MAIN POINTS OF DISCUSSION

17th Meeting Frontex Consultative Forum on Fundamental Rights

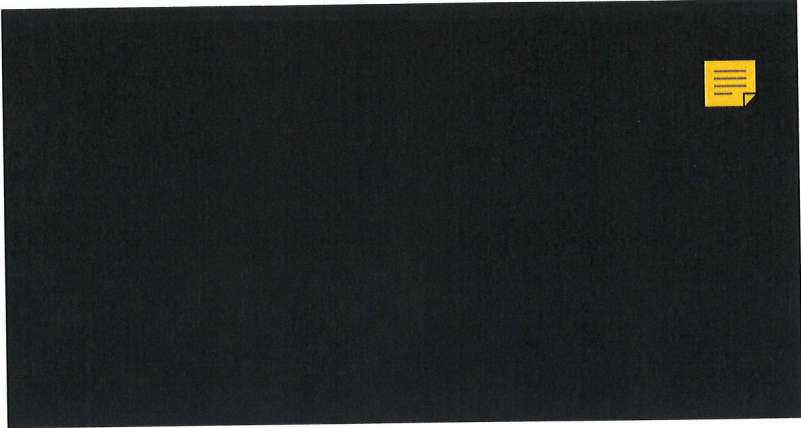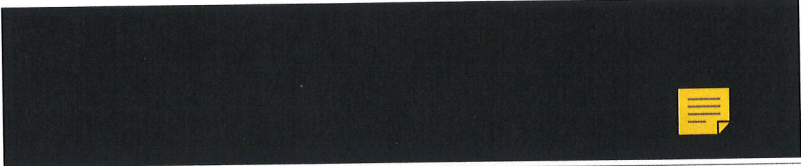|	
Date:	███████████████████ **18 October (9:30 – 12:30/ 1█:█0- 17:30)- Thematic meetings & Meeting with Frontex Deputy Executive Director and Chair of the Management Board**
Venue:	**Room 603** *Frontex Headquarters* *Plac Europejski 6,* *00-844 Warsaw, Poland*
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CF Chair	███████████████████████
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Management Board	███████████████████████
Frontex	███████████████████████

Fundamental Rights
Office

Thursday 18 October 2018 –Thematic meetings with Frontex staff

EU IT systems and Frontex: ETIAS, the Common Repository for Reporting and Statistics and Frontex access to personal data in IT-systems

For the first time, the CF had a dedicated session on information technology (IT) systems. The purpose of the session was to create awareness among CF members of the role IT systems will play in the future of border guarding. It consisted in a joint presentation by Frontex and FRA and in questions and answers. The ppt presentation were shared with the CF. The session focused on ETIAS, the European Travel Information and Authorisation System.

FRA also informed the CF on **the Common Repository for Reporting and Statistics (CRRS)** that stores anonymized data imported from European IT systems in order to generate more evidence-based risk analysis and reports. The main risk is that sometimes the stored data will lead to identify people, and the use of data could lead to indirect discrimination. In addition, in future, according to the regulations establishing the various IT systems, Frontex staff as well as Frontex deployed officers will have **much broader access to existing IT systems.** Return management system may also contain personal data and Frontex will be able to access to information national authorities.

1) *General presentation of EU information systems and of ETIAS(Frontex)*

Presentation of EU information systems which are used in border control: i.e. VIS, ETIAS, SIS, EES, EURODAC. All these systems except ETIAS will store biometrics. Interoperability between these systems will provide first line officers with additional information for decision-making and enhance security screening, but also raises new challenges on how to deal with multiple hits in IT systems concerning the same persons.

The presentation focused on ETIAS established by Regulation (EU) 2018/1240, as its Central Unit will be run by Frontex (which will require the recruitment of 250 people). ETIAS serves "to gather information and identify migration, security or health risks associated with a visa-exempt visitor travelling to the Schengen area". Currently, these comprise 61 nationalities. In simple terms, ETIAS is the EU version of the ESTA travel authorization by the United States.

The Central Unit will conduct the first assessment of an application for entry to the Schengen area. The Central Unit in Frontex will run the applicant against existing databases as well as against screening rules. The Central Unit will approve all applications which do not raise issues. Where an issue emerges, the application is forwarded to the national ETIAS units in MS. Refusal will never be done in an automated way but manually by national units.

According to the estimations 39 million applications per year are expected in 2020, which means 107,000 a day out of which 5% (5,300 per day) might generate a hit and 1 to 2% will be forwarded to the national units for manual processing after the hit is confirmed by the Central unit.

2) *Screening rules (Frontex Risk Analysis Unit)*

Presentation of the screening rules as regulated in Article 33 (4) of the ETIAS Regulation (COM will develop implementing rules explaining how these indicators shall be used for risk analysis purposes). The question remains open whether the broad indicators included in the Regulation will be sufficient to identify risk and to take a targeted and proportional negative decision. Questions about proportionality and non-discrimination also arise. A second concern is that individuals whose application has been rejected may share on the social media the justification given for this negative decision. As a result the screening rules may become well-known and be circumvented. Frontex considers that with such a wide range of screening rules, you will have a much higher percentage of people hitting the screening rules. Frontex would have preferred links to very specific criminal profiles.

3) *Fundamental Rights risks (FRA)*

While the ETIAS Regulation contains safeguards, i.e. proportionality and necessity, obligation to ensure training including fundamental rights, ETIAS guidance board, it is crucial to look at a fundamental rights compliance implementation. The main risks to fundamental rights are protection of personal data, prohibition of discrimination, risk that a hit resulting in a negative decision is mistakenly generated due to inaccurate data stored in the system. The presentation also pointed the need to process differently the applications filed where the applicants have a specific status (e.g. family members of mobile EU/EEA/CH nationals who benefit from the right to free movement).

Q&A

- **Is there a complaint mechanism whereby a person whose application has been rejected can appeal this decision?**

There is a possibility to appeal against an ETIAS refusal. However, the complexity of the system – several actors involved - and the lack of competent legal advice might undermine the right to an effective remedy.

- **Is there a mechanism whereby the data subject can ask to access his/her data?**

ETIAS is supposed to have a central repository of data where data can be stored during max. 5 years. Data protection rights are maintained and therefore data subjects can request to access their data (and also to correct their data) by contacting Frontex. Furthermore, complaints can be submitted to EDPS and the FRO (Frontex complaints mechanism). However, considering the high number of estimated applications, Frontex is concerned about the capacity to timely process those requests.

- **Are there specific rules to access the different databases?**

As a rule, an officer can only access the data necessary for the performance of his/her tasks. Under the interoperability proposals, under certain circumstances, namely to verify "red links" of an individual suspected of identity fraud, an officer will be able to access identity data only in systems a border guard is normally not entitled to see. Frontex affirms the usefulness of this systems to reinforce border management.

- **What is the timeframe as regards the set-up of ETIAS?**

The first implementing acts regarding the set-up of the infrastructure of the system will be adopted very quickly. The other acts, e.g. screening rules, will follow at a later stage.

Action point
- CF member from ODIHR to act as thematic rapporteur on this file and represent the CF in the FR guidance board.

Proposal for a revision of EBCG Regulation and EU Return acquis (Frontex Legal Unit)

Frontex Legal and Procurement unit described the following four key features of the COM proposal for a new EBCG Regulation:

- » The first innovation is the creation of the concept of **"EBCG standing corps"** with executive powers. Agency's own border guards (statutory staff) recruited under SR/CEOS. As a result, a category of EU staff will be granted executive powers. The operational control of the standing corps will remain under the operational control of the MS.
- » The second innovation is the creation of **controlled centers.** The definition laid down in the proposal lacks clarity as to the division of tasks and as to the possibility to set-up controlled centers in third countries. CF could conduct on-spot-visits.
- » The third innovation is the enhanced ability for the Agency to **cooperate with third countries.** The Agency is no longer limited to cooperation with neighboring third countries. The COM is given a stronger role in cooperation with third countries through the drafting of a status agreements.
- » The fourth innovation is the greater role of the Agency in the **area of return activities.** The Agency will have the possibility to prepare return decisions (without entering into the merits thereof), to identify third country nationals and to acquire travel documents. Moreover, the Agency will be tasked with operating a

central return case management system and its infrastructure connecting it with national return management systems.

There are other innovations in the Proposal, such as the possibility for the MB to appoint three DEDs, the possibility to set-up antenna offices in MS, a stronger lead given to the Agency in resource planning, the integration of EUROSUR and the FADO system in the Agency's realm.

As regards the COM proposal for a recast of the EU return directive, the Legal unit emphasized the following:
» MSs are requested to establish assistance programs to support the return of third country nationals staying illegally in their territory.
» The proposal establishes a list of cases in which MSs are not allowed to grant a period for voluntary departure (risk of absconding, application for legal stay dismissed as manifestly unfounded or fraudulent, risk to public security)
» Legal processes are generally swifter, e.g. return decision can be appealed judicially only once at a single level of jurisdiction. Appeals against a court decision do not have suspensive effect unless a court decides otherwise.
» Detention is allowed when a TC national constitutes a threat to public security or in case of risk of absconding. The proposal broadens the criteria as how the risk of absconding is to be defined.

Q&A

• **Would Frontex retain certain degree of power over those officers deployed in third countries?**

Look at specific status agreement and operational plan.

• **Is there sufficient legal basis under EU Treaties for EU statutory staff to carry out executive tasks?**

Ask COM legal service. COM has surely looked into the legal basis before it suggested to create EU staff with executive powers and it might thereby be legal. However, EU border guards will not be "fully fledge police officers".

• **What does the reference in the COM proposal to develop "command and control structures" by the Agency mean?**

The wording of this article does not suggest that the Agency will have authority to give instructions on how to carry out law enforcement activities. The Agency contributes to the definition of the tasks through operational plans, but does not have the powers to give instructions to the standing corps.

• **Will the Agency have the mandate to assist in voluntary returns and reintegration activities?**

The Agency has the mandate for assisting in voluntary departure, not in voluntary return. There is no change in this regard in the proposal. As regards reintegration, no changes neither - the Agency has no role on it. Frontex can support and promote but not develop/design reintegration programs.

• **What will be the difference between Frontex statutory staff with executive powers and a national border guard with the same powers? Is this in compliance with the Schengen Borders Code that states that border guard activities have to be carried out by national border guards?**

The powers bestowed on the EBCG standing corps are ambitious but this does not make it a police corp. However, it is true that the reference to the SBC definition of a border guard has been deleted from Article 2 of the proposal - it could make it possible for officers who are not national border guards to carry out activities that were the specific prerogative of national border guards. Nevertheless, the three category of staff will probably not exert these executive powers to the same degree. Frontex agrees that it would merit further clarification.

• **What happens when a Frontex statutory staff deployed in TC incurs in a violation of fundamental rights? Remedies? Could these officers refuse to carry out actions which are in contravention of the EU Charter of fundamental rights?**

The EU Charter of fundamental rights remains applicable and Article 86 of the Proposal regarding criminal liability applies to statutory staff as well. Members of the teams should therefore not execute orders that are in breach of fundamental rights. Decisions taken by deployed officers or by members of the standing corp have to be seen as decisions taken on behalf of host MSs which is responsible of external border.

• **Impact of the proposal on the work of the European Centre for Return, in particular in the field of pre-return and detention**

The proposal expands considerably the Agency's mandate in the field of pre-return assistance. Through the set-up of a central information system [and its linkages with return case management system] the Agency will be able to provide tailored made support, adding more efficiency to the return process. Furthermore, the Agency will support third countries in enhancing their return capacities. The proposal also foresees the possibility of launching return interventions in TCs hand the provision of technical and operational assistance to TCs on returns. The proposal suggests a possibility to appoint return liaison officers in third countries. LOs would facilitate pre-return but also return operations. A new profile for return specialists needs to be developed.

As regards detention, Frontex does not see a role on that.

- **Decision to launch a forced-return operations: respective roles of Frontex and MSs**

Although there is a framework contract in place to procure the whole package, i.e pilot, plane, crew, the Agency cannot organise a return operation on its own. Frontex still needs to get diplomatic clearance from MSs and an airport. Moreover, the Council decision 573/2004 still applies which requires a leading MS on every JRO.

The pools are not mentioned in the new proposal but returns supposes that the pools will be transferred to the standing corps.

CF member is concerned about the impossibility of independent monitoring, lack of effective legal remedies and lack of accountability of forced return operations fully conducted by Frontex, i.e. CPT wouldn't be able to go on board and ECHR would not have jurisdiction. Furthermore, CF emphasizes Frontex pool of forced-return monitors is not external or independent.

- **Return LOs**

There is already a European Return LO program financed through the Asylum, Migration and Integration Fund. A pilot project has started in Ghana to increase return efficiency. A steering group decides on the deployment of return LOs. At the moment there are not pre-set destinations but deployment will be in line with the EU return agenda and Frontex risk analysis. At the moment, there are some 20 return LO deployed by MS. Frontex return LO will be appointed by MB and Frontex, not COM.

- **There is a difference in wording as regards the role of the Agency in return interventions and return operations: the statement that the Agency does not enter into the merits of return decisions appears solely in the latter.**

It is probably a mistake as the Agency does not enter into the merits of a return decisions - its role is to support national authorities. Legal and Procurement Unit is not however leading the task force on COM proposal, contrary to the 2016 amendments.

- **In the context of Vulnerability Assessment, COM has the possibility to compel MSs to take certain measures, do MS have an obligation to comply?**

Frontex has still little experience in that process.

Meeting with Frontex Deputy Executive Director and Chair of the Management Board

Welcome notes
CF Chairs recalled the CF Program of Work 2018:
- CF will visit LO Western Balkans at the end of November. Frontex proposed to organise a meeting with LO Niger instead of a visit, as a start, as the security situation in Niger is unstable.
- CF will organise an internal meeting to discuss return
- CF met new Head of Training Unit in the framework of the Frontex Annual Training conference. CF will commission a consultant to do a mapping of fundamental rights in Frontex training courses and products.
- CF's work on statelessness which will be followed by a recommendation to ED and MB.
- Save the Children discussion with Frontex staff on child protection and safeguards at the end of September.
- Evaluation of the work of the CF to be launched as soon as possible so that results can inspire recruitment of new members in 2019.
- Timeline and procedure for the recruitment of new members to be also adopted and communicated asap (composition to be adopted by MB mid-June). Consultations on the status of technical and operational European IBM Strategy.

On the activities foreseen for 2019:
- Re-election of CF Members
- Effectiveness of the monitoring mechanism and complaints mechanism. Research is envisaged on this question
- Continue the work/focus on child protection and safeguarding.
- CF role in ETIAS guidance board
- Revision of the Fundamental Rights Strategy
- Continued advice in the field of training, third country cooperation and returns

CF Chairs will present CF activity report and program of work 2019 during MB meeting on 5 November.

General remarks from the **MB Chair** concerning the Fundamental Rights Strategy and the implementation documents:
- Need to adapt to varying changing political developments.
- Need to take into account the MS's strong desire to enhance cooperation with TC.
- Important to reflect the concept of mixed migration flows in the new FRS.
- EBCG proposal to be incorporated in the FRS.

The CF raised concerns about the FRS revision process which is in standby since 2016 – stressing that the FRS dates back to 2011. According to the CF, Frontex should not continue relying on the 2011 Strategy but be pro-active and continue the work carried out by the FRO. On this note, the CF reiterated concerns about the staffing of the FRO and the need to provide her with adequate staffing to carry out her work in line with her independent function.

DED:
Frontex acknowledged that there was no time to work on the comments provided by other units to the FRO draft and added that the IBM Strategy has priority. Also, it was repeated that Frontex is not taking part in the negotiations of the new Regulation. Concerning the increase of staff, the drastic staff increase poses several challenges, notably as regard management and training. Concerning the staffing of the FRO, there is a need to find an interim solution in case of longer absence of the FRO [which will be discussed during upcoming MB meeting] and to find a solution to capacitate the FRO office.

Operational update: Operations; Pre-frontier monitoring pilots in the Mediterranean and Western Balkans; Return support activities (see ppt)

Q&A
- *What is the timeline between IBM and FRS?*
The IBM strategy is still currently under drafting and it will need more work. It is crucial to have good linkages between the FRS and the IBM. IBM Strategy will not be adopted during MB meeting in November as planned.
- *Is there a more precise timeline for the CF consultation in this IBM process?*
At this stage difficult to say, the process is delayed.
- *Contrary to the satellite pictures where there is no risk of processing of personal data, videos from MAS could entail the processing of personal data. Which are the safeguards in place, particularly given that MAS is run by a private company?*
A decision has been taken to fly high enough so as not to have pictures with a resolution enabling identification of persons. If a person is identifiable, then data protection rules applies and safeguards. Affected persons could also submit a complaint via Frontex complaints mechanism.
- *What is the state of play with controlled centres?*
COM didn't provide further information after its announcement on control centres and disembarkation platforms. As regard disembarkation platforms: no TC agreed so far to set up a platform of the like on its territory.
- *On ETIAS, do you foresee cases where applicants do not have a credit card?*
There is a possibility to apply *via* a travel agency/service provider. A payment gateway will be decided by COM implementing act. Credit card is only for payment, not for identification.
- *COM proposal with regards to return*
COM approached Frontex on the training of forced return monitors. There is a need to ensure the independence of the pool and the effectiveness of the complaints mechanism.

Action points
- Frontex to keep the CF informed on development of the IBM strategy and potential consultation with the CF
- Frontex to also update on plans for the review of the FRS as a matter of priority
- CF will consider views of MB and Frontex and present its work programme and 2018 activity report at MB meeting in Vienna on 5 November (documents will be provided in advance by 26 October 2018)
- CF Secretariat to put forward a timeline and facilitate the process for the recruitment of new members with a view to its final composition to be adopted by the MB at its meeting mid-June 2019
- Frontex to follow up with the COM to ensure a timely launch of the CF evaluation (in accordance with the TOR and under coordination by the CF)
- Frontex and MB to revert on concrete plans to capacitate the FRO office as a matter of priority
- CF to commission expertise on the mapping of fundamental rights aspects and approach in Frontex current training portfolio to provide a sound basis for its continued support to this activity in 2019
- CF to issue recommendations on third country engagement and on statelessness as well as to update on outcome of internal discussions on returns
- CF Secretariat to support the scheduling of formal CF meetings in 2019 (as per established procedures in consultation with Frontex and MB)
- CF and Frontex to follow up on agreed points at the meeting held with Save the Children and proceed with the implementation of action points, including on child safeguarding

- CF and Frontex to continue working level engagement on ETIAS with a view to ensuring the CF is able to fulfil its role within the Fundamental Rights Board