Brief Fundamental Rights Considerations in the Proposal for a Regulation on the European Border and Coast Guard Agency (EBCGA) - COM Proposal dated 15 December 2015, COM (2015) 617 Final

Fundamental Rights Officer’s Observations to the Frontex Executive Director and the internal Task Force, Draft 1

11 February 2016

Objective: FRO intends to strengthen and support the fundamental rights (FR) aspects in view of any foreseen Frontex position on the Regulation on EBCGA, highlighting positive aspects as well as possible areas that would require reinforcement or inclusion for further consideration by Frontex in the negotiation process of the Regulation.

1. Lack of monitoring mechanism for FR: Recital 29 states that the Regulation seeks to fully respect fundamental rights. Recital 12 states that, in the spirit of shared responsibility, the role of the Agency is to regularly monitor the management of the external borders. There is a crucial missing aspect that combines the respect and the monitoring in the proposed Regulation compared to the current Regulation, which is to establish an effective monitoring system for FR in the current reading of Art. 26 a): “[T]he Agency shall put in place an effective mechanism to monitor the respect for fundamental rights in all the activities of the Agency.” The proposed Regulation only mentions the role of the FRO contributing to such a mechanism (Art. 71.2) as well as the Coordinating Officer role in reporting to the Agency on aspects related to the protection of FR throughout the joint operation and rapid border intervention (Art. 21.3.d)) but omits the crucial obligation for the new Agency to establish an effective monitoring system for FR.

2. FR as a general principle vs mainstreaming FR: The inclusion of FR as a general principle (Art. 33), without linking it to the monitoring of the situation at the borders and the overall activities of the Agency, could jeopardize the respect of FR in the Agency’s activities. These should be reinforced by reintroducing the current obligation to set up a monitoring mechanism for FR in all activities in the Agency (as explained above) and a clear reference to this FR monitoring mechanism together with the obligation to draw up, further develop and implement a FR Strategy in Art 33.1.

3. Shared responsibility and FR: The enhanced responsibility of the Agency with MSs entails enhanced FR related accountability, or a sensu contrario, it would be difficult to prove that FR are excluded from the “shared responsibility” since there is no specific exclusion mentioned and there are clear judicial implications in case of violations of FR, both before national courts and European Court of Justice. This situation calls for reinforcement or the reintroduction of several tools:
   - An effective monitoring system for FR (as explained above).
   - A systematic FR component of the vulnerability assessment in Art. 12, that could include, inter alia, qualitative indicators on arrivals (children,
including unaccompanied children, women, families, THB, etc). This would allow for preparing basic conditions of reception in accordance with the *EU acquis* in areas where shared responsibility is to be applied (Reception Conditions Directive, Art. 4 Regulation 656/2014, etc.) paired with the already foreseen obligation to include, develop and respect referral of FR situations in the Operational Plans (OPlans) (Art. 15.3.1)).

- Effective access and consideration to the FR related aspects of Schengen evaluation (SchEval) reports of the MS concerned (Art. 12.3), in regards to both border management and return questionnaires as well as to the overall conclusions of SchEval mechanism. The conclusions contained in SchEval reports could be factored in the vulnerability assessment and in the OPlans, including remedial action to avoid triggering responsibilities for inaction by EU/Agency and/or MSs.

- In line with the above, the Agency could play an important role in advising European Union funds (ISF, AMIF, etc.) in order to strengthen FR compliance during border management activities, and as such, advice the European Commission (EC) and other stakeholders on the most important elements requiring reinforcement.

4. **Respect vs promotion and guarantee of FR.** He proposed Regulation makes references to the Agency’s obligation to respect FR in several articles, but it restricts the activities of promotion to the principles of non-discrimination and non-refoulement (Recital 29 in fine) without any apparent justification. The proposal indirectly foresees promotion for the relations of the Agency with third countries when it calls for the “promotion of European standards in border management and return” (Art 53.1), which undoubtedly includes FR standards. The proposed Regulation would benefit from the Agency’s activities in promotion of FR as already foreseen by the existing CoCs applicable to all Agency’s activities also in the internal EU sphere and in relation to MSs and the EBCG Teams, for instance, Art 52. 1. c) of the proposal related to capacity building.

In the light of a shared responsibility, a specific mention to the need not only to respect but also to guarantee and ensure FR in the Agency’s activities could bring effectiveness and clarity to the obligations of MSs in relation to FR matters since the inception of the Agency’s activities. This seems to be especially necessary in the apparent proposed situation (Art. 18) that even when urgent action is imposed on the MS, the command of the operation seems to remain with the MS and not with the Agency. FR guarantees required to be well anchored in the obligations by the host MSs and in the OPlans to avoid triggering FR responsibility towards the Agency.

5. **Instructions to the European Border and Coast Guard Teams (EBCGTs):** The proposed wording of Art. 20 para. 4&5 (obligation to respect FR by EBCGT Teams, proportionality principle, and disciplinary measures by home MS) seem to be referring to the overall general obligation to respect FR, and do not seem to be adequate subject matters for instructions from the host MS to the EBCGTs, as the title of the article suggests. FR obligations are applicable to both MSs and EU officials, and as such, the reference to include details of referrals in OPlans (Art. 5.3.1) might to be a sufficient instruction on how to make the obligation operational in practice. In FRO’s opinion, the obligation to respect FR and the consequences of violating them currently foreseen in Art. 20 para. 4&5 cannot be subject, neither in essence nor by definition, to an instruction to the EBCGTs from host MSs and these two paragraphs should be better placed within Art. 33 on General Rules.
6. **Right to access asylum procedures.** The proposed Regulation (Art. 17.3.b)) seems to limit the provision of information on international protection in hotspots areas to a restricted group of persons, namely persons in **clear need** of international protection, and to applicants and potential **applicants for relocation.** This limitation could possibly result in deprivation of the right to access asylum procedures to any other applicant in hotspots as guaranteed by Art. 6 of the Asylum Procedure Directive (recast), that obliges border guards to receive "**Instructions to inform applicants as to where and how applications for international protection may be lodged.**". Furthermore, the determination of a clear need, as posited, may pose serious difficulties in practice, considering that international protection is based on personal circumstances that may not be so noticeable.

7. **Suspension and termination of operations.** The proposed Art. 24 reiterates the existing **obligation** of the Executive Director to suspend or terminate, in whole or in part, operations when the **conditions** to conduct those operations are no longer fulfilled (para. 1) or when there are **violations** of fundamental rights or international protection that are of a **serious nature** or **likely to persist** (para.3). The existing lack of criteria to gradually reach a decision and execute the obligation to suspend persists in the current text. The current internal SOP only foresees the procedural aspects of the suspension/termination (letter, discussion at the MB, internal reports, decision, etc.) and not the substantive criteria based on objective FR considerations that would determine the process.

8. **FR in Return related matters.** Several aspects could be enhanced in the proposed Regulation in relation to return activities, which are very sensitive in terms of FR compliance. Some of the most strategic ones include:

- Art. 26. 2 b) reference to **information on third countries** seems to include all kind of information, possibly including FR related, that could serve for determining risks for non-refoulement in the return decision making process. The reference to which type of information is to be provided to MSs by the Agency should be clarified.

- Art. 26.2 d) seems to be pointing at the Agency to provide **advice on detention** "to avoid returnees to abscond", or could potentially include alternatives to detention as well. Deprivation of liberty is one of the most sensitive FR matters and unless the Agency can provide solid advice on basic detention conditions in order to avoid triggering shared responsibility following the advice when conditions are not met, or advice on alternatives to detention, FRO would recommend qualifying the reference or deleting it.

- Art. 27.4 opens the possibility to **return operations from third countries**, which increases the risk of FR violations, **inter alia**, the right to effective remedy, access to asylum procedures, and the prohibition of **refoulement.** The return decision making process in third countries does not necessarily have to follow the procedural guarantees enshrined in Art. 47 EU Charter of Fundamental Rights and the Return Directive. Third countries cannot be monitored by the EC and eventually be a subject to an infringement procedure. The foreseen safeguard of the particular third country (TC) being bound by the European Convention on Human Rights can only be activated

---

1Art 6 APD stated that "[M]ember States shall ensure that those other authorities which are likely to receive applications for international protection such as the police, border guards, immigration authorities and personnel of detention facilities have the relevant information and that their personnel receive the necessary level of training which is appropriate to their tasks and responsibilities and instructions to inform applicants as to where and how applications for international protection may be lodged."
after exhaustion of national remedies in that given third country. In practice, the safeguard of the Convention has proven effective but only as a subsidiary mechanism and a posteriori of the implementation of the removal process (MSS v Greece and Italy), which could trigger responsibilities for the Agency as a later stage.

- Art. 28 establishes the pool of monitors, but does not provide for an obligation to provide the reports from monitors to the Agency. This would render the EU initiative to establish a pool as inefficient. As proposed, the pool is an administrative tool to ensure the -compulsory? - presence of monitors in all flights, which is an excellent initiative, but would require of independent oversight in terms of training, selection of monitors and evaluation of reports in order to guarantee the independence of the pool. In para. 3, the Agency cannot request the participation of a monitor from the pool, as this request comes only from MSs participating in the operation.

- Art. 29.3 establishes the possibility of escorting returnees on behalf of another MS. This provision requires clarification with regards to the applicable legislation in that situation, especially concerning the use of force and means of restraint. The risk of non-refoulment/collective expulsion for the escorting MS of returnees removed by return decisions taken in another MS may require also further analysis and consideration.

- Art. 30 on return specialists, the proposed Regulation foresees that they carry out identification of particular groups of TC nationals. It is likely that their role would be simply to "support the identification" as the identification as such could be considered within the mandate of the third country.

- Art. 53.4 on acquisition of travel documents, the cooperation between the Agency and MSs in the acquisition of travel documents should include safeguards to avoid violations of the principle of non-refoulment and the obligation to ensure effective access to international protection procedures.

9. **Processing of personal data.** Specific safeguards should be included to ensure that no international protection related personal data is given to countries of origin and/or countries of return and that this processing only happens once the access to international protection procedure/decision on asylum case has been guaranteed, in accordance with international and European law. Processing of personal data for risk analysis purposes (eg. Art. 45.1. d) and 46.2.c) should be defined more clearly and include safeguards as to content, scope, limitations and addressees (for instance, to EUROPOL and for criminal activities matters -not risk analysis strictu sensu-). The current formulation is too wide and does not seem to reflect the definition of the risk analysis as per Art. 10 - situation, trends and threats- and also needs to include further consideration to safeguards established under Regulation 45/2001 when EU institutions process personal data.

10. **Decision to refuse entry by team members.** Art. 39.9 allows members of the EBCG7s teams to take non-admission decision once the MS has authorised this possibility. A similar possibility could be considered for decisions to allow entry in clear cases such as applicants of international protection, THB victims or unaccompanied children.

11. **Complaint mechanism** (Art. 72). FRO welcomes the reference to the establishment of a complaint mechanism that would increase transparency and accountability of the Agency’s future activities. As such, the complaint mechanism should focus further efforts on ensuring the right to effective remedy of the complainants. For that purpose, the obligation of MSs to report to the Agency -format, content and timelines could be further clarified- as well as the obligation to provide for effective remedies when complaints are substantiated,
in line with Art. 47 of the EU Charter of FR. Furthermore, the proposed system is heavily based on a reporting circle between the various stakeholders, summarily as follows:

FRO registration → ED/MS follow up → FRO reports on follow up to ED/MB

More importantly, the proposed Regulation does not contain an obligation of MSs to provide for documentation to the Agency’s ED, MB or FRO that could support the findings and follow up with concrete evidences. A system of gradual consequences to be determined by ED/MB should already be anticipated in case no follow up or reporting is received in due course.

The system proposed misses to include a mechanism for cooperation to refer relevant complaints to national human rights institutions/Ombudsman that could be competent to deal with them, once FRO has determined that the complaint might be inadmissible as outside the framework of the Agency’s activities (national operation or return without Agency’s involvement). The principle of good administration would oblige that such concrete complaints are promptly refer to the respective national institution competent for its handling and inform the complainant as to where the complaint should be or has been submitted.

Lastly, the proposed mechanism does not consider the translation services required to undergo admissibility criteria by FRO, as these may include non-EU languages in view of Art. 72.9 referring simply to most common languages and third parties being most commonly third country nationals.

12. Search and rescue provisions. The proposed Regulation could include additional references to the already existing obligation of the Agency to support MSs on on search and rescue operations when needed, as acknowledged by the budgetary implications and in direct link to the provisions of Regulation 656/2014. The proposed Art 35 only mentions support in relation to devising training material on search and rescue.

13. FRO reporting line. After 4th February Consultative Forum (CF) meeting, FRO wish to advance to Frontex that in the CF’s opinion, the proposed Art. 71.2 on FRO reporting only to the MB and cooperating with CF, which deviates from the current FRO reporting system, is considered detrimental to the independence of the FRO and her activities and a step backwards in the great efforts towards transparency and accountability undertaken so far by the Agency.

Inmaculada Arnaez
Fundamental Rights Officer