

Establishing national independent mechanisms to monitor fundamental rights compliance at EU external borders

Fundamental rights monitoring at EU external borders should be systematically and regularly carried out for a range of border-management activities. These include border surveillance, apprehensions at land, sea and air borders, and the operation of referral mechanisms, including in the event of mass arrivals.

The monitoring should examine how these activities are carried out. It should look at, for example, whether:

- people at the border are being treated with dignity;
- particular attention is being paid to vulnerable people;
- living conditions in initial reception facilities and immigration detention centres are adequate;
- people have access to effective judicial remedies.

It should also look at the fundamental rights implications of implementing contingency plans in the event of a large number of arrivals at the border.

The European Commission **proposed a screening regulation** on 23 September 2020. This proposal includes an obligation for Member States to establish an independent monitoring mechanism. On 25 May 2021, the Commission asked the European Union Agency for Fundamental Rights (FRA) to prepare general guidance in the light of Article 7 (2) of the proposed screening regulation. That article refers to assistance that FRA should provide to Member States with setting up such national monitoring systems (see the following box).

This general guidance provides assistance to EU Member States in setting up national independent mechanisms to monitor fundamental rights compliance at EU external borders, in line with the proposed screening regulation of 23 September 2020 by the European Commission. The EU Agency for Fundamental Rights prepared this guidance at the request of the Commission.

Proposed screening regulation, Article 7

Monitoring of fundamental rights

[...]

2. Each Member State shall establish an independent monitoring mechanism

- to ensure compliance with EU and international law, including the Charter of Fundamental Rights, during the screening;
- where applicable, to ensure compliance with national rules on detention of the person concerned, in particular concerning the grounds and the duration of the detention;
- to ensure that allegations of non-respect for fundamental rights in relation to the screening, including in relation to access to the asylum procedure and noncompliance with the principle of non-*refoulement*, are dealt with effectively and without undue delay.

Member States shall put in place adequate safeguards to guarantee the independence of the mechanism.

The Fundamental Rights Agency shall issue general guidance for Member States on the setting up of such mechanism and its independent functioning. Furthermore, Member States may request the Fundamental Rights Agency to support them in developing their national monitoring mechanism, including the safeguards for independence of such mechanisms, as well as the monitoring methodology and appropriate training schemes.

Member States may invite relevant national, international and non-governmental organisations and bodies to participate in the monitoring.




ELEMENTS FOR EFFECTIVE AND INDEPENDENT NATIONAL BORDER-MONITORING MECHANISMS AND THEIR FUNCTIONING


The following suggested elements provide guidance for EU Member States when discussing parameters and safeguards for establishing an independent national border-monitoring mechanism. They are grouped into eight building blocks for effective mechanisms. These non-binding recommendations cover a wider scope of border management monitoring than the national monitoring mechanism set out under the **proposed screening regulation** does. They also include monitoring under the scenario of mass arrivals. Annex I of this document sets out the fundamental rights safeguards that apply at borders, and Annex II lists material to assist in the proper application of these standards.

1

INDEPENDENCE AND OPERATIONAL AUTONOMY


The full independence of the national entity monitoring fundamental rights at borders should be guaranteed in law to ensure that the mechanism can be free of any undue external influence.


National border-monitoring mechanisms should be free of any institutional affiliation with the authorities responsible for border and migration management.


The staff of national border-monitoring mechanisms should be recruited through transparent procedures such as those used for the recruitment of public servants or staff of statutory independent state authorities. There should be particular emphasis on avoiding conflicts of interest.



The mechanism should have operational autonomy and the authority to take action on its own initiative, including during emergency situations.



The mechanism should establish its own working procedures and methods within the scope of its mandate.



The mechanism should ensure the safety of its staff while carrying out their duties. This includes introducing guarantees in national law that protect staff from legal liability for professional activities carried out in good faith within the scope of the mechanism's mandate.



The operation of the mechanism should be periodically evaluated as regards its efficiency, effectiveness and independence based on objective indicators. Those designing this process can seek inspiration from the **periodical accreditation procedure** that national human rights institutions use to assess their independence and effectiveness.



Member States can draw inspiration from the following guidance when considering the safeguards of independence and operational autonomy of their national monitoring mechanisms: the **United Nations (UN) Paris Principles** for national human rights institutions; the Council of Europe Committee of Ministers **Recommendation CM/Rec(2021)1**, with respect to aspects of autonomy, composition, multidisciplinary nature and adequate human and financial resources; and the **guidelines on national preventive mechanisms**, which the **UN Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment** developed as a reference document for the independence and operational autonomy of national monitoring mechanisms.

— Sources: UN, **Principles relating to the status of national institutions (the Paris Principles)**, adopted by UN General Assembly Resolution 48/134, 20 December 1993; FRA, **Strong and effective national human rights institutions – Challenges, promising practices and opportunities**, September 2020; Office of the United Nations High Commissioner for Human Rights (OHCHR) and United Nations High Commissioner for Refugees (UNHCR), **Joint consultation on independent national monitoring mechanisms proposed in the EU Pact on Migration and Asylum**, 23 February 2021; European Network of National Human Rights Institutions (ENNHRI), **ENNHRI's opinion on independent human rights monitoring mechanisms at borders under the EU Pact on Migration and Asylum**, March 2021; Council of Europe, Committee of Ministers, **Recommendation CM/Rec(2021)1 of the Committee of Ministers to Member States on the development and strengthening of effective, pluralist and independent national human rights institutions**, 31 March 2021; European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, **30th general report of the CPT**, May 2021, paragraphs 20 and 21; Organization for Security and Co-operation in Europe (OSCE), Office for Democratic Institutions and Human Rights, **Border police monitoring in the OSCE region: A discussion of the need and basis for human rights monitoring of border police practices**, 5 May 2021, section 6; European Parliament, **Resolution on the annual report on the functioning of the Schengen Area**, 2019/2196(INI), 8 July 2021, point 18; UNHCR Greece, OHCHR Europe Regional Office and ENNHRI, **Ten points to guide the establishment of an independent and effective national border monitoring mechanism in Greece**, 9 September 2021.

2

THEMATIC COVERAGE OF THE MANDATE



The mechanism should have a broad thematic mandate: to monitor the actual implementation of fundamental rights safeguards – including dignified living conditions, in terms of the provision of food, clothing, temporary shelter and healthcare – during border checks and border surveillance within the meaning of the **Schengen Borders Code** and at initial registration of new arrivals at or in proximity to EU external borders.



The mechanism should have unimpeded access to observe all border operations at any time. It should be able to access remote border surveillance, monitor apprehensions and inspect all designated detention areas.



State authorities should facilitate the operation of the mechanism without any undue geographical or procedural limitations.

— Sources: UN, **Principles relating to the status of national institutions (the Paris Principles)**, adopted by UN General Assembly Resolution 48/134, 20 December 1993; European Council on Refugees and Exiles et al., **Joint statement: Turning rhetoric into reality: New monitoring mechanism at European borders should ensure fundamental rights and accountability**, 10 November 2020; OHCHR and UNHCR, **Joint consultation on independent national monitoring mechanisms proposed in the EU Pact on Migration and Asylum**, 23 February 2021; ENNHRI, **ENNHRI’s opinion on independent human rights monitoring mechanisms at borders under the EU Pact on Migration and Asylum**, March 2021; OSCE, Office for Democratic Institutions and Human Rights, **Border police monitoring in the OSCE region: A discussion of the need and basis for human rights monitoring of border police practices**, 5 May 2021, section 6; UNHCR Greece, OHCHR Europe Regional Office and ENNHRI, **Ten points to guide the establishment of an independent and effective national border monitoring mechanism in Greece**, 9 September 2021.

3

POWERS OF THE MONITORING MECHANISM



The monitoring mechanism should have the necessary configuration and level of power to conduct periodic and ad hoc, and announced and unannounced, visits – based on fundamental rights risk assessment.



The mechanism should have unimpeded access, at any time, even in situations of emergency and mass influx, to all areas where border management actions take place at air, land and sea borders and to all places of initial reception and detention of third-country nationals at or near borders.



The mechanism should have the right and necessary power to access any documents, registers and records, including files, videos and electronic records, of relevance to its mandate.



The mechanism should have the right to observe border surveillance patrolling and apprehensions (‘shadow patrolling’) with due precautions for safety and security of all the persons involved.



The mechanism should be entitled to communicate directly with investigative authorities, both internal disciplinary bodies and prosecutors, if malpractices are uncovered during monitoring.



The mechanism should have the right to record (photo, video and/or sound recording) its activities in any place and at any time, with due precaution for privacy, safety and security.



The mechanism should have the right to hear from all people concerned when monitoring complaints procedures concerning fundamental rights violations. This includes witnesses and alleged victims, privately and respecting the confidentiality of the information received and of the sources consulted.

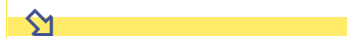


The monitors involved in the mechanism need to comply with the national legislation of the Member State where they exercise their tasks.

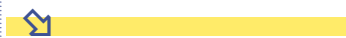
— Sources: *European Council on Refugees and Exiles et al., Joint statement: Turning rhetoric into reality: New monitoring mechanism at European borders should ensure fundamental rights and accountability, 10 November 2020; OHCHR and UNHCR, Joint consultation on independent national monitoring mechanisms proposed in the EU Pact on Migration and Asylum, 23 February 2021; ENNHRI, ENNHRI’s opinion on independent human rights monitoring mechanisms at borders under the EU Pact on Migration and Asylum, March 2021; European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 30th general report of the CPT, May 2021, paragraph 21; OSCE, Office for Democratic Institutions and Human Rights, Border police monitoring in the OSCE region: A discussion of the need and basis for human rights monitoring of border police practices, 5 May 2021, section 6; UNHCR Greece, OHCHR Europe Regional Office and ENNHRI, Ten points to guide the establishment of an independent and effective national border monitoring mechanism in Greece, 9 September 2021.*

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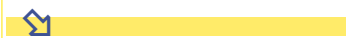
EXPERTISE OF THE MONITORING MECHANISM



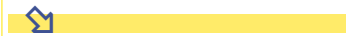
The mechanism should be appropriately staffed for its mission. Staff with monitoring tasks at borders should have relevant knowledge of and experience in human and fundamental rights standards as laid down in international, EU and national law and in relevant case law. They should also have theoretical knowledge of and practical experience in fundamental rights monitoring, with sound knowledge of monitoring principles, procedures and techniques. Moreover, they should have solid knowledge in the fields of asylum, border management and return, including the special needs of vulnerable people. They should also have practical experience in human rights monitoring, in assessing the proportionality of use of force and in working with law enforcement actors. This knowledge and experience are important additional assets facilitating the effective functioning of monitoring activities, coupled with the relevant level of security clearance for monitors.



The mechanism should use a multidisciplinary approach by including, as much as possible, lawyers, health professionals, forensic experts, child protection specialists and interpreters/cultural mediators in monitoring teams. These teams should be diverse in gender and background. Health professionals should have experience in evaluating physical or psychological injuries and signs of ill-treatment.



The mechanism should provide regular on-the-job training for the staff.



The mechanism should closely cooperate with other human rights-monitoring mechanisms, non-governmental organisations and civil society institutions active in the field of fundamental rights, and academic and other qualified experts, to exchange information and pool knowledge, without jeopardising the mechanism's independence.

— Sources: ENNHRI, **ENNHRI's opinion on independent human rights monitoring mechanisms at borders under the EU Pact on Migration and Asylum**, March 2021; European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, **30th general report of the CPT**, May 2021, paragraphs 20–21; UNHCR Greece, OHCHR Europe Regional Office and ENNHRI, **Ten points to guide the establishment of an independent and effective national border monitoring mechanism in Greece**, 9 September 2021.



5

RESOURCES AND FUNDING



The funding of the monitoring mechanism should comply with the principle of independence. This can be achieved by modelling funding on the funding of other independent statutory bodies, such as ombudsman institutions, equality bodies and human rights institutions.



The funding of the mechanism should be sufficient for its monitoring tasks, the employment of suitably qualified staff and the acquisition of appropriate equipment, in addition to administrative support, regular training activities, etc.



The mechanism should be allowed to access EU funds to finance its activities. Such funds include the **Instrument for Financial Support for Border Management and Visa Policy**, the **Asylum, Migration and Integration Fund**, and its **emergency assistance grant scheme**, for which the European Commission Directorate-General for Migration and Home Affairs is responsible.

— Sources: UN, **Principles relating to the status of national institutions (the Paris Principles)**, adopted by UN General Assembly Resolution 48/134, 20 December 1993; FRA, **Strong and effective national human rights institutions – Challenges, promising practices and opportunities**, September 2020; European Council on Refugees and Exiles et al., **Joint statement: Turning rhetoric into reality: New monitoring mechanism at European borders should ensure fundamental rights and accountability**, 10 November 2020; OHCHR and UNHCR, **Joint consultation on independent national monitoring mechanisms proposed in the EU Pact on Migration and Asylum**, 23 February 2021; ENNHRI, **ENNHRI’s opinion on independent human rights monitoring mechanisms at borders under the EU Pact on Migration and Asylum**, March 2021; **Regulation (EU) 2021/1148** of the European Parliament and of the Council of 7 July 2021 establishing, as part of the Integrated Border Management Fund, the Instrument for Financial Support for Border Management and Visa Policy, PE/57/2021/INIT, OJ L 251, 15.7.2021, pp. 48–93; **Regulation (EU) 2021/1147** of the European Parliament and of the Council of 7 July 2021 establishing the Asylum, Migration and Integration Fund, PE/56/2021/INIT, OJ L 251, 15.7.2021, pp. 1–47; Council of Europe, Committee of Ministers, **Recommendation CM/Rec(2021)1** of the Committee of Ministers to Member States on the development and strengthening of effective, pluralist and independent national human rights institutions, 31 March 2021; OSCE, Office for Democratic Institutions and Human Rights, **Border police monitoring in the OSCE region: A discussion of the need and basis for human rights monitoring of border police practices**, 5 May 2021, section 6; European Parliament, **Resolution on the annual report on the functioning of the Schengen Area, 2019/2196(INI)**, 8 July 2021, point 18; UNHCR Greece, OHCHR Europe Regional Office and ENNHRI, **Ten points to guide the establishment of an independent and effective national border monitoring mechanism in Greece**, 9 September 2021.

6

REPORTING, TRANSPARENCY AND ACCOUNTABILITY



The mechanism should publicly present its findings and recommendations to the competent state authorities and the national parliament.



The mechanism should report on remedial actions that the competent state authorities take in response to its recommendations.



The mechanism should provide an annual public report on its work.

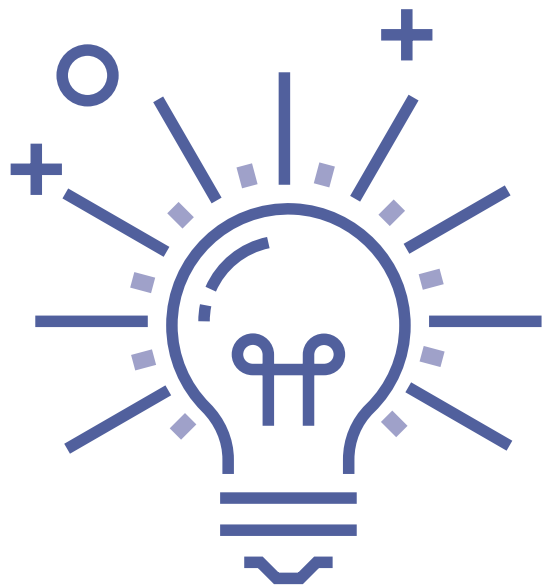


The core activities of the mechanism should be regularly evaluated, based on forecasts (ex ante) and actual results (ex post).



The overall performance of the mechanism should be evaluated externally and independently against its objectives. This evaluation should be carried out multiannually in accordance with professionally recognised standards, with a view to increasing transparency and contributing to the review of the mechanism's independence, as well as informing decisions on funding.

— Sources: OHCHR and UNHCR, **Joint consultation on independent national monitoring mechanisms proposed in the EU Pact on Migration and Asylum**, 23 February 2021; ENNHRI, **ENNHRI's opinion on independent human rights monitoring mechanisms at borders under the EU Pact on Migration and Asylum**, March 2021; OSCE, *Office for Democratic Institutions and Human Rights*, **Border police monitoring in the OSCE region: A discussion of the need and basis for human rights monitoring of border police practices**, 5 May 2021, section 6; UNHCR Greece, *OHCHR Europe Regional Office and ENNHRI*, **Ten points to guide the establishment of an independent and effective national border monitoring mechanism in Greece**, 9 September 2021.



7

SYNERGIES WITH EXISTING MONITORING MECHANISMS



The mechanism should take into account, in the programming of its work, information from third parties, including statutory national human rights bodies, non-governmental organisations, EU entities and international organisations.



The mechanism should ensure coherence and complementarity, in addition to information sharing, with existing national, regional and international human rights-monitoring bodies, to maximise synergies and reinforce fundamental rights protection.



The mechanism should establish and maintain cooperation schemes and working relationships with national, regional and international bodies in charge of the promotion and protection of human and fundamental rights, particularly **national human rights institutions and ombudsman institutions**.



The tasks and activities of the mechanism should be designed to build on existing monitoring mandates at national (e.g. national human rights and ombuds institutions, national preventive mechanisms and forced return monitoring systems set up under the **Return Directive**), regional (e.g. Council of Europe) and international (e.g. UN) levels.



The mechanism should communicate its findings to the **Schengen evaluation and monitoring mechanism** and the vulnerability assessments carried out under **Regulation (EU) 2019/1896**, and to the national monitoring committees in charge of ensuring the conditionality requirements for all relevant EU funds, in particular the EU migration and border management funds.



The tasks and activities of the mechanism should complement the activities of the Fundamental Rights Officer of Frontex, the European Border and Coast Guard Agency, under **Regulation (EU) 2019/1896**, including the use of each other's findings as sources of information. To achieve this, the national monitoring mechanism should coordinate its monitoring activities with Frontex operational plans and exchange information to maximise synergies.

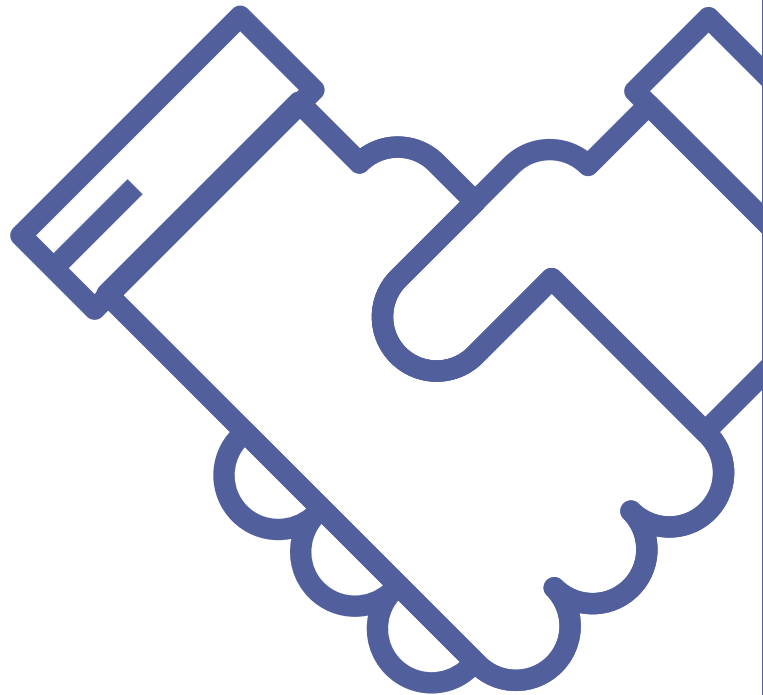
— Sources: Institut de Droit International, **Mass migrations – Final resolution**, 9 September 2017, Article 20 ('Coordination and cooperation'); OHCHR and UNHCR, **Joint consultation on independent national monitoring mechanisms proposed in the EU Pact on Migration and Asylum**, 23 February 2021; ENNHRI, **ENNHRI's opinion on independent human rights monitoring mechanisms at borders under the EU Pact on Migration and Asylum**, March 2021; Council of Europe, Committee of Ministers, **Recommendation CM/Rec(2021)1 of the Committee of Ministers to Member States on the development and strengthening of effective, pluralist and independent national human rights institutions**, 31 March 2021; OSCE, Office for Democratic Institutions and Human Rights, **Border police monitoring in the OSCE region: A discussion of the need and basis for human rights monitoring of border police practices**, 5 May 2021, section 6; Council Regulation (EU) 2022/922 of 9 June 2022 on the establishment and operation of an evaluation and monitoring mechanism to verify the application of the Schengen acquis, and repealing Regulation (EU) No 1053/2013, Article 11; European Parliament, **Resolution on the annual report on the functioning of the Schengen Area**, 2019/2196(INI), 8 July 2021, point 18; UNHCR Greece, OHCHR Europe Regional Office and ENNHRI, **Ten points to guide the establishment of an independent and effective national border monitoring mechanism in Greece**, 9 September 2021.

8

COOPERATION WITH NATIONAL BORDER AND MIGRATION AUTHORITIES

Legislation establishing the national monitoring mechanism should include reference to the duty of national border and migration management authorities to cooperate, where appropriate, with the mechanism, including through regular exchange of information, as Article 3 (1) (e) of **Regulation (EU) 2019/1896** stipulates.

National legislation should underline that national bodies in charge of border and migration management have a duty to cooperate with and respect the mandate of the monitoring mechanism and that they should stay informed of any guidance that the monitoring body issues, as part of a constructive and cordial working relationship.



— Sources: Institut de Droit International, **Mass migrations – Final resolution**, 9 September 2017, Article 20 ('Coordination and cooperation'); FRA, **Border controls and fundamental rights at external land borders – Practical guidance**, 15 July 2020, point 9; OHCHR and UNHCR, **Joint consultation on independent national monitoring mechanisms proposed in the EU Pact on Migration and Asylum**, 23 February 2021; ENNHRI, **ENNHRI's opinion on independent human rights monitoring mechanisms at borders under the EU Pact on Migration and Asylum**, March 2021; UNHCR Greece, **OHCHR Europe Regional Office and ENNHRI, Ten points to guide the establishment of an independent and effective national border monitoring mechanism in Greece**, 9 September 2021.



POLICY BACKGROUND AND OBJECTIVES

The following suggested elements provide guidance for EU Member States when discussing parameters and safeguards for establishing an independent national border-monitoring mechanism. They are grouped into eight building blocks for effective mechanisms. These non-binding recommendations cover a wider scope of border management monitoring than the national monitoring mechanism set out under the **proposed screening regulation** does. They also include monitoring under the scenario of mass arrivals. Annex I of this document sets out the fundamental rights safeguards that apply at borders, and Annex II lists material to assist in the proper application of these standards.

International, regional and national bodies regularly monitor compliance with human rights. For example, the International Committee of the Red Cross and the United Nations High Commissioner for Refugees (UNHCR) have specific protection mandates: the International Committee of the Red Cross in the context of armed conflicts and the UNHCR for refugee protection under **the 1951 Geneva convention on refugees and its 1967 protocol**. In addition, the Office of the High Commissioner for Human Rights (OHCHR) has a strong human rights-monitoring role, notably through its field presence. The special procedures of the United Nations Human Rights Council play a similar role.

The **2002 Optional Protocol to the Convention against torture and other cruel, inhuman or degrading treatment or punishment (OPCAT)** and the **1987 European Convention for the prevention of torture and inhuman or degrading treatment or punishment** both established monitoring bodies, providing them with unrestricted access rights to people, places and relevant documents. The following universal and regional bodies carry out regular monitoring visits to places of deprivation of liberty, including at borders: the UN Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT), the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) and the National Preventive Mechanisms (NPMs) that States Parties created under OPCAT.

The European Commission encourages border-monitoring mechanisms to be set up under national law, despite there being no obligation under EU law as of yet. The European Commission asked FRA to prepare this guidance to help those Member States considering establishing such mechanisms at national level, even before, and independently of, the adoption of the screening regulation. Border monitoring is even more timely in the context of mass arrivals of people fleeing the war in Ukraine.

An effective and independent fundamental rights border-monitoring system is preventative, as it reduces the risk of fundamental rights violations. It also enhances the protection of victims of fundamental rights violations, by strengthening the application of fundamental rights safeguards already in place and providing expert advice when needed. At the same time, it can support 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.

An independent national border-monitoring mechanism with a clear legal basis in domestic law is the most effective option. Moreover, such a mechanism can support the work of relevant international and EU mechanisms by enabling them to take into consideration the specificities of the national situation and to build on the work of other national human rights-monitoring bodies.

Monitoring compliance with fundamental rights is particularly important for state activities in places where the public has limited or no access, such as EU land and sea borders. Over recent years, border control tools, capacity, resources and infrastructure (including physical barriers) at EU external borders have been significantly enhanced to address ever more complex challenges. However, some of these enhancements have given rise to fundamental rights challenges. This calls for more effective fundamental rights monitoring through reinforced mechanisms that have the capacity to monitor respect for the following fundamental rights at external borders:

- the right to life (Article 1 of the Charter of Fundamental Rights of the EU (hereinafter: ‘the Charter’));
- the principle of non-*refoulement* (Article 19 (2) of the Charter);
- the prohibition of collective expulsion (Article 19 (1) of the Charter);
- the prohibition of ill-treatment (Article 4 of the Charter), which requires the provision of adequate living conditions and access to healthcare;
- access to an effective judicial remedy (Article 47 of the Charter).

Effective monitoring mechanisms can contribute to an environment at EU external borders where people can effectively exercise their fundamental rights and access asylum procedures, other forms of protection (e.g. temporary protection), judicial remedies and complaints mechanisms. Such mechanisms can also effectively contribute to answering questions of accountability in relation to actions of national border management authorities and other authorities (e.g. in the event of operationalising contingency plans as a result of mass arrivals).

The recommendations of national monitoring mechanisms to address shortcomings in relevant state activities and potential structural deficiencies should be followed up with regular, for example annual, fundamental rights impact assessments of border management activities. This has the potential to improve such activities over time.

ANNEX I

APPLICABLE FUNDAMENTAL RIGHTS FRAMEWORK AT EU EXTERNAL BORDERS

CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

The **Charter of Fundamental Rights of the European Union**, which has the same legal value as the EU founding treaties, is the core instrument under primary EU law for fundamental rights monitoring at borders. The Charter applies to all EU institutions, agencies and bodies and to EU Member States when they implement EU law (Article 51 (1) of the Charter). Its applicability to Member States is relevant to border management, since Member States are responsible for carrying out external border controls (with the support of Frontex when requested). Member States, in performing this function, act in **the common interest** of all Member States and the Union. The FRA report ***Applying the Charter of Fundamental Rights of the European Union in law and policymaking at national level – Guidance*** (October 2018) provides further guidance on the application of the Charter.

The Charter spells out rights and principles that are relevant to border control. These include, in particular, human dignity (Article 1), the right to life (Article 2), the right to integrity of the person (Article 3), the prohibition of torture and inhuman or degrading treatment or punishment (Article 4), the prohibition of trafficking in human beings (Article 5), the right to liberty and security (Article 6), the right to private and family life (Article 7), the protection of personal data (Article 8), the right to property (Article 17), the right to asylum and protection in the event of removal, expulsion or extradition (Articles 18 and 19), non-discrimination (Article 21), the rights of the child (Article 24), the right to good administration (Article 41 – it is binding on Member States as a general principle of EU law) and the right to an effective judicial remedy (Article 47). Some of these rights are non-derogable, even in emergency situations, such as the right to life, the prohibition of torture and other forms of ill-treatment, and the prohibition of *refoulement*.

EUROPEAN CONVENTION ON HUMAN RIGHTS

Charter rights that are included in the **European Convention on Human Rights** (ECHR) must be interpreted in the same way as the equivalent rights in the ECHR, according to Article 52 (3) of the Charter. This means that the case law of the European Court of Human Rights (ECtHR) must be duly taken into account when determining the meaning and content of rights set forth in both the Charter and the ECHR. This is the case for many of the Charter rights mentioned above.

INTERNATIONAL LEGAL INSTRUMENTS

Member States must continue to comply with the rights protected by the ECHR, and other **regional and international human rights law** and **refugee law instruments** to which they are party, in areas that EU law does not cover. For an overview of these instruments – both universal and regional – and their ratification by EU Member States, see the FRA, ECtHR and Council of Europe **Handbook on European law relating to asylum, borders and immigration** (December 2020), Annexes 2–4.

Different (not legally binding) recommendations, tools and standards have been developed within the UN and the Council of Europe frameworks, based on legally binding instruments. Four of them may be particularly useful for the monitoring work at borders:

- the **UN basic principles on the use of force and firearms by law enforcement officials** (1990),
- OHCHR, **Recommended principles and guidelines on human rights at international borders** (2014),
- OHCHR, **Guidance on less-lethal weapons in law enforcement** (2020),
- the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment **standards in respect of immigration detention**.

EU LAW RELATING TO BORDER MANAGEMENT

The general framework for EU action in the field of border management is set out in Title V (Area of Freedom, Security and Justice) of the **Treaty on the Functioning of the European Union**. More specifically, Chapter 2 of Title V of the Treaty sets out the framework for EU policies on borders, asylum and immigration. The main secondary EU law instrument applicable to external borders is the Schengen Borders Code (**Regulation (EU) 2016/399**). It regulates border controls at the borders of the Schengen Area and at other EU external borders. The code does not apply to the land border between Ireland and the United Kingdom, which is subject to the arrangements of the **Common Travel Area** between the two countries (this, in principle, remains **unaffected** by the United Kingdom's withdrawal from the EU).

The Schengen Borders Code and other EU law instruments regulating border controls contain fundamental rights protection clauses. These clauses underline the need to comply with the fundamental rights enshrined in the Charter that are frequently at stake in border management.

Table 1 shows how relevant EU law applies to border controls. Leaving aside the land border between Ireland and the United Kingdom, most EU law provisions apply equally to EU external borders and Schengen Area borders. Those monitoring fundamental rights at external borders should have good knowledge of the relevant instruments of EU law that may have an impact on their work, and know whether they apply to the given area or location.

Table 1: EU law instruments relevant to controls at external borders

| EU law instrument | Subject matter (selected) | Not applicable to (Member States) |
|-------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------|
| Schengen Borders Code (EU) 2016/399 | Regulates conduct of border checks and border surveillance (border control) | Cyprus (border with British Overseas Territory of the Sovereign Base Areas of Akrotiri and Dhekelia) and Ireland |
| European Border and Coast Guard Regulation (EU) 2019/1896 | Establishes a European Border and Coast Guard, including Frontex, to ensure European integrated border management, and regulates the framework for information exchange between Member States, and between Member States and Frontex | Ireland |
| Sea Borders Regulation (EU) No 656/2014 | Regulates Frontex-coordinated maritime operations, including rules on disembarkation and provisions on search and rescue | Ireland |
| Convention Implementing the Schengen Agreement , 19 June 1990 | Regulates measures to take to enable free movement (text largely amended by subsequent EU law instruments) | Ireland |
| Asylum Procedures Directive 2013/32/EU | Duty to identify and refer asylum claims (Articles 6 and 8) | Denmark and Ireland |
| Anti-Trafficking Directive 2011/36/EU | Duty to identify suspected victims of trafficking in human beings (Article 11) | Ireland |
| Return Directive 2008/115/EC | Duty to issue a return decision to third-country nationals without permission to stay | Ireland |
| Facilitation Directive 2002/90/EC and related Framework Decision (2002/946/JHA) | Duty to impose sanctions on migrant smugglers | Ireland |
| Eurodac Regulation (EU) No 603/2013 | Duty to process data, including biometric data of asylum applicants and irregular migrants | - |
| Entry/Exit System Regulation (EU) 2017/2226 | As of 2022, requires electronic recording of entry and exit of all third-country nationals coming for short-term stays | Cyprus, Croatia and Ireland Partial use in Bulgaria and Romania (e.g. no processing of biometric data) |
| Schengen Information System Regulations (EU) 2018/1862, (EU) 2018/1861 and (EU) 2018/1860 | The legal instruments require verifying if there are any alerts concerning a third-country national and adding alerts in certain cases (e.g. for entry bans) | Cyprus, Croatia and Ireland Bulgaria and Romania can consult the regulations but do not issue own alerts in the system |
| Visa Information System (EC) No 767/2008 | Requires checking visa-holders upon entry and, if necessary, exit | Cyprus, Croatia and Ireland |

Notes: Text in the ‘subject matter’ column is not comprehensive. It includes selected issues relevant to this guidance. The table does not include information on the applicability of these instruments to French and Dutch overseas territories.

Source: FRA, 2022.

The applicability of the Return Directive (**Directive 2008/115/EC**) at external borders is subject to an exception. The directive regulates the procedure to follow when an EU Member State apprehends a migrant in an irregular situation who does not apply for asylum. Article 2 (2) (a) allows Member States not to apply several of its provisions to people whom competent authorities apprehend or intercept in connection with their irregular border crossing at EU external borders. This opt-out clause cannot be applied at internal borders even if border controls have been reinstated there.¹ Most Member States that have an EU external land border have made use of this opt-out clause, as Table 2 shows. However, they remain bound by certain provisions and safeguards of the directive under Article 4 (4), including the prohibition of *refoulement*.

Table 2: Use of the Return Directive’s opt-out clause in external border cases

| | |
|---------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------|
| EU Member States with external land borders that have made use of the opt-out clause in Article 2 (2) (a) of the Return Directive | Bulgaria, Croatia, Greece, Spain, France, Hungary, Lithuania, Latvia, Poland, Romania and Slovenia |
| EU Member States with external land borders that have not made use of the opt-out clause in Article 2 (2) (a) of the Return Directive | Estonia, Finland and Slovakia |

Source: FRA, 2022 (based on information from FRA’s National Liaison Officers).

Visa, border, asylum and immigration authorities in EU Member States increasingly rely on information technology when making decisions affecting individual people. The EU has set up six large-scale IT systems, excluding Europol databases. These IT systems support the management of migration, asylum and borders, enhancing judicial cooperation among Member States and contributing to strengthening EU internal security. The **EU Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice** (eu-LISA) is responsible for the development and operational management of large-scale EU IT systems. It ensures continuous and uninterrupted exchange of data between the national authorities using these systems.

A reasonable level of knowledge about the relevant EU IT systems and how they support border management is required when monitoring fundamental rights at borders. The use of such databases may have implications for the right to the protection of personal data, the right to respect for private life, the right to asylum, the rights of the child, the right to good administration, the right to an effective judicial remedy, etc. See the FRA, ECtHR and Council of Europe **Handbook on European law relating to asylum, borders and immigration** (December 2020), Chapter 2, for more information on these EU databases and their fundamental rights implications, particularly from the data protection angle.

¹ See Court of Justice of the European Union, C-444/17, *Préfet des Pyrénées-Orientales v. Abdelaziz Arib*, 19 March 2019.

ANNEX II

FRA GUIDANCE AND OTHER MATERIALS ON APPLICABLE EUROPEAN STANDARDS AT BORDERS

FRA, the ECtHR and the Council of Europe published the third edition of the **Handbook on European law relating to asylum, borders and immigration (December 2020)**. The updated handbook examines relevant law in the field of asylum, borders and immigration stemming from both European legal systems: the EU and the Council of Europe (see especially Chapters 1, 2, 7 and 10). It is intended for use by legal practitioners, judges, prosecutors, immigration officials and non-governmental organisations, in EU Member States and Council of Europe member states.



FRA and the Council of Europe summarised **key European law safeguards for migrants, asylum applicants and refugees as they apply at EU external borders (March 2020)** and **European standards on legal remedies, complaints mechanisms and effective investigations at borders (July 2021)**. Note that relevant Council of Europe instruments apply to all borders (not only EU external borders). Both documents are also available in French.



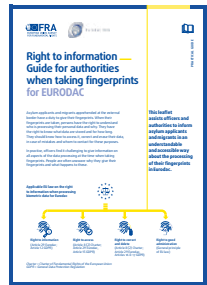
The FRA note **Initial-reception facilities at external borders: Fundamental rights issues to consider** outlines how to help ensure a dignified stay for non-EU nationals who are apprehended or intercepted at EU external borders. It identifies 12 points for protection-sensitive and fundamental rights-compliant planning and design of initial reception facilities at such borders. These are based on FRA's work at external borders, including data collection and research activities. The overall purpose of the note is to help prevent the design and setting up of reception facilities that do not provide dignified conditions for migrants and refugees.



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- 2. The main objectives of the note
- 3. The scope of the note
- 4. The main findings of the note
- 5. The main recommendations of the note
- 6. The main conclusions of the note

FRA and the Eurodac Supervision Coordination Group developed and published a **leaflet to more effectively provide migrants and asylum applicants with information on fingerprinting in Eurodac**. The leaflet helps authorities to comply with their obligation to clearly inform the people concerned why fingerprints are taken and what happens to their biometric data in Eurodac. National data protection authorities translated the leaflet into most official EU languages.



The European Asylum Support Office (now European Union Agency for Asylum) and Frontex developed **practical tools on access to the asylum procedure** to support practitioners in facilitating access to asylum for those in need. The below poster is one example.



Source: European Asylum Support Office and Frontex, 'Access to the asylum procedure', available at 'Practical tools for first-contact officials', 2016.

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