

ECRE COMMENTS ON THE COMMISSION PROPOSAL FOR A REGULATION ON THE EUROPEAN BORDER AND COAST GUARD (COM(2018) 631 FINAL)

NOVEMBER 2018

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SUMMARY

ECRE submits the following key observations and recommendations to the Commission proposal for a Regulation on the European Border and Coast Guard.

- » Article 2(24): delete the definition of “controlled centres” and the references to the concept throughout the EBCG proposal.
- » Article 41: designate strictly border management related tasks to members of the European Border and Coast Guards standing corps deployed as members of the Migration Management Support Teams, thus ensuring a clear division of tasks with experts deployed by the European Union Asylum Agency within such context.
- » Article 44: insert an obligation for the coordinating officer to communicate his or her views on the fundamental rights compliance of instructions given by the home Member State
- » Article 47: further strengthen the obligation to suspend or terminate operations in case of persistent fundamental rights violations by imposing an obligation to take into account relevant information collected from the complaint mechanism as well as reports from independent international and national human rights organisations and human rights treaty bodies.
- » Article 55: assess the necessity of amending the Schengen Borders Code in light of the compatibility of conferring executive powers on border control management to Agency Statutory staff members.
- » Article 57(4) and 58(3): entrust the Agency with the power to refuse nominated candidates for the European Border and Coast Guard Standing corps in case of non-compliance with the required profiles insufficient language skills, misconduct or infringement of the applicable rules during previous deployments
- » Article 54(2) and 75(4): delete the possibility for the Agency to engage in return operations from the territory of third countries.
- » Article 79(2): limit the possibility for observers from third countries to participate in EBCG activities strictly to training and ensure that their presence shall not endanger the safety of third country nationals affected by the EBCG activity.
- » Article 78: add contributing to a fundamental rights impact assessment of EBCG operations and cooperation with third countries to the tasks of EBCG liaison officers in third countries and make their deployment conditional on the third country’s migration and asylum management’s compliance with human rights standards.
- » Article 97 – 106 -107: Secure the organisational independence of the Consultative Forum and Fundamental Rights Officer and ensure they are entrusted with the administrative support and human resources commensurate to the expansion of the Agency’s staff and operational presence
- » Article 108: further strengthen the complaints mechanism by expanding its scope to omissions and ensure that admissible complaints trigger appropriate preventive measures by the Agency as regards the continued or future involvement in Agency operations of the border guard concerned
- » Article 76 - 87: include the prohibition of any exchange of information which provides a third country with information that could be used to identify persons or groups of persons whose request for access to international protection is under examination, of the fact that such an application has been lodged and the onward transfer of such information to another third country in the provision on information exchange in the context of Eurosur as well as the general rules on processing personal data by the Agency.

INTRODUCTION¹

Only two years after a major expansion of Frontex' competences and its transformation into the European Border and Coast Guard (EBCG),² the Commission proposed on 12 September 2018 yet another revision of the Agency's mandate.³ Instead of amending or recasting the existing Regulation, the Commission proposal repeals it and replaces it in its entirety with a new text. Significant as changes may be, this does not result in a fundamental overhaul of the core functions and tasks of the Agency. As will be discussed below, the proposal rather boosts the tasks and competences already entrusted to the EBCG Agency in 2016, while it expands its budget and human and technical resources to unprecedented levels.

The proposal fits in a series of measures taken and proposed to implement the European Agenda on Migration,⁴ the European Commission's framework for addressing the legal and political challenges the EU is facing in this area, and the June 2018 European Council conclusions.⁵ At their meeting in Brussels, European leaders have explicitly called for a further strengthening of the effective management of external borders through a reinforced EBCG Agency and a more effective return policy. This is translated in a proposed massive increase in the Agency's budget to 12 bn euros and the creation of a standing corps of 10.000 European borders guards by 2020. Since the establishment of Frontex in 2004 with a budget of 5.5 million euros, the EU's Border Agency's resources and mandate have systematically expanded. The current proposal confirms the Agency's status as an institutional Moloch which importance for the EU's border management and broader migration policy can hardly be overstated.

The EBCG proposal is presented together with two other proposals in the area of migration management. The proposal to recast the Return Directive fits in the Commission's ill-fated logic of substantially increasing the return rates through longer detention periods, reduced procedural safeguards and additional tools for Member States to merge asylum and return procedures.⁶ In this regard, the Commission sees a pivotal role for the EBCG Agency in lifting the numbers of migrants effectively removed from EU territory, as it proposes to further bolster its powers and resources to coordinate and initiate return operations and seek the cooperation of third countries to that end. The amended proposal on the European Union Asylum Agency (EU AA)⁷ on the other hand is presented as complementing the provisional agreement already reached between co-legislators in 2017 and as necessary to reinforce cooperation with the EBCG Agency in particular as regards the deployment of migration management support teams at hotspots and controlled centres. The latter concept was launched together with the concept of regional disembarkation platforms in the June 2018 European Council Conclusions. Despite further elaboration in two non papers published by the Commission in July 2018,⁸ both concepts remain ill-defined notions which risk creating more legal ambiguity and fatally undermining the EU's efforts in convincing North African coastal states to get involved in a regional solution to Mediterranean sea crossings, as argued by ECRE elsewhere.⁹ Relevant links between the recast Return Directive and amended EU AA proposals and the EBCG proposal are further analysed below.

The timing of the EBCG proposal – as well as the two other abovementioned proposals – is remarkable from a political and institutional viewpoint. On the one hand, the proposals are presented only eight months before the European elections in May 2019. As it concerns highly controversial legislative proposals, this leaves very little time for the European Parliament and the Council to adopt their respective positions and successfully

1. ECRE thanks Anneliese Baldaccini (Amnesty International) and Massimo Frigo (International Commission of Jurists) for their comments. All errors remain our own.
2. Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2014 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC (hereafter "EBCG Regulation"), OJ 2016 L 251/1.
3. European Commission, Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Council Joint Action n°98/799/JHA, Regulation (EU) n° 1052/2013 of the European Parliament and of the Council and Regulation (EU) n° 2016/1624 of the European Parliament and of the Council (hereafter "EBCG proposal"), COM(2018) 631 final, Brussels, 12 September 2018.
4. European Commission, European Agenda on Migration, COM(2015) 240 final, Brussels, 12 May 2015.
5. Council of the European Union, European Council conclusions, 28 June 2018, Press Release 421/18.
6. European Commission, Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (recast) (hereafter "recast Return Directive proposal"), COM(2018) 634 final, Brussels, 12 September 2018.
7. European Commission, Amended proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010 (hereafter "Amended EU Asylum Agency proposal"), COM(2018) 633 final, Brussels, 12 September 2018.
8. See European Commission, [Non-paper on regional disembarkation arrangements](#) and [Non-paper on "controlled centres" in the EU – interim framework](#), 24 July 2018.
9. ECRE, [Asylum at the European Council 2018: Outsourcing Or Reform?](#), Policy Paper 4, August 2018.

conclude inter-institutional discussions with a view to adoption within this legislature. Whereas the objective of increasing returns and strengthening external border controls, including far beyond the EU's territory, is shared by many governments in Europe today, the Commission proposals raise fundamental questions of State sovereignty, efficiency,¹⁰ data protection and compliance with international human rights law. These issues deserve thorough reflection and a full-fledged democratic debate about the fundamental policy choices implied in these proposals.

On the other hand, these proposals are submitted at a time when the Commission's ambitious reform of EU asylum law, presented in 2016, faces a deadlock in the Council, primarily over the scale and role of solidarity in a revised Dublin system. While officially the European Council may still pursue "a speedy solution to the whole package" and the Council is encouraged to continue discussions, the presentation of ambitious proposals on the Agencies and the Return Directive, indicates a major shift of focus from asylum to border management and return. Given its political and institutional implications and the existential questions it has raised for the EU as a whole, the asylum package no longer seems to be pushed as a key priority. Instead, a major boost of the EBCG Agency's powers and resources and a reduction of procedural safeguards in return processes is now presented as quintessential for the EU's policy on asylum, migration and border management. The Commission's shifting policy priority reflects domestic political developments in a number of countries and coincides with the Austrian Presidency's efforts to promote its externalisation agenda, resulting in a *de facto* de-prioritisation of the CEAS reform.

While ECRE has raised fundamental objections and concerns with respect to the Commission's asylum package, fundamental reform of the Dublin system in particular remains necessary alongside systematic enforcement of Member States' compliance with their obligations under the existing EU asylum legislation. In ECRE's view, the deadlock on solidarity cannot be used as a pretext to leave the existing gaps in the EU's asylum policy and legal framework untouched. Strengthening the EU's external border management may be a legitimate objective but it must go hand in hand with a fundamental debate about the architecture of the EU's protection system. Therefore, the Commission's proposals on the EBCG Agency, EU AA and the Return Directive cannot be seen in isolation from the asylum package. In a letter addressed to the Austrian Presidency, the chair of the LIBE Committee and the rapporteurs on the various asylum files have expressed their great disappointment over the stalemate in the Council on the asylum package, "while border control measures and agreements with third countries on migration management are advanced as foreseen".¹¹

Finally, the expansion of the EBCG Agency's mandate and strengthening of external (and internal) border management is proposed at a time when the number of migrants arriving irregularly over sea or land in the EU has substantially decreased compared to previous years.¹² In this regard the proposal, and in particular its emphasis on boosting the operational capacity of the Agency to unprecedented levels, epitomises a European policy which artificially perpetuates a crisis mode approach contrary to the realities on the ground.

ECRE's comments and recommendations concentrate on key provisions in the Commission proposal which raise concerns from a fundamental rights perspective, with a particular focus to access to international protection as well as return procedures and the role of migration management teams in the hotspots, without aiming to present a comprehensive article-by-article analysis. This paper should be read in combination with ECRE's comments and observations on relevant Commission proposals on the reform of the CEAS, in particular the proposal for an Asylum procedures Regulation¹³ and the Regulation establishing a European Union Asylum Agency (EU AA)¹⁴ as well as its forthcoming comments and recommendations with regard to the Commission proposal recasting the Return Directive.

10. On this issue, see for instance, M. Gkliati, "The next phase of the European Border and Coast Guard: towards operational effectiveness", EU law analysis, 8 October 2018, available at <http://bit.ly/2wwoxmu>.

11. Committee on Civil Liberties, Justice and Home Affairs, Letter 10 October 2018, IPOL-COM-LIBE D(2018)39145.

12. According to the EBCG Agency, whereas migration patterns have shifted, the number of irregular border crossings dropped in the first nine months of 2018 by a third, compared to the same period in 2017. See Frontex, 'Migration flows in September: Total down by a third, Spain sees significant rise, Press Release', 15 October 2018, available at <http://bit.ly/2wwoxmu>.

13. ECRE, *Comments on the Commission Proposal for an Asylum Procedures Regulation COM(2016) 416 final*, November 2016.

14. ECRE, *Comments on the Commission Proposal for a Regulation on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010 COM(2016) 271*, July 2016.

ANALYSIS OF KEY PROVISIONS

I. ACCOUNTABILITY OF THE EBCG AGENCY FOR HUMAN RIGHTS VIOLATIONS

Responsibility for European integrated border management, consisting of no less than 12 components covering all areas of activity and modes of cooperation of the Agency, is shared between the Agency and the national authorities responsible for border management.¹⁵ What this entails concretely in terms of legal responsibility for actions undertaken by or under coordination of the Agency, remains unclear. Throughout the proposal, the Agency's tasks are interchangeably referred to as consisting of "coordination", "support" and "assistance" to Member States without clear definition of such terminology and the exact division of tasks between the Agency and the national authorities this entails. Yet, as mentioned above, a major objective of the Commission proposal is to enhance the Agency's operational capacity in the field by increasing its own staff and opportunities for own equipment acquisition and entrusting Agency staff with executive powers in addition to their traditional role of providing assistance and coordination to joint operations and border management activities.¹⁶ In this regard, the proposal now includes a list of tasks to be carried out by the Agency's statutory staff as team members of the European Border and Coast Guard's standing corps which require executive powers.¹⁷

At the same time, Member States' primary responsibility for the management of their sections of the external border, detention of returnees and issuing of return decisions is explicitly emphasised in Article 3(2) and (3) EBCG proposal. Moreover, Member States are allowed to continue cooperation at an operational level with other Member States and even third countries as long as it is compatible with the tasks of the Agency, suggesting a relatively wide scope for Member States to engage in border management activities beyond the boundaries of the framework set by the EBCG Regulation.

Human rights violations committed by Member States border guards

The lack of clarity in the division of competences between the Agency and Member States inevitably blurs the respective responsibility - of the Agency and Member States under EU law as well as of the EU, through the Agency and Member States under international law - for human rights violations committed during EBCG Agency activities.¹⁸ Whereas home and participating Member States can always be held responsible for human rights violations committed by their border guards before national Courts and eventually before the ECHR; the responsibility of the Agency for such human rights violations is much more difficult to establish, in particular where it has a coordination or supervisory role.¹⁹ And even where its responsibility can be established, as the Agency has no international legal personality, only the EU can be held accountable under international human rights law for such human rights violations. However, as long as the EU has not acceded to the ECHR, its provisions are not binding on the EU as a matter of international human rights law and therefore the EU cannot be held responsible for human rights violations committed by one of its bodies, such as the EBCG Agency, either autonomously or in addition to a Member State.

Under EU law, the EBCG Agency has legal responsibility²⁰ and is responsible for human rights violations committed by its own staff (see discussion below). It is also responsible for human rights violations committed by Member State officers in addition to the Member States concerned but only in specific circumstances. This is the case where the Agency had or should have had knowledge of the human rights violations and failed to undertake all reasonable (supervisory) measures to protect the individual or where the Executive Director failed to suspend or terminate the operation in case of serious or persistent human rights violations in accordance with Article 47 of the EBCG Regulation. However, in practice it is very difficult for victims of such human rights violations to hold the EBCG Agency effectively accountable under EU law before a Court for its "share" in the human rights violation committed by a Member State border guard. Two possibilities exist in theory: (1) an action for annulment before the CJEU to review the legality of acts of EU institutions and agencies and have them annulled in case of non-compliance with Union law, including the EU Charter and (2)

15. See Article 7(1) EBCG proposal.

16. EBCG proposal, explanatory memorandum, p. 2.

17. See Annex II EBCG proposal and discussion in section 3 below.

18. It should be noted that such responsibility may be triggered not only by actions but also by omissions of border guards, i.e. where border guards have not intervened to avoid human rights violations where they had the possibility to do so.

19. See on this issue M. Fink, *Frontex and Human Rights: Responsibility in 'Multi-Actor' situations under the ECHR and EU Public Liability Law*, Oxford University Press, 2018.

20. Article 92(1) EBCG proposal.

an action for damages under Article 340(2) TFEU. However, for such action to succeed, the act of the Agency must be intended to produce legal effects vis-à-vis third parties and the individual must be the addressee of and be directly and individually concerned by the act of the Agency. Until to date, the role of the Agency in joint operations is predominantly one of coordination and supervision and in the context of both border control and return operations its competences arguably do not include the adoption of acts that are legally binding on individuals. In practice, this means that an action for annulment against Frontex is in most cases bound to fail on both the requirements for the individual to have legal standing before the CJEU and the requirement of the disputed act producing legally binding effects on the individual, as eventually all decisions are taken by and under the responsibility of the host Member State of the operation.

A second option under EU law for victims of human rights violations committed in the context of Frontex joint operations is to launch an action for damages against the Agency on the basis of the Agency's non-contractual liability in accordance with Article 96(3) EBCG Regulation. According to the jurisprudence of the CJEU relating to Article 340(2) TFEU liability is subject to three conditions: the alleged conduct of the institutional actor must be unlawful, i.e. it must constitute a breach of binding EU law; there must be (material or immaterial) damage on the part of the victim and there must be a causal relationship between the action or omission of the institutional actor and the damage suffered by the individual. In order to be considered unlawful, the breach of EU law must concern a provision which confers rights to individuals and is sufficiently serious. In its case-law the CJEU sets a fairly high threshold with regard to the latter requirement. This is the case when Union bodies manifestly and gravely disregard their discretionary powers.²¹ In the context of current joint EBCG Agency operations, where most if not all human rights violations are most likely to occur as far as EBCG Agency activities are concerned, the Agency's discretion is wide as its role is limited to supervision, assistance and coordination. To what extent the Agency has effectively gravely and manifestly disregarded its obligations to respect and protect fundamental rights of the third-country national concerned will have to be assessed on a case-by-case basis, taking into account the complexity of the situation, its margin of discretion as well as whether it acted with due diligence. Depending on the CJEU's interpretation, the Agency may therefore only be liable for human rights violations committed by Member State officers which are sufficiently serious under the abovementioned high threshold.²² Under the EBCG proposal the supervisory and coordination role of the EBCG Agency in joint operations remains the same but its resources and operational power is significantly increased. In such context, the lack of effective possibilities for victims of human rights violations committed by Member State border guards in EBCG Agency-coordinated joint operations to hold the Agency accountable in addition to Member States becomes increasingly problematic.

Human rights violations committed by own staff

The increased powers of the Agency in operational activities and the executive powers entrusted to its statutory staff as members of the European Border and Coast Guard's standing corps provides more conceptual clarity on the actions that can be undertaken by border guards.

However, at the same time, the conferral of executive powers to Agency staff also risks exacerbating the legal vacuum that exists as far as the Agency's accountability is concerned. Whereas the host and home member State remain responsible for human rights violations committed by border guards deployed in the framework of EBCG Agency operations and activities and can be held accountable for such violations before the national and European courts, this is less straightforward for violations resulting from the Agency's statutory staff.

Under international law, as long as the EU has not acceded to the European Convention on Human Rights (ECHR), victims of human rights violations committed during operations by EU Agency staff may be left without an effective means of redress or effective remedy in terms of the EU's responsibility. This is because there is no home Member State for the Agency's own staff members and the EU cannot be held accountable for human rights violations for which the Agency would be responsible before the ECHR.

As far as accountability under EU law for human rights violations committed by Agency staff is concerned, victims of such human rights violations would face the same difficulties discussed above in meeting the high threshold set by the CJEU in establishing a sufficiently serious breach of an EU law provision conferring rights

21. "As regards that condition, the decisive criterion for establishing that a breach of Community law is sufficiently serious is whether the Community institution concerned manifestly and gravely disregarded the limits on its discretion. Where that institution has only considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach." See CJEU, Case C-440/07 P, *Commission v Schneider Electric*, Judgment [GC] of 16 July 2009, par. 160.

22. See on this issue M. Fink, *Frontex and Human Rights: Responsibility in 'Multi-Actor' situations under the ECHR and EU Public Liability Law*, Oxford University Press, 2018.

to an individual when launching an action for damages under Article 96(3) EBCG Regulation, in particular where they act within their margin of discretion under EU law.²³ Moreover, while being Agency staff, these border guards will exercise their executive powers under the instructions of the host Member State, while it is unclear whether this entails that the Agency waives any power to give instructions to its staff during the operation. This will create additional legal ambiguity in establishing the authority to which the unlawful conduct can be attributed, the host Member State of the operation or the EBCG Agency.

The EBCG Agency's individual complaints mechanism does not address this gap. As discussed below, the mechanism still contains a number of flaws and as an internal administrative redress mechanism, it cannot substitute access to a remedy before a Court or Tribunal as required under Article 47 EU Charter.

II. CONTROLLED CENTRES

A definition of "controlled centre" is included referring to a centre where relevant Union Agencies, in support of the host Member State and with participating Member States distinguish persons in need of international protection from those who are not and carry out security checks and where they apply rapid return and international protection procedures.²⁴ The proposed definition reflects certain elements of the abovementioned Commission's non-paper on controlled centres but remains as unclear on two crucial aspects.

Firstly, the proposed definition does not specify the legal status of such centres as open or closed facilities, which has important implications on the procedural safeguards which must be in place in order to protect those accommodated there from unlawful interference with their right to liberty. In the Commission's view these centres should be designed to operate a flexible approach and covering some or all aspects of the asylum procedure and within a maximum period of between four and eight weeks.²⁵ In ECRE's view, given the experiences with the hotspots operational in Italy and Greece, strong guarantees are needed to ensure that third-country nationals wishing to apply for international protection are not subjected to a detention regime as this is not conducive to creating the necessary conditions for a qualitative assessment of the need for international protection and applicants' trust in the asylum process.

Secondly, the proposed definition seems to suggest that Union Agencies such as the EBCG Agency and the EU AA would have competences on asylum and return at equal footing with participating Member States as they are entrusted with the tasks of "distinguishing" between two categories of third country nationals. However, whereas the competences of both agencies to interfere with individual decision-making processes are further stretched under the EBCG²⁶ and the amended EU AA proposal,²⁷ this remains without prejudice to Member States' responsibility to issue individual decisions.

Thirdly, the territorial scope of controlled centres is not defined in the Regulation, leaving ambiguity as to whether such centres could be established on the territory of third countries. Nevertheless, throughout the proposal references to controlled centres seem to confirm that such centres are conceived as exclusively operating on EU territory as they concern centres where third-country nationals disembarked in the Union could be rapidly processed and Member States volunteering to host such centres receive full financial and operational support through the EU Agencies.²⁸

Although the controlled centres concept was launched in the European Council conclusions as part of a set of measures aiming at developing a regional response to Mediterranean sea crossings, there seems to be little appetite with Member States to host such centres on their territory. Furthermore, there seems to be hardly any difference between controlled centres and hotspots currently operating in Greece and Italy in terms of the actors involved and type of activities developed, whereas the recast Reception Conditions Directive and the Return Directive already establish the legal standards on accommodation of applicants for international protection and returnees respectively. If anything, the proposed definition will lead to increased conceptual ambiguity and risks increasing situations of *de facto* detention of applicants for international protection and undocumented third country nationals without a protection claim depriving them procedural safeguards under

23. Although it would be less complicated to establish the direct causal link between the action or omission of the Agency staff member and the damage suffered by the victim of the human rights violation resulting from the Agency staff members exercising for instance executive powers to refuse or authorise entry.

24. Article 2(24) EBCG proposal.

25. European Commission, Non-paper on "controlled centres" in the EU – interim framework, p. 1.

26. EBCG proposal, Recital 69.

27. Article 16(m) amended EU Asylum Agency proposal.

28. See recitals 44 and 48, Article 37(2)(d) and 41(1) EBCG proposal.

EU and international law to protect them from arbitrary deprivation of their liberty.²⁹ Consequently, there is no added value in using and defining controlled centres as a new legal concept in the EBCG Regulation which serves no other purpose than the one pursued in the hotspot areas, already defined in Article 2(23) EBCG proposal. Therefore, ECRE recommends deleting the definition of controlled centres and the references to the concept throughout the EBCG proposal.

ECRE recommends deleting Article 2(24) and the references to “controlled centres” throughout the EBCG proposal.

III. STANDING CORPS OF EUROPEAN BORDER GUARDS: SET UP, TASKS AND RESPONSIBILITIES

The creation of a Standing Corps of European Border Guards of 10 000 operational staff is one of the core elements in the proposal. The Standing Corp should enable the Agency to instantly deploy border guards where needed and therefore enhance the Agency’s capacity to support Member States in securing external border controls. The standing corps “shall be part of the Agency” and will be composed of three categories of staff, notably (1) operational staff members of the Agency (2) operational staff seconded from Member States to the Agency for a long term duration and (3) operational staff from Member States provided to the Agency for a short term deployment. All members of the standing corps can be deployed by the Agency as members of any configuration of deployment provided for under the Regulation. This means that they can be deployed as members of the border management teams, migration management support teams, return teams in joint operations, rapid border interventions or return interventions or any other relevant operational activities in the Member States or in third countries.

The creation of the standing corps fits in the broader objective of establishing a multiannual strategic policy cycle of European and national integrated border management strategies.³⁰ This is set up to ensure better preparation of border operations and ensure effective responses to migratory flows by better coordination of training and acquisition of equipment in short and longer term.³¹

The new provisions on the standing corps raise a number of concerns from a fundamental rights perspective relating to the executive powers of statutory staff members and in particular the power to authorize or refuse entry; the power to give instructions to the members of the standing corps, and the criminal and civil liability of statutory staff members. In addition, the Commission proposal omits to address an existing gap in the Agency’s power to accept or refuse members seconded or provided to the Agency.

Agency’s statutory staff executive powers

The Commission proposal explicitly provides Agency Staff members of the standing corps with executive powers in operations. As they are not governed by the national law of a home Member State, the Agency’s statutory staff’s executive powers are listed in Annex II to the proposal. This includes authorisation and refusal of entry upon border check carried out at border crossing points in accordance with the relevant provisions of the Schengen Borders Code. The power of all members of the teams to perform functions on entry to and removal from the territory, in principle a prerogative of national authorities of the State concerned, is covered by the general provision in Article 83(1), which requires members of the teams to have the capacity to perform all tasks and exercise all powers for border control and return and necessary to achieve the objectives of the Schengen Borders Code and the Return Directive. However, under the Schengen Borders Code border control tasks may only be performed by public officials assigned in accordance with national law to a border crossing point to perform such tasks.³² Providing statutory staff members with far-reaching executive powers on authorisation and refusal of entry of third-country nationals under the Schengen Borders Code is questionable from the perspective of the primary responsibility of Member States for external border management.

This is even more contentious where, in derogation of the general rule according to which executive powers

29. For a discussion of current de facto detention of asylum seekers in practice in European countries, see AIDA, *Boundaries of Liberty. Asylum and de facto detention in Europe*, April 2018.

30. Article 8 and 9 EBCG proposal.

31. See EBCG proposal, Explanatory memorandum, p. 2-3.

32. See Article 2(14) Regulation (EU) 2016/99 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (codification) (hereafter ‘Schengen Borders Code’), OJ 2016 L 77/1.

are to be exercised, under the command and control of the host Member State and as a rule in the presence of border guards or staff entrusted with return-related tasks from the Member State, such tasks are performed in absence of a team member of the host State, upon the host Member State's authorisation to act on its behalf.³³ In such cases, the power to authorise and refuse entry is effectively conferred to the Agency, through its independently operating statutory staff. However, the Schengen Borders Code lacks a clear legal basis for authorisation or refusal of entry by statutory staff members of EU Agencies. An amendment of the Schengen Borders Code inserting a provision mirroring Article 83(1) EBCG proposal would be needed to clarify the legal basis for the Agency's statutory staff to perform the tasks listed in Annex II of the EBCG proposal. Without such amendment, statutory staff of the Agency will not be allowed to make use of their executive powers to authorise or refuse entry, unless they are explicitly empowered to do so by the national law of the Member State concerned.³⁴

ECRE recommends ensuring the compatibility of conferring executive powers to statutory Agency Staff with the Schengen Borders Code.

Instructions to members of the standing corps

All members of the standing corps, including Agency statutory staff members, are bound by instructions of the host Member State in the context of operational activities. According to Article 44 EBCG proposal, the host Member State must issue instructions to the teams in accordance with the operational plan during deployment of border management teams, return teams and migration management support teams. No distinction is made between the various categories of staff of the European Border Guard Standing Corps with respect to receiving instructions. As a result, both operational statutory staff of the Agency and operational staff seconded or provided by Member States will be receiving and obeying instructions from the Member State hosting the operation set up within the framework of the EBCG Regulation.

In particular in an operational context it is important that such instructions fully comply with obligations under EU and international human rights law in practice. Both under the existing EBCG Regulation as under the EBCG proposal the Agency's power to influence those instructions is limited. First, through its coordinating officer it can communicate its views on the instructions given to the teams, which must be "taken into consideration" and followed "to the extent possible" by the host Member States.³⁵ However, there is no obligation for the host Member State to change or adapt its instructions to the views of the coordinating officer. Second, in case of non-compliance of the said instructions with the operational plan, the coordinating officer must immediately report to the Executive Director, who may eventually withdraw the Agency's financing of an activity within the operation or even suspend or terminate the operation.³⁶ As the operational capacity of the Agency and its statutory staff's extensive executive powers are significantly boosted under the EBCG proposal, the limited powers of the Agency to influence the operational instructions provided by the host Member State becomes increasingly problematic from the perspective of the Agency's responsibility in aiding or assisting to human rights violations. This risk should be further mitigated by increasing the Agency's powers to ensure that instructions provided to members of the standing corps are fully human rights compliant.

Article 44(3) EBCG proposal does not explicitly refer to situations where instructions given by the Member State would create a risk of fundamental rights violations and entail a risk of the Agency being indirectly complicit in committing such violations. However, this must be applied without prejudice to the general obligation imposed on the Executive Director to withdraw the financing or suspend or terminate in whole or in part operations if he or she considers that there are fundamental rights violations or international protection obligations that are of a serious nature or are likely to persist.³⁷ Nevertheless, there is merit in expanding the reporting obligations of the coordinating officer explicitly to situations where instructions of the host member States would create a risk of human rights obligations. As operational plans must comply with fundamental rights obligations, instructions of host Member States cannot derogate from such obligations, which should be made explicit in Article 44(3). Secondly, as the Agency's statutory and long term seconded staff are also under the instructions of the host Member States, such extension would constitute an additional guarantee in preventing such violations, which may trigger the responsibility of the Agency under EU law.

33. Article 40(3) EBCG Regulation and Article 86(3) EBCG proposal.

34. See Article 14 Schengen Borders Code requiring refusal of entry decisions to be taken by an authority empowered by national law. It should be noted that third country nationals who do not fulfill one or more of the entry conditions for short stays laid down in the Schengen Borders Code may only be authorised by a Member State to enter its territory on humanitarian or national interest grounds or because of international obligations, according to Article 6(5)(c) of the Schengen Borders Code.

35. Article 44(2) EBCG proposal.

36. See Article 44(3) EBCG Regulation.

37. Article 47(4) EBCG proposal.

ECRE recommends amending **Article 44** as follows

Article 44(2): The Agency, through its coordinating officer, may communicate its views to the host Member State on the instructions given to the teams, **including with regard to the protection, respect and promotion of fundamental rights.**

Power to accept or refuse national border guards as standing corps members

Finally, with regard to both long term and short term secondment to the standing corps, the Agency has no power to reject proposed candidates with insufficient language skills or for reason of misconduct or infringement of applicable rules during previous deployments. According to Article 57(4) and 58(3) the Agency's power to intervene is limited to requesting the Member State concerned to propose another candidate for long term secondment or remove an operational staff member from the national list, without being able to refuse such nominations. As the operational arm of the Agency is significantly enhanced and therefore the likelihood of being responsible for human rights violations increases, it is of the utmost importance that the members of the teams deployed in the Agency's operations and involved in its activities are fully competent to perform their tasks and are of impeccable reputation and conduct. Therefore, the Agency should have the power to refuse proposed candidates for deployment where it can be substantiated that the candidate's language or other skills do not match the required profile or previous inappropriate behaviour or misconduct makes him or her unsuitable for deployment.

ECRE recommends amending **Article 57(4)** and **58(3)** as follows:

Article 57(4): [maintain text] By 15 September, the Agency shall accept the proposed candidates or refuse them in case of non-compliance with the required profiles, insufficient language skills, misconduct or infringement of the applicable rules during previous deployments and request that a Member State propose another candidate for secondment.

Article 58(3): [maintain text] The Agency shall refuse nominated operational staff in case of non-compliance with the required profiles, insufficient language skills, misconduct or infringement of the applicable rules during previous deployments and request that a Member State propose another candidate for short-term deployments.

Civil and criminal liability of Agency statutory staff and use of force

Civil and criminal liability of members of the teams are dealt with under Article 85 and 86 and state the principle that the host Member State shall be liable for any damage caused by all team members, therefore including Agency statutory staff. Furthermore, as far as criminal liability is concerned team members shall be treated in the same way as officials of the host Member State with regard to any criminal offences committed against them or by them. However, statutory staff members do not have a home Member and this creates an important gap in particular in the context of model status agreements concluded with third countries.³⁸ In the context of current model status agreements with third countries, teams members and therefore also statutory staff of the Agency benefit from immunity from the criminal jurisdiction of the third country concerned. In absence of a home Member State and in absence of EU criminal law liability, this would result in impunity for crimes committed by Agency statutory staff in the context of operations carried out on the territory of third countries.

As further discussed below, given the substantial expansion of the Agency's powers to act extraterritorially, no Agency statutory staff members with executive powers should be deployed under such agreements on the territory of third countries as long as no clear liability rules are established.

As already mentioned above, Agency statutory staff members are directly recruited by the Agency and have no home State for the purpose of the Regulation. This is in contrast to longer term seconded and short term provided staff for which the sending State remains the home Member State during their deployment.³⁹ This means *inter alia* that seconded staff remain subject to the home Member State's national law with regard to the carrying and use of service weapons, ammunition and equipment while for the Agency's statutory staff this is subject to rules laid down in Annex V to the Regulation.⁴⁰

The applicability of different legal frameworks on the use of force by border guards depending on their status in

38. See section 6 below.

39. Article 57(3) EBCG proposal.

40. Article 83(5) EBCG proposal.

the European Border Guard standing corps, despite them operating in the same area as part of the same team, creates additional complexity in practical terms as well as from the perspective of establishing responsibility and accountability for excessive use of force for instance. In absence of fully harmonised EU rules, mere reference to national legislation on the use of force may result in certain situations in impunity for national staff members seconded or provided to the standing corps, where statutory staff would be in breach of the rules explicitly laid down in Annex V of the Regulation and *vice versa*.

IV. MIGRATION MANAGEMENT SUPPORT TEAMS

The Commission proposal further emphasises the importance of inter-agency cooperation and in particular with the (future) EU Asylum Agency.⁴¹ In line with the Commission's worrying push to merge asylum and return procedures as much as possible and to implement a continuum between assessing and rejecting an application and implementing return,⁴² the proposal strengthens the cooperation between the two agencies in various activities, ranging from information provision to newly arriving migrants at the border to information and intelligence collection with regard to migratory flows through risk analysis. However, where both mandates are most prominently intertwined is in the context of the Migration Management Support Teams (MMST), established already under the 2016 EBCG Regulation but further amended by the Commission proposal.

A first important change in the approach to the MMST is the extension of its scope. Whereas the current EBCG Regulation exclusively links the deployment of such teams to situations where a Member States "faces disproportionate migratory challenges at particular hotspot areas of its external borders characterised by large inward mixed migratory flows",⁴³ this restriction is lifted in the Commission's proposal.⁴⁴ Migration management support teams, composed of operational staff from the EBCG Agency, experts deployed by the EU AA, Europol or other agencies and from Member States, can be deployed beyond circumstances of disproportionate migratory challenges".⁴⁵ A second important change relates to the actor triggering the deployment of the teams. Whereas this is currently limited to the Member State facing disproportionate migratory pressure, under the proposal MMST may be deployed at the request of a Member State or "upon initiative of the Agency".⁴⁶ Moreover, such teams can be deployed either at hotspot areas or in controlled centres.

The mainstreaming of such multi-agency approach beyond situations of disproportionate pressure carries both opportunities and risks. It can improve the quality and efficiency of procedures conducted in Member States by making available additional resources and well-trained staff, which can lead to better and quicker decision-making. However, giving the agencies the power to initiate the deployment of MMST on the territory of a Member State as they see fit, even with the agreement of the Member State concerned, may distort the division of roles between national authorities and the agencies in this field. Moreover, the massive expansion of the EBCG Agency's budget, which exceeds the EU AA's prospective budget by far for years to come, increases the likelihood of the deployment of such teams to be predominantly focussing on return and irregular migration objectives than on international protection considerations.

In addition, where the deployment of such teams occurs upon the initiative of the Agency, Article 41 is unclear as to the procedure to be followed. According to Article 41(1) and (2), a request for reinforcement by migration management teams must be submitted to the Commission where this is requested by a Member State, after which the request is to be assessed by the relevant Agencies. In case of deployment upon the initiative of the Agency in Article 41, however, it is unclear whether and if the Agency or the consenting Member State should make such request. Entrusting the EBCG Agency with the assessment of the necessity of the deployment of a migration management support team when it initiates such deployment would in any case inevitably create a conflict of interest for the Agency.

41. See Explanatory memorandum to the EBCG proposal, p.3

42. The Commission's proposal to recast the Return Directive includes a mandatory return procedure at the border for applicants for international protection whose application has been rejected with an extremely short 48 hour deadline for lodging an appeal without automatic suspensive effect in certain cases and allowing for quasi automatic detention up to four months in addition to the 18 month maximum detention period maintained in the directive. See European Commission, Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (recast), COM(2018) 634 final, Brussels, 12 September 2018, Article 22. The proposed procedure incorporates aspects of truncated border procedures currently applied in the hotspots as well as in the transit zones at the Hungarian transit zones, the latter being the subject of an infringement procedure initiated by the European Commission which has been referred to the CJEU. See European Commission, Migration and Asylum: Commission takes further steps in infringement procedures against Hungary, Press Release IP/18/4522, Brussels, 19 July 2018.

43. Article 18(1) EBCG Regulation.

44. Article 41 EBCG proposal.

45. See Explanatory memorandum to the EBCG proposal, p.19.

46. Article 41(1) EBCG proposal.

Therefore, the possibility for the deployment of a migration management support team upon the initiative of the Agency should be deleted from Article 41(1).

Furthermore, according to Article 41 (4) MMST may be involved in assistance in screening of third country nationals, including identification, registration and debriefing and the provision of initial information to persons who wish to apply for international protection and their referral to the competent national authorities of the Member States or to the experts deployed by the EU AA.

Activities relating to screening of third country nationals upon arrival as well as the provision of information to persons in need of international protection do not belong to the core tasks of an EU border Agency but should be entrusted, if they are to be performed at a EU level, to EASO/EU's Asylum Agency. While cooperation between both agencies is needed at the external borders, it is important that activities that are crucial to ensure proper access to the asylum procedure such as the provision of information as well as activities relating to registration and the establishment of nationality are coordinated by EASO in light of its expertise in the area of country of origin information as well as information tools to ensure effective access to the asylum procedure. In this regard, the Commission amended proposal on the EU AA clearly includes identification, registration, taking of biometric data, and (initial) information provision among the measures to be coordinated by the EU AA.⁴⁷ At the same time, unlike Article 41(4) of the EBCG proposal, the corresponding Article on MMST in the amended EU Asylum Agency proposal, does not detail the technical and operational reinforcement to be provided in the context of MMST, but refers to the tasks referred to in Article 16(2) and 16a of the amended proposal.

In order to avoid any ambiguity and interference with the mandate and expertise of experts deployed by EASO /EU AA, the technical and operational reinforcement to be provided under Article 41(4) should be strictly limited to border guard functions. As discussed below, in ECRE's view, the Agency's experts should not be entrusted with the task of preparing return decision. Therefore, Article 41(4)(c) should be amended accordingly

ECRE recommends amending **Article 41** as follows:

Article 41(1): delete "or upon the initiative of the Agency and with the agreement of the Member State concerned".

Article 41(4): The technical and operational reinforcement provided by experts deployed by the Agency as part of migration management support teams shall be strictly limited to the performance of border guard functions and may include:

(a) assistance in security checks of third-country nationals arriving at the external borders and providing information regarding the purpose of such checks.

(b) information on the possibility to apply for international protection and the referral of persons wishing to apply for international protection to the competent national authorities of the Member State concerned or to the experts deployed by [the European Union Agency for Asylum].

(c) technical and operational assistance in the return process, [deleted text] acquisition of travel documents, preparation and organisation of return operations, including with regard to voluntary returns;

Maintain (d).

V. RETURN OPERATIONS

Increasing the low return rate of irregularly staying third country nationals has become a key priority of the Commission following the peak of arrivals in 2015 and 2016. Various initiatives have been taken to support and encourage Member States in effecting return of third country nationals, including the publication of recommendations to Member States on the implementation of the return Directive,⁴⁸ a revised return Handbook⁴⁹ and a proposal recasting the return Directive as mentioned above.

47. See Article 16(2) (a)(b) and (c) Amended EU Asylum Agency proposal.

48. European Commission, Commission recommendation of 7.3.2017 on making returns more effective when implementing the Directive 2008/115/EC of the European Parliament and of the Council, C(2017) 1600 final, Brussels, 7 March 2017.

49. European Commission, Annex to the Commission Recommendation establishing a common "Return Handbook" to be used by Member States' competent authorities when carrying out return related risks, C(2017) 6505 ANNEX 1, Brussels, 27 September 2017.

Within the logic of speeding up returns, the EBCG proposal further enhances the Agency's mandate in the area of return in two ways. First, the Agency's overall competence to provide technical and operational assistance to Member States on return is extended to include the "preparation of return decisions".⁵⁰ Moreover, the Commission proposal provides a legal basis to develop technical support tools to streamline return processes at Member State level through "return case management system" reference models and enabling the Agency to develop and operate a central system and a communication infrastructure between national return management systems of the Member States and the central system.⁵¹ Second, the Commission proposal introduces a possibility to launch so-called return interventions in third countries, which may consist of deploying return teams to return activities of the third country.⁵² Both aspects raise various human rights concerns.

The possibility for the Agency to provide assistance with preparing return decisions is not further defined in the Commission proposal but mirrors wording used in the amended Commission proposal on an EU AA Regulation with regard to the Asylum Agency's competence to prepare decisions on asylum applications.⁵³ Assistance with preparing return decisions will necessarily be provided through national experts or operational Agency staff members. In absence of any definition of preparation of decisions, this could potentially cover any activity related to the process of drafting the return decision short of its actual adoption and issuance, which remains the exclusive competence of the Member States under the proposal. However, theoretically, this could include the drafting of draft return decisions, to be adopted or rather rubberstamped by the competent authorities of the host Member State. The Agency's involvement, through the experts it deploys on the territory of the Member States, in the actual drafting of individual return decisions entails a joint responsibility for the content of such decisions and for their compliance with the fundamental rights safeguards laid down in the Return Directive and the EU Charter of Fundamental Rights, including with respect to *non refoulement*. However, in practice it would be difficult to determine such responsibility as the return decision would be issued by the authorities of the Home Member State in accordance with national law.

Moreover, the added value in practical terms of the involvement of the EBCG Agency deployed experts in the preparation of return decisions is questionable as they are not familiar with the host Member State's legal framework and administrative practice. Entrusting border guards from other Member States with the task of preparing return decisions would require extensive preparation and training for this particular purpose, while final responsibility for issuing return decisions would remain with national authorities. Contrary to refusal of entry decisions under the Schengen Borders Code, return decisions must state the reasons in fact and in law in accordance with the Return Directive and require an assessment of the individual circumstances and history of the returnee in the Member State concerned. Return decisions are in most EU Member States within the competence of immigration authorities rather than law enforcement authorities. Involving border guards from other Member States in the preparation of return decisions may therefore complicate such processes through duplication of efforts.

In addition, the reference to "other pre-return and return-related" activities of the Member States provides too broad a competence for the Agency. It risks providing a *carte blanche* to engage in all types of activities related to return which may have significant human rights implications for the individuals concerned, such as pre-removal detention, but without providing necessarily for the safeguards required under EU and international human rights law to protect the third country nationals from arbitrary detention or collective expulsion. Therefore, ECRE strongly recommends to delete such broadly formulated competence in Article 49(1)(a).

For those reasons, ECRE recommends deleting the Agency's role in the preparation of return decisions and in "other pre-return and return-related activities" in Article 49(1)(a).

Return decisions and EBCG Agency accountability

Although the final responsibility for issuing return decisions remains with the authorities of the Member States under the EBCG proposal, the increased operational involvement of the Agency staff in and knowledge of the process leading up to the return decision also results in enhanced responsibility to ensure that its return operations comply with human rights obligations under EU and international human rights law. This implies increased monitoring and verification duties on the Agency to ensure that the fundamental rights of third country nationals subject to EBCG Agency led return operations have been fully respected and that all procedural safeguards to protect them from arbitrary *refoulement* have been observed in practice. In order to

50. See Article 49(1)(a) EBCG proposal.

51. Article 49(1)(c) EBCG proposal.

52. Article 54(2) EBCG proposal.

53. See Amended Commission proposal on an EU Asylum Agency, Articles 16(2)(m) and 16a(2)(h).

do so properly, it cannot simply rely on the host Member State to discharge its responsibility in this regard. As discussed above, the non-contractual liability of the EU for actions of its staff and Agencies is established by Article 340(2) TFEU, while in such case the proposed Regulation requires the Agency to make good any damage caused by its departments or by its staff in the performance of their duties.⁵⁴ In order to avoid such liability all reasonable steps must be taken by the Agency to avoid that persons returned through its operations are subjected to human rights violations. One such reasonable measure is a final verification, for instance by the coordinating officer, appointed among the statutory staff of the Agency and deployed by Executive Director for each joint operation or rapid border intervention, whether all individuals on the joint return flight have received a return decision in accordance with the Return Directive and whether any suspensive appeal before a national court or the European Court of Human Rights is still pending. Such obligation could be added to the return-related tasks listed in Article 49(1).

Return interventions

Under the current EBCG Regulation the Agency's competence to launch return interventions, is limited to the deployment of European return intervention teams to the host Member State and organisation of return operations from the host Member State.⁵⁵ This is further expanded under the Commission proposal which allows the Agency to launch return interventions in third countries.⁵⁶ The geographical expansion of return interventions, based on the directions set out in the multiannual strategic policy cycle, is premised on that country's need for additional technical and operational assistance with regard to its return activities. The multiannual strategic policy cycle for a European Integrated Border Management is to be adopted by the Commission by delegated act and shall define how the challenges in the area of border management and return are to be addressed in a coherent and systematic manner.

No geographical limitations nor general conditions are set with regard to the third countries concerned, which implies that return operations can be organised in any third country, regardless of its human rights record. Under the current EBCG Regulation, operational return actions implying EBCG Agency officers being deployed on the territory of third countries with executive powers are limited to the territory of third countries neighbouring one or more Member States.⁵⁷ The EBCG proposal deletes this geographical limitation and provides a legal basis for such return interventions, including the deployment of return teams, in any third country, regardless of whether it is located geographically close to the EU external border or not.

In absence of a proper fundamental rights impact assessment prior to implementing such return interventions in the third country concerned, this carries significant risks of the Agency and its staff or deployed experts having to carry out return-related activities within a legal and operational framework lacking the necessary safeguards to ensure that fundamental rights, not least the principle of *non refoulement*, is respected in practice. As discussed below in the section on cooperation with third countries, the expansion of the EBCG Agency's powers to co-operate with third countries on their territory, amplifies the concerns relating to prevention, monitoring and remedying of fundamental rights violations during EBCG Agency-coordinated or initiated operations. Where return interventions are carried out on the territory of third countries, EU Agency staff members as well as experts from Member States are at heightened risk of becoming complicit to *non refoulement* and other human rights violations as they would be required to execute or assist with the execution of return decisions issued by a third country, which are not subject to the fundamental rights safeguards in the Return Directive or the EU Charter of Fundamental Rights.

In order to prevent such risk, ECRE's preferred option is to delete Article 54(2) EBCG proposal and discard entirely the possibility of return interventions in third countries. Should co-legislators opt to maintain such possibility, ECRE strongly recommends including additional fundamental rights safeguards by making return interventions in third countries conditional on a prior fundamental rights assessment by the Agency, adherence in law and practice of the third country concerned to core human rights instruments, including access to an effective remedy against a return decision or return order, an effective system of forced return monitoring and a complaints mechanism.

ECRE recommends further amending **Article 49(1)(a)** as follows: provide technical and operational assistance to Member States in the return of third country nationals, including **[deleted text]** voluntary departures **[deleted text]**, to achieve **[maintain text]**.

54. Article 96(3) EBCG proposal.

55. Article 33(1) EBCG Regulation.

56. Article 54(2) EBCG proposal.

57. See Article 54(3) and (4) EBCG Regulation.

ECRE recommends adding the following sentence to **Article 51(2)**: **The Agency, through its coordinating officer, shall verify whether all third country nationals embarked on return flights organised or coordinated by the Agency, have received a return decision in accordance with the Return Directive and whether any suspensive appeal before a national court or the European Court of Human Rights.**

ECRE recommends the **deletion of Article 54(2)**.

VI. COOPERATION WITH THIRD COUNTRIES

The expansion of the Agency's competence to cooperate with and in third countries is another key feature of the Commission's proposal, which partly aims to reinsert provisions which did not survive negotiations between the co-legislators on the 2016 EBCG Regulation.⁵⁸ The proposal more clearly distinguishes between cooperation of Member States with third countries and cooperation of the Agency with third countries and clarifies the role of the Commission with regard to third country cooperation, in particular as regards the conclusion of status agreements.⁵⁹ However, the provisions in the Commission proposal on liaison officers in third countries and the presence of third country observers in Agency activities further expand their respective operational involvement, with potential repercussions on fundamental rights protection. In addition, two new provisions on technical and operational assistance by the Agency to third countries and information exchange with third countries raise particular concerns from a fundamental rights perspective.

Cooperation between the Agency and authorities of third countries may concern all aspects of European Integrated Border Management and cover any activity within the Agency's mandate, ranging from traditional border control activities and law enforcement to return and coast guard functions.⁶⁰ Such activities may include the deployment of border management and return teams from the standing corps, but where this implies the use of executive powers, a status agreement needs to be concluded by the Union with the third country concerned.⁶¹

Recently a status agreement has been concluded with Albania, which empowers border guards members of a EBCG team to perform tasks and exercise the executive powers required for border control and return operations.⁶² Although they can only execute those powers in the territory of Albania under instructions from and in presence of border guards or other relevant staff of the Republic of Albania, Albania may exceptionally authorise members of the teams to act its behalf. As a result team members can be given extensive powers to act extra-territorially in the field of border control and return operations which may affect the fundamental rights of third country nationals in the territory of Albania. Those team members' role in border control is defined as "control of persons carried out at a border in response exclusively to an intention to cross or the act of crossing that border".⁶³ The scope of such response is unclear. Although it does not explicitly confer powers on team members to refuse or authorise entry at Albania's external borders, this is not excluded either. In particular, where team members act on behalf of Albania's authorities, this leaves potentially considerable powers to team members to externalise the EU's border control and prevent irregular migration towards the EU far beyond its physical borders, without independent oversight. As status agreements are being negotiated with all countries along the Balkan route, they could become an additional tool in the closure of the Balkan route and containing refugees and migrants in Greece.

Moreover, return operations carried out under the current generation of status agreements under negotiations concern the forced or voluntary return of third country nationals from one or more EU Member States to the third country concerned.⁶⁴ As mentioned above, due to the deletion of mixed operations from the scope of

58. Such as mixed return operations, discussed below, which were part of the 2015 Commission proposal establishing a EBCG Agency but which was ultimately rejected by the co-legislators. See European Commission, Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC, COM(2015), 671 final, Brussels, 15 December 2015, Article 27(4).

59. Third country cooperation, both between Member States and third countries and between the Agency and third countries, and the participation of third country observers in activities of the Agency is dealt with in Article 54 EBCG Regulation. Article 55 EBCG Regulation describes the tasks of Agency liaison officers in third countries.

60. Article 74(1) EBCG proposal.

61. Article 74(3) EBCG proposal.

62. Council of the European Union, Status Agreement between the European Union and the Republic of Albania on actions carried out by the European Border and Coast Guard Agency in the Republic of Albania (hereafter "Status Agreement Albania"), 10290/18, Brussels, 10 July 2018.

63. Article 2(5) Status Agreement Albania.

64. See Article 2(4) Status Agreement Albania.

Article 54 EBCG Regulation, this should not include return operations from the territory of the third country to another country, although this is not explicitly excluded either.⁶⁵ In the same vein, Article 74 EBCG proposal does not define the scope of status agreements beyond stating that it “shall cover all aspects that are necessary for carrying out the actions” and is not explicitly restricted to return from a Member State to the third country concerned. The scope of future status agreements concluded on the basis of the proposed Article 74 EBCG Regulation may therefore not necessarily be restricted to return operations to the third country concerned. In addition, the Agency shall now contribute to the implementation of international agreements and of non-legally binding arrangements on return concluded by the Union with third countries within the framework of the EU’s external action policy and regarding matters covered by this Regulation. This leaves scope for broad interpretation of the Agency’s activities, including in the area of return, on or from the territory of third countries. For reasons explained below, ECRE opposes the proposed possibility for the Agency to engage in so-called mixed return operations from the territory of third countries. Consequently, in order to eliminate any ambiguity on the scope of status agreements and the possibility to cooperate in return operations from the territory of a third country, Article 74 should explicitly exclude such possibility.

Involving Agency statutory staff members and Member State experts in operational activities on the territory of third countries raises complex legal and political questions relating to Member States’ and the Agency’s responsibility for human rights violations committed during such operations or team members’ complicity in human rights violations committed by officers of the third country concerned. This would particularly be the case where such operations take place in third countries with a questionable human rights record. A particular issue arises with regard to the criminal and civil liability of members of the team, and in particular Agency statutory staff, operating in the territory of a third country under a Status Agreement. Taking the Status Agreement with Albania as an example, members of the team enjoy immunity from the criminal jurisdiction of Albania with respect to acts performed in the exercise of their official functions in the course of actions in accordance with the operational plan.⁶⁶ This does not exempt them from the jurisdiction of the home Member State, but as statutory staff of the Agency do not have a home State but can be deployed on the territory of a third country, this creates a liability gap, which seems impossible to address under EU law. Therefore, the Regulation should prohibit the deployment of Agency statutory staff with executive powers under status model agreements or any other type of arrangement on the territory of third countries.

At the same time, team members may only perform tasks and exercise powers in the territory of Albania under the instructions from and, as a general rule, in the presence of border guards or other relevant staff of Albania. This constitutes far-reaching conferral of command and control over Agency and Member States staff, which carries important risks for the Member States and the Agency as they would no longer be able to instruct their staff members. As third countries are not bound by EU law and its fundamental rights safeguards, this is extremely problematic.

Moreover, whether a criminal offence was committed by the border guard in the exercise of his or her functions in accordance with the operational plan is to be certified by the Agency’s Executive Director, which is binding on the Albanian Courts.⁶⁷ The Executive Director therefore has extensive powers to exonerate experts deployed by the EBCG from criminal jurisdiction of the third country concerned. If cooperation with third countries on the basis of Status Agreements is to be maintained under the new EBCG regulation, ECRE strongly recommends reviewing the provisions on criminal and civil liability of members of the teams exercising executive powers in the territory of a third country in order to clarify the applicable rules on the civil and criminal liability of the members or the team.

Mixed return operations

As mentioned above, team members’ involvement in return operations in the territory of a third state on the basis of status agreements only concerns the voluntary or forced return of persons from one or more Member States to the third country concerned. However, under the EBCG proposal the Agency would be allowed to provide assistance or return activities of third countries, either through coordination or *organisation* of return operations from the third country concerned to another third country.⁶⁸ Such operations may be organised as so-called mixed operations – with the participation of one or more Member States – or as national return

65. Also the Status Agreement with Albania does not explicitly exclude return operations from Albania but the model Status Agreement published by the Commission does. See European Commission, Communication from the Commission to the European Parliament and the Council. Model status agreement as referred to in Article 54(5) of Regulation (Eu) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard, COM(2016)747 final, Brussels, 22 November 2016.

66. Article 6(3) Status Agreement Albania.

67. *Idem*.

68. Article 74(5).

operations. The possibility of mixed operations was already included in the 2015 Commission proposal on the European Border and Coast Guard but was deleted from the final compromise as it was strongly opposed by the European Parliament. Allowing the Agency and Member States under the aegis of the Agency to organise return operations from the territory of a third country would present the ultimate form of externalising EU border management as it would engage EU and Member States' authorities effecting returns on the basis of return decisions taken by the third country concerned meaning engaging in returning third country nationals on the basis of return decisions taken by a non EU member State. The risk of the Agency and/or Member States aiding and assisting another State in committing human rights violations, including *refoulement* is unacceptably high in such scenario. First, the Agency or the participating Member States would be unable to verify whether return complies with fundamental rights safeguards. Whereas joint return operations from EU territory are at least carried out within a common legal framework, i.e. requirement of a return decision for each individual compliant with the standards and safeguards laid down in the Return Directive and the EU Charter of Fundamental Rights, no such safety net would exist with regard to return operations from the territory of third countries. The Agency and Member States would assist in returning persons almost blindfolded and assume that national procedures in the third country concerned respect the fundamental rights of returnees in practice. Secondly, even where the third country concerned has ratified the core international human rights treaties or the ECHR, this is not sufficient to assume that cooperation with such country, in particular effecting return from its territory, is therefore by definition in line with human rights law. According to the ECHR jurisprudence, rather than the ratification of human rights treaties, it is their adherence and application in practice which must be taken into account as "the existence of domestic laws and the ratification of international treaties guaranteeing respect for fundamental rights are not in themselves sufficient to ensure adequate protection against the risk of non-refoulement".⁶⁹ Therefore, ECRE strongly recommends deletion of Article 75(4).

ECRE recommends amending **Article 74(3)** by adding the following sentence: **No Agency statutory staff with executive powers shall be part of the border management and return teams deployed to a third country.**

ECRE recommends further amending **Article 74(5)** by adding the following sentence: **The Agency shall not organise, coordinate or support return operations from the territory of third countries to other third countries.**

ECRE recommends the **deletion of the Article 75(4)** allowing the Agency to engage in mixed return operations as it is impossible for the Agency in practice to ensure that such operations are carried out in full compliance with fundamental rights obligations and Union law, as required under Article 72(3).

Participation of observers in Agency's activities

The possibility for observers to participate in the Agency's activities, is now extended to institutional actors, including international organisations and CSDP missions upon invitation of the Agency and where their presence may contribute to exchange of best practice and does not jeopardise the safety and security of the activity. This adds to the already existing possibility for the Agency, to invite observers from third countries to participate in activities listed in Article 79(2). The type of activities they can be invited to includes not only return related activities and training, but also any actions at the external border referred to in Article 37, which includes the deployment of the European Border and Coast Guard standing corps in the framework of MMST. As the MMST carry out asylum related tasks through EASO deployed experts who may conduct substantive personal interviews of applicants for international protection, the presence of observers from third countries, can obviously create tension, in particular where applicants have the same nationality of the third country observer.⁷⁰ Here too, their participation is conditional on their presence contributing to exchange of best practice and not affecting the overall safety of the activities. However, such disclaimer does not address the potential adverse effects of their participation and physical presence in Agency activities on the right to asylum and applicants' trust in the host Member State's asylum system. Similar tension is created by their presence in return related operations, in particular from hotspot areas where EASO/EU AA and EBCG operations take place at the same time. This entails an increased risk of newly arriving third country nationals wishing to apply for international protection being confronted in those locations with observers from their country of origin, even inadvertently.

In order to reduce those risks, ECRE recommends to restrict the participation of third country observers strictly to training activities, as this does not entail a risk of applicants for international protection being confronted

69. EctHR, *Hirsi Jamaa and Others v. Italy* [GC], Application no. 27765/09, Judgment of 23 Februari 2012, par. 128.

70. See also ECRE, ECRE, Comments on the Commission Proposal for a Regulation on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010 COM(2016) 271, July 2016, p. 21-22.

with third country observers or those observers inadvertently having access to applicants' personal details. In addition, the participation of third country and institutional observers should also be made conditional on their presence not affecting the safety and fundamental rights, in particular the right to asylum, of the third country nationals affected by the Agency operation.

ECRE recommends amending **Article 79(2)** as follows:

The Agency may, with the agreement of the Member States concerned, invite observers from third countries to participate in **[deleted text] training activities** referred to in Article 62, to the extent that their presence is in accordance with the objectives of those activities, may contribute to improving cooperation and the exchange of best practices, and does not affect the overall safety of those activities **nor the safety and access to the right of asylum of third country nationals**. The participation of those observers may take place only with the agreement of the Member States **[deleted text]**. Detailed rules on the participation of observers shall be included in the operational plan. **[deleted text]** They shall be required to adhere to the codes of conduct of the Agency while participating in its activities.

EBCG Liaison Officers

The 2016 EBCG Regulation provides a legal basis for the Agency to deploy experts from its own staff as liaison officers in third countries. Today the Agency has its own liaison officers in countries such as Turkey, Niger and Serbia,⁷¹ where they establish and maintain contacts with the relevant authorities with a view to “contributing to the prevention of and fight against illegal migration and return of returnees”.⁷² The Commission proposal confirms the aforementioned tasks of the Agency third country liaison officers but now specifies that the liaison officer’s tasks in the area of return include “providing technical assistance in identification of third-country nationals and the acquisition of travel documents”. Moreover, in doing so, liaison officers must coordinate closely not only with Union delegations as per the existing Regulation but also, where relevant, “CSDP missions and operations”. The latter addition seems to accommodate the EBCG’s cooperation with operations such as EUNAVFORMED operation Sophia in the Central Mediterranean, aiming at dismantling smuggling networks.⁷³ The necessity and added value of coordination of liaison functions with CSDP missions in particular is questionable given the military purpose served by the latter missions as opposed to the EBCG’s mandate on border control and law enforcement and the potentially sensitive nature of interaction with such missions. EBCG liaison officers’ tasks should be strictly limited to the areas included in the Agency’s mandate and therefore coordination with CSDP missions should be deleted from the list of tasks they can be entrusted with.

Secondly, the third country liaison officers shall form part of local or regional cooperation networks of immigration networks, including the one set up by the 2004 Immigration Liaison Officers network Regulation, amended in 2011 and now again subject to further revision by a Commission proposal submitted in May 2018.⁷⁴ This proposal aims to create a European network of immigration liaison officers and now includes explicitly liaison officers deployed abroad by the Union Agencies in the definition of “liaison officer”. At the same time, it expands the tasks of immigration liaison officers to collect information on ways and means to facilitate reintegration in the third countries concerned, asylum seekers’ access to protection in the third country, legal immigration strategies and tools and pre-departure measures. Beyond collecting information they will be entitled to render assistance in establishing the identity of third country nationals irregularly staying in EU Member States as well as confirming identity and facilitating resettlement of refugees and admission of legal immigrants.⁷⁵ The generic reference to this variety of tasks, some of them specifically asylum-related, carries the risk of blurring the respective functions of liaison officers deployed by the EBCG Agency and future EU AA as well as liaison officers deployed by national law enforcement authorities. Under its current legal framework EASO cannot deploy liaison officers, which means that, were the EU AA proposed regulation not to be adopted, also asylum-related tasks of the European liaison officers network would be performed exclusively by officers who have no specific expertise on asylum and international protection. This would result in lower quality of the information collected with obvious repercussions on the EU’s evidence-based policy. Therefore, in line with the mandate-specific description of tasks in the EBCG proposal and the provisional agreement on the EU Asylum Agency Regulation, the proposed recast Regulation on the creation of a European ILO network should designate

71. See EBCG, Liaison Officers Network, available at <https://frontex.europa.eu/partners/liaison-officers-network/>.

72. Article 78(3) EBCG Regulation.

73. Council Decision (CFSP) 2015/972 of 22 June 2015 launching the European Union military operation in the southern Central Mediterranean (EUNAVFOR MED), OJ 2015 L157/51.

74. European Commission, Proposal for a Regulation of the European Parliament and of the Council on the creation of a European network of immigration liaison officers (recast)(hereafter ‘ILO Regulation proposal’), COM(2018) 303 final, Brussels, 16 May 2018.

75. Article 3 ILO Regulation proposal.

asylum-related tasks exclusively to liaison officers deployed by the EU Asylum Agency.

Thirdly, whereas the role of liaison officers and the European Immigration Liaison Officers Network is traditionally centered around information collection and assistance to prevent irregular migration to the EU, the Commission ILO proposal usefully expands such role to assisting the regular entry of third country nationals on the territory of EU Member States as resettled refugees or legal migrants. This is a useful addition to the liaison officers' tasks. In addition, because of their presence in third countries, EBCG Agency as well as future EU AA third country liaison officers could also make a useful contribution to an assessment of the fundamental rights impact of EBCG Agency or EU AA cooperation with or activities in third countries. This should be added to the description of tasks in Article 78(3) EBCG proposal as well as Article 3 of the ILO Regulation recast proposal.

Finally, Agency liaison officers are to be deployed by way of priority in those third countries which constitute a country of origin or transit regarding illegal immigration. Contrary to the provisional agreement on the EU AA Regulation,⁷⁶ this is not made conditional to compliance with human rights standards in the third country of deployment. There is no objective reason why such conditionality should only apply with regard to the deployment of EU AA third country liaison officers. In fact, given the nature of their tasks, which include assistance with return to the third country of their deployment, additional guarantees with regard to human rights compliance in the country of deployment is even more important in the case of EBCG Agency third country liaison officers. Therefore, deployment of Agency third country liaison officers should be limited to third countries presenting at least minimum safeguards as regards compliance with human rights, including with regard to migration and border management.

ECRE recommends amending **Article 78** as follows:

Article 78(3), last sentence: **delete “and, where relevant, CSDP missions and operations”.**

Article 78(3): **add the following sentence: “Agency Liaison officers shall contribute to assessing the fundamental rights impact of EBCG operations and cooperation with third countries”.**

Article 78(2): **add the following sentence: “Agency liaison officers shall only be deployed to third countries in which migration and asylum management practices comply with human rights standards”.**

VII. REMEDIAL ACTION TO FUNDAMENTAL RIGHTS VIOLATIONS IN EBCG ACTIVITIES

Activities carried out by the Agency, whether in the area of border control, law enforcement or return, are taking place in circumstances where there is a heightened risk of fundamental rights violations. Entrusted with the task of controlling the border while fully respecting fundamental rights of those subject to their actions, EU border guards are at the forefront of fundamental rights protection and have to lead by example in this regard. An abundance of reports from NGOs and human rights treaty bodies as well as landmark judgments of the European Court of Human Rights have shown that the fundamental rights of refugees and migrants at the EU's external borders are frequently violated, including in sections of the border where EBCG operations are taking place.⁷⁷ Beyond the complex legal question of the EU's responsibility for human rights violations occurring during EBCG operations discussed above,⁷⁸ this raises questions as to the effectiveness of the EBCG internal mechanisms to report, respond to and redress fundamental rights violations. Under the EBCG Regulation the Executive Director may suspend or terminate operations in case of persisting fundamental rights violations,⁷⁹ while a complaints mechanism was introduced enabling any person directly affected by an action of staff involved in various operational activities alleging to be the victim of a fundamental rights violation to submit a complaint to the Agency.⁸⁰ Beyond those tools established in the Regulation, a system was set up within the

76. See Article 35a(1) Provisional Agreement on a Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010.

77. For an overview of practice at the EU's external borders see ECRE, [Access to protection in Europe. Borders and entry into the territory](#), October 2018. See also Danish Refugee Council, [Fundamental Rights and the EU Hotspot Approach](#), October 2017 and Dutch Council for Refugees, ECRE, CIR, GCR, Pro Asyl, [The implementation of the hotspots in Italy and Greece](#), December 2016. On push backs at the Hungarian-Serbian border, see for instance Council of Europe, [Report to the Hungarian Government on the visit to Hungary carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment \(CPT\) from 20 to 26 October 2017](#), CPT/Inf (2018) 42, Strasbourg, 18 September 2018.

78. See section 2 above.

79. Article 25 EBCG Regulation.

80. Article 72 EBCG Regulation.

Agency collecting serious incident reports by staff involved in EBCG operations. Although those tools remain heavily underused, the Commission proposal leaves the relevant provisions in the EBCG Regulation intact. In ECRE's view, there is room for considerable improvement of the proposal on those points as discussed in this section.

Complaints mechanism

The EBCG complaints mechanism introduced by the 2016 revision of Frontex' mandate⁸¹ was considered an important step in advancing and mainstreaming respect for fundamental rights in the Agency's activities and was explicitly called for by the European Parliament in response to a European Ombudsman own-initiative enquiry.⁸² It should be noted that the EBCG Agency complaints mechanism deals with complaints lodged against all staff members involved in the Agency's operation but that only with regard to its statutory staff the Agency is able to undertake a substantive examination of the complaints and impose sanctions. Where the complaint concerns actions by staff members of Member States deployed by the EBCG Agency, the Agency's competence is limited to an admissibility assessment and transmission of admissible complaints to the home Member State and follow-up with the Member State in case no reports is received from the Member State.⁸³ As it is operated within the Agency and the limited powers to sanctions are vested with the Executive Director, it remains an essentially internal oversight and redress system, which has inherent limitations in terms of impartiality and independence.⁸⁴ It should therefore be emphasised that the EBCG Agency complaints mechanism, even if improved in accordance with ECRE's recommendations below, cannot be considered as or substitute an effective remedy against human rights violations before a Court or tribunal as required under Article 47 EU Charter of Fundamental Rights and Article 13 European Convention on Human Rights (ECHR).

More than two years after its entry into force, the number of complaints lodged with the Agency remains low.⁸⁵ This is explained by a variety of reasons, including the limited publicity given to the mechanism in light of the limited capacity of the Fundamental Rights Officer to handle such complaints, the lack of familiarity of migrants, NGOs and even border guards involved in EBCG operations with the system and its overall complexity. However, the effectiveness and quality of a complaints mechanism should not be assessed against the number of complaints it triggers, nor should it be concluded from such low numbers that no further revisions of the mechanism are needed.

The mechanism has both a monitoring and redress function, although the relevant provision is flawed in various respects and therefore fails to serve its stated purpose in practice. In ECRE's view, in order to improve its effective functioning, the following amendments to Article 108 EBCG proposal are required.

The right to submit a complaint to the Agency is limited to persons *directly* affected by *actions* of staff involved in EBCG operations and who consider to have been the subject of fundamental rights violations or *any party representing such a person*. This presents a threefold restriction of the personal and material scope of the complaints mechanism.

First, under international human rights and EU law, responsibility of States and international organisations for human rights organisations can be triggered not only by actions undertaken by representatives of the State or international organisations but also by omissions, *i.e.* their inaction in a situation where action was needed in order to avoid a human rights violation.⁸⁶ In the context of an EBCG Regulation an example of such omission could be a situation where a border guard from a participating Member State is a witness of the use of excessive force by a border guard of the host Member State but does not undertake any action to stop such behaviour. While the host Member State's border guard is responsible under international human rights law for the action undertaken, *i.e.* the excessive use of force, the border guard of the participating Member State could also be held responsible for omitting to interfere and try to stop the unlawful act. Under a strict reading of the provision, such omissions would fall outside the scope of the EBCG Agency complaints mechanism.

81. Article 72 EBCG Regulation.

82. European Parliament, European Parliament resolution of 2 December 2015 on the Special Report of the European Ombudsman in own-initiative inquiry OI/5/2012/BEH-MHZ concerning Fronted (2014/2215(INI)), P8_TA(2015)0422.

83. Article 72(7) EBCG Regulation.

84. For an overview and discussion of the various administrative review or complaints mechanisms in the context of border management and return at national and international level, see S. Carrera and M. Stefan, *Complaints Mechanisms in Border Management and Expulsion Operations in Europe. Effective remedies for victims of human rights violations?*, Centre for European Policy Studies (CEPS), Brussels, 2018.

85. According to the FRO, 2 complaints were received in 2016 and 15 in 2017.

86. On this issue see V. Stoyanova, "Causation between State Omission and Harm within the Framework of Positive Obligations Under the ECHR", *Human Rights Law Review*, Volume 18, Issue 2, 1 June 2018, pp. 309 – 346.

Therefore, Article 108(2) should be further amended to explicitly refer not only to actions but also omissions of the staff involved in an EBCG operation.

Secondly, only persons who are *directly* affected by the action (or omission), can submit a complaint.⁸⁷ This may place an unduly high burden of proof on the complainant which may be very difficult to meet in particular where the alleged fundamental rights breach concerns an omission and would exclude any possibility for the individual to submit a complaint for a fundamental rights violation triggered by the omission of an Agency staff member in a coordinating role. This could be the case for instance, where the coordinating officer of the Agency does not comply with his or her obligation to report to the Executive Director instructions given by the home Member State to the team members which are unlawful and give rise to human rights violations. In such a situation, the individual would not be able to show that he or she is directly affected by the omission of the EBCG Agency coordinating officer, whereas the Executive Director, if properly informed, could have decided to suspend or terminate the operation and possibly prevent the fundamental rights violation. Therefore, the requirement that individuals be *directly* affected by the action or omission of staff involved in EBCG operations should be deleted, it should be sufficient for the individual to be affected by the actions or omissions of the staff.

Thirdly, while any party representing a person directly affected by actions of staff involved in EBCG operations may submit a complaint to the Agency on that person's behalf, this does not include the submission of complaints in the "public interest" by third parties. Non governmental organisations assisting refugees and migrants in particular may receive information concerning fundamental rights violations from individuals who may not be willing to lodge a complaint or to have a complaint lodged on their behalf for fear of repercussions or that it may negatively affect their asylum procedure for instance. However, the information collected may reveal a pattern of fundamental rights violations in the context of EBCG operations which require further investigation. If not subject of an individual complaint before a national competent body or the ECHR, a possibility for such organisations to submit a complaint, not on behalf of individuals but in the "public interest", would constitute a useful tool to alert the Agency and participating Member States of the alleged fundamental rights violations. It would also encourage them to undertake appropriate action to investigate and where necessary take the appropriate measures to stop such violations or suspend or terminate the operation on such basis. This was among the recommendations of the European Ombudsman as part of its own initiative report concerning Frontex,⁸⁸ but was unfortunately not included in the EBCG Regulation or the current proposal. Therefore, the Regulation should provide for a possibility for third parties to submit a substantiated "public interest complaint" in writing, in particular where it has evidence of a consistent pattern of fundamental rights violations occurring in the context of an EBCG operation.

Fourthly, according to Article 108(8) where a team member is found to have violated fundamental rights or international protection obligations, the Agency *may* request that the Member State removes that member immediately from the activity of the Agency or the European Border and Coast Guard standing corps. As the EBCG Agency is to lead by example and should be at the forefront of respecting, protecting and promoting fundamental rights, it should not tolerate the presence of border guards who have violated fundamental rights, in particular as its operational capacity and presence is considerably expanded by the Commission proposal.

In line with the strengthening of the Agency's power to refuse experts submitted as members of the standing corps by Member States as recommended above,⁸⁹ the Agency should request that the Member State remove a team member immediately from the activity of the Agency or the standing corps where he or she has been found to have violated fundamental rights.

Moreover, it should be noted that the definition of "member of the teams"⁹⁰ includes now all members of the European Border and Coast Guard standing corps and therefore staff of the Agency as well. Given the different procedure applying to Agency staff and staff of Member States in the context of the complaints mechanism, references to team members should be adjusted accordingly.

The existing complaints mechanism lacks effective tools for the Agency, through its Fundamental Rights Officer (FRO), to ensure effective follow-up of complaints it receives concerning team members of host Member States or participating Member States. In such cases, it is for the Member State concerned to deal with the complaint and to report back to the FRO as to the findings and follow-up made to the complaint within a determined time-period and at regular intervals thereafter if necessary. As the majority of cases so far concerns Member

87. Article 108(2) EBCG proposal.

88. European Ombudsman, Special Report of the European Ombudsman in own-initiative inquiry OI/5/2012/BEH-MH concerning Frontex, 7 November 2013.

89. See section 3 above.

90. Article 2(18) EBCG proposal.

State staff, this means that the Agency is entirely dependent on the goodwill of the Member States concerned to report back to the FRO as to the follow-up given to such complaints. In some cases, such reporting back is significantly delayed or does not occur at all. However, as it concerns experts involved in its operations, the EBCG Agency should be at least duly informed of any follow-up given to the complaint. In case the team member is found to have committed a fundamental rights violation, the Agency should take appropriate action in accordance with Article 108(8).

In order to further encourage Member States to swiftly examine the complaint, the Agency should at least be enabled to suspend the team member's participation in an Agency activity until a final decision has been taken by the competent authority of the host Member State or participating Member State. Such possibility could be included in Article 108(7).

A major flaw in the complaints mechanism remains the fact that the assessment of the merits of complaints against Agency staff members lies with the Executive Director of the Agency. The latter must ensure "appropriate follow-up" and report back to the Fundamental Rights Officer on the measures taken in response to the complaint. However, as the staff member is under the instruction of the Executive Director, the alleged fundamental rights violation may be directly related to instructions approved by the Executive Director. This makes an impartial and independent assessment of the complaint impossible. However, this could be overcome by expanding the Fundamental Rights Officer's competence in the complaints mechanism to include an assessment of the merits of the complaint, as the Fundamental Rights Officer is independent in the performance of his or her duties. This would also imply that the Fundamental Rights Officer should have the power to issue a binding recommendation to the Executive Director as to the findings and follow up to be made by the Agency in response to such complaints. Therefore, Article 108(6) should be amended accordingly.

The suggested amendments would significantly improve the complaints mechanism but cannot address the biggest flaw of the mechanism. As it is an internal mechanism it can never ensure a fully independent and impartial examination of the complaints lodged as long as it remains an internal arrangement. This could only be solved by making an external and independent body competent for complaints lodged by individuals alleging to the victims of human rights violations occurring during EBCG operations or activities. Within the institutional architecture of the EU, the European Ombudsman investigated complaints by individuals and organisations about the maladministration by institutions, bodies and agencies of the Union, including violations of the principle of good administration and fundamental rights. In this regard, co-legislators could consider transferring the competence to examine complaints lodged against Agency staff exclusively to the European Ombudsman.

ECRE recommends the following amendments to **Article 108**:

2. Any person who is affected by the actions and **omissions** of staff involved in a joint operation, pilot project, rapid border intervention, migration management support team deployment, joint return operation or return intervention and who considers him or herself to have been the subject of a breach of his or her fundamental rights due to those actions, or any party **either** representing such a person or **in the public interest** , may submit a complaint in writing to the Agency.

6. **In the case of a registered complaint concerning a staff member of the Agency, the fundamental rights officer shall examine the complaint and issue a recommendation, including disciplinary measures as necessary, to the Executive Director as to the findings and appropriate response of the Agency to the complaint. Where the Executive Director decides not to follow the recommendation, he or she shall provide the reasons for such derogation to the fundamental rights officer without delay.**

Maintain first subparagraph.

8.[maintain text] **Where an admissible complaint concerns a team member of a host Member State or a team member from other participating Member States, the Agency may suspend the deployment of that team member and financing of such deployment under Article 61 until it receives a report from the relevant Member State.**

9.**Where a team member of a host Member State or a team member from other participating Member States, including a seconded member of the teams or seconded national expert is found to have violated fundamental rights or international protection obligations, the Agency shall request that the Member State remove that member immediately from the activity of the Agency or the European Border and Coast Guard standing corps.**

Suspension of activities in case of persistent human rights violations – Article 47

The suspension or termination of activities of the Agency in case the conditions to conduct such activities are no longer fulfilled is a powerful tool at the disposal of the Executive Director to respond not only to a situation where the operational plan is not respected, but also in case of serious human rights violations occurring during operational activities. Although such possibility exists since the revision of Frontex' mandate in 2011, no formal decision to suspend or terminate, in whole or in part, an operation was taken so far by the Executive Director on that basis.⁹¹ The threshold set by the previous Frontex Regulation and the existing EBCG Regulation,⁹² maintained in the EBCG proposal, is high: "violations of fundamental rights or international obligations that are of a serious nature or are likely to persist" are required. This is justified by the need for operational continuity as well as the fact that the Agency's withdrawal from a border section with a problematic human rights situation deprives the Agency at the same time of the possibility to monitor and intervene with the authorities of the host Member State. Secondly, the suspension or termination of the activity or suspension or withdrawal of financing remains at the discretion of the Executive Director, who must take such decision, after consulting the FRO, only where he or she *considers* that such serious fundamental rights violations take place or are likely to persist. Moreover, the EBCG Regulation nor the EBCG Regulation contain any criteria or indicators for the Executive Director to make such fundamental rights assessment.

Although ECRE agrees that a decision to terminate or suspend an operation requires careful consideration of all possible implications and is not to be taken lightly, the boosted operational capacity and presence of the Agency through its own staff under the proposed Regulation also automatically increases the Agency's awareness and knowledge of the actual situation on the ground. In addition, through its own comprehensive vulnerability assessment of Member States borders⁹³ and envisaged increased synergy with the Schengen Evaluation Mechanism,⁹⁴ its network of liaison officers in the Member States⁹⁵ and the creation of Antenna Offices,⁹⁶ the Agency disposes of an ever more sophisticated situational picture, including as regards respect for fundamental rights and the safeguards in place to uphold them at the border.

Under the jurisprudence of the ECtHR relating to complicity of States for gross human rights violations committed by another State on account of their acquiescence and connivance, State responsibility for human rights violations may be engaged where "the authorities fail to take reasonable steps to avoid a risk of ill-treatment about which they knew or ought to have known".⁹⁷ The enhanced and multiplied tools in the EBCG proposal to detect human rights violations committed within the context of its operations increase the knowledge and awareness of the Agency of fundamental rights occurring in its operations and activities. This inevitably reduces the level of discretion for the Executive Director with regard to his or her power to suspend or terminate operations as these tools increase the likelihood that the Agency knew or ought to have known of the serious or persisting violations of fundamental rights or international obligations. The complaints mechanism established in accordance with Article 108 as well as the Agency's internal serious incident reporting system and reports by the Agency liaison officers posted in the Member States may reveal the existence of serious violations of fundamental rights or international protection obligations or even a pattern of such violations at a particular border section. Where such border section is situated in the operational area of an EBCG operation or activity this should give rise to partial or entire suspension or termination in accordance with Article 47. At the same time, absence of such complaints or incident reporting should not lead to the conclusion *per se* that the conditions of Article 47(4) are not fulfilled, as other sources may reveal this to be the case as discussed below. With the aim of ensuring that the Executive Director's decision on the basis of Article 47(4) is based on all information collected through the Agency's internal tools, the provision should be further amended by including an explicit reference to the abovementioned tools.

Beyond the Agency's information tools, the Executive Director must also take into account relevant human

91. In November 2016, the EBCG Consultative Forum recommended the suspension of operational activities of the Agency at the Hungarian-Serbian border in light of the widely documented human rights violations taking place. The Executive Director refused to suspend the operation on the basis that the Agency's presence could assist in documenting human rights violations as well as reducing risks of such violations. Following the adoption of legislation in 2017 by Hungary triggering the launch of an infringement procedure by the European Commission, the Consultative Forum maintained its recommendation. See Frontex Consultative Forum on Fundamental Rights, *Fifth Annual Report*, 2017, pp. 29-30.

92. Article 25 EBCG proposal.

93. Article 33 EBCG proposal

94. Article 34 EBCG proposal

95. Article 32 EBCG proposal.

96. Article 60 EBCG proposal.

97. ECtHR, *Al-Nashiri v Poland*, ECtHR, Application no. 28761/11, Judgment of 24 July 2014, par. 509.

rights reports published by international organisations, human rights Treaty bodies and national and international human rights organisations documenting human rights abuses relating to the operational areas of EBCG Agency activities. Such obligation stems from the jurisprudence of the ECtHR and the EU Charter of Fundamental Rights, which imposes a positive obligation to rely on all credible sources when assessing a risk of ill-treatment contrary to Article 3 ECHR, including information from reputable non governmental organisations. Where necessary such information must be obtained proprio motu.⁹⁸ Such obligation applies mutatis mutandis to the Agency when considering the application of Article 47.

In order to ensure that this is duly taken into account by the Executive Director when considering the application of Article 47, this should be explicitly referred to in the preamble through the creation of a new Recital dedicated to the Executive Director's power to suspend or terminate an operation.

Finally, as the Agency's may engage in operations on the territory of third countries within the framework of status agreements, the scope of Article 47 should be extended accordingly.

ECRE recommends amending **Article 47** as follows:

Amend Article 47(4) as follows: The Executive Director shall, after consulting the fundamental rights officer and informing the Member State concerned withdraw the financing of or suspend or terminate, in whole or in part, a joint operation rapid border intervention, pilot project, migration management support team deployment, return operation, return intervention, working arrangement or **operation carried out in the territory of a third country.**

Add the following sentence to Article 47(4). **When taking such decision, the Executive Director shall take into account relevant information resulting from the Agency complaints mechanism, serious incident reports, and the reports of the Agency liaison Officer posted in the host Member State as well as material originating from EU institutions and EU Agencies, agencies of the United Nations or Council of Europe bodies and reputable national and international non governmental organisations.**

A new recital XX is added: **Where the conditions to conduct the Agency's activities are no longer fulfilled the Executive Director shall terminate those activities. Where the Executive Director considers that there are violations of fundamental rights or international protection obligations that are of a serious nature or are likely to persist, he or she shall withdraw the financing of or suspend or terminate, in whole or in part, a joint operation rapid border intervention, pilot project, migration management support team deployment, return operation, return intervention, working arrangement or operation carried out in the territory of a third country. In taking such decision, the Executive Director shall take into account relevant information resulting from the Agency complaints mechanism, serious incident reports, and the reports of the Agency liaison Officer posted in the host Member State as well as material originating from EU institutions and EU Agencies, agencies of the United Nations or Council of Europe bodies and reputable national and international non governmental organisations.**

VIII. PREVENTIVE MECHANISMS

As the Agency's resources, staff and operational activities, including in the area of return and on the territory of third countries are significantly expanded, the tools to ensure and monitor fundamental rights compliance of the actions undertaken by the Agency, its staff and experts deployed under its coordination must be strengthened accordingly. Consecutive revisions of Frontex' mandate have introduced specific bodies set up with the aim of advising the Agency on its fundamental rights strategy, including on ways to prevent that activities undertaken or coordinated by the Agency result in fundamental rights violations. The creation of a fundamental rights officer position as well as a Consultative Forum on fundamental rights constitute important tools in this regard, but need further adjustment to its scope and powers to match the Agency's massive expansion in recent years. At the same time, the vulnerability assessment introduced by the EBCG Regulation could be further adjusted to incorporate an assessment of targeted fundamental rights-related criteria.

98. "In respect of materials obtained proprio motu, the Court considers that, given the absolute nature of the protection afforded by Article 3, it must be satisfied that the assessment made by the authorities of the Contracting State is adequate and sufficiently supported by domestic materials as well as by materials originating from other, reliable and objective sources, such as, for instance, other Contracting or non-Contracting States, agencies of the United Nations and reputable non-governmental organisations." See ECtHR, *Salah Sheekh v. The Netherlands*, Application no. 1948/04, Judgment of 11 January 2007, par. 136.

Fundamental Rights Officer (FRO)

The FRO's tasks, copied from the corresponding provision in the EBCG Regulation, are defined as contributing to the Agency's fundamental rights strategy, monitoring its compliance with fundamental rights, promoting its respect for fundamental rights and contribute to the mechanism for monitoring fundamental rights. The FRO's independence in the performance of his or her duties is explicitly stipulated and entails a direct reporting duty to the management board rather than the Executive Director. At the same time, the FRO is only required to *cooperate* with the Consultative Forum, whereas under its initial mandate the FRO was under an obligation to *report* to the Consultative Forum as well.⁹⁹ The change, consolidated in the EBCG Regulation, is not without importance as a reporting duty to the Consultative Forum, being the body assisting the Executive Director and management board with independent advice, implies a directly supervisory role for the Consultative Forum over the FRO on an equal footing with the Management Board. As an independent expert body on fundamental rights, the Consultative Forum should be able to supervise the activities of the FRO and provide recommendations on the FRO's priorities in light of the Consultative Forum's mandate. Therefore, the FRO's duty to *report* to the Consultative Forum should be reinserted in Article 107(2).

Furthermore, whereas the FRO's independence is clearly stipulated in the EBCG Regulation as well as in the proposal, this is not the case for the FRO's staff. In order to avoid any possible conflict of interest on behalf of the staff dedicated to the FRO's office, their independence should be unambiguously consolidated in the Regulation.

In addition, the FRO's resources are insufficient and do not enable her to perform all required fundamental rights-related tasks in light of the current Agency mandate. This mismatch will no doubt be exacerbated if the significant expansion of the Agency's operational capacity, including outside the EU as proposed by the Commission were to be adopted by the co-legislators. As a result of the increase in operational activities, the number of operational plans which have to be reviewed by the FRO will increase accordingly, while also on the monitoring side, the FRO will have to play a key role in the set up and operation of the effective mechanism the Agency is required to establish to monitor the respect for fundamental rights in all its activities.¹⁰⁰ In order to ensure that the FRO is fully equipped to perform the range of fundamental rights-related tasks, the necessary resources and staff must be earmarked in the Agency's budget. Whereas the Agency's budget is part of the Commission proposal for establishing an Integrated Border Management Fund, such principle could be usefully reinforced in the preamble of the EBCG Regulation.

ECRE recommends the following amendments to Article 107:

Article 107(1): Add the following sentence: **A fundamental rights office shall be established to support the fundamental rights officer in the performance of his or her tasks. The fundamental rights office shall be provided with the necessary resources and staff. Staff allocated to the fundamental rights office shall report only to the Fundamental Rights Officer.**

Article 107 (2): The fundamental rights officer shall report directly to the management board and [~~deleted text~~] to the consultative forum.

Add the following sentence to recital 88: **The fundamental rights officer shall be provided with the resources and staff with the skills and seniority commensurate to the expansion of activities and powers of the Agency and necessary to enable him or her to effectively perform the variety of tasks in accordance with this Regulation.** Any regular or extraordinary assignment of staff to the Agency must be accompanied with the proportional allocation of staff to support the fundamental rights officer.

Consultative Forum

The Consultative Forum continues to resort under the Administrative and management structure of the Agency as it is the case under the current EBCG Regulation. The same applies to the Fundamental Rights Officer.¹⁰¹ This creates tension with the Consultative Forum's role as an expert body providing independent advice in fundamental rights matters to the Executive Director and Management Board as well as the FRO's independence. Moreover, neither the FRO nor the Consultative Forum perform managerial or administrative

99. Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ 2011 L 304/1, Article 26 a.

100. Article 81(1) EBCG proposal.

101. See Article 61 (c) and (d) EBCG Regulation and Article 97 (d) and (e) EBCG proposal.

functions on behalf of the Agency and therefore should not be considered as part of the administrative and management structure. Therefore, the reference to the CF and the FRO should be deleted from Article 97.

ECRE recommends **deleting (d) and (e) in Article 97** in order to secure the independence of the Consultative Forum and the Fundamental Rights Officer vis-à-vis the decision-making bodies of the Agency.

Under Article 106 of the EBCG Regulation, the Consultative Forum is only able to assist the Executive Director and the management board, as it is the case under the current Regulation. This means that the Consultative Forum is not entitled to formally engage with the different departments within the Agency without the permission of the Executive Director. Fundamental rights obligations are imposed on the entire Agency and therefore this is no objective reason for such limitation. Therefore, Article 106(1) should be amended accordingly.

As it is the case for the FRO, the resources available to the Consultative Forum under the current Regulation are not sufficient to enable it to perform its advisory role properly. A consultative Forum secretariat was created to provide administrative and technical support but beyond such valuable assistance, no substantive support is provided on legal analysis, screening of EBCG Agency documents or field visits conducted by the CF members. These constraints on the capacity of the Consultative Forum have implications on the scope of the Consultative Forum's activities and create a gap between what is required under its mandate and what it can deliver. This gap will be significantly increased in light of the proposed expansion of the Agency's mandate, resources and operational activities. Therefore, the Regulation should establish a Consultative Forum secretariat, provided with the financial resources and staff qualified to provide the logistical and substantive support to enable the Consultative Forum to comply with its mandate. Such support should be commensurate to the expansion of the activities and powers of the Agency.

ECRE recommends further amending **Article 106** as follows:

Article 106(1): A consultative forum shall be established by the Agency to assist the Agency with independent advice in fundamental rights matters.

Article 106(6) (new): A Consultative Forum Secretariat shall be established to support the Consultative Forum members with administrative and substantive support. The Secretariat shall receive the resources and staff with the skills and seniority commensurate to the activities and powers of the Agency and necessary to enable the Consultative Forum to assist the Agency with independent advice in fundamental rights matters in accordance with this Article.

Fundamental rights compliance as inherent part of vulnerability assessment

The vulnerability assessment to be carried out by the Agency aims to assess the capacity and readiness of Member States to face both present and future challenges and threats at the external borders as well as possible consequences on the functioning of the Schengen area. This essentially entails a monitoring and assessment exercise of the availability of technical equipment, capabilities, resources, infrastructure, and adequately skilled and trained staff of Member States necessary for border control. Under the Commission proposal, European Integrated Border Management explicitly includes "measures related to the referral of persons who are in need or wish to apply for international protection" in the list of measures constituting border control. In ECRE's view, referral mechanisms to the asylum procedure are an important aspect of a Member State's readiness and capacity to control external borders in accordance with EU law. Under the EU asylum acquis, border guards have a specific obligation to refer persons wishing to apply for international protection to the authorities competent to register their claim,¹⁰² while an obligation is imposed on Member States to provide information on the possibility to apply in detention facilities and at border crossing points under certain conditions.¹⁰³

However, another crucial aspect of the European Integrated Border Management with significant fundamental rights implications listed in Article 3 concerns search and rescue operations for persons in distress at sea. Saving lives is one of the key objectives of the EU's policy on Mediterranean Sea crossings and ensuring and supporting search and rescue capacity is key to reduce the loss of life at sea. In particular at a time where NGO search and rescue activities are increasingly obstructed or made impossible, the capacity of Member

102. See Article 6 Asylum Procedures Directive.

103. See Article 8 Asylum Procedures Directive. For an analysis of Member States' implementation in practice of obligations under Article 6 and 8 Asylum Procedures Directive, see ECRE, [Access to protection in Europe. The registration of asylum applications](#), October 2018.

States to engage in SAR missions should be secured and enhanced by all available means. As search and rescue is an integral part of European Integrated Border Management as a shared responsibility, this should be reflected in the scope of the Agency's vulnerability assessment, which should also monitor and assess the availability of SAR related equipment and skilled staff to the same extent as border control related measures. Therefore, Article 33(2) should be further amended to explicitly refer to Article 3(1)(b) as well as Article 3(1)(a). This would provide an important tool to map available SAR specific capacity and technical equipment and enable the Executive Director to issue specific recommendations to Member States to address gaps in SAR capacity as necessary and the Management Board and ultimately the Commission to take further measures in case of non-compliance with the Executive Director's recommendation.

ECRE recommends further amending Article 33(2), first sentence by adding a reference to Article 3(1)(b).

IX. DATA PROTECTION

The expansion of the Agency's operational activities in border control management, return and cooperation with third countries also entails an increased role in the processing of data, both personal and operational. Border guards deployed as members of the European Border Guard standing corps will have far-reaching executive powers and in that capacity also be responsible for processing operational and personal data relating to third country nationals. Whether it is in the context of the migration management support teams, Eurosur, the central system for processing information and data on return or cooperation with third countries, the processing of personal data entails risks of violation of data protection rights of the individuals concerned and requires that the necessary safeguards are in place to prevent and remedy infringements.

Among the variety of tasks performed by border guards in the context of Agency activities, those related to return and cooperation with third countries are particularly challenging from a data protection perspective. The interaction and the exchange of personal data with third country authorities, including where persons claim or have claimed a need for international protection to an EU Member State is extremely sensitive and requires a cautious approach. EU data protection rules, based on the purpose limitation principle, safeguard the subject's rights to information and remedies against the unlawful use of personal data and restrictions on the sharing of data with external actors. EU law sets overall high data protection standards, which are seldom met in countries of origin or transit of migrants present in the EU.

The EBCG Agency as an EU Agency is bound by Regulation 45/2001 which sets out the rules for the processing of data by the EU institutions and bodies.¹⁰⁴ Following the adoption of the General Data Protection Regulation and the Directive relating to the processing of personal data for the purpose of crime prevention or execution of criminal penalties, which are applicable to Member States, the European Parliament and the Council reached an agreement in May 2018 on the revision of Regulation 45/2001, which aligns the Regulation to the abovementioned data protection instruments applicable to Member States.¹⁰⁵ According to the revised Regulation, the transfer of personal data would only be possible on the basis of a so-called adequacy decision by the Commission. An adequacy decision affirms the equivalence of data protection standards in a third country with the data protection standards in EU law. In absence of such adequacy decision, transfer of data is nevertheless possible if appropriate safeguards are in place and provided that enforceable data subject rights and effective legal remedies for data subjects are available. Such appropriate safeguards may be laid down in a binding agreement between public authorities. Failing an adequacy decision or the existence of appropriate safeguards, EU law allows for derogations on the prohibition of transfer of personal data in "specific situations".¹⁰⁶ Importantly, one of the conditions in which transfer of personal data to a third country may be allowed, is where this is necessary for "important reasons of public interest". It is unclear whether EU border management or return objectives qualify as such important reasons of public interest but if this is the case such derogation could be relied upon in the context of EBCG operations as for most countries of transit and origin the EBCG Agency cooperates or seeks cooperation with, no Commission adequacy decision or appropriate safeguards

104. Regulation (EC) No 45/2001 of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, OJ 2001 L 008/1. See also Article 87(1) EBCG proposal.

105. The Regulation was not published in the Official Journal at the time of writing. The compromise text between the European Parliament and the Council is available at the Council register. See European Union, Regulation (EU) 2018/XX of the European Parliament and of the Council of ... on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC, Document PE-CONS 31/1/18 REV 1 (hereafter 'Compromise text on Regulation on processing of personal data by EU institutions, bodies, offices and agencies'), Strasbourg 23 October 2018, available at <http://bit.ly/2FbRa04>.

106. See Compromise text on Regulation on processing of personal data by EU institutions, bodies, offices and agencies, Article 50(1) (d).

would be in place.¹⁰⁷

This would allow considerable flexibility for the EBCG Agency to cooperate with countries with weak data protection rules and deprive third country nationals affected by its operations from essential data protection safeguards. Exchange of personal data with third countries may have serious if not irreversible consequences in particular when it concerns persons who expressed a fear for persecution by the authorities of the third countries concerned. The third country nationals and their family members may become victim of retaliation by the authorities amounting to ill-treatment. The EBCG Regulation proposal usefully reiterates the prohibition in the current Eurosur regulation to provide a third country with information that could be used to identify persons whose application for international protection is under examination or who are under a risk of ill-treatment.¹⁰⁸ However, this is restricted to personal data processed in the framework of Eurosur as laid down in bilateral agreements, status agreements or an operational plan regarding technical and operational assistance by the Agency to third countries. Moreover, not only the identification of applicants during the examination of their claim but also the disclosure to the authorities of the fact that a person has lodged an application even if not successful may be harmful for the individual upon return. Under the EU asylum *acquis* Member States are prohibited to disclose information on individual applications or the fact that an application has been made to the alleged actor of persecution/serious harm.¹⁰⁹ In line with this obligation and in order to ensure that such information is not inadvertently provided when cooperating with third countries, the prohibition on the Agency to share such information should also concern the fact of having lodged an application regardless of whether it was successful and should apply as a safeguard applicable to all forms of cooperation with third countries and not be limited to exchanges of information under Article 73(2), 74(3) and 75(3) within the framework of Eurosur.

Therefore, this safeguard should be included in Article 87 establishing general rules on processing of personal data by the Agency. In addition, according to the Eurosur Handbook, the information referred to in current Article 20(5) Eurosur Regulation which Member States are prohibited to share with third countries is not limited to personal data but extends to any information which could lead to identification of persons at risk of ill-treatment. Such an approach is listed as best practice in the Handbook.¹¹⁰ Accordingly, the safeguard laid down in Article 90(4) of the EBCG proposal, a provision restricted to processing of personal data, should also be included in Article 76 on information exchange with third countries in the framework of Eurosur in order to ensure that it also applies to all information – both personal and other data - transferred by EU Member States and the Agency in the framework of Eurosur.

Furthermore, Article 87(3) allows the Agency to provide for internal rules on restricting the data subject's rights under the Regulation on the processing of personal data by EU institutions and bodies to obtain notification of corrections to third parties, to object, on compelling legitimate grounds concerning his or her particular situation to the processing of his data and to be informed of the disclosure of data to third parties. Such restriction would be justified if the exercise of these rights would "jeopardise the return procedure". In addition, recital 85 implies an assumption of bad faith on behalf of third country nationals by stating that providing third country nationals with the right to data rectification "may increase the risk of misleading the authorities by providing incorrect data" in the first place. These are mere assumptions which are unsubstantiated and contribute to "criminalising" third country nationals. As these provisions provide the Agency with unduly broad powers to arbitrarily deprive third country nationals of core data protection rights for reasons of administrative convenience beyond what is permitted under Regulation 45/2001, they should be deleted.

107. This point was raised by Professor Jorrit Rijpma and Dr. Melanie Fink in the context of a discussion on the fundamental rights accountability of Frontex in the context of the Frontex Consultative Forum.

108. According to Article 50(5) of the compromise text of the Regulation on the processing of personal data by EU institutions, bodies, offices and agencies, where the abovementioned derogation in specific situations apply, "Union law may, for important reasons of public interest, expressly set limits to the transfer of specific categories of personal data to a third country or an international organisation". The prohibition to share information on applicants or former applicants for international protection in the EBCG Regulation could be considered as such express limit set in Union law and is an important safeguard against unlawful and harmful exchange of information, should border management or return objectives be considered as important reasons of public interest allowing for personal data exchange in absence of an adequacy decision or appropriate safeguards.

109. See Article 30 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), OJ 2013 L 180/60.

110. See European Commission, Annex to the Commission Recommendation adopting the Practical Handbook for implementing and managing the European Border Surveillance System (EUROSUR Handbook), C(2015) 9206 final; Brussels, 15 December 2015, p. 10.

ECRE recommends amending **Article 76, 87 and 90** as follows

Move Article 90(4) and (5) to become new Article 76 (4) and (5):

4. Any exchange of information under Article 73(2), Article 74(3) and Article 75(3) which provides a third country with information that could be used to identify persons or groups of persons whose request for access to international protection is **or has been** under examination or who are under a serious risk of being subjected to torture, inhuman and degrading treatment or punishment or any other violation of fundamental rights, shall be prohibited.

5. Onward transmission or other communication of information exchanged under Article 73(2), Article 74(3) and Article 75(3) to other third countries or to third parties shall be prohibited.

Delete Article 87(3), last sentence and recital 85.

Add new paragraph 4 to Article 87: Any exchange of information which provides a third country with information that could be used to identify persons or groups of persons whose request for access to international protection is or has been under examination or who are under a serious risk of being subjected to torture, inhuman and degrading treatment or punishment or any other violation of fundamental rights, shall be prohibited. The Agency shall not disclose the fact that a person has lodged an application for international protection to a third country.

Add new paragraph 5 to Article 87: Onward transmission or other communication of information exchanged under this Regulation to other third countries or to third parties shall be prohibited.

Principles of necessity, purpose limitation and proportionality underpinning EU data protection rules require a strict interpretation of the lawful purpose for which the Agency is entitled to process personal data of third country nationals. Moreover, to comply with the EU Charter of Fundamental Rights, EU law must strike a fair balance between the aim of securing the objective of enabling the EU Agency to perform its tasks and the fundamental rights to privacy and data protection of the individuals affected by the collection of information. In this regard, ECRE considers that there is no objective justification for the processing of personal data for the purpose of risk analysis in accordance with Article 30 and collected during operational activities. Risk analysis carried out by the Agency consists of monitoring of migratory flows towards and within the Union as well as general trends and challenges at the Union's external borders and with regard to return. The Commission proposal fails to justify how the processing of personal data of third country nationals affected by the Agency's operations can usefully contribute to general risk analysis which aims at mapping general trends and challenges related to border control and return. Therefore, ECRE recommends deleting the possibility for the Agency to process personal data for risk analysis purposes.

ECRE recommends deleting **Article 88(1)(d) and Article 89(2)(d)**.

Finally, it should be noted that the Agency's role in the management of the European Travel Information and Authorisation System (ETIAS), which is to set up and operate the ETIAS Central Unit, ensure the automated processing of applications and apply the future ETIAS screening rules,¹¹¹ has potentially huge implications on data protection rights. The application form requires the visa-exempt applicant to provide an extensive set of personal data, including the applicant's name, home address, level of education, email address, phone number etc, which will be checked against no less than 11 EU databases through the Central Unit. Based on a set of very broadly formulated screening rules, to be further defined through Commission implementing and delegated acts, the ETIAS system entails multiple risks for violation of applicant's data protection rights and wrong data being processed and stored. Complaints related to ETIAS and the wrong processing of personal data will have to be addressed through the complaints mechanism. Given the likelihood of massive numbers of ETIAS-related complaints, this will put serious constraints on the resources of the FRO and the EBCG Agency Data Protection Officer, which will have to be taken into account when allocating resources to both offices.

111. See Article 75 Regulation (EU) 2018/1240 of the European Parliament and of the Council of 12 September 2018 establishing a European Travel Information and Authorisation System (ETIAS) and amending Regulation (EU) No 1077/2011, (EU) No 515/2014, (EU) 2016/399, (EU) 2016/1624 and (EU) 2017/2226, OJ L 236/1.

ANNEX–LIST OF PROPOSED AMENDMENTS

Controlled centres

Delete Article 2(24) and the references to “controlled centres” throughout the EBCG proposal.

Instructions to the teams

Amend Article 44(2) to read:

The Agency, through its coordinating officer, may communicate its views to the host Member State on the instructions given to the teams, **including with regard to the protection, respect and promotion of fundamental rights**.

European Border and Coast Guard standing corps

Amend Article 57 (4) to read:

[maintain text] By 15 September, the Agency shall accept the proposed candidates **or refuse them in case of non-compliance with the required profiles, insufficient language skills, misconduct or infringement of the applicable rules during previous deployments and request that a Member State propose another candidate for secondment.**

Amend Article 58(3) to read:

[maintain text] The Agency shall **refuse nominated operational staff in case of non-compliance with the required profiles, insufficient language skills, misconduct or infringement of the applicable rules during previous deployments and request that a Member State propose another candidate for short-term deployments.**

Migration Management Support Teams

Amend Article 41(1) as follows:

Delete “or upon the initiative of the Agency and with the agreement of the Member State concerned”.

Amend Article 41(4) to read:

The technical and operational reinforcement provided **by experts deployed by the Agency as part of migration management support teams shall be strictly limited to the performance of border guard functions and** may include:

(a) **assistance in security checks of third-country nationals arriving at the external borders and providing information regarding the purpose of such checks.**

(b) **information on the possibility to apply for international protection and the referral of persons wishing to apply for international protection to the competent national authorities of the Member State concerned or to the experts deployed by [the European Union Agency for Asylum].**

(c) technical and operational assistance in the return process, **[deleted text]** acquisition of travel documents, preparation and organisation of return operations, including with regard to voluntary returns;

[Maintain (d)].

Return, Return operations and return interventions

Amend Article 49(1)(a) to read:

provide technical and operational assistance to Member States in the return of third country nationals, including **[deleted text]** voluntary departures **[deleted text]**, to achieve [maintain text].

Add the following sentence to **Article 51(2)**:

The Agency, through its coordinating officer, shall verify whether all third country nationals embarked on return flights organised or coordinated by the Agency, have received a return decision in accordance with the Return Directive and whether any suspensive appeal before a national court or the European Court of Human Rights.

Delete Article 54(2).

Cooperation with third countries and mixed return operations:

Add the following sentence to **Article 74(3)**:

No Agency statutory staff with executive powers shall be part of the border management and return teams deployed to a third country.

Add the following sentence to **Article 74(5)**:

The Agency shall not organise, coordinate or support return operations from the territory of third countries to other third countries.

Delete Article 75(4)

Liaison officers in third countries and third country observers

Amend Article 79(2) to read:

The Agency may, with the agreement of the Member States concerned, invite observers from third countries to participate in **[deleted text] training activities** referred to in Article 62, to the extent that their presence is in accordance with the objectives of those activities, may contribute to improving cooperation and the exchange of best practices, and does not affect the overall safety of those activities **nor the safety and access to the right of asylum of third country nationals**. The participation of those observers may take place only with the agreement of the Member States **[deleted text]**. Detailed rules on the participation of observers shall be included in the operational plan. **[deleted text]** They shall be required to adhere to the codes of conduct of the Agency while participating in its activities.

Delete “and, where relevant, CSDP missions and operations” in Article 78(3), last sentence.

Add the following sentence to **Article 78(2)**:

Agency liaison officers shall only be deployed to third countries in which migration and asylum management practices comply with human rights standards.

Add the following sentence to **Article 78(3)**:

Agency Liaison officers shall contribute to assessing the fundamental rights impact of EBCG operations and cooperation with third countries.

Complaints mechanism

Amend Article 108(2) to read:

Any person who is affected by the actions and **omissions** of staff involved in a joint operation, pilot project, rapid border intervention, migration management support team deployment, joint return operation or return intervention and who considers him or herself to have been the subject of a breach of his or her fundamental rights due to those actions, or any party **either** representing such a person **or in the public interest** , may submit a complaint in writing to the Agency.

Amend Article 108(6) to read:

In the case of a registered complaint concerning a staff member of the Agency, the fundamental rights

officer shall examine the complaint an issue a recommendation, including disciplinary measures as necessary, to the Executive Director as to the findings and appropriate response of the Agency to the complaint. Where the Executive Director decides not to follow the recommendation, he or she shall provide the reasons for such derogation to the fundamental rights officer without delay.

[Maintain first subparagraph.]

Add the following sentence to Article 108(8):

[maintain text] **Where an admissible complaint concerns a team member of a host Member State or a team member from other participating Member States, the Agency may suspend the deployment of that team member and financing of such deployment under Article 61 until it receives a report from the relevant Member State.**

Amend Article 108(9) to read:

Where a team member of a host Member State or a team member from other participating Member States, including a seconded member of the teams or seconded national expert is found to have violated fundamental rights or international protection obligations, the Agency shall request that the Member State remove that member immediately from the activity of the Agency or the European Border and Coast Guard standing corps.

Suspension or termination of activities

Amend Article 47(4) to read:

The Executive Director shall, after consulting the fundamental rights officer and informing the Member State concerned withdraw the financing of or suspend or terminate, in whole or in part, a joint operation rapid border intervention, pilot project, migration management support team deployment, return operation, return intervention, working arrangement or **operation carried out in the territory of a third country.**

Add the following sentence to Article 47(4):

When taking such decision, the Executive Director shall take into account relevant information resulting from the Agency complaints mechanism, serious incident reports, and the reports of the Agency liaison Officer posted in the host Member State as well as material originating from EU institutions and EU Agencies, agencies of the United Nations or Council of Europe bodies and reputable national and international non governmental organisations.

Add the following new recital:

Where the conditions to conduct the Agency's activities are no longer fulfilled the Executive Director shall terminate those activities. Where the Executive Director considers that there are violations of fundamental rights or international protection obligations that are of a serious nature or are likely to persist, he or she shall withdraw the financing of or suspend or terminate, in whole or in part, a joint operation rapid border intervention, pilot project, migration management support team deployment, return operation, return intervention, working arrangement or operation carried out in the territory of a third country. In taking such decision, the Executive Director shall take into account relevant information resulting from the Agency complaints mechanism, serious incident reports, and the reports of the Agency liaison Officer posted in the host Member State as well as material originating from EU institutions and EU Agencies, agencies of the United Nations or Council of Europe bodies and reputable national and international non governmental organisations.

Fundamental rights officer

Article 107(1): Add the following sentence to Article 107(1):

A fundamental rights office shall be established to support the fundamental rights officer in the performance of his or her tasks. The fundamental rights office shall be provided with the necessary resources and staff. Staff allocated to the fundamental rights office shall report only to the Fundamental Rights Officer.

Amend Article 107 (2) to read:

[maintain text] The fundamental rights officer shall report directly to the management board and [deleted text] to the consultative forum. [maintain text].

Add the following sentence to recital 88:

The fundamental rights officer shall be provided with the resources and staff with the skills and seniority commensurate to the expansion of activities and powers of the Agency and necessary to enable him or her to effectively perform the variety of tasks in accordance with this Regulation. Any regular or extraordinary assignment of staff to the Agency must be accompanied with the proportional allocation of staff to support the fundamental rights officer.

Administrative and management structure of the Agency

Delete Article 97 (d) and (e).

Consultative Forum

Amend Article 106(1) to read:

A consultative forum shall be established by the Agency to assist **the Agency** with independent advice in fundamental rights matters.

Create a new Article 106(6):

A Consultative Forum Secretariat shall be established to support the Consultative Forum members with administrative and substantive support. The Secretariat shall receive the resources and staff with the skills and seniority commensurate to the activities and powers of the Agency and necessary to enable the Consultative Forum to assist the Agency with independent advice in fundamental rights matters in accordance with this Article.

Vulnerability assessment

Amend Article 33(2), first sentence to read

The Agency shall monitor and assess the availability of the technical equipment, systems, capabilities, resources, infrastructure, adequately skilled and trained staff of Member States necessary for border control as defined in Article 3(1)(a) and **Article 3(1)(b)**.

Information exchange with third countries in the framework of EUROSUR

Add a new paragraph 4 to Article 76:

Any exchange of information under Article 73(2), Article 74(3) and Article 75(3) which provides a third country with information that could be used to identify persons or groups of persons whose request for access to international protection is or has been under examination or who are under a serious risk of being subjected to torture, inhuman and degrading treatment or punishment or any other violation of fundamental rights, shall be prohibited.

Add a new paragraph 5 to Article 76:

Onward transmission or other communication of information exchanged under Article 73(2), Article 74(3) and Article 75(3) to other third countries or to third parties shall be prohibited.

General rules on processing of personal data by the Agency

Delete Article 87(3) last sentence.

Delete recital 85.

Add a new paragraph 4 to Article 87:

Any exchange of information which provides a third country with information that could be used to identify persons or groups of persons whose request for access to international protection is or has been under examination or who are under a serious risk of being subjected to torture, inhuman and degrading treatment or punishment or any other violation of fundamental rights, shall be prohibited. The Agency shall not disclose the fact that a person has lodged an application for international protection to a third country.

Add a new paragraph 5 to Article 87:

Onward transmission or other communication of information exchanged under this Regulation to other third countries or to third parties shall be prohibited.

Purposes of processing personal data

Delete Article 88(1)(d).

Processing of personal data collected during joint operations, pilot projects and rapid border interventions and by migration management support teams.

Delete Article 89(2)(d).



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