

FRONTEX CONSULTATIVE FORUM ON FUNDAMENTAL RIGHTS

Mr Fabrice Leggeri,
Executive Director, European Border and Coast Guard Agency

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Chair of the Management Board, European Border and Coast Guard Agency

only by email

cc:

Members of the Consultative Forum on Fundamental Rights
Fundamental Rights Office, European Border and Coast Guard Agency

21 May 2019

Dear Mr ██████████

Dear Mr Leggeri,

Recommendations on the fundamental rights implications of the Agency's engagement with third countries

In the exercise of its powers in relation to third countries, Frontex is bound by EU primary and secondary law, which contain safeguards to promote compliance with fundamental rights. Article 54 (1) of the European Border and Coast Guard Regulation¹ (EBCG Regulation) stipulates that the Agency's cooperation with third countries must take place within the framework of the EU's external relations policy, including the protection of fundamental rights. Furthermore, the Agency must comply with Union law also when cooperation with third countries takes place on the territory of those countries. This includes the duty to respect the rights and principles of the EU Charter of Fundamental Rights. Finally, as an Agency of the EU, the actions and omissions of Frontex engage the international responsibility of the European Union under international law.

During 2018, the Consultative Forum commissioned an advice on the fundamental rights implications of the Agency's enhanced cooperation with third countries on matters covered by its mandate. The notes of such advice, which was discussed at the Consultative Forum meeting held on 17 October 2018 and served as a resource for these recommendations, are provided as an Annex.²

¹ Regulation (EU) No. 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard Regulation, OJ L 251, 16.9.2016, pp. 1–76.

² Jorrit Rijpma and Melanie Fink, *Advice on the Fundamental Rights Implications of Frontex' Cooperation with Third Countries*, November 2018.

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In line with its mandate, as enshrined in Article 70 of the EBCG Regulation, the Consultative Forum has adopted the following 14 recommendations on the fundamental rights implications of the Agency's engagement with third countries. The recommendations aim at supporting the Agency in complying with its fundamental rights responsibilities in the context of its activities in or together with third countries. The recommendations are not exhaustive.

1) Carry out an effective fundamental rights impact assessment prior to engaging with a third country

The potential fundamental rights consequences of cooperation with a third country should be assessed beforehand in an effective fundamental rights impact assessment. The assessment should be general before concluding a working arrangement as well as specific before concrete operational activities, such as joint operations, are planned with a third country.

The assessment should feed from a variety of sources, take into account publicly available information and reports, including from civil society and international organisations, and be documented in a transparent manner. It should be conducted by the Agency in close cooperation with its Fundamental Rights Officer and establish whether border management practices in a third country comply with the human rights obligations the Agency is bound to uphold. It should assess the human rights situation in the third country and identify potential risks of directly or indirectly assisting in the commission of human rights violations in relation to the foreseen engagement by the Agency.

Where the assessment of the Agency reveals violations of fundamental rights or international protection obligations, that pertain to the context in which the engagement should occur, and that are of serious nature or are likely to persist, it should not engage in (operational) cooperation until the third country concerned has taken the necessary measures to prevent serious human rights violations in the area of planned cooperation. If specifically requested by the third country, the Agency may engage in activities, which are within its mandate, provided these support the third country in taking the necessary measures to prevent serious human rights violations in the area of planned cooperation.

In any case in which engagement is recommended, measures should be clearly outlined and implemented to avoid exposing the Agency, or persons deployed in the context of its activities, to a direct or indirect contribution in fundamental rights violations. Prior to engagement with a third country, the Agency should ensure that effective accountability mechanisms are put in place to address potential violations that may occur in the context of its foreseen activities.

The fundamental rights impact assessment should approach the respect for fundamental rights from a broader perspective than merely that of strict tort responsibility for fundamental rights violations committed directly. It should take into account possible unintended consequences of broader actions, including financial or logistical support as well as the contribution of technical equipment. The fundamental rights implications of Frontex engagement with third countries should be closely monitored with the need to revisit the assessment in the event of a change in the situation in the concerned countries or on the details of Frontex engagement.

2) Ensure that future Working Arrangements contain a designated fundamental rights clause

Since Working Arrangements form part of the framework within which cooperation with third countries is developed, a designated fundamental rights clause should be included in future working arrangements or when current working arrangements are amended. Such clause

should include provisions on the applicability of the Agency's standards and fundamental rights mechanisms as well as on adherence by third country officers to these when participating in the activities of the Agency.

3) Ensure that the updated Fundamental Rights Strategy of the Agency adequately reflects the enhanced engagement of Frontex with third countries

The Frontex Fundamental Rights Strategy should elaborate on the ways in which the Agency will seek to ensure and promote fundamental rights compliance in its cooperation with third countries. This could be done by incorporating the recommendations made here, in particular as regards fundamental rights impact assessments and monitoring.

4) Enhance the role of the Fundamental Rights Officer and her monitoring capacity

The Fundamental Rights Officer (FRO) should have the same powers when the Agency operates within or outside the EU. The FRO should give her views on whether or not to initiate or continue cooperation with a particular third country and under what conditions. For this purpose, she should be provided with up to date information from the Agency and the Liaison Officers network as well as information from reputable human rights organisations and international organisations. For the same purpose, it is also recommended that the FRO establishes links with the European External Action Service, EASO, FRA and other relevant actors.

The Agency should ensure that independent actors, including child protection and civil society representatives, have full access to Frontex activities in third countries.

The respective operational plans or other relevant documents adopted by the Agency in relation to its engagement with third countries, should clearly envisage the role of the FRO as well as the relevant mitigating measures and monitoring procedures proposed in the initial fundamental rights impact assessment. Details on the concrete applicability of the Agency's fundamental rights and accountability mechanisms (including the complaints mechanism) should also be included. The FRO's office should be provided with sufficient funding, staff and autonomy to adequately fulfil its role, including independent monitoring, also in relation to Frontex' activities in third-countries.

5) Ensure respect for fundamental rights and international protection obligations in the sharing of personal data with third countries

Given that the cooperation with third countries may entail the sharing of personal data, in particular in the field of return, the FRO should work in close cooperation with the Agency's Data Protection Officer. The Agency should follow their recommendations to ensure that no data that could undermine the security or protection of persons is shared with third countries and that data protection equivalency agreements, including with regard to the effectiveness of the remedies in case of breach, are ratified before any exchange of data takes place.

6) Ensure that in all external relations a fundamental rights training component is included

The Agency should continue to offer and promote fundamental rights training to third country officials, as part of technical assistance activities in third countries. The provision of fundamental rights training should also be ensured in the context of joint operational cooperation, including to third country liaison officers and observers.

7) Ensure that the Codes of Conduct apply to all participants in all Frontex activities

The Agency should ensure that its Codes of Conduct apply in full to third-country observers and other third country participants in Frontex activities. To this end, all agreements and guiding documents adopted by the Agency should include a clear provision on their applicability.

8) Define tasks and powers of third-country observers and liaison officers

Even though the tasks of third-country observers are limited, they are described in very general terms. Operational plans should clarify which tasks, powers, and obligations they have and that they are bound by relevant EU and national law of the host Member State as well as responsible to conduct themselves in accordance with the Agency's fundamental rights standards.

9) Ensure that a return monitor can effectively prevent fundamental rights violations

When fundamental rights violations are committed by third country representatives, including escorts, the return monitor should have the power to suspend or call off the operation or at least directly request the Executive Director to explicitly do so. Reporting obligations cannot suffice to ensure effective enforcement of fundamental rights.

10) Enhance the complaints mechanism in relation to cooperation with third countries

It should be clear in which situations persons whose rights may have been violated in the context of the Agency's activities on third-country territory can lodge a complaint to the Agency's complaints mechanism or to the third country equivalent as designated in the respective status agreement.

Respective operational plans or implementing agreements on Frontex activities should envisage the modalities for the transmission of complaints related to violations potentially perpetrated by third country actors in the context of a Frontex activity to the relevant/competent fundamental rights institutions.

The complaints mechanism should also be applicable to the Agency's activities with third countries outside joint operational areas, where they affect individual rights.

There should be a web portal made available to lodge complaints, since it may be practically more difficult to lodge a complaint from a third country.

The Agency should insert, in working arrangements with third countries, clauses to ensure access to effective remedies in the country against human rights violations that have occurred in joint operations.

11) Apply a restrictive definition of “operational personal data”

The Management Board Decision on the processing of personal data will need to be brought in line with Regulation (EU) No. 2018/1725. When aligning the internal rules on the processing of personal data, the Management Board should adopt a restrictive interpretation of “operational personal data”, ensuring that the regime set out in Chapter IX of the Regulation only applies to the processing of personal data which is solely carried out for the purposes of prevention, detection, investigation or prosecution of criminal offences.

12) Improve reporting on cooperation with third countries

The Agency should ensure timely, consistent, transparent, complete, and accurate reporting on cooperation with third countries in line with Article 54(11) of the EBCG Regulation.

Reporting provided under Article 54(11) of the EBCG Regulation should include information on the amount, purpose, and source of funding provided to third countries as well as detailed information on any other potential support measures provided.

13) Create a dedicated page on external relations on Frontex’ website

All activities of the Agency in relation to its cooperation with third countries should be made public on the website. This should include a detailed list of activities per country, the working arrangements, the fundamental rights impact assessments conducted, the relevant Management Board Decisions, status agreements, command and control arrangements, support measures undertaken as well as the amount, purpose, and source of funding provided to third countries.

14) Increase transparency on fundamental rights complaints

The Agency should regularly report on complaints lodged, as well as on their follow-up, and on the outcomes.

In light of the specific fundamental rights challenges that the cooperation with third countries entail, the Consultative Forum would appreciate having the opportunity to present these recommendations and the findings of the underlying study to the Management Board in 2019.

The Consultative Forum looks forward to continue providing its fundamental rights expertise to the Agency on this difficult topic.

Kind regards,

[Redacted]

[Redacted] UNHCR

Chair of the Consultative Forum

[Redacted]

[Redacted] Jesuit Refugee Service

Chair of the Consultative Forum