and the need to continue to explore the idea of developing return hubs outside the European Union,

Considering conclusion No 37 of the European Council of 17 October 2024 [EUCO 25/24] which calls for 'determined action at all levels to facilitate, increase and speed up returns from the European Union, using all relevant EU policies, instruments and tools, including diplomacy, development, trade and visas' as well as conclusion No 19 of the European Council of 19 December 2024 [EUCO 50/24] which envisages a new EU legislative proposal on returns to be

tabled in early 2025,

Submits the following own initiative opinion which sets out FRA's initial position on the planned creation of return hubs in third countries.

Executive summary

1. This legal analysis sets out the European Union Agency for Fundamental Rights' initial position on the planned creation of 'return hubs' in third countries as a measure to increase effective returns. Return hubs are understood as open or closed facilities physically located in third countries. Such facilities would temporarily host third-country nationals with an order to leave the territory of the EU or a refusal of entry issued by an EU Member State, until the Member States or the European Border and Coast Guard Agency (Frontex) organise their return home. No such return hubs have been established yet.
2. The underlying idea of setting up a return hub in a third country is to have a location outside the EU where returnees can be accommodated until the Member States and/or Frontex implement their return to the country of origin. The hub itself may be directly managed by Member State authorities, by the third country hosting it or be administered jointly.
3. Return hubs are not a rights-free zone. Member States and/or Frontex remain accountable for those rights violations in relation to their conduct after the returnees are transferred to the hub. This is different from the situation where Member States hand over a third-country national without the right to stay to the authorities of a (neighbouring) third country based on a readmission agreement and then stop any further involvement with the returnee.
4. The planned creation of return hubs in third countries as a measure to increase effective returns is only compatible with EU law if accompanied by a clear and robust set of safeguards.
5. The first pre-condition and the starting point for any return, regardless of the envisaged destination of the returnee, is the issuance of a valid and enforceable decision ordering the individual to leave the Member State or refusing entry. Such a decision must always be based on an individualised assessment. Article 47 of the Charter of Fundamental Rights of the European Union (the Charter) requires that the individuals concerned must have the right to an effective judicial remedy to challenge such a decision. The transfer to a return hub located in a third country must be expressly allowed under EU law. Articles 4 and 19 of the Charter prohibit any transfer if third-country nationals moved there would be exposed to serious harm, to inhuman or degrading treatment or to a flagrant breach of the right to liberty (arbitrary detention). Rules on pre-removal detention and the primacy of voluntary departure over forced removals further limit the categories of people who could be transferred to a return hub. Persons in a vulnerable situation require particular attention, which makes their lawful transfer to a return hub highly unlikely and difficult to implement. Children should be excluded from any transfers to return hubs.
6. As a second pre-condition, a legally binding agreement with the third country hosting the hub must regulate at least core aspects relating to the implementation of a return hub scheme. The agreement must provide for a clear and adequate legal basis to enable the lawful transfer of third-country nationals to the hub. The agreement may be concluded by

the EU or its Member States. Member States continue to act within the scope of EU law when they run a return hub in a third country and implement returns from there. The agreement must respect the rights and principles set out in the Charter. This also entails a duty to take preventive measures to mitigate the risk of rights violations while third-country nationals stay in the return hub. A fundamental rights impact assessment should analyse *ex ante* any risks and how to mitigate them.

7. A third pre-condition flows from the fact that the Member States and/or the EU will be in charge of the returnees' departure or removal from the hub to their country of origin or habitual residence. This creates a duty under international law and EU law to respect the prohibition of *refoulement* and collective expulsion, and to respect fundamental rights and dignity when Member States or Frontex implement removals from the hub. The agreement setting up the return hub must comply with EU fundamental rights law, prevent arbitrary detention and set minimum standards for the material conditions and treatment of third-country nationals accommodated in the hub. If, at least in part, Member States use EU funds to cover the costs of the return hub, the specific safeguards applicable to the relevant EU funding instrument also apply.
8. Primary EU law does not ban the possibility for Frontex to implement removals from one third country to another. However, it exposes the agency to a constant risk of operating in violation of the principle of *non-refoulement* enshrined in Articles 18 and 19 of the Charter. To mitigate such risk, robust and clear fundamental rights safeguards must be in place, if this option is to be considered.
9. Considering the serious fundamental rights risks connected with the running of return hubs, any agreement which may be concluded with third countries envisaging the establishment of return hubs should include provisions on effective and independent human rights monitoring mechanisms.
10. This legal analysis does not examine the extraterritorial processing of asylum applications. Third-country nationals who reach Member State territory either on their own or after being rescued at sea and seek asylum must be channelled into national asylum procedures respecting the safeguards of the EU asylum acquis and in full compliance with the European Convention on Human Rights and the 1951 Geneva Convention relating to the Status of Refugees. This legal analysis applies nevertheless to return procedures Member States may carry out from centres located in third countries, as may be the case for the Italian centres created in 2024 in Albania.

Introduction

11. Some people enter the European Union (EU) without having the right to do so. Others do not leave when their visa or residence permit expires and have no other grounds to stay. The EU developed a set of common rules – the EU return *acquis* – to deal with them. The central piece of such EU rules – Directive 2008/115/EC (the EU return directive) – requires that any third-country national who has no right to stay in the EU should be issued a return decision or granted permission to stay (Article 6). If voluntary departure (Article 7) is not an option, returnees must be removed (Article 8) from the EU Member State's territory.
12. There is a significant gap between the number of people ordered to leave and those who actually leave the EU. In recent years, the EU and its Member States have been increasing efforts to make return policies more effective. This legal analysis sets out the European Union Agency for Fundamental Rights' (FRA) initial position on the creation of 'return hubs' in third countries as one of the debated measures which are part of the toolbox to enhance the effectiveness of returns of third-country nationals without the right to stay in the EU.
13. This legal position paper uses the term return hub for two different situations.

    - In the first scenario, third-country nationals who are physically present in a Member State and who hold a valid and enforceable return decision issued under the EU return directive are temporarily transferred to a facility (return hub) in a third country to organise their return home. The departure or transfer to the third-country hub can be, in principle, either voluntary or forced. No such return hub has been established yet.

    - In the second scenario, third-country nationals who are rescued at sea (outside the territorial sea of a Member State) are brought to and disembarked in a third-country hub where the rescuing Member State carries out the return processing, either following the final rejection of their asylum claim based on a fair procedure or immediately, in case the person does not apply for asylum and there are no other legal bars to removal. The affected individuals remain hosted in the third-country hub until their return home is organised and implemented by the Member State. The Italian centres created in 2024 in Albania would fall under this category, if they start hosting asylum applicants whose asylum claim has been rejected through a final decision and their return is organised from there.
14. In both situations, the Member State and/or the European Border and Coast Guard Agency (Frontex) implement the return decision while the returnee is in the third country hosting the hub. They would do so by organising, carrying out or otherwise supporting the returnees' departure or removal to their country of origin or habitual residence.
15. This differs from situations where Member States return third-country nationals to a non-EU country – typically a neighbouring country – they transited through before reaching the EU. In such cases, with the handover to the third-country authorities as per an EU-level [1] or bilateral readmission agreement [2], the Member States complete their duty to implement

the EU's return *acquis.* Responsibility for the returnees ceases after the transfer. It is prior to such removal (readmission) that Member States must examine that there are no obstacles – flowing from EU law and international human rights law, including the principle of *non-refoulement* – to return the person to the transit country. A 2013 FRA report on fundamental rights at Europe's southern sea borders contains, in Chapter 8, an analysis of fundamental rights in the context of readmissions and presents suggestions for safeguards, which broadly remain valid.

16. The degree to which Member States may be involved in running a return hub could vary from situations where a Member State takes full authority to situations where the third country administers the return hub. Chapter 3 of this legal analysis examines various options without exhaustively covering all possible scenarios. The ensuing joint or shared accountability (liability) of a Member State, Frontex and the third country concerned requires more in-depth analysis, which goes beyond the scope of this legal analysis [3].

17. This legal analysis presumes that the return hub is a closed, open or semi-open facility. However, the same considerations apply to other types of arrangements, such as allowing returnees to arrange their own stay in the third country (e.g. with family members living there), subject to reporting requirements and/or the duty to hand over their travel documents.

18. This legal analysis also covers the operational support Frontex would provide to return third-country nationals – from the return hub but also, more generally, from a third country – to the returnees' country of origin. It does not cover the return support that Frontex already provides to third countries, for example as part of its capacity-building work in the framework of Article 10(1)(u) to (w) of Regulation (EU) 2019/1896, the European border and coast guard regulation (EBCG regulation).

19. This legal analysis focuses on the EU return *acquis* as interpreted by the Court of Justice of the European Union (CJEU) – for an overview of these CJEU rulings, see the quarterly updates by the Centre for Migration Law at Radboud University – and on the fundamental rights issues which need to be duly addressed and resolved should the operationalisation of return hubs in third countries be considered.

20. This position paper does not examine EU law aspects relating to the *effet utile* of relevant EU law instruments. The principle of sincere cooperation set out in Article 4(3) of the Treaty on European Union (TEU) requires Member States to facilitate the achievement of the EU's tasks and to refrain from measures which could jeopardise the attainment of the EU's objectives. In relation to other questions – domestic criminal sanctions for disregarding an entry ban and the legality of criminal imprisonment for an irregular stay – the CJEU clarified that national rules are only allowed as long as they do not undermine the effectiveness of the EU return directive [4]. Similar concerns may emerge, if national rules establishing a return hub would lead to returnees absconding from the hub and re-entering another Member State, which would then have to deal with the person's return.

21. This legal analysis does not examine the extraterritorial processing of asylum applications. Third-country nationals who reach Member State territory (including the territorial sea),

either on their own or after being rescued at sea, and seek asylum must be channelled into national asylum procedures respecting the safeguards of the EU asylum acquis and in full compliance with the requirements flowing from the European Convention on Human Rights (ECHR) and the 1951 Geneva Convention relating to the Status of Refugees. Their potential transfer to a return hub may only be considered after a final rejection of their asylum claim and in the absence of other legal bars to removal.

22. This legal analysis focuses solely on the fundamental rights requirements for the EU and its Member States flowing from the Charter of Fundamental Rights of the European Union (the Charter) and relevant CJEU case-law, together with applicable European and international human rights law standards. Due to this strong legal focus, it does not examine other challenges to establishing return hubs, for example those related to international relations or linked to their practical feasibility in terms of resources, cost-effectiveness and implementation challenges. It also does not examine the unintended consequences of return hubs potentially contributing to a new category of stranded people in third countries hosting a return hub, should final removal to their country of origin not materialise.

23. In terms of structure, after a short background on EU return policies, the first three chapters of the ensuing analysis examine the fundamental rights pre-conditions under EU law for Member States to set up return hubs in a third country. Chapter 4 examines the fundamental rights implications of Frontex-supported returns from third countries, and Chapter 5 deals with fundamental rights monitoring.

Background on EU return policies

24. The effective implementation of the EU's return policy is a pre-condition for an EU-wide rights-based immigration policy and is essential for the credibility of the common European asylum system. In accordance with Articles 13 and 18 of Directive 2011/95/EU, third-country nationals who risk persecution or serious harm in their own country must be granted international protection, even if they entered a Member State without permission. However, if everybody who comes to the EU remains physically in the EU without having the right to do so, this undermines the willingness of Member States – and of Europeans, more generally – to accord special treatment to people in need of international protection fleeing persecution or armed conflict who arrive in the EU spontaneously, without valid papers.

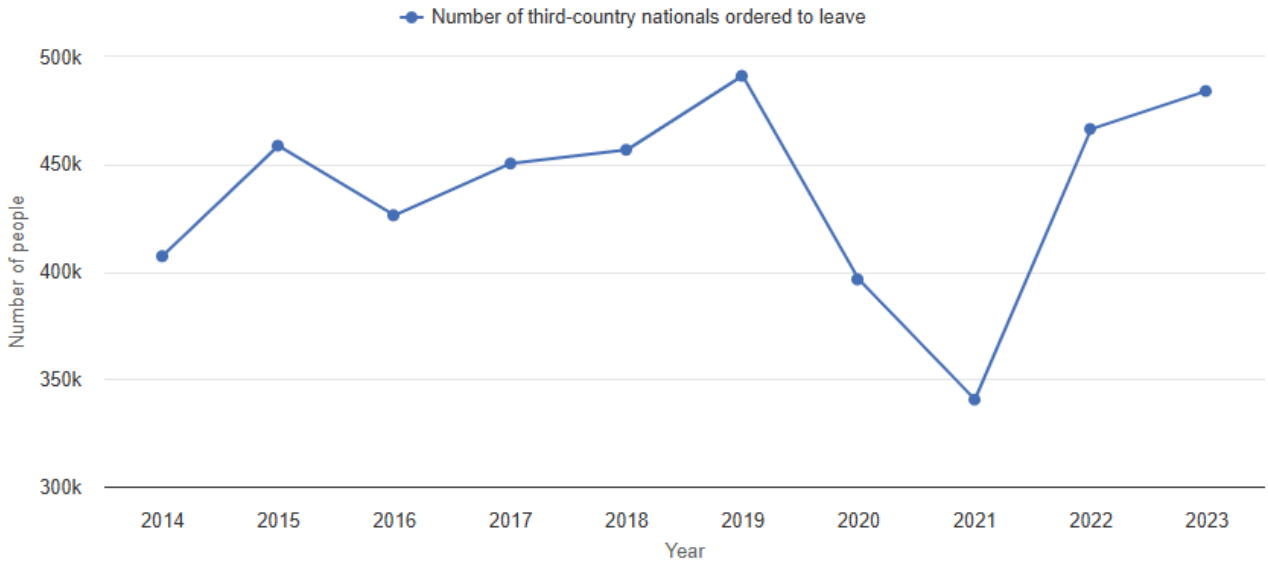
EU return policies and fundamental rights

25. From a fundamental rights perspective, the implementation of EU return policies is a very sensitive area. Core fundamental rights guaranteed in the Charter are at stake. Without adequate safeguards, the return of third-country nationals may lead to violations, inter alia, of the prohibition of torture, inhuman or degrading treatment (Article 4 of the Charter), of the right of asylum (Article 18 of the Charter), of the principle of *non-refoulement* (Article 19(2) of the Charter) and of the prohibition of collective expulsions (Article 19(1) of the Charter). It may also result in unlawful interference with the right to liberty (Article 6 of the Charter), the rights of the child (Article 24 of the Charter) and, when seeking redress, the right to an effective judicial remedy (Article 47 of the Charter). It could also put human dignity at risk (Article 1 of the Charter).
26. Any innovative approach or arrangement to increase the effectiveness of returns, including the possible creation of return hubs in third countries, needs to be assessed in light of these risks.

EU return rates

27. There are no fully reliable statistics which show how many third-country nationals without the right to stay in the EU and subject to a return decision leave the territory of the Member States. There are also no reliable figures on the actual number of third-country nationals who are staying in the EU in an irregular situation.
28. The statistical office of the EU, Eurostat, publishes yearly data on the number of people ordered to leave. Figure 1 below shows the figures for the past 10 years, where the number of third-country nationals ordered to leave the EU fluctuated between 400, 000 and 500, 000 people, except during the COVID-19 pandemic, when they were lower.

Figure 1 – Number of third-country nationals ordered to leave the 27 Member States, by year, 2014–2023

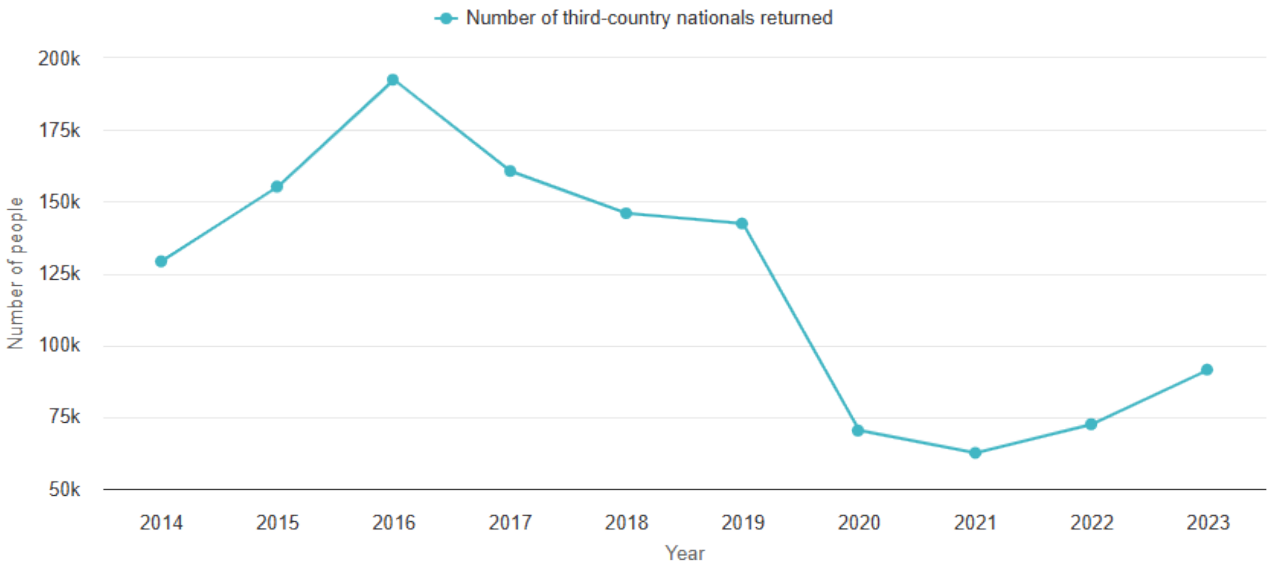


Alternative text: Line chart displaying the annual number of third-country nationals ordered to leave the EU from 2014 to 2023. The data range from 400,000 to 500,000 except for 2021, when the number dropped to some 340,000 individuals.

Source: Eurostat, Third-country nationals ordered to leave – annual data (rounded), data extracted on 11 November 2024. Data for 2024 are not yet available.

29. The number of those third-country nationals who actually returned following an order to leave peaked at almost 200 000 in 2016. Following a significant drop during the COVID-19 pandemic, in 2023 it reached some 91 500.

Figure 2 – Number of third-country nationals returned from the 27 Member States, by year, 2014–2023



Alternative text: Line chart displaying the annual number of third-country nationals who returned from the EU from 2014 to 2023. The chart shows an increase from some 130,000 in 2014 to almost 200,000 in 2016. After that, the number dropped every year to reach a minimum of some 62,000 in 2021. After that, it increased to some 72,000 in 2022 and to some 91,000 in 2023.

Source: Eurostat, Third-country nationals returned following an order to leave – annual data (rounded), data extracted on 11 November 2024. Data for 2024 are not yet available. Data for 2014 and 2015 do not include figures for Austria, and data for 2021 do not include Lithuania. See Eurostat for further details on how to read the data.

30. Even if the quality and reliability of these data are sometimes questioned (see International Centre for Migration Policy Development policy brief), and although the two Eurostat datasets are not directly comparable (for example, a person may receive a return decision in one year and be removed the next year, or there may be multiple return decisions for the same individual), they show a significant gap between the number of people ordered to leave and those who actually left the EU.

31. The reasons for low return rates are multiple [5]. These can be grouped into three different blocks.

- Reasons linked to administrative inefficiency of national return systems, which can be addressed through better coordination among national stakeholders and more procedural coherence, for example by systematically ensuring a rigorous assessment of international protection needs in the asylum procedure and improving communication between asylum and return authorities. The findings of the 2024 thematic Schengen evaluation on the effectiveness of return systems are expected to identify ways for Member States to make better use of existing tools and options, building on promising practices identified at the national level.

- Reasons linked to a lack of cooperation from the individual who is the subject of a return decision, for example to facilitate the identification process and obtain travel documents or

to remain at the disposal of the authorities. Enhanced return counselling may be one way to counter such a lack of cooperation, together with other tools EU law already provides. These include pre-removal detention and alternatives to detention, when necessary and proportionate, to prevent absconding.

- Reasons linked to a lack of cooperation from the third country concerned, in refusing to identify and issue travel documents to the returnee or in taking other steps that delay returns and readmissions.

Initiatives in the EU to increase the effectiveness of returns

32. In recent years, the EU and its Member States have been increasing efforts to make return policies more effective. In 2019, the EU legislator strengthened the operational role of Frontex in returns, paving the way for a more substantial Frontex engagement in supporting Member States in various ways, for example by offering return counselling and financing voluntary returns as well as post-return activities. In 2020, the Commission created the position of the EU Return Coordinator to bring together different strands of the EU's return policy and support their consistent and coherent implementation. In 2024, the EU legislator adopted Regulation (EU) 2024/1349 on establishing a return border procedure for asylum applicants rejected in the asylum border procedure. In the same year, the Commission also launched a thematic Schengen evaluation of the effectiveness of the EU return system.
33. A proposed revision of the EU return directive, on which FRA had issued a legal opinion (FRA Opinion – 1/2019), remains pending, although a new legislative proposal on returns is expected to be tabled in early 2025 (see European Council conclusions of 19 December 2024, Conclusion No 19). In a letter to the Commission in May 2024, 15 Member States called for new solutions to address irregular migration to the EU and, as part of these, for exploring 'potential cooperation with third countries on return hub mechanisms, where returnees could be transferred to while awaiting their final removal'. On 4 October 2024, 17 Member States called for new EU legislation for more effective returns in a non-paper. The European Council meeting of 17 October 2024 (European Council conclusions, Conclusion No 37) invited the Commission to take 'determined action at all levels to facilitate, increase and speed up returns from the European Union, using all relevant EU policies' and to submit a new legislative proposal on returns, as a matter of urgency [6].

1. Pre-condition 1: Valid and enforceable return or refusal of entry decision issued by a Member State

34. Primary EU law does not ban the creation of return hubs but imposes considerable limitations.

35. Concerning the transfer of returnees to a return hub in a third country (the first scenario in paragraph 13 of this paper), secondary EU law limits the return of third-country nationals to a country other than their country of origin. Article 3(3) of the EU return directive allows return only to 'a country of transit', if there are agreements and arrangements in place, and to 'another third country to which the third-country national concerned voluntarily decides to return and in which he or she will be accepted'.

36. Returns to any third country that would accept a third-country national, regardless of their consent and irrespective of whether the returnee has any link to such a third country, are not envisaged by the EU return *acquis*. As FRA pointed out in its Opinion 1/2019 (page 19) on the proposed recast EU return directive, such an approach would raise significant concerns not only from a fundamental rights point of view but also regarding the sustainability of such returns in light of the risk it entails that individuals returned to a neighbouring third country – and not to their country of origin, usually located further afield – may re-enter the EU unlawfully.

37. EU law does not prohibit the transfer of migrants rescued at sea by a Member State to a facility in a third country (the second scenario in the introduction of this paper), if it qualifies as a 'place of safety' [7] and the transfer is carried out in line with the requirements of the Schengen *acquis*, including applicable fundamental rights safeguards.

38. The issuance of a valid decision ordering the individual to leave the Member State, which is based on an individual assessment, is the starting point (Article 6 of the EU return directive) for any return within the meaning of the EU return directive, regardless of the envisaged destination of the returnee.

39. The CJEU reaffirmed that Member States must issue a return decision for third-country nationals unlawfully staying in their territory and falling within the scope of the EU return directive, before carrying out their removal. Such a return decision must comply with the substantive and procedural safeguards established by that directive [8]. For the upcoming return border procedure, under Article 4(6) of Regulation (EU) 2024/1349, Member States will also have the option of issuing a 'refusal of entry decision' (as per Article 14 of the Schengen Borders Code, Regulation (EU) 2016/399) instead of a return decision. Under Article 4(6) of Regulation (EU) 2024/1349, core safeguards of the EU return directive regarding the treatment and level of protection – including respect for the principle of *non-refoulement*, the necessity and proportionality of coercive measures, access to healthcare, the treatment of persons in a vulnerable situation and detention conditions – equally apply to returnees under the return border procedure.

Individualised assessment

40. As a general principle of EU law, decisions must be adopted on a case-by-case basis [9]. Relevant secondary EU law reflects this requirement. Under Recital 6 of the EU return directive, all return-related decisions should be adopted on a case-by-case basis, based on objective criteria and following a fair and transparent procedure. The Schengen Borders Code, which regulates refusals of entry, states in Article 4 that '[i]n accordance with general principles of Union law, decisions under this Regulation shall be taken on an individual basis'. Without an individualised assessment, there is a high risk of acting against the prohibition of collective expulsion and the principle of *non-refoulement* set out in Article 19 of the Charter.

Respecting legal bars to removal

41. A transfer to a third country hosting a return hub would not be allowed if there are substantial grounds for believing that the person in question, if removed, would face a real risk of torture, inhuman or degrading treatment or punishment, or a real risk of a flagrant breach of the right to liberty (arbitrary detention) [10].

42. Member States must respect the prohibition of torture, inhuman or degrading treatment or punishment (Article 4 of the Charter) and the principle of non-refoulement. The principle of non-refoulement stems from international human rights law and refugee law [11] and from Article 3 of the ECHR as interpreted by the ECtHR. It is embedded in Articles 18 and 19 of the Charter. It requires Member States not to return a person to a country where their life and freedom are at risk or where the person would be exposed to other serious harm. In addition, the right to liberty prohibits the removal of a person if there is a real risk of a flagrant breach of Article 5 of the ECHR (right to liberty and security, implying the prohibition of arbitrary deprivation of liberty) [12].

43. The risk of violating the prohibition of *refoulement* must be assessed in line with ECtHR jurisprudence on the matter. This is required by Article 52(3) of the Charter: insofar as the rights included in the Charter correspond to rights guaranteed by the ECHR, the meaning and scope of those rights must be the same as those laid down by the ECHR. This requires taking into account that:

    - the principle of non-refoulement is absolute and cannot be restricted under any circumstances [13];

    - the principle of non-refoulement also prohibits the removal to a third – intermediary – country from which an individual may then be removed to the country in which they face a real risk of harm (indirect or 'chain' refoulement) [14].

44. Articles 5 and 9 of the EU return directive, Articles 3 and 4 of the Schengen Borders Code and Articles 36, 48, 71, 73, 80 and Article 86(4) of the EBCG Regulation also reflect the prohibition of *refoulement.* Acknowledging that legal barriers to removal may also flow from other considerations, Article 5 of the EU return directive requires Member States to also take due account of the best interests of the child, family life and the state of health of the third-country nationals concerned.

Indicating the country of return

45. A return or removal decision must indicate the country to which the return will take place. The CJEU underlined that the obligation to return is inconceivable unless a concrete destination is identified [15]. Determining the country of destination is essential to assess the risk of violation of the principle of *non-refoulement*. The individuals concerned must be made aware of the country of return in advance to be able to express any reasons why the return to the given country hosting the hub and/or to the country of origin would expose them to the risk of the death penalty, torture or other inhuman or degrading treatment or punishment, contrary to Articles 4 and 19 of the Charter.

Persons in a vulnerable situation

46. Additional pre-conditions flowing from various Charter rights – such as the right to health (Article 35 of the Charter) and the protection of children, the elderly and persons with disabilities in Articles 24 to 26 of the Charter – apply to returnees in a vulnerable situation. Under EU law (see, specifically, Article 5 and Article 14(1)(d) of the EU return directive and Article 3(1)(a) of the EBCG regulation), persons in vulnerable situations require particular attention, making a lawful transfer to a return hub highly unlikely for them. The principle of the best interests of the child, enshrined in Article 3 of the Convention on the Rights of the Child, Article 24 of the Charter and Article 3(3) of the TEU, must be respected when deciding on the return of children who do not have the right to stay in the EU. The status of being a child and their extreme vulnerability prevail over their migratory situation [16]. Article 5 of the EU return directive and Article 80(3) of the EBCG regulation also reflect the best interests of the child principle. For unaccompanied children, it is virtually impossible to imagine situations where the transfer to a return hub could be in the child's best interests [17].

Prioritising voluntary departure

47. Where there are no reasons to believe that it would undermine the purpose of a return procedure, priority should be given to voluntary departure, and forced removal should take

place as a measure of last resort. The priority of voluntary departure is a horizontal principle of the EU return directive stemming from Recital 10, reflected also in Recital 9 and Article 4(5) of Regulation (EU) 2024/1349, and has been underlined by the CJEU multiple times [18]. It should be the preferred option both from a fundamental rights point of view and from a sustainability perspective [19].

Avoiding unlawful detention

48. In addition to the considerations set out in paragraphs 41 and 42 of this legal analysis, if the return hub is a closed facility, Member States would be allowed to transfer to the hub only those returnees who are detainable under Article 15 of the EU return directive and (after mid 2026) under Article 5 of Regulation (EU) 2024/1349. The Member State must examine and document the case and notify the person concerned that deprivation of liberty is necessary and proportionate, and applied as a measure of last resort, following an individualised assessment. This considerably limits the categories and profiles of returnees who can be transferred to a return hub.

49. For returnees for whom there is no reasonable prospect of removal, continued deprivation of liberty would infringe the right to liberty in Article 6 of the Charter [20].

Effective judicial remedy

50. Article 47 of the Charter requires that the individuals concerned have the right to an effective judicial remedy [21]. In accordance with Article 13 of the EU return directive and Article 14 of the Schengen Borders Code, effective remedies must be provided against return and refusal of entry decisions. To prevent irreversible harm, when there is an arguable claim that return or removal would infringe upon the right to life or expose returnees to a risk of torture, inhuman or degrading treatment or punishment, the appeal against a return or refusal of entry decision must automatically suspend the implementation of the return [22]. It follows that before a transfer to a third country hosting a hub, remedies before an independent and impartial tribunal in the Member State issuing the return decision have been exhausted and that the respective return decision is enforceable.

Conclusion

51. EU law does not ban the creation of return hubs but imposes considerable limitations. The starting point for any return, regardless of the envisaged destination of the returnee, is the issuance of a valid and enforceable decision ordering the individual to leave the Member State or refusing entry. Such a decision must be based on an individualised assessment.

Article 47 of the Charter requires that the individuals concerned must have the right to an effective remedy to challenge the legality of such a decision. The transfer to a return hub located in a third country must be expressly allowed under EU law. It is barred if returnees who are moved there would be exposed to serious harm, to inhuman or degrading treatment or to a flagrant breach of the right to liberty (arbitrary detention). This would violate, among other things, Articles 4 and 19 of the Charter. Persons in a vulnerable situation require particular attention, which makes their lawful transfer to a return hub unlikely. Children should be excluded from transfers to return hubs. Rules on pre-removal detention and the priority of voluntary departure over forced removal further limit the categories of people who could be transferred to a return hub.

2. Pre-condition 2: Adequate legal basis for transfers to the return hub

52. The underlying idea of setting up a return hub in a third country is to have a location outside the EU where returnees can be accommodated until the Member State authorities, and/or the EU (Frontex), implement the return to the country of origin or habitual residence.

53. To transfer third-country nationals to a return hub, there must be a third country that is ready to take them. In a comparable setting, the CJEU clarified that Member States cannot reject an application for asylum as inadmissible based on the concept of 'safe third country' in cases where they have established that the applicant will not be allowed to enter the territory of a third country designated as safe [23] .

Legally binding agreement

54. The establishment of a return hub thus requires a legally binding agreement, within the meaning of the 1969 Vienna Convention on the Law of Treaties, with the third country hosting the hub. Informal arrangements would not suffice.

55. The agreement must regulate at least core aspects relating to the functioning of the return hub. This will include, for example, rules on who will be transferred to the return hub, on the modalities of the transfer, on the responsibility for the services provided in the hub and what to do with individuals whose removal from the hub does not materialise.

Respecting Charter rights and principles

56. The agreement must respect European and international human rights law. States are not allowed to evade their responsibilities under the ECHR by relying on an agreement concluded with a third country [24] .

57. The agreement to set up a return hub could be concluded at the EU level in the application of Articles 216 and 218 of the TFEU. Under Article 3(2) of the TFEU, the EU has 'exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.' When concluding such agreements, the EU must not only respect the EU founding treaties but also the rights and principles of the Charter, which always apply to EU institutions, bodies and agencies. The Charter – which under Article 6(1) of the TEU has the same rank and legal value as the EU Treaties – applies to the EU's external relations and therefore extraterritorially [25] . Article 21(1) of the TEU states that the '[t]he Union's action …

seeks to advance in the wider world … the universality and indivisibility of human rights and fundamental freedoms'. Article 3(5) of the TEU further states that '[i]n its relations with the wider world, the Union shall uphold and promote its values'. These values include respect for human dignity and fundamental rights and are listed in Article 2 of the TEU, and the EU's general fundamental rights commitment is detailed further in Article 6 of the TEU, which applies horizontally to all EU measures.

58. Another option which can be envisaged is to set up a return hub based on an international agreement to be concluded by one or more Member States with the third country concerned. Under Protocol No 23 to the TFEU on external relations of the Member States with regard to the crossing of external borders, Member States may negotiate or conclude agreements with third countries 'as long as they respect Union law and other relevant international agreements' [26]. This also means that such Member State agreements must respect the Charter, which applies to Member States when they act within the scope of EU law (Article 51(1) of the Charter).

59. Under Article 77 of the TFEU, the EU must develop a policy for 'the gradual introduction of an integrated management system for external borders'. Such a policy led to the emergence of a body of EU law on border management, the central pieces of which are the Schengen Borders Code – which regulates border controls – and the EBCG regulation, the subject matter of which is the effective management of the EU's external borders and increasing the efficiency of the EU's return policy (Article 1). The latter also introduces the concept of 'European integrated border management', describing its components in Article 3 [27]. These include returns and cooperation with third countries.

60. Such cooperation with third countries is subject to the rules set out in Section 11 of the EBCG regulation, which contains provisions reflecting the limits Protocol No 23 to the TFEU imposes on Member States. Article 71(2) of the EBCG regulation provides that Member States must 'comply with Union law, including norms and standards which form part of the Union *acquis*, including where cooperation with third countries takes place on the territory of those third countries'. Agreements and other arrangements that Member States conclude with third countries in the areas of border management and returns must respect the requirements of Article 72(3) of the regulation. This provision requires that they must comply with 'Union and international law on fundamental rights and on international protection, including the Charter, the European Convention for the Protection of Human Rights and Fundamental Freedoms and the 1951 Convention relating to the Status of Refugees, the 1967 Protocol thereto, and in particular the principle of *non-refoulement*.'

Categories of third-country nationals

61. For Member States, the connection of a return hub with EU law also derives from the thematic EU policy field. This must be examined separately for the two categories of third-country nationals that may be placed in return hubs.

A. Returnees brought to the return hub from the EU (category 1)

62. By setting up and running a return hub in a third country, Member States intend to combat 'illegal immigration and unauthorised residence, including removal and repatriation of persons residing without authorisation', as regulated in Article 79 (2) (c) of the TFEU. The establishment of a return hub – even though it does not per se transpose an express EU law obligation – is based on the assumption that it considerably contributes to the achievement of the objectives of the EU return directive, namely, to remove third-country nationals who do not have the right to stay in the EU and thus increase the effectiveness of EU return policy. While recognising that Member States may adopt rules on matters that the EU return *acquis* does not regulate, the CJEU noted that when they do so, they are subject 'to full observance of fundamental rights' [28] .

63. For returnees, legal acts establishing a return hub in a third country would be so closely linked with the implementation of the EU *acquis* on returns that it would be difficult to argue that they would not fall within the scope of EU law [29] and thus would exclude the applicability of the Charter. This situation would be different from the one the CJEU reviewed in *Gueye and Sanchez*, where the Spanish law provision at stake related to a piece of EU legislation (Framework Decision 2001/220/JHA) which did not intend to harmonise or approximate Member State legislation [30] .

B. Individuals brought to a facility directly after being rescued at sea (category 2)

64. Article 18 of the EBCG regulation establishes the European border surveillance system Eurosur, an integrated framework for the exchange of information and for operational cooperation, to improve situational awareness in the context of border surveillance, to detect and combat irregular migration and cross-border crime and to protect and save the lives of migrants. Maritime border surveillance activities thus fall under EU law (see also Regulation (EU) 656/2014 for Frontex-coordinated maritime border surveillance operations).

65. Also, the Schengen Borders Code and, therefore, the Charter apply to people intercepted or rescued at sea in the context of border surveillance activities. When dealing with such people, Member States must always comply with the fundamental rights safeguards in Articles 3 and 4 and Article 13(2) of the Schengen Borders Code (as amended by Regulation (EU) 2024/1717). These safeguards reflect the duty to act in accordance with the principle of *non-refoulement* and obligations related to access to international protection.

Fundamental rights impact assessment

66. As the Charter applies to agreements the EU or its Member States conclude with a third

country to establish a return hub, the rules set out therein must comply with Charter rights and principles. If EU law safeguards apply to the agreement establishing the hub, they necessarily apply to its implementation.

67. The agreement – whether concluded with the third country hosting the hub at the EU or national level – will have to describe, with sufficient clarity and precision, the obligations and procedures for all parties involved to enable a rights-compliant implementation of the return hub.

68. Under the ECHR, if Member States have jurisdiction over the returnees hosted in the return hub – either alone or jointly with the third country hosting the hub – and human rights violations occur therein, then they also have a positive obligation to take preventive measures, as the ECtHR clarified in its case-law [31]. Under Article 52(3) of the Charter, the meaning and scope of Charter rights, which correspond to rights guaranteed by the ECHR, must be the same as those laid down by the ECHR. This is the case, for example, of the right to life in Article 3 of the Charter and the prohibition of torture and other forms of ill treatment in Article 4 of the Charter. Such Charter rights also require preventive action.

69. An *ex ante* evaluation of the situation and practices in place in the specific third country to guarantee the respect of fundamental rights is necessary to determine the impact of a planned return hub on fundamental rights. Such assessment would clarify if an agreement to set up a return hub can be concluded in a rights-compliant manner at all. It also serves to identify any mitigating measures which the agreement should include to ensure respect for the principle of *non-refoulement* and to safeguard the right to life and humane and dignified treatment.

Conclusion

70. The second pre-condition to operate a return hub in a third country is the existence of a legally binding agreement with the third country hosting the hub, which regulates, with sufficient elaboration, at least core aspects relating to the establishment of the return hub. The agreement must provide for a clear and adequate legal basis to enable the lawful transfer of third-country nationals to the hub. The agreement may be concluded by the EU itself or by Member States. In both situations, it must respect the rights and principles set out in the Charter, which also entails a duty to take preventive measures to mitigate the risk of rights violations while third-country nationals stay in the return hub and will be subjected to further onward return to the country of destination. An *ex ante* fundamental rights impact assessment should analyse fundamental rights risks and how to mitigate them. Member States continue to act within the scope of EU law when they run a return hub in a third country and implement returns from there. This means that the machinery to enforce EU law can be activated in case of failure to comply with EU fundamental rights law.

3. Pre-condition 3: Guarantees for lawful treatment in the third country hosting the return hub

71. The third pre-condition flows from the fact that in the case of a return hub, the Member States and/or the EU take charge of the returnees' departure or removal to their country of origin or habitual residence. The transfer of returnees to a return hub in a third country does not entail a termination of fundamental rights obligations of a Member State towards such individuals.

72. Individuals hosted in return hubs must be treated in accordance with applicable international human rights law. Among other things, the processing of their return to the country of origin must respect the principle of *non-refoulement*.

73. The question of who – the Member State who transferred the returnee to the hub or the third country hosting the hub – bears the responsibility to ensure the respect of applicable human rights law and in particular the ECHR is, in practice, linked to the scope of relevant obligations regarding the individuals hosted in the return hub.

74. This requires clarifying the term 'jurisdiction', which has a different meaning in general public international law and in human rights treaty law. Jurisdiction, in the more general sense, designates the exclusive competence of a state with respect to conduct within its own territory, precluding intervention in the territories of other sovereign powers in the absence of agreements providing otherwise. Jurisdiction, as the technical term of art in human rights treaties, delineates the scope of human rights obligations. In certain circumstances, obligations may extend also to persons who are outside the state's territory [32] . For example, in October 2024, the UN Human Rights Committee found that Australia was responsible for the arbitrary detention of asylum seekers transferred to offshore detention facilities in the Republic of Nauru, as it had effective control over the persons in these facilities [33] .

75. Taking the example of protection against *refoulement*, Article 2(1) of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment obliges states to 'prevent acts of torture in any territory under its jurisdiction'. Article 2(1) of the International Covenant on Civil and Political Rights stipulates that a state undertakes to respect and ensure the rights of the convention to all persons 'present in its territory and subject to its jurisdiction'. The UN Human Rights Committee has clarified that the notions of 'territory' and 'jurisdiction' are not cumulative requirements [34] .

76. At the European level, Article 1 of the ECHR compels states to ensure the rights of the convention to anyone within their jurisdiction. Article 1 is presumed to apply within a state's sovereign territory [35] . The extraterritorial scope of human rights protection is considered 'exceptional' and needs special justification. Examples of such extraterritorial scope of application include situations in which military forces control parts of foreign territory and when state agents operating on foreign soil violate a person's human rights through their

conduct [36].

77. In a report on the scope of the principle of non-refoulement published in 2016, FRA listed three indicators to identify and establish whether there is a jurisdictional link between the person affected and state conduct [37]:

    - *de jure* control, meaning instances where jurisdiction is derived from a defined set of rules that have been agreed upon in advance by the state in question;

    - de facto control over a territory or a person;

    - the exercise of public powers, when – in accordance with customary international law, treaty or other agreement – the authorities of a state carry out executive or judicial functions on the territory of another state.

78. Taking these indicators as a starting point, the EU and/or its Member States will have applicable human rights obligations whenever they have effective control over the individuals, even if they operate extraterritorially.

Respecting the prohibition of *refoulement* and collective expulsion

79. The prohibition of *refoulement* and of collective expulsion is laid down in international law [38] and reflected in Article 18 (right to asylum) and Article 19 (protection in the event of removal, expulsion or extradition) of the Charter. A crucial tool to ensure compliance with the prohibition of *refoulement* and of collective expulsion is the individual assessment of the person's circumstances, on a case-by-case basis, as part of a return or refusal of entry decision. To avoid chain *refoulement*, the Member States' return or refusal of entry decisions which constitute the legal basis for the transfer to the return hub must not only assess the legality of the transfer to the third country but also establish that there are no legal bars to remove the third-country nationals to their country of origin or habitual residence.

80. A returnee has the right to bring forward any change in circumstances that occurred after the adoption of the return decision that may have a significant bearing on the assessment of their situation [39]. The requirement to uphold the principle of *non-refoulement* may, at least in some circumstances, also necessitate an updated assessment of *refoulement* risks by the state carrying out the removal [40]. The Member State carrying out the removal must have a procedure to re-examine the lawfulness of the removal in light of the new circumstances. Such re-examination also entails the right to an effective remedy, the characteristics of which must comply with Article 47 of the Charter [41]. These considerations flow from the Member State's involvement in the removal and apply regardless of the fact that the returnee is not physically present in the Member State territory but is accommodated in a return hub outside the EU.

81. It is theoretically also possible that the Member State exceptionally agrees with the third country that any new circumstance which may affect the lawfulness of return to the country of origin is examined by the responsible authorities of the third county hosting the return hub. Depending on the human rights record of the third country, such a scenario may bear very high fundamental rights risks. It must not result in circumventing applicable EU fundamental rights law.

82. In such a case, the Member State that carries out forced removals from the return hub needs to be satisfied that the quality of the third-country decision-making process protects individuals from *refoulement* or collective expulsions. This would require embedding specific safeguards in the agreement establishing the return hub, whereby the Member State would be required to review and clear each individual third-country decision that examined whether the removal remains lawful in light of any new circumstances.

83. Alternatively, the agreement would have to establish a detailed set of mitigating measures along the lines described in Chapter 4 for Frontex. This would, among other things, require that the Member State carries out an independent, thorough and *ex ante* assessment of the third-country return system and of the safeguards it applies to prevent human rights violations; repeats such an assessment regularly; establishes a system for effective and independent human rights monitoring; and establishes a mechanism to ensure the right to an effective judicial remedy for returnees claiming that their removal violates the prohibition of *refoulement* or collective expulsion.

Ensuring dignified treatment in the hub

84. The return hub may be either a closed facility, comparable to a pre-removal detention facility, or an open or semi-open facility, where certain categories of individuals would be allowed to leave the centre temporarily, for example during the daytime. Regardless of the type of arrangement, the material conditions, treatment and services provided in the hub must respect applicable fundamental rights law.

85. Various practical arrangements are possible as regards, for example, the provision of food, non-food items, healthcare or counselling. The Member State, the third country hosting the hub or both could be involved. Two scenarios are possible, as follows.

A. The Member State provides material conditions and services (scenario 1)

86. In a first scenario, the Member State sending the returnees to the hub also administers it. It provides a range of services, which could include all aspects of daily life, except for emergency hospitalisation (at least until the patient can be transported back to the Member State) and those aspects of the administration of justice, for which the third country, as a sovereign state, will have to take responsibility. Under this scenario, the Member State has

either full control over the third-country nationals hosted in the hub or over those aspects of the third-country nationals' lives for which it is responsible. Leaving aside jurisdiction under the ECHR, if the agreement setting up the hub gives the authority to the Member State to run it fully or partly, this also triggers the applicability of fundamental rights law enshrined in the Charter to ensure humane and dignified treatment of the people kept therein. The protection of children, the elderly and persons with disabilities under Articles 24 to 26 of the Charter also requires that special attention is afforded to third-country nationals in a vulnerable situation.

87. Member States must also respect Article 6 of the Charter (right to liberty and security), which protects individuals from arbitrary deprivation of liberty. Authorities may resort to pre-removal detention – including in a return hub located in a third country – only if less coercive measures are not a viable option and only as long as necessary for the purpose pursued [42]. Returnees can only be detained as long as removal arrangements are in progress and executed with due diligence and provided that there are reasonable prospects for removal [43]. These safeguards flow from the case-law of the ECtHR on immigration detention [44], which the EU return directive mirrors in its Article 15. The ECtHR also held that the place and conditions of immigration detention must be appropriate [45] and that special safeguards apply to children and to persons with vulnerabilities [46].

B. The third country provides material conditions and services (scenario 2)

88. In a second scenario, Member States transfer returnees to a facility managed by a third country. Under this scenario, third-country authorities cater fully or partly for the returnees' needs. The authorities of the third country hosting the hub bear primary accountability for the services they are responsible for.

89. As described in Chapter 2, the agreement between the Member States and the third country that establishes the return hub must comply with EU law on fundamental rights, including the Charter. This means, for example, that rules on the treatment of returnees hosted in the third-country return hub must respect human dignity, as set out in Article 1 of the Charter. Therefore, such agreements should set minimum standards for the treatment of third-country nationals accommodated in the hub, for example as regards material conditions, food, healthcare and information provision.

90. The Member States may agree with the third country to cover the costs of running the return hub. In such a case, additional fundamental rights considerations emerge if EU funds are used, for example through the national envelope of the Asylum, Migration and Integration Fund [47]. The specific fundamental rights safeguards applicable to the relevant EU funding instrument apply [48]. Under Article 19(2) of Regulation (EU) No 516/2014, national programmes must 'fully respect the rights and principles enshrined in the Charter of Fundamental Rights of the European Union'. CJEU case-law found that where there is a sufficiently strong connection between the financed activities and the related EU policy (in this case, the EU return or border management *acquis*), the matter falls within the scope of

EU law and triggers the applicability of the Charter [49].

91. Thus, when third countries administer the return hub, the Member State that set up the hub maintains a certain degree of accountability for the standards of treatment in the hub.

Adequate treatment during removals to the country of origin

92. In the case of a return hub, the Member States and/or the EU agree with the third country that they will take charge of the returnee's onward departure or removal to their country of origin. Member States may either organise their departure and/or removal by themselves or request Frontex's support to do so (see Chapter 4 for the fundamental rights implications for Frontex).

93. When implementing returns from a third country, Member States are responsible for rights violations which may occur during the removal. The circumstance that the returnees are picked up from a facility located in a third country and not in the Member State territory does not change the fact that they still implement the EU return *acquis* and thus operate within the scope of EU law. Fundamental rights standards on the necessity and proportionality of the use of force flowing from the Charter and mirrored in Article 8(4) of the EU return directive on coercive measures continue to apply.

94. It is also possible to have situations whereby certain parts of the removal process – for example picking up returnees from the hub and bringing them to the airport – might be carried out together with escort officers of the third country hosting the hub. This may raise additional questions on (joint or shared) responsibilities for rights violations flowing from the involvement of law enforcement authorities of two states, the analysis of which goes beyond this legal position paper.

95. If the return is not implemented within the maximum detention period allowed under the EU return directive or Member States' national law (in case of an opt-out under Article 2(2)(a) of the directive), the Member State would take or return the individual to the EU and continue the return procedures from its own territory. Alternatively, the Member State may agree with the third country hosting the return hub to transfer to the latter the jurisdiction over the returnee. Before the transfer, the Member State must examine that the transfer respects the principle of *non-refoulement* and other relevant Charter rights. From the transfer date onwards, the third country will take over the return processing.

Conclusion

96. A third pre-condition for return hubs flows from the fact that the Member States and/or the EU will be in charge of the returnees' departure or removal from the hub to their country of origin or habitual residence. This creates a duty under international law and EU law to respect the prohibition of refoulement and collective expulsion and to respect fundamental

rights and dignity when the Member States or Frontex implement removals from the hub. The agreement setting up the return hub must comply with EU fundamental rights law and should set out minimum standards for the material conditions and treatment of third-country nationals accommodated in the hub. If Member States use EU funds to cover the costs of the return hub, at least in part, the specific safeguards applicable to the relevant EU funding instrument apply.

4. Pre-conditions for Frontex removals from third countries

97. This chapter presents fundamental rights considerations should Frontex – in the future – be entrusted with the direct implementation of returns from a third country, for example by allowing a third country to benefit from Frontex's joint return operations or by financing or organising return operations from a third country to the country of origin. The considerations set out in this chapter apply regardless of whether third-country nationals are hosted in a return hub or not.

98. As an EU agency, any activity Frontex implements must comply with EU law, including the Charter (see Article 51(1) of the Charter).

99. Whereas primary EU law would not exclude the possibility for Frontex to implement removals from one third country to another, in its Opinion 5/2018, FRA concluded that entrusting Frontex 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 (see FRA Opinion 5/2018, opinion No 24). To mitigate such risk very strong fundamental rights safeguards must be in place.

Legal basis in Frontex's founding regulation

100. The EBCG regulation lists the type of support Frontex can provide to Member States and to third countries. Whereas Frontex should coordinate and organise return operations from one or more Member States (Recital 80 of the EBCG regulation), such activity is not mentioned in Article 10(1)(u) to (w), which lists the tasks which Frontex may carry out for the benefit of third countries.

101. Similarly, Article 10(1)(u) of the EBCG regulation, which concerns cooperation with third countries, does not include the possibility for the agency to deploy return teams (deployments being limited to 'border management teams'). This entails, for example, that Frontex has no legal basis for deploying officers to escort third-country nationals subject to forced-return procedures to third countries. Such a task, as listed in Article 55(7)(i) of the regulation, entails the exercise of executive powers and must be regulated in a manner that addresses the fundamental rights risks that this entails.

Legal basis: status agreements and working arrangements with third countries

102. Article 73 of the EBCG regulation subjects the deployment by Frontex of officers who will exercise executive powers to the conclusion of a status agreement, by the EU, with the third country.

103. Such status agreements would need to provide for the possibility of Frontex carrying out removals of third-country nationals from the third country with which the agreement is concluded. These agreements, falling under procedural rules of Article 218 of the TFEU, are negotiated on the basis of a model agreement from 2021 by the Commission pursuant to Article 76 of the EBCG regulation. The agreements concluded with Albania (2023), Moldova (2022), Montenegro (2023), North Macedonia (2023) and Serbia (2020) do not provide for this possibility, nor does the 2021 model status agreement [50].

104. Should a future (model) status agreement for measures by Frontex conducted on the territory of third countries envisage the possibility of coordinating and organising return operations and deploying escort officers, this should be accompanied by adequate fundamental rights safeguards. There must be a clear commitment by both parties to act in accordance with fundamental rights protection standards that are equivalent to those embedded in EU fundamental rights law. It should also set out rules on how to handle returnees' personal data. Operational activities should ideally be flanked by commensurate capacity building or other measures to promote the respect of fundamental rights in return procedures.

105. The same safeguards should apply to operational support to facilitate returns from third countries that do not entail the exercise of executive powers. This is, for example, the case when Frontex purely finances the return without deploying any officers. Frontex's operational activities in third countries that do not entail the exercise of executive powers are subject to working arrangements. Under Article 73(4) of the EBCG regulation, these must respect EU law and therefore the Charter.

Measures to mitigate the risk of implementing a flawed return decision

106. Frontex has no mandate to issue return decisions or to assess their validity (see Recital 12 and Article 48(1) of the EBCG regulation). When it organises return operations from a Member State, it limits itself to verifying that the returnee has been issued a return decision that is final and enforceable. It is up to Member States to ensure that they respect the procedural and substantial safeguards included in the EU return directive. The agency presumes that the return decision has been issued in a lawful manner and relies on the assumption that the Member State concerned acts in good faith. This assumption is based on the principle of sincere cooperation in Article 4(3) of the TEU [51].

107. Concerning return hubs in third countries, this means that as long as the Member States remain responsible for the return procedure and for assessing any legal bars to removal in line with the EU return *acquis*, Frontex can rely on the enforceable return decision. Frontex

must have a flawless mechanism to document for each returnee that an enforceable return decision made by a Member State is present.

108. In exceptional situations, where there is reliable evidence that the Member State's national return procedure does not comply with EU law, additional measures may be necessary to avoid direct or indirect breaches of EU and international law by Frontex. These may reach the threshold of suspending return operations partly or in full, based on Article 46 of the EBCG regulation.

109. The situation is different if the third country carries out the return procedure and/or is responsible for verifying that there are no legal bars to removal. Although they may be bound by international human rights law, including the ECHR, third countries are not bound by the EU legal framework, including the Charter and the common standards for return procedures set out in the EU return directive. In the absence of this common EU framework, the principle of mutual trust and the presumption of compliance with EU fundamental rights law does not apply [52] . This creates the risk that Frontex's activities in support of third countries may be based on a flawed return decision that is not in conformity with the principle of *non-refoulement* or the prohibition of collective expulsion.

110. To mitigate such risks when removing third-country nationals from a return hub located in a third country, the third country would need to be bound to respect fundamental rights safeguards which are comparable to those in EU law. This should be clearly set out in the agreement establishing the return hub and be integrated into the third-country legal system as binding law. Otherwise, Frontex would run the risk of engaging in or contributing to *refoulement* when it removes returnees hosted in the hub and returns them to their country of origin or habitual residence.

111. In case Frontex supports return operations in a third country as part of its own operational activities outside the context of a return hub, a comparable duty would need to be reflected in the status agreement or, as applicable, in working arrangements.

112. It is not sufficient to look at the legal framework applicable to the third country alone. This must also be implemented in practice. Frontex needs to be satisfied that the quality of third-country return decisions respects the safeguards to protect individuals from *refoulement* or collective expulsions. In addition to the due diligence work by the Frontex fundamental rights officer, there is a need for an independent assessment of the national return system in the third country that examines if comparable safeguards to those embedded in EU law are also applied in practice by the third country.

113. This requires a thorough *ex ante* assessment of the quality of the third country's return system. Such an assessment must be rigorous, based on a diverse range of independent, objective and reliable sources and up-to-date information [53] . It also needs to be capable of concluding with sufficient certainty that the quality of the third-country scrutiny is adequate to exclude, as a rule, the risk that a third-country return or 'order to leave' decision would violate the prohibition of *refoulement* and/or collective expulsion. Such an *ex ante* assessment must be completed before Frontex engages operationally and must be updated on a regular basis. This also flows from Article 73(1) of the EBCG regulation, according to

which the agency must comply with EU law, including norms and standards, when it operates in the territory of third countries.

114. An independent European entity – different from Frontex and with expertise in fundamental rights in the context of returns – should assess the safeguards in the third country's return system and how these are applied in practice. The assessment should benefit from the Frontex fundamental rights officer's expertise. The status agreement or the working arrangement should refer to such an assessment and include a commitment by the third country to cooperate in providing the necessary information and data.

115. Frontex should only activate its operational support if the assessment concludes that the third country's return system contains sufficient safeguards to mitigate the risk that Frontex will engage in conduct contrary to the Charter, in particular to the rights set out in its Articles 4, 18 and 19.

Application of Frontex's internal fundamental rights protection and oversight mechanisms

116. The EBCG regulation established several internal fundamental rights protection mechanisms to operationalise Frontex's task to respect, protect and promote fundamental rights set out in Article 10(1)(a) to (d) of the EBCG regulation. The regulation tasks the Frontex fundamental rights officer (Article 109) and the fundamental rights monitors (Article 110) to monitor Frontex's implementation of its fundamental rights commitments. The Consultative Forum on Fundamental Rights (Article 108) provides independent advice. Individuals who are directly affected by the actions, or failure to act, of staff involved in Frontex activities may submit a complaint under Article 111 of the regulation.

117. Being a piece of EU law, the provisions of the EBCG regulation are not binding for third countries. This is also the case for Frontex's internal fundamental rights protection mechanisms. To enable these mechanisms to also operate effectively for Frontex's activities in third countries, they need to be regulated in the status agreement or – if no executive powers are envisaged – in a working arrangement, which must provide for concrete rules concerning their operationalisation. In line with Article 73(3) of the EBCG regulation, the status agreement must provide for practical measures related to the respect of fundamental rights and for a complaint mechanism.

118. One important safeguard in this regard is monitoring fundamental rights compliance (see Chapter 5). Article 50(3) of the EBCG regulation sets a higher standard for forced-return monitoring when means of transport and return escorts are provided by a third country of return ('collecting return operations'). In such cases, a return monitor must be present on every return flight. A similar approach should be taken for Frontex's forced returns carried out from a return hub.

119. Pursuant to Article 3(1)(e) of the EBCG regulation, the concept of European integration border management requires inter-agency cooperation among national authorities,

including, where appropriate, cooperation with national bodies in charge of protecting fundamental rights. To also reflect the philosophy of integrated border management in operational return activities Frontex carries out in third countries, where appropriate in light of the specific situation in the third country, consideration should be given to including in status agreements or working arrangements additional measures envisaging cooperation mechanisms with third-country statutory human rights bodies, beyond what may be needed for establishing a complaint mechanism as required by Article 73(3) of the regulation.

Conclusion

120. Primary EU law does not ban the possibility for Frontex to implement removals from one third country to another. However, it exposes the agency to a constant risk of operating in violation of the principle of non-refoulement enshrined in Articles 18 and 19 of the Charter. To mitigate such risk, robust and clear fundamental rights safeguards must be in place.

5. Monitoring compliance with fundamental rights in the context of return hubs

121. An effective and independent fundamental rights monitoring system is preventative, as it reduces the risk of fundamental rights violations.

122. Monitoring enhances the protection of victims of violations by strengthening the application of safeguards already in place and providing expert advice when needed. It also supports domestic investigations of allegations against public authorities by providing objective, evidence-based and unbiased analysis and reporting. This improves transparency and accountability and thus enhances trust in public authorities.

123. EU law already envisages the monitoring of forced returns. Under Article 8(6) of the EU return directive, Member States must have an effective forced-return monitoring system. The EBCG regulation established the fundamental rights monitors within Frontex. Under Article 110 of the regulation, the monitors constantly assess the fundamental rights compliance of Frontex's operational activities, provide advice and assistance, and contribute to the promotion of fundamental rights as part of European integrated border management. Article 10 of Regulation (EU) 2024/1356 and Article 43(4) of Regulation (EU) 2024/1348 require Member States to provide, by mid 2026, an independent mechanism to monitor compliance with fundamental rights during the screening of new arrivals and when assessing asylum claims at external borders. FRA developed practical guidance to assist Member States in setting up or designating such national independent monitoring mechanisms.

124. Considering the fundamental rights risks connected to the running of return hubs, FRA considers it advisable to include provisions on independent and effective human rights monitoring mechanisms in any agreement that may be concluded with third countries envisaging the establishment of return hubs. Such provisions should extend the scope of the monitoring to all phases of the process, from the transfer of the returnee to the return hub until the final removal to the country of origin. Monitoring should not only be limited to the forced return itself. National statutory human rights bodies of the Member State establishing the return hub and of the third country hosting the return hub as well as Frontex fundamental rights monitors should be involved in the monitoring, as appropriate. Relevant aspects of the practical guidance FRA developed under Article 10 of Regulation (EU) 2024/1356 and relevant UN materials [54] can help define the scope, powers and tasks of such monitoring. Such monitoring work should be funded by the Member State making use of the return hub, using available EU funding schemes where relevant.

125. An additional safeguard to complement fundamental rights monitoring is the provision of complaints mechanisms. Consideration should be given to establishing these mechanisms beyond the duty under Article 111 of the EBCG regulation.

Conclusion

126. In conclusion, considering the serious fundamental rights risks connected with the running of return hubs, any agreement which may be concluded with third countries envisaging the establishment of return hubs should include provisions on independent and effective human rights monitoring mechanisms.

Endnotes

[1] For a list of EU readmission agreements, see European Commission, 'A humane and effective return and readmission policy', European Commission – Migration and Home Affairs website.

[2] For an inventory of such bilateral agreements, including those concluded by the Member States, see Harvard Dataverse and Cassarino, J. P., 'Inventory of the bilateral agreements linked to readmission', Version 2, 16 March 2022.

[3] In legal literature, see, for example, Gkliati, M., 'Shaping the joint liability landscape? The broader consequences of WS v Frontex for EU Law', European Papers – A journal on law and integration, Vol. 9, 2024, pp. 69–86; Fink, M., Rauchegger, C. and De Coninck, J., 'The action for damages as a fundamental rights remedy', in: Fink, M. (ed.), Redressing Fundamental Rights Violations by the EU: The promise of the 'complete system of remedies', Cambridge University Press, Cambridge, 2024, pp. 55–60, notably Section 2.5, 'Joint liability between the EU and its Member States'; Molnár, T., 'EU Member States' responsibility under international law for breaching human rights when cooperating with third countries on migration: Grey zones of law in selected scenariosEU Member States' responsibility under international law for breaching human', European Papers – A journal on law and integration, Vol. 8, No 2, 2023, pp. 1013–1035; Molnár, T., 'The EU General Court's judgment in WS and Others v Frontex: What could international law on the responsibility of international organizations offer in grasping Frontex' responsibility?', EJIL:Talk! website, 18 October 2023; and Nollkaemper A., d'Aspremont, J., Ahlborn, C., Boutin, B., Nedeski, N. et al., 'Guiding principles on shared responsibility in international law', European Journal of International Law, Vol. 3, No 1, February 2020, pp. 15–72, notably the 'Commentary' section of Principle 7, 'Shared responsibility in situations of concerted action'.

[4] On entry bans see judgment of the Court of Justice of 19 September 2013, Filev and Osmani, C-297/12, ECLI:EU:C:2013:569, paragraph 37; on criminal imprisonment see judgment of the Court of Justice of 28 April 2011, El Dridi, C-61/11 PPU, ECLI:EU:C:2011:268, paragraph 55; judgment of the Court of Justice of 6 December 2011, AchughbabianAchughbabian, C-329/11, ECLI:EU:C:2011:807, paragraph 39; judgment of the Court of Justice of 6 December 2012, Sagor, C-430/11, ECLI:EU:C:2012:777, paragraph 32.

[5] See, in this context, also 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 – A contribution from the European Commission to the leaders' meeting in Salzburg on 19 and 20 September 2018Proposal 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 – A contribution from the European Commission to the leaders' meeting in Salzburg on 19 and 20 September 2018, COM(2018) 634 final of 12 September 2018.

[6] See also President of the European Commission Ursula von der Leyen's letter to Commissioner-designate for Internal Affairs and Migration, 17 September 2024; and her letter of 16 December 2024 (and its annex) on migration matters, presented ahead of the European Council of 19 December 2024.

[7] See Article 2(12) and Article 10 of 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 June 2014, p. 93.

[8] See judgment of the Court of Justice of 17 December 2020, Commission v Hungary, C-808/18,

ECLI:EU:C:2020:1029, paragraph 253.

[9] See also FRA, Scope of the principle of non-refoulement in contemporary border management: Evolving areas of law, Publications Office of the European Union, Luxembourg, 2016; FRA, The recast return directive and its fundamental rights implications – Opinion of the European Union Agency for Fundamental Rights, Publications Office of the European Union, Luxembourg, 2019.

[10] See, for example, judgment of the Grand Chamber of the European Court of Human Rights (ECtHR) of 21 November 2019, Ilias and Ahmed v Hungary, No 47287/15, paragraphs 126–127. For an overview of the most recent ECtHR case-law on the matter, see, for example, Jakulevičienė, L., 'Principle of non-refoulement in the context of recent ECtHR caselaw and the EU migration and asylum pact', ERA Forum, Vol. 24, 11 September 2023, pp. 379–396. On arbitrary detention as a flagrant breach of Article 5 of the ECHR (right to liberty), see judgment of the Grand Chamber of the ECtHR of 13 December 2012, El-Masri v the former Yugoslav Republic of Macedonia, No 39630/09, paragraph 239.

[11] See the International Covenant on Civil and Political Rights, Article 7 (as interpreted by the Human Rights Committee in paragraph 9); the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 3; the ECHR, Article 3, as interpreted by the ECtHR; and the 1951 Geneva Convention relating to the Status of Refugees, Article 33.

[12] Judgment of the Fourth Section of the ECtHR of 17 January 2012, Othman (Abu Qatada) v the United Kingdom, No 8139/09, paragraph 233.

[13] See, for example, Council of Europe, ECtHR and FRA, Handbook on European law relating to asylum, borders and immigration – Edition 2020, Publications Office of the European Union, Luxembourg, 2020, pp. 105–107 and the case-law cited therein.

[14] Judgment of the Grand Chamber of the ECtHR of 23 February 2012, Hirsi Jamaa and Others v Italy, No 27765/09; judgment of the Grand Chamber of the ECtHR of 21 January 2011, M.S.S. v Belgium and Greece, No 30696/09; Information Note on the ECtHR's case-law 16 of 7 March 2000, T.I. v the United Kingdom, No 43844/98.

[15] Judgment of the Court of Justice of 14 May 2020, Országos Idegenrendeszeti Főigazgatóság Dél-alföldi Regionális Igazgatóság, C-924/19 PPU and C-925/19 PPU, ECLI:EU:C:2020:367, paragraph 115.

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[17] FRA, Returning Unaccompanied Children: Fundamental rights considerations, Publications Office of the European Union, Luxembourg, 2019.

[18] See, for example, judgment of the Court of Justice of 11 June 2015, Zh. and O., C-554/13, ECLI:EU:C:2015:377,

paragraph 47; judgment of the Court of Justice of 5 June 2014, Mahdi, C-146/14 PPU, ECLI:EU:C:2014:1320, paragraph 38.

[19] FRA, The recast return directive and its fundamental rights implications – Opinion of the European Union Agency for Fundamental Rights, Publications Office of the European Union, Luxembourg, 2019, pp. 23–24.

[20] See judgment of the Court of Justice of 30 November 2009, Kadzoev, C-357/09 PPU, ECLI:EU:C:2009:741, paragraphs 64–67; judgment of the Fifth Section of the ECtHR of 8 October 2009, Mikolenko v Estonia, No 10664/05, paragraph 68; judgment of the Fourth Section of the ECtHR of 27 July 2010, Louled Massoud v Malta, No 24340/08, paragraph 69.

[21] Judgment of the Court of Justice of 30 September 2020, CPAS Liège, C-233/19, ECLI:EU:C:2020:757, paragraph 45.

[22] Judgment of the Second Section of the ECtHR of 26 April 2007, Gebremedhin [Gaberamadhien] v France, No 25389/05.

[23] Judgment of the Court of Justice of 4 October 2024, Elliniko Symvoulio gia tous Prosfyges and Ypostirixi Prosfygon sto Aigaio, C-134/23, ECLI:EU:C:2024:838, paragraph 54.

[24] Judgment of the Grand Chamber of the ECtHR of 23 February 2012, Hirsi Jamaa and Others v ItalyHirsi Jamaa and Others v Italy, No 27765/09, paragraphs 128–129.

[25] Judgment of the General Court of 10 December 2015, Front Polisario v Council, T-512/12, ECLI:EU:T:2015:953; judgment of the Court of Justice of 7 March 2017, X and X, C-638/16 PPU, ECLI:EU:C:2017:173, more specifically the Opinion of Advocate General Mengozzi delivered on 7 February 2017, ECLI:EU:C:2017:93, paragraphs 89 and 92. See also Kassoti, E. and Wessel, R. A. (eds), The EU's Duty to Respect Human Rights Abroad – Extraterritorial applicability of the EU Charter and due diligence considerations, Centre for the Law of EU External Relations, The Hague, 2020.

[26] See also FRA, How the Eurosur Regulation Affects Fundamental Rights, Publications Office of the European Union, Luxembourg, 2018.

[27] Regulation (EU) 2024/1351 likewise refers to the concept of 'European integrated border management' (Article 4(b)) as an internal component of the comprehensive approach to asylum and migration management, making it part of the EU policy-cycle planning in the area of migration and asylum.

[28] See judgment of the Court of Justice of 6 December 2011, Achughbabian, C-329/11, ECLI:EU:C:2011:807, paragraph 49; judgment of the Court of Justice of 1 October 2015, Celaj, C-290/14, ECLI:EU:C:2015:640, paragraph 32; judgment of the Court of Justice of 17 September 2020, JZ, C-806/18, ECLI:EU:C:2020:724, paragraph 41; and judgment of the Court of Justice of 24 February 2021, M and Others, C-673/19, ECLI:EU:C:2021:127, paragraph 47.

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[33] UN Human Rights Committee, 'Views adopted by the committee under Article 5(4) of the Optional Protocol, concerning communication No 2749/2016', CCPR/C/142/D/2749/2016, United Nations, 31 October 2024; and UN Human Rights Committee, 'Views adopted by the committee under the Option Protocol, concerning communication No 3663/2019', CCPR/C/142/D/3663/2019, United Nations, 25 October 2024.

[34] UN Human Rights Committee, 'General comment No 31 [80] – The nature of the general legal obligation imposed on States Parties to the Covenant', CCPR/C/21/Rev.1/Add. 13, United Nations, 26 May 2004, paragraphs 10 and 12.

[35] Decision of the Grand Chamber of the ECtHR of 12 December 2001, Banković and Others v Belgium and Others, No 52207/99, paragraph 61; judgment of the Grand Chamber of the ECtHR of 8 July 2004, Ilaşcu and Others v Moldova and Russia, No 48787/99, paragraphs 312–314; judgment of the Grand Chamber of the ECtHR of 7 July 2011, Al-Skeini and Others v the United Kingdom, No 52207/99, paragraph 131.

[36] Decision of the Grand Chamber of the ECtHR of 12 December 2001, Banković and Others v Belgium and Others, No 52207/99, paragraphs 68–73. For a comprehensive treatise on the matter, see Milanovic, M., Extraterritorial Application of Human Rights Treaties: Law, principles, and policy, Oxford University Press, Oxford, 2011.

[37] FRA, Scope of the principle of non-refoulement in contemporary border management: Evolving areas of law, Publications Office of the European Union, Luxembourg, 2016, pp. 18–19.

[38] See the relevant legal instruments in footnote 11.

[39] Judgment of the Court of Justice of 19 June 2018, Gnandi, C-181/16, ECLI:EU:C:2018:465, paragraph 64.

[40] Judgment of the Court of Justice of 17 October 2024, Ararat, C-156/23, ECLI:EU:C:2024:892, paragraph 38.

[41] Judgment of the Court of Justice of 30 September 2020, CPAS Liège, C-233/19, ECLI:EU:C:2020:757, paragraph 45; judgment of the Court of Justice of 17 October 2024, Ararat, C-156/23, ECLI:EU:C:2024:892, paragraph 46.

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[46] For an overview of the extensive case-law on the matter, see ECtHR, 'Guide on the case-law of the European Convention on Human Rights – Immigration', Council of Europe and ECtHR, 2024, updated on 31 August 2024.

[47] Regulation (EU) 2021/1147 of the European Parliament and of the Council of 7 July 2021 establishing the Asylum, Migration and Integration Fund, OJ L 251, 15 July 2021, p. 1.

[48] In the case of the Asylum, Migration and Integration Fund, these would also include the safeguards laid down in Regulation (EU) 2021/1060 of the European Parliament and of the Council of 24 June 2021 laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and financial rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy, OJ L 231, 30 June 2021, p. 159.

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[50] See Articles 2 and 4 of the Annex to the Communication from the Commission to the European Parliament and the Council – Model status agreement as referred to in Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624, COM(2021) 829 final of 21 December 2021.

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[52] See Court of Justice, Opinion 1/17 of the Court (Full Court) of 30 April 2019, ECLI:EU:C:2019:341, paragraph 129.

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