

**Recommendation by the Consultative Forum to the Executive Director
and Management Board of the European Border and Coast Guard
Agency (Frontex) - 10 November 2016**

1. Pursuant to Article 70(1) of Regulation (EU) 2016/1624, the role of the Consultative Forum is to “assist the executive director and the management board with independent advice in fundamental rights matters”. The working methods of the Consultative Forum specify that the Consultative Forum “may act in the form of an opinion at the initiative of the management board or the executive director” and “in the form of a recommendation at the initiative of the Consultative Forum members.”
2. The Consultative Forum takes the initiative to issue a recommendation concerning the operational activities of the European Border and Coast Guard Agency (the Agency or Frontex) at the Hungarian-Serbian border.
3. At the 11th Consultative Forum meeting (19-21 October 2016), several concerns were raised with the Frontex Deputy Executive Director, the Chair of the Management Board and the Frontex Fundamental Rights Officer (FRO) on the situation at the Hungarian-Serbian border. This followed information by Amnesty International and other organisations detailing the impact of the legislative and procedural framework of Hungary on the fundamental rights of persons who arrive at the Hungarian-Serbian border. Concerns were expressed in particular with regard to the impact of the new law of July 2016 on border control measures which, amongst others, obliges officers to return migrants apprehended within 8 km of the border back to the fence with Serbia. In practice, these return measures seem to be of a summary nature as persons are ‘escorted’ back to the Serbian border without assessing their protection needs, their individual situation or even registering them. Reports from the Hungarian national police illustrate the systematic use of expulsions to the Serbian border: in July 2016, Hungarian police recorded 1,701 cases of people escorted to Serbia; in August 2016, such cases amounted to 1,842.¹ UNHCR and other organisations consider persons returned to Serbia at risk of *refoulement*, given Serbia’s inability to provide a fair and efficient asylum procedure.²
4. The new restrictive border measures of July 2016 build upon a raft of other changes introduced since July 2015 to Hungary’s border and asylum laws and practices which have resulted in severely limiting and deterring access to asylum in Hungary and raise serious concerns as regards compatibility with international and European law.³

¹ ‘Illegal border crossings on the Serbian-Hungarian border, preventions of entry and returns across the temporary security barrier since 5 July’, National Police, http://police.hu/sites/default/files/illegalis_hataratlepes_megakadalyozas_atkiseres_szerb_szakaszi_2016.07.31_24.00-ig.pdf; ‘Illegal border crossings on the Serbian-Hungarian border, preventions of entry and returns across the temporary security barrier in the last thirty days’, National Police, http://police.hu/sites/default/files/illegalis_hataratlepes_megakadalyozas_atkiseres_szerb_szakaszi_2016.08.31_24.00-ig.pdf

² UNHCR, *Serbia as a country of asylum: Observations on the situation of asylum-seekers and beneficiaries of international protection in Serbia*, August 2012, available at: <http://www.unhcr.rs/media/UNHCRSerbiaCountryofAsylumScreen.pdf> See also AIDA (Asylum Information Database), *Country report Serbia*, March 2016, available at: <http://www.asylumineurope.org/reports/country/serbia>

³ See UNHCR, *Hungary as a country of asylum: Observations on restrictive legal measures and subsequent practice implemented between July 2015 and March 2016*, May 2016, available at: <http://www.refworld.org/docid/57319d514.html> In December 2015, the European Commission started an infringement procedure on some elements of the legislative changes of July and September 2015.

Critical aspects of these measures include the introduction of a border procedure in special “transit zones” which lacks adequate legal safeguards; limiting entry to the transit zones to a small number of asylum seekers per day (currently 30); the application of the ‘safe third country’ concept to countries such as Serbia, with standard inadmissibility decisions that are in practice impossible to rebut, and despite UNHCR’s and other organisations’ assessment that Serbia is an unsafe country of asylum and that asylum seekers should not be returned there.⁴

5. Moreover, Amnesty International and several other sources reported physical violence taking place during the course of the expulsions to Serbia. The Consultative Forum has also taken note of the serious incident reports from Hungarian operational areas received by the FRO, which include allegations of beatings of migrants, police dog bites and a case of drowning, that was later alleged to happen following a collective expulsion.⁵
6. Given the situation and allegations of police abuses above, the Consultative Forum has been concerned by the operational support that Frontex provides to Hungary at the Hungarian-Serbian border. According to information received from Frontex, in September 2016, the Agency deployed 58 officers at the Hungarian-Serbian border through three joint operations (JO): 51 through JO Flexible operational Activities on border surveillance; and 7 through JO Focal Points 2016 Land and JO Flexible Operational Activities 2016 Land and Border Checks. The majority (48) of staff deployed by the Agency are border surveillance officers who apprehend persons crossing the border in an irregular manner and hand them over to the Hungarian authorities.
7. The Consultative Forum notes that in relation to the Hungarian operational area, the relevant operational plans explicitly recommend that “[s]upport for conducting border surveillance activities should be maintained at the Hungarian border with Serbia in order to consolidate border control activities carried out by the Hungarian authorities at this border section.”⁶
8. The Consultative Forum is of the view that the Agency’s support to Hungarian officials in operational areas where various sources denounce a systemic practice of collective expulsions being carried out within 8 km of the border, as well as police violence and serious abuses, risks triggering the responsibility of the European Union, through the Agency, in the commission of, or aid and assistance to, wrongful acts under international and EU law.
9. During the above referred Consultative Forum meeting, the FRO expressed similar concerns that the Agency might be operating under conditions which pose risks to the respect, protection and fulfilment of the rights of persons crossing the Hungarian

⁴ See above footnote 2.

⁵ *Situation at the Hungarian-Serbian border*, FRO Observations, 14 10.2016, and Annex 1, *Compilation of information from open sources on fundamental rights at Hungarian-Serbian border*, October 2016.

⁶ Specific Annex FOA2016 (April 2016), p. 17.

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Serbian border and seeking international protection, that may put the Agency in a situation where it would be supporting activities that *de facto* violate the Charter of Fundamental Rights of the European Union (in particular its articles 18 and 19) and the applicable regional and international law regulating the status of refugees.

10. According to Article 25(4) of Regulation (EU) 2016/1624, “[t]he executive director shall, after consulting the fundamental rights officer and informing the Member State concerned, withdraw the financing of a joint operation, rapid border intervention, pilot project, migration management support team deployment, return operation, return intervention or working arrangement or suspend in whole or in part such activities, if he or she considers that there are violations of fundamental rights or international protection obligations that are of a serious nature or are likely to persist. The executive director shall inform the management board of such a decision.”
11. The Consultative Forum considers that the restrictive provisions of the new law and the manner in which they are implemented by Hungarian officials create an environment leading to violations of fundamental rights or international protection obligations that are of a serious nature and are likely to persist.
12. **Operational support at the Hungarian-Serbian border must be contingent upon Frontex being satisfied that people arriving at that border are duly registered by Hungarian authorities, given access to an individualised procedure and to asylum, if they so wish, are not summarily returned to Serbia, and that instances of police abuse and violence are investigated in an independent and impartial manner. Until this can be guaranteed, the Consultative Forum recommends to the Executive Director to immediately take action pursuant to Article 25(4) of Regulation (EU) 2016/1624 and suspend operational activities at the Hungarian-Serbian border.**

Chair of the Frontex Consultative Forum
On Fundamental Rights

Co-Chair of the Frontex Consultative
Forum on Fundamental Rights

The Council of Europe, the EU Agency for Fundamental Rights and the European Asylum Support Office have requested their abstention from the issuance of this recommendation by the Consultative Forum, as well as the reasons for such decision, to be communicated. Their respective opinions are provided in attachment.

OPINIONS ON THE POSITION OF THE COUNCIL OF EUROPE, THE EU AGENCY FOR FUNDAMENTAL RIGHTS AND THE EUROPEAN ASYLUM SUPPORT OFFICE.

COUNCIL OF EUROPE:

The CoE shares the serious concerns expressed in the recommendation in respect of the Hungarian legislation as applied in the Hungarian border with Serbia and of the abuses reported. It also shares the conclusion according to which "operational support at the Hungarian-Serbian border must be contingent upon Frontex being satisfied that people arriving at that border are duly registered by Hungarian authorities, given access to an individualised procedure and to asylum, if they so wish, are not summarily returned to Serbia, and that instances of police abuse and violence are investigated in an independent and impartial manner".

It considers however that before recommending the suspension of Frontex operations a more thorough assessment should be undertaken of the risk for the European Union to be held responsible for possible violations of international and EU law through the operational assistance offered by Frontex to the Hungarian authorities. This risk assessment should be performed through a field mission to which the CoE stands ready to participate or contribute to.

For these reasons the CoE shall abstain.

EUROPEAN ASYLUM SUPPORT OFFICE:

EASO fully agrees with the importance of raising awareness on fundamental rights' concerns at the Hungarian-Serbian border, following the entry into force of the Hungarian law amending the asylum procedures at the border. To this end, the documentation provided by the Fundamental Rights Officer and by the Consultative Forum to the management board and Executive Director of the European Border and Coast Guard Agency constitute a valuable support for their decision making process.

EU AGENCY FOR FUNDAMENTAL RIGHTS:

The European Union Agency for Fundamental Rights has drawn attention to the critical situation at the Hungarian-Serbian border in its past monthly overviews of migration-related fundamental rights concerns (see: <http://fra.europa.eu/en/theme/asylum-migration-borders/overviews>). For the period of October, the Agency's monthly overview (to be published by the end of November) reports on returns of people, including children, to outside of the transit zone where they have to wait in poor and unprotected conditions for a long time before admission. The Agency has also referred to increasing reports by civil society of alleged violence by police and vigilante groups and inadequate reception conditions in Hungary.

As for the conclusion expressed in paragraph 12 of the Recommendation, the Agency would advise to undertake a fundamental rights risks analysis prior to a potential suspension of Frontex operational activities at the Hungarian-Serbian border. In this context, the Agency stands ready to assist with further expertise and advice, should Frontex so require.

For these reasons, the European Union Agency for Fundamental Rights abstains from the Recommendation.