# UNHCR comments on the 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

## 1. Introduction

**Legal Framework**

In October 2004, Council Regulation (EC) 2007/2004 established the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex). Based in Warsaw,[1] Frontex was tasked to coordinate cooperation and to assist Member States (MS) in the management of their external borders.[2]

The Frontex Regulation was first amended by Regulation (EC) No 863/2007 of 11 July 2007, establishing a mechanism for the creation of Rapid Border Intervention Teams[3] and later by Regulation (EU) No 1168/2011 of 25 October 2011,[4] which took important measures to strengthen the structure and mandate of Frontex' in the area of fundamental rights. Of direct impact on the work of Frontex are also Regulation (EU) No 1052/2013 of 22 October 2013 on the European Border Surveillance System (Eurosur), which set out a common framework for the exchange of information and cooperation between EU Member States and Frontex;[5] and Regulation (EU) No 656/2014 of 15 May 2014, which established rules for the

[1] European Union, *Council Decision of 26 April 2005 designating the seat of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (2005/358/EC)*, 26 April 2005, available at: http://frontex.europa.eu/assets/Legal_basis/frontex_seat_warsaw_en.pdf

[2] Council of the European Union, *Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union*, 26 October 2004, available at: http://www.refworld.org/docid/4847e8022.html

[3] European Union, *Regulation (EC) No. 863/2007 of the European Parliament and of the Council of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers*, 11 July 2007, available at: http://www.refworld.org/docid/47fdfb040.html

[4] European Union, *Regulation 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*, 25 October 2011, available at: http://www.refworld.org/docid/533d212c4.html

[5] European Union, *Regulation (EU) No 1052/2013 of the European Parliament and of the Council of 22 October 2013 establishing the European Border Surveillance System (Eurosur),* 22 October 2013, available at: http://frontex.europa.eu/assets/Legal_basis/Eurosur_Regulation_2013.pdf

surveillance of the external sea borders in the context of operational cooperation coordinated by Frontex.[6]

The Schengen Borders Code,[7] the Charter of Fundamental Rights of the European Union,[8] and the Asylum Procedures Directive[9] also include provisions of direct application to the management of the EU external borders.

As a follow-up to the European Agenda on Migration[10] and the conclusions of the European Council of 15 October 2015,[11] the European Commission has presented a package of proposals with regard to the management of external borders and migratory flows, including a Proposal for a Regulation establishing a European Border and Coast Guard Agency (to be built from the existing EU border agency Frontex and Member States' border authorities).[12]

The proposal indicates that 2015 has demonstrated that existing structures at both EU and MS level are inadequate to effectively manage the challenges faced at the EU external borders, and serious limitations and deficiencies have been brought to light. Taking a further step towards the integrated management of the EU external borders,[13] the Commission proposes to overcome these limitations through a set of measures that include the transformation of Frontex into a more autonomous EU Border and Coast Guard Agency (hereafter referred to as "the Agency"). According to the proposal, the Agency would share responsibility with MS for implementing the European integrated border management approach and have a reinforced role in a number of areas, such as monitoring, crisis prevention and return operations. It would also have more autonomy and increased resources for the deployment of officers and equipment to the EU external borders to assist in preventing and

[6] European Union, *Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union*, 15 May 2014, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0656&from=EN

[7] European Union, *Regulation 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code)*, 15 March 2006, available at: http://www.refworld.org/docid/47fdfb0525.html

[8] European Union, *Charter of Fundamental Rights of the European Union (2012/C 326/02),* 26 October 2012, available at: http://www.refworld.org/docid/3ae6b3b70.html

[9] European Union, *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)*, 26 June 2013, available at: http://www.refworld.org/docid/51d29b224.html

[10] European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "A European Agenda on Migration, COM(2015) 240 final,* 13 May 2015, available at: http://www.refworld.org/docid/555c861f4.html

[11] European Council, *European Council meeting (15 October 2015) – Conclusions,* 16 October 2015, available at: http://www.consilium.europa.eu/en/press/press-releases/2015/10/16-euco-conclusions/

[12] 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 2015/0310 (COD),* 15 December 2015, available at: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/securing-eu-borders/legal-documents/docs/regulation_on_the_european_border_and_coast_guard_en.pdf

[13] As provided for in the European Union, *Consolidated version of the Treaty on the Functioning of the European Union, 2008/C 115/01,* 13 December 2007, Articles 77 (2)(b) and (d) and Article 79 (2)(c), available at: http://www.refworld.org/docid/52303e8d4.html

responding to situations of particular pressure due to unpredicted or unmanaged refugee or migratory arrivals.

The proposal takes into consideration the results and recommendations made by an external evaluator commissioned by the Frontex Management Board in 2015 to assess the work of the Agency in accordance with Article 33 of the amended Frontex Regulation.[14]

**UNHCR Mandate**

The United Nations High Commissioner for Refugees (UNHCR) is mandated by the General Assembly of the United Nations (Resolution 428 (V), December 1950) to provide international protection to refugees and together with Governments, seek permanent solutions to the problems of refugees.[15] Paragraph 8 of UNHCR's Statute confers responsibility on UNHCR for supervising international conventions for the protection of refugees,[16] whereas Article 35 of the Convention Relating to the Status of Refugees (hereafter "1951 Refugee Convention")[17] and Article II of the 1967 Protocol relating to the Status of Refugees (hereinafter "1967 Protocol)[18] oblige States Parties to cooperate with UNHCR in the exercise of its mandate, in particular facilitating UNHCR's duty of supervising the application of the provisions of the 1951 Refugee Convention and 1967 Protocol.

UNHCR's supervisory responsibility is reflected in European Union law, including pursuant to Article 78 (1) of the Treaty of the Functioning of the European Union,[19] which stipulates that a common policy on asylum, subsidiary protection and temporary protection must be in accordance with the 1951 Refugee Convention. This role is reaffirmed in Declaration 17 to the Treaty of Amsterdam, which provides that *"consultations shall be established with the United Nations High Commissioner for Refugees…on matters relating to asylum policy."*[20] In addition to refugees, as defined by the 1951 Refugee Convention, persons of concern to UNHCR include people who are entitled to subsidiary forms of international protection under other international and regional treaties.

[14] External Evaluation of the Agency under Art. 33 of the Frontex Regulation, Final Report, Ramboll Management Consulting and EurAsylum Ltd, July 2015, available at: http://frontex.europa.eu/assets/Publications/General/Final_Report_on_External_Evaluation_of_Frontex.pdf

[15] UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees,* 14 December 1950, A/RES/428(V), paragraph 1, available at: http://www.unhcr.org/refworld/docid/3ae6b3628.html.

[16] UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees,* 14 December 1950, A/RES/428(V), paragraph 8(a), available at: http://www.unhcr.org/refworld/docid/3ae6b3628.html.

[17] UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951 (hereinafter "1951 Refugee Convention"), United Nations Treaty Series No. 2545, vol. 189, p. 137, available at: http://www.unhcr.org/refworld/docid/3be01b964.html.

[18] UN General Assembly, *Protocol Relating to the Status of Refugees*, 30 January 1967 (hereinafter "1967 Protocol"), United Nations Treaty Series No. 8791, vol. 606, p. 267, available at: http://www.unhcr.org/refworld/docid/3ae6b3ae4.html.

[19] European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 13 December 2007, 2008/C 115/01, available at: http://www.refworld.org/docid/52303e8d4.html

[20] European Union, *Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities, 2 September 1997*, *Declaration on Article 73k of the Treaty establishing the European Community* [OJ C 340, 10.11.1997], available at: http://www.refworld.org/docid/51c009ec4.html

UNHCR's mandate encompasses individuals who meet the refugee criteria under the 1951 Convention and 1967 Protocol, and has been broadened through successive UNGA and UN Economic and Social Council resolutions to include persons affected by a variety of other situations of forced displacement resulting from conflict, indiscriminate violence or public disorder.[21] In light of this evolution, UNHCR's competence extends to individuals who are entitled to subsidiary protection within the meaning of Article 15 of the EU Qualification Directive and – more broadly – to individuals outside their country of origin or habitual residence and who are unable or unwilling to return there owing to serious threats to life, physical integrity or freedom resulting from indiscriminate violence or events seriously disturbing public order.[22]

In line with its mandate, UNHCR has consistently called for European asylum, border and migration management policies and procedures to incorporate safeguards to guarantee that persons seeking asylum are identified and given access to EU territory, as well as to fair and efficient asylum procedures.

**UNHCR observations**

UNHCR notes the challenges outlined by the Commission with regard to ensuring a coordinated response inclusive of protection-sensitive management of the EU external borders.[23] UNHCR notes that the creation of a reinforced EU Agency with the aim of ensuring that the management of the EU external borders is carried out as a shared responsibility in accordance with high, uniform and protection-sensitive standards can seek to address such challenges. Built on Frontex, the proposal foresees a new Agency that progressively grows in its tasks, as well as the human and financial resources allocated to it. In UNHCR's view, such efforts will bring the expected results provided they are coupled with a clear, coherent and pragmatic distribution of responsibilities at the external borders of the EU. Likewise, the strengthening of the EU response at the external borders should contribute to the promotion and fulfilment of human rights and international protection obligations, including the right to asylum in line with Article 18 of the Charter of Fundamental Rights of the EU,[24] and the principle of *non-refoulement*.

---

[21] UNHCR, *Providing International Protection Including Through Complementary Forms of Protection*, 2 June 2005, EC/55/SC/CRP.16, available at: http://www.refworld.org/docid/47fdfb49d.html; UN General Assembly, *Note on International Protection,* 7 September 1994, A/AC.96/830, paras. 8, 10-11, 31-32, available at: http://www.refworld.org/docid/3f0a935f2.html.

[22] This evolution reflects the development of broader definitions within regional instruments, including the *Convention Governing the Specific Aspects of Refugee Problems in Africa (of the Organisation of African Unity* (now African Union)), 10 September 1969, 1001 UNTS 45, available at: http://www.unhcr.org/refworld/docid/3ae6b36018.html; The Council of the European Union, *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)*, 20 December 2011, OJ L. 337/9-337/26; 20.12.2011, 2011/95/EU, available at: http://www.refworld.org/docid/4f197df02.html.

[23] 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 2015/0310 (COD),* 15 December 2015, p. 3, available at: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/securing-eu-borders/legal-documents/docs/regulation_on_the_european_border_and_coast_guard_en.pdf

[24] European Union, *Charter of Fundamental Rights of the European Union (2012/C 326/02),* 26 October 2012, available at: http://www.refworld.org/docid/3ae6b3b70.html

A responsible and collaborative approach with a stronger focus on preparedness, incorporating measures such as the undertaking of vulnerability assessments, coupled with an enhanced response capacity to address situations requiring urgent action, could greatly contribute to increasing trust and predictability in EU and MS response at the external borders as well as to a timely and effective identification and referral of persons who may be in need of international protection.[25] UNHCR welcomes the commitment to build upon the existing fundamental rights provisions, including through the continued engagement of the expertise of the Frontex Consultative Forum on Fundamental Rights. The proposal to set up a complaints mechanism is also viewed by UNHCR as an important step forward in addressing and preventing human rights violations at the EU external borders.

In line with this, UNHCR encourages the Council of the European Union and the European Parliament to support these measures, outlined in the proposal, which would contribute towards a responsible and joint management of the EU external borders.

Additionally, UNHCR would like to offer a number of recommendations, which aim to contribute to ensuring that the management of EU external borders is undertaken in a manner that is fully compliant with the EU and MS international protection responsibilities.

## 2. General Recommendations

**Integrated Border Management**

In its recommendations on the amendment of the Frontex Regulation, the Frontex Management Board highlighted the need to update the EU Integrated Border Management concept to clearly define the roles of relevant Justice and Home Affairs Agencies and other bodies cooperating in this framework; to incorporate the principle of solidarity in relation to joint operations and MS cooperation; to outline EU inter-agency and national inter-service cooperation (border guards, customs, police, immigration services, security and other relevant authorities); and to better reflect the enhancement of third country cooperation and the use of technologies in border control.[26]

Building on this recommendation, UNHCR considers that the definition included in Article 4 of the proposal could better highlight that the protection-sensitive management of mixed-migration flows including measures to identify, provide

[25] In line with European Union, *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)*, 26 June 2013, Article 6(1) and Article 8 (1), available at: http://www.refworld.org/docid/51d29b224.html

[26] Frontex Management Board, *Recommendation 8 - Updating EU Integrated Border Management concept, Frontex Management Board Decision No 40/2015 of 28 October 2015 adopting recommendations of the Management Board following the evaluation of Frontex (Article 33),* 28 October 2015, available at http://frontex.europa.eu/assets/Publications/General/MB_Decision_40_2015_adopting_the_recommendations_of_the_Management_Board_following_the_evaluation_of_Frontex_Article_33.pdf

information to, register and refer persons who may be in need of international protection is a key aspect of Integrated Border Management.

*UNHCR proposes to achieve this through the inclusion of a new sub-paragraph in Article 4 as follows: "**Establishment and maintenance of clear mechanisms and procedures, in cooperation with relevant authorities, for the identification of, provision of information to and referral of persons who may be in need of international protection**".*

**Shared responsibility**

UNHCR welcomes the provisions in Article 5 to strengthen the principle of shared responsibility in the implementation of the European Integrated Border Management, as well as the enhanced coordinating role foreseen for the Agency. However, UNHCR would like to stress the need to further develop the concept of shared responsibility to ensure it leads to a clear and effective response at the EU's external borders in a protection-sensitive manner.

*UNHCR recommends that provisions in Article 5:*

- *Be accompanied by the clear and unequivocal delineation of the tasks of the Agency and those of the national authorities, the practical arrangements and modalities for cooperation, as well as well-defined lines of command, reporting and accountability.*
- *Be implemented in a way that ensures access to an effective remedy in case of violations.*

**Promotion of international and EU legislation**

In line with the enhanced responsibilities foreseen for the Agency, and the key role that EU JHA Agencies play in promoting the implementation of EU legislation and standards, UNHCR recommends that the proposal clearly outline the responsibility of the Agency to promote the implementation of EU legislation as well as to promote respect for fundamental rights and international protection responsibilities in the management of the EU external borders.

*UNHCR recommends that:*

- *A new sub-paragraph in Article 5 be introduced as follows: "**The European Border and Coast Guard Agency shall ensure that the management of the EU external borders is undertaken in full compliance with relevant EU legislation, including the 1951 Convention, 1967 Protocol and other relevant treaties as per article 78 of the TFEU."***
- *Article 6 (1) be amended as follows: "To ensure a coherent European integrated border management at all external borders, the Agency shall facilitate and render more effective the application of existing and future Union measures relating to the management of external borders, in particular the Schengen Borders Code established by Regulation (EC) No. 562/2006, **contribute to the identification, development and sharing of good practices, and promote EU border management legislation and standards and their implementation in a manner which ensures respect for fundamental rights and international protection obligations**."*

- *A new sub-paragraph be introduced in Article 11 to explicitly include the promotion of EU border management standards and respect of human rights, including the right to asylum, as one of the tasks of the Agency's Liaison Officers.*

- *Article 21 (3) (d) on the role of the Agency's Coordinating Officers be amended as follows: "**ensure EU border management standards and respect of fundamental rights in border management activities**, and report to the Agency on aspects relating to the provision of sufficient guarantees by the host Member State to ensure the protection of fundamental rights throughout the joint operation or rapid border intervention."*

- *Reference to the Convention Relating to the Status of Refugees in Article 33 (1) be amended as follows: "…the 1951 Convention Relating to the Status of Refugees **and the 1967 Protocol Relating to the Status of Refugees…"***

**Preparedness and vulnerability assessment**

UNHCR welcomes the strengthened focus on preparedness and the additional responsibilities of the Agency in guaranteeing that the EU border and coast guard system performs effectively. UNHCR also welcomes the aim to promote a more objective and pragmatic assessment of the resources and capacities of Member States' border management systems. However, UNHCR stresses the need for such assessments to broadly consider all aspects of border management, including impact on fundamental rights.

*To this effect, UNHCR recommends that:*

- *Article 12 be amended to require that the assessment takes account of:*

    - *The skills and training received by personnel, the existence and effectiveness of the response mechanisms for the protection of fundamental rights, and the existence and adequacy of referral mechanisms in line with relevant EU standards as laid down in relevant EU legislation.*

    - *The existing cooperation mechanisms with relevant EU agencies, international organisations and civil society.*

- *Article 10 (3) on aspects to be covered by the risk analysis include an obligation to also evaluate MS capacities for the protection of the human rights of people in need of international protection at the EU external borders.*

- *The proposal include an obligation to ensure that the risk analyses and vulnerability assessments conducted by the Agency in accordance with Articles 10 and 12 are comprehensive and fact-based, and that they take into account the outcome of Schengen Evaluations as well as the assessments of relevant operational actors, including EASO, FRA, international organisations and the civil society.*

**Promotion, respect and protection of Fundamental Rights**

UNHCR is concerned that the proposal does not fully maintain the focus on fundamental rights introduced through the 2011 amendments to the Frontex Regulation.[27]

In view of the enhanced role and responsibilities of the new Agency, UNHCR recommends that the proposal maintain a clear commitment to guarantee the protection of fundamental rights in the performance of its tasks in accordance with relevant provisions of EU law as well as those of international and European human rights and refugee law.

*In particular, and in addition to the provisions included in Article 33 (1), UNHCR recommends that:*

- *Article 1 and all further references to the management of external borders be amended as follows: "A European Border and Coast Guard is hereby set up to ensure a European integrated border management at the external borders with a view to managing migration effectively and ensuring a high level of integral security within the Union, while safeguarding the free movement of persons* ***as well as the fundamental rights of migrants and refugees****."*
- *The promotion, respect and protection of fundamental rights including in particular the right to asylum be included as one of the tasks of the Agency under Article 7 (1).*
- *The proposal explicitly foresee that the Agency should closely cooperate with the European Union Fundamental Rights Agency including but not restricted to the development and management of research and innovation activities foreseen in Article 7 (1) (n) and Article 36 to ensure such activities are accompanied by research into the fundamental rights implications of the use of such technology.[28]*
- *Article 15 explicitly foresee the inclusion in the Operational Plans of relevant provisions on fundamental rights including the right to asylum and the principle of non-refoulement as well as on mechanisms and procedures by means of which those rights will be respected by all involved personnel.*
- *Clearly defined criteria on the conditions for the suspension or termination of a joint operation should the host MS violate fundamental rights, as well as the applicable procedures be included in Article 24 as well as on the Operational Plans for all joint operations, including rapid border interventions under Article 16, return operations under Article 27 and return interventions under Article 32.*

[27] UNHCR, *UNHCR's observations on the European Commission's proposal for a Regulation of the European Parliament and the Council 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 (FRONTEX)*, COM(2010)61 final, October 2010, p. 3, available at: http://www.refworld.org/docid/4cb881a02.html

[28] In line with the mandate and tasks as set out by the *Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights*, 15 February 2007, available at: http://www.refworld.org/docid/47fdfb0214.html

- *Article 52 (1) (c) on the provision of capacity building measures to relevant national authorities be amended to explicitly foresee the enhancement of understanding and respect for human rights in border management activities.*

- *Specific reference be made to the Agency's responsibility to set up a monitoring mechanism as well as the modalities for its implementation beyond the general references made in Recital 12 (on the Agency's responsibility to regularly monitor the management of the external borders), Article 21 (3) (d) (on the Coordinating Officer's reporting on respect for fundamental rights in joint operations and border interventions) and Article 71 (2) on the Fundamental Rights Officer's contribution to the monitoring mechanism.*

**Commitment to Saving Lives**

UNHCR has reiterated its appreciation of the increased EU commitment to saving lives, an example of which is the enhanced engagement of Frontex in search-and-rescue activities, which currently constitute a crucial element of its operations in the Mediterranean Sea.

While the Agency is obliged to continue its engagement in search-and-rescue activities, as provided for in the relevant legal instruments governing activities at sea,[29] UNHCR regrets that the proposal does not stipulate a continuous EU commitment to saving lives as the Agency is not given the possibility to launch operations primarily aimed at supporting MS in the area of search-and-rescue.

UNHCR recommends that:

- Article 7 (1) (c) not confine itself to foreseeing that "some situations" may constitute humanitarian emergencies and rescue at sea, but provide instead for the launching of joint operations and rapid border interventions with the purpose of supporting MS in the area of search-and-rescue or in their individual or collective responses to humanitarian emergencies.

- Specific reference be made to ensuring equipment acquired by the Agency under Article 37 or included in the technical equipment pool under Article 38 fully meets the necessary requirements to safely and efficiently undertake search-and-rescue activities.

[29] European Union, *Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union*, 15 May 2014, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0656&from=EN; UN General Assembly, *Convention on the Law of the Sea*, 10 December 1982, http://www.refworld.org/docid/3dd8fd1b4.html; International Maritime Organization (IMO): *International Convention for the Safety of Life At Sea*, 1 November 1974, 1184 UNTS 3, available at: http://www.refworld.org/docid/46920bf32.html; International Maritime Organization (IMO), *International Convention on Maritime Search and Rescue,* 27 April 1979, 1403 UNTS, available at: http://www.refworld.org/docid/469224c82.html; International Maritime Organization (IMO), *Resolution MSC.155(78), Adoption of Amendments to the International Convention on Maritime Search and Rescue, 1979,* 20 May 2004, available at: http://www.refworld.org/pdfid/432aca724.pdf

**Terminology**

UNHCR considers it important that the terminology relevant to the protection of fundamental rights of people at the EU external borders employed in the proposal reflect applicable legal obligations, norms and European values, and be used in a consistent manner. To this end, UNHCR welcomes the use throughout of '*irregular*' instead of '*illegal*' immigration, as this avoids the implication that persons in need of international protection who may have entered the EU irregularly in order to seek asylum and who have subsequently regularized their status by doing so have acted unlawfully and may permissibly be penalized.

UNHCR recognizes that the arrivals to Europe typically enter as part of mixed migration flows, whereby people in need of international protection travel alongside migrants. The terms '*migrant*' and '*refugee*' are not, however, interchangeable and the difference between the two terms has important legal consequences.

Refugees are specifically defined and protected in international law. The term refugee refers to people outside their country of origin because of feared persecution, conflict, violence, or other circumstances that have seriously disturbed public order, and who, as a result, require 'international protection'. Their situation is often so perilous and intolerable, that they cross international boundaries to seek safety in nearby countries, and thus become internationally recognized as 'refugees' with access to assistance from states, UNHCR, and relevant organizations. They are so recognized precisely because it is too dangerous for them to return home, and they therefore need sanctuary elsewhere. These are people for whom denial of asylum has potentially deadly consequences.

Migrants, on the other hand, may move not because of a risk of persecution or threat to their life or liberty, but typically to improve their lives by finding work or, in some cases, for education, family reunion, or other reasons. Unlike refugees, who by definition cannot safely return home, migrants generally face no such impediment: they can in principle avail themselves of the protection of their own country. This distinction is reflected in immigration and asylum laws and processes, therefore conflating migrants and refugees can undermine the status and protection that the latter need to receive.[30]

## 3. Extended mandate on Returns

**Protection of Fundamental Rights in**

Through this proposal, the Commission aims to enhance the effectiveness of the EU system for returns and to reinforce the capacity of EU MS by strengthening the role of the Agency in this area, including through the establishment of a Return Office.[31] UNHCR considers that a humane and efficient system for the return of third

[30] For more information on UNHCR's position please refer to *UNHCR: "Refugees" and "Migrants" Frequently Asked Questions (FAQx), 15 March 2016,* available at http://www.unhcr.org/55e95c676 and *UNHCR viewpoint: "Refugee" or "migrant" – Which is right?*, 27 August 2015, available at http://www.unhcr.org/55df0e556.html

[31] In line with: European Union: *Communication from the Commission to the European Parliament and to the Council "EU Action Plan on return", COM(2015) 453 final,* 9 September 2015, p. 2, available at: http://ec.europa.eu/dgs/home-affairs/what-we-

**return operations and interventions**

country nationals, including persons who are found following a fair and efficient status determination procedure, not to be in need of international protection and who have no other lawful grounds for continued stay on the territory of the EU, is a part of a sustainable asylum system. [32] UNHCR has also called for the full compliance of return systems with all applicable human rights safeguards, including those laid down in the Return Directive[33] and the Return Handbook.[34]

UNHCR further supports the proposed provision, at Article 27(1), that reaffirms the principle currently set out (mutatis mutandis) at Article 9(1) of Regulation 2007/2004 that the Agency would not have a role in assessing the merits of individual return decisions undertaken by Member States. However, Article 26 (1) equally stipulates that "*The Return Office shall be responsible for carrying out the return-related activities of the Agency, in accordance with the respect of fundamental rights and general principles of Union as well as international law, including refugee protection and human rights obligations*".

In UNHCR's view, the fulfillment of the Agency's responsibilities under Article 26 (1) will require that additional guarantees be established to ensure that the Agency's support in the removal of third country nationals is only triggered after a final decision has been issued by the requesting MS in the context of a national procedure that is fully compliant with EU law, in particular fundamental rights and due process guarantees. UNHCR considers that, while it is appropriate that the Agency not enter into the merits of individual return decisions, a mechanism should be put in place whereby the Agency is obliged to decline its support to or terminate return interventions after receiving credible information that a MS or third country is systemically failing to comply with the standards of the Return Directive. A similar mechanism concerning respect for human rights should, in UNHCR's view, also apply in the context of the Agency's collaboration with third countries. Third countries should thereby be required to fully comply with relevant fundamental rights provisions to benefit from the Agency's support on returns.

Such mechanism should also ensure that sufficient guarantees from the receiving country regarding the treatment of returnees and compliance with the prohibition of

do/policies/european-agenda-migration/proposal-implementation-package/docs/communication_from_the_ec_to_ep_and_council_-_eu_action_plan_on_return_en.pdf

[32] This is also noted in the document UNHCR: *Building on the Lessons Learned to Make the Relocation Schemes Work More Effectively - UNHCR's Recommendations,* January 2016, available at: http://www.refworld.org/docid/56a076e24.html; as well as in *UNHCR's recommendations to Luxembourg and the Netherlands for the EU Presidency July - December 2015 and January – June 2016,* July 2015, available at: http://www.refworld.org/docid/559bc6b64.html

[33] European Union: *Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals,* 16 December 2008, available at: http://www.refworld.org/docid/496c641098.html

[34] European Union: *Annex 1 "Return Handbook" to the Commission Recommendation of 1.10.2015 establishing a common "Return Handbook" to be used by Member States' competent authorities when carrying out return related tasks,* 1 October 2015, available at: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/return_handbook_en.pdf

*refoulement*, be offered by the State returning, before any return operation or intervention by the Agency is carried out.

*To ensure and promote respect for fundamental rights, UNHCR recommends that:*

- *The provisions on the suspension or termination of joint operations and rapid border interventions under Article 24 apply, mutatis mutandis, to return operations and interventions.*
- *A mechanism be put in place for the Agency to decline to provide support to or terminate return interventions after receiving credible information that a MS or third country is systemically failing to comply with the standards of the Return Directive[35] or applicable fundamental rights and international protection obligations.*

**Monitoring of return operations and interventions**

UNHCR welcomes Article 27 (5), which states that every return operation must be monitored in line with the Return Directive[36] on the basis of objective and transparent criteria covering the entire operation. This also extends to the establishment of Pools of Forced Return Monitors, Escorts and Return Specialists, under Articles 28-30, who must be trained in line with Article 35, including on human rights and international protection obligations. The Commission proposes that the forced return monitors and escorts are drawn from national competent bodies, whereas the return specialists would come from national competent bodies and from the staff of the Agency.

*UNHCR recommends that:*

- *The obligation to monitor forced return flights, in line with the Return Directive, be extended, mutatis mutandis, to return interventions under Article 32.*
- *The proposal spell out to which body – the Agency, the competent national authorities or both – the forced return monitors will transmit their reports, and how a proper follow-up to these reports will be ensured.*
- *A specific reference be inserted under Article 27 (4) to render it explicit that the forced return monitors participating in returns from one third country to another third country ('mixed return operations') are drawn from the Pool established under Article 28 and trained in accordance with Article 35. Where other third country national personnel are involved in return-related activities, UNHCR recommends that they be required to comply with the Codes of Conduct of the Agency.*
- *All return monitors and escorts be individually identifiable by anyone who comes into contact with them in the context of a return operation by means of a visible sign that makes reference to their function and Member State as well as be obliged to identify themselves on request while*

[35] *European Union, Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, 16 December 2008,* available at: http://www.refworld.org/docid/496c641098.html

[36] Ibid

*carrying out return operations and interventions to further promote transparency and compliance with relevant human rights norms.*

- *Forced return monitors, escorts and specialists be subject to disciplinary measures of their MS, such as those applicable to European Border and Coast Guard Teams under Article 20, to promote compliance with relevant national and international standards, and the Agency's Code of Conduct.*

**Additional tasks on returns**

In line with Article 26 (2) (c), the Agency is tasked "*to coordinate the use of relevant IT systems and provide support on consular cooperation for the identification of third-country nationals and the acquisition of travel documents…*"

UNHCR acknowledges that contact with competent consular authorities is a necessary step to facilitate the return of persons not in need of international protection and irregularly staying in the EU. Given the risks that sharing of information with their countries of origin may pose for persons in need of international protection, as well as their families and relatives who remain in the country of origin, UNHCR would stress the need to ensure that such contact is only undertaken following the issuance of a final return decision.

UNHCR also notes that Article 26 (2) (b) provides the Agency with an additional task to assist Member States with information on third countries of return. In its current form, this provision is too vague on the scope and purpose of such information, as well as the methodology and criteria for its collection.

*UNHCR recommends that:*

- *Should Article 26 (2) (b) aim at assessing whether return to a country would be in line with EU fundamental rights standards (including respect for the principle of non-refoulement), the analysis is not undertaken by the Agency, but under the lead of a specialised EU Agency such as EASO or FRA, taking into consideration the views of UNHCR and other organisations with relevant expertise.*

- *Article 26 (2) (c) on the operational support provided by the Agency to competent national authorities be amended as follows: "Advice on the handling and management of return procedures in compliance with Directive 2008/115/EC* ***and support on consular cooperation for the identification of third-country nationals who either wish to return voluntarily or are the subject of a final return decision undertaken in accordance with EU legislation, including human rights and international protection obligations …"***

**Return to and from Third Countries**

UNHCR notes that Article 27 (4) stipulates that return operations can also be carried out from one third country to another third country, provided that the third country issuing the return decision is bound by the 1950 European Convention of Human Rights and Fundamental Freedoms. UNHCR emphasizes that any collaboration

with third countries must ensure compliance with relevant human rights norms, the principle of *non-refoulement* and other refugee law obligations.

Cooperation with third countries on the acquisition of travel documents in the framework of return interventions should also be undertaken observing strict fundamental rights safeguards and with due observance of personal data protection under relevant EU law.[37]

*UNHCR recommends that the proposal provide that any assistance provided for mixed return operations under Article 27 (4) is contingent on:*

- *The establishment of an adequate and objective mechanism, which would ensure that return decisions issued by the removing third country meet relevant international and EU standards, including sufficient guarantees against arbitrary removal to their country of origin.*
- *The Agency's confirmation that the removal of persons from third countries is either at the request of the potential returnee or the result of a final decision undertaken in accordance with relevant international and EU standards.*

**Operational Plans**

UNHCR considers that the operational plans of return operations and interventions provided for under Article 27 (2) and Article 32 (4), respectively, should include references to relevant fundamental rights provisions. UNHCR also considers that it would be beneficial to foresee the Agency's engagement with relevant bodies and organizations, with which the agency cooperates in the framework of the particular return-related activity, in the development and evaluation of operational plans.

## 4 . Other operational activities

**Protection of Fundamental Rights in actions by the Agency at the EU external borders**

Through this proposal, the Commission aims to enhance the European integrated border management, conceived as a shared responsibility of the Agency and the national authorities of EU Member States. UNHCR acknowledges this objective, but considers that the reinforcement of border management must be implemented in full respect of fundamental rights, in particular, the right to asylum in the EU.[38] Therefore, it is essential that persons in need of international protection are provided with access to territory in the EU, as well as fair and efficient procedures. In addition, UNHCR reiterates that EU Member States are bound by the provisions of Article 31 (1) of the 1951 Geneva Convention, which stipulates that penalties shall not be imposed on refugees on account of their illegal entry or presence in a country.[39]

[37] European Union, *Regulation (EC) No 45/2001 of the European Parliament and of the Council 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,* 18 December 2000, available at: http://www.refworld.org/docid/3ddceb60c.html

[38] A principle explicitly referenced in relevant EU legislation, as outlined in the Introduction under Legal Framework.

[39] UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951 (hereinafter "1951 Refugee Convention"), United Nations Treaty Series No. 2545, vol. 189, p. 137, available at: http://www.unhcr.org/refworld/docid/3be01b964.html.

Accordingly, UNHCR welcomes Article 20 (4), which stipulates that members of European Border and Coast Guard Teams shall, in the performance of their tasks and in the exercise of their powers, fully respect fundamental rights, including the principle of *non-refoulement*, access to asylum procedures and human dignity.

This will be made possible*, inter alia,* by ensuring that the pools of border guards and other relevant staff are comprised of qualified individuals, trained in accordance with Article 35 of the proposal, and who are in the position to observe and promote common European standards with respect to border management.

*UNHCR recommends that:*

- *The provisions on anti-discrimination under Article 35 be amended to reflect Article 21 of the Charter of Fundamental Rights of the European Union[40] on the prohibition of discrimination.*
- *A reference to the obligation to respect relevant human rights provisions under EU and international law, including the principle of non-refoulement, in all actions undertaken by the Agency at the external borders be inserted in Article 13.[41]*
- *The proposal be amended to ensure that operational plans of joint operations and rapid border interventions, the content of which is laid down in Article 15, include references to relevant fundamental rights provisions, including respect for the principle of non-refoulement, prohibition of torture and of inhuman or degrading treatment or punishment, the right to liberty and security, the right to protection of personal data, as well as an anti-discrimination clause, in line with Article 21 of the Charter of Fundamental Rights of the European Union.[42]*
- *Article 39 (9) on the possibility of the host MS to authorize European Border and Coast Guard Teams to take decisions on refusal of entry be amended to also foresee this possibility for decisions to allow entry for the purpose of making an international protection application or in view of specific needs or vulnerabilities (e.g. THB victims or unaccompanied children).*

**Provision of information**

UNHCR notes that Article 17 (3) (b) stipulates that the tasks of migration management support teams may include a limited responsibility to provide information "*to persons in clear need of international protection or to applicants or potential applicants for relocation*". UNHCR is concerned that reference made to a "clear" need implies an evaluation of the merits of an international protection application that should only be undertaken by a competent authority as provided for

[40] European Union, *Charter of Fundamental Rights of the European Union (2012/C 326/02),* 26 October 2012, Article 21, available at: http://www.refworld.org/docid/3ae6b3b70.html
[41] Such a responsibility is consistent with the responsibilities established in EU legislation, including Articles 6 and 8 of the Asylum Procedures Directive (ref to note no 9 above).
[42] European Union, *Charter of Fundamental Rights of the European Union (2012/C 326/02),* 26 October 2012, Article 21, available at: http://www.refworld.org/docid/3ae6b3b70.html

in article 2 (f) of the Asylum Procedures Directive.[43] In UNHCR's view, this Article should be aligned with Article 8 of the Asylum Procedures Directive which refers to an obligation to provide information on asylum procedures where there are "*...indications that third-country nationals or stateless persons ... may wish to make an application for international protection*".

To facilitate a clear distribution of tasks among the various actors involved in line with their respective mandates, and the smooth implementation of the "hotspot" approach, UNHCR considers that a clarification on what information the migration management support teams, deployed by the Agency, would be required to disseminate would be helpful.

*In addition, UNHCR recommends that Article 17 (3) (b) on the tasks of migration management support teams be amended in line with Article 8 of the Asylum Procedures Directive[44] and relevant provisions of the Practical Handbook for Border Guards (the Schengen Handbook)[45], to read as follows: "…**the identification, provision of information to and referral of persons who may be in need of international protection, as well as persons belonging to particularly vulnerable groups…".***

**Evaluation of the activities of the Agency at external borders**

UNHCR welcomes the provisions of Article 25, which stipulate that the results of joint operations and rapid border interventions shall be evaluated in the form of detailed reports produced and transmitted to the Management Board alongside the observations of the Fundamental Rights Officer.

*UNHCR recommends that:*

- *Compliance with fundamental rights during the Agency's activities at the external borders be made a central criteria for assessing the quality, coherence and effectiveness of joint operations and rapid border interventions based on specific guidelines developed in consultation with the Fundamental Rights Officer and the Consultative Forum on Fundamental Rights.*
- *With the exception of confidential aspects of the operation, the comprehensive comparative analysis included in the consolidated annual report be made public and accessible to all relevant institutional and non-governmental stakeholders, as well as the general public.*

[43] *European Union, Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, 16 December 2008,* available at: http://www.refworld.org/docid/496c641098.html

[44] European Union, *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),* 26 June 2013, available at: http://www.refworld.org/docid/51d29b224.html

[45] European Commission, *Commission Recommendation establishing a common "Practical Handbook for Border Guards (Schengen Handbook)" to be used by Member States' competent authorities when carrying out the border control of persons*, 6 November 2006, available at: http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2015010%202006%20INIT

## 5 . Cooperation with Third Countries

**Protection of Fundamental Rights in cooperation with Third Countries**

UNHCR welcomes Article 53 (1), which sets forth a requirement for the Agency and MS to protect fundamental rights in cooperation with third countries, where collaboration takes place on the territory of those countries, and to comply with norms and standards at least equivalent to those set by EU legislation.

UNHCR welcomes the provisions of Article 53 (5), which stipulate that observers from third countries participating in the activities of the Agency at the external borders shall receive appropriate training prior to their participation.

*UNHCR recommends that:*

- *Adequate safeguards be put in place to ensure that the participation of third country officers in the Agency's operations does not pose a challenge to the protection of the rights of migrants and refugees, with a particular attention to international protection obligations and data protection.*
- *Article 53 (5) also provide for the adherence of third country officers to the Codes of Conduct of the Agency while participating in its activities.*

## 6. Fundamental Rights Officer

**Reporting**

UNHCR is concerned that proposed Article 71 (2) differs from the existing Frontex Regulation in that it requires the Frontex Fundamental Rights Officer only to cooperate with the Frontex Consultative Forum on Fundamental Rights, instead of reporting to it. In this regard, the Fundamental Rights Officer's reporting to the Consultative Forum is key to Frontex's commitment to promote respect for fundamental rights in its activities and an essential requirement to legitimize the independence of this function.

*In the absence of an apparent justification for this proposal, UNHCR recommends that Article 71 (2) be amended to ensure the continuation of the Fundamental Rights Officer's reporting to the Consultative Forum as a necessary provision to legitimise its independent status and to duly exercise her or his mandate.*

**Supervisory Board**

UNHCR notes the proposal to establish a Supervisory Board with the responsibility to advise the Executive Director on the need to initiate and carry out joint operations; the assessment and decision-making on vulnerability assessments carried out in accordance with Article 12; and on measures related to the equipment and staffing needed to meet the objectives of an intervention by the Agency.

*Given the strengthened mandate of the Agency and the increased challenges it will face in ensuring respect for fundamental rights and protection responsibilities in its future activities, UNHCR recommends that the composition of the Supervisory Board established under Article 69 is extended to include the Fundamental Rights Officer as a permanent member.*

**Adequate staffing**

Despite repeated and consistent recommendations by the Frontex Consultative Forum,[46] representatives of the EU Parliament,[47] the Council of Europe,[48] and the External Evaluator of Frontex,[49] the work of the Fundamental Rights Officer has been hindered by inadequate staffing since the creation of this function. Over the past years, Frontex has exhibited considerable and consistent growth in terms of the financial and human resources made available to it, to carry out actions at the EU external borders. This, coupled with increasingly complex challenges at the external borders, has resulted in a significant increase of the workload and responsibilities of the Fundamental Rights Officer.

*In view of the increased responsibilities of the new Agency, and the establishment of a complaints mechanism, UNHCR recommends that the proposal include a provision to ensure that the growth of the Agency is proportionally reflected in the recruitment of qualified officers with the necessary skills, background and seniority to support the Fundamental Rights Officer. This provision could establish that a meaningful proportion of any regular or extraordinary assignment of staff or resources to the Agency directly results in the proportional allocation of staff to support the Fundamental Rights Officer.*

## 7. Establishment of an individual complaints handling mechanism

**Scope of the complaints mechanism**

While UNHCR welcomes the establishment of a complaints handling mechanism as proposed by the European Ombudsman, the European Parliament and the Parliamentary Assembly of the Council of Europe,[50] UNHCR regrets that the current

[46] Frontex Consultative Forum on Fundamental Rights, *Annual Report 2014*, available at: http://frontex.europa.eu/assets/Partners/Consultative_Forum_files/Frontex_Consultative_Forum_annual_report_2014.pdf and *Annual Report 2013,* available at: http://frontex.europa.eu/assets/Partners/Consultative_Forum_files/Frontex_Consultative_Forum_annual_report_2013.pdf

[47] 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 Frontex (2014/2251(INI)),* 2 December 2015, available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2015-0422+0+DOC+XML+V0//EN;

[48] Council of Europe, *Parliamentary Assembly of the Council of Europe Resolution 1932 (2013) Final version, Frontex: human rights responsibilities,* 25 April 2013, available at: http://www.refworld.org/docid/51c2b8154.html

[49] External Evaluation of the Agency under Art. 33 of the Frontex Regulation, Final Report, Ramboll Management Consulting and EurAsylum Ltd, July 2015, available at: http://frontex.europa.eu/assets/Publications/General/Final_Report_on_External_Evaluation_of_Frontex.pdf

[50] European Ombudsman, *Special Report of the European Ombudsman in own-initiative inquiry OI/5/2012/BEH-MHZ concerning Frontex,* available at: http://www.ombudsman.europa.eu//en/cases/specialreport.faces/en/52465/html.bookmark; 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 Frontex (2014/2251(INI)),* 2 December 2015, available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2015-0422+0+DOC+XML+V0//EN; Council of Europe, *Parliamentary Assembly of the Council of Europe Resolution 1932 (2013) Final version*
*Frontex: human rights responsibilities,* 25 April 2013, available at: http://www.refworld.org/docid/51c2b8154.html

proposal falls short of ensuring that the distribution of legal obligations, roles and sharing of responsibilities between the Agency and EU MS does not undermine human rights protection, as well as accountability for violations, in the activities of the Agency at the EU external borders.

**Formal involvement of the EU and national Ombudsmen**

As acknowledged by the European Parliament, the expertise and continued support of the European and national Ombudsmen are key to the development of a well-defined mechanism that provides for the independent, transparent and impartial handling of complaints in line with appropriate procedural safeguards.

UNHCR would thus recommend that the proposal include provisions aimed at ensuring a formal involvement of these institutions in the development and management of the Agency's complaints mechanism, possibly through the development phase and oversight such as a possible periodic reporting responsibility from the Agency.

*For the complaints handling mechanism to effectively address fundamental rights violations, UNHCR recommends that:*

- *Article 72 be amended to ensure that admissible complaints are shared with national ombudsmen, as set forth by the European Ombudsman, as well as other relevant bodies competent in the area of fundamental rights.*
- *With due respect to data protection standards and obligations, independence in the handling of complaints be guaranteed through the oversight of relevant institutions such as the office of the European Ombudsman.*

**Admissibility and follow up**

UNHCR concurs with the European Parliament in recommending the setting up of an effective appeal/review mechanism, providing for an effective remedy, in cases where an application is ruled inadmissible or rejected. A mechanism should also be established for the referral to competent authorities and human rights institutions of those complaints where a potential fundamental rights violation is identified/found, though a direct connection to Frontex joint operations cannot be established.

UNHCR further recommends that the proposal take on board the recommendation of the European Parliament to formally request feedback from the respective Member States through a warning that is shared with relevant human rights institutions. UNHCR also advises to specify the possible actions that can be undertaken if no or inadequate follow-up is received.

*UNHCR recommends that:*

- *Article 72 foresee that written reasons be provided to the complainant, including contact details of the responsible national authorities, should no follow-up procedure be initiated by the Agency.*

**Applicability to third country officers**

Article 72 (2) foresees that a complaint may be submitted by *any person* who considers that he or she has been the subject of a breach of his or her fundamental rights by the actions of staff involved in an activity of the Agency. While this formulation appears to allow for the submission of complaints against third country officers taking part in Frontex operations, Article 72 fails to establish measures for the follow-up and investigation of such complaints.

*In line with the recommendation of the European Parliament, UNHCR recommends that Article 72 be amended to include a referral mechanism for the investigation and response to individual complaints in the respective working arrangements concluded with the competent authorities of third countries as a pre-requisite for third country officer's participation in Frontex activities.*[51]

**Adequate staffing**

Without additional and dedicated resources, the allocation of this responsibility to the Fundamental Rights Officer would undermine her already stretched capacity to fully implement her mandate. It thus requires that competent staff be provided to the Fundamental Rights Officer, as deemed proportionate and necessary.

With reference to the recommendation made in the previous section on the role of the Fundamental Rights Officer, UNHCR considers that the setting up of an effective complaints handling mechanism requires the hiring of competent staff exclusively committed to this function under the supervision of the Fundamental Rights Officer and the European Ombudsman.

*UNHCR further recommends the inclusion of a provision under Article 72 that ensures all personnel taking part in the Agency's activities receive clear instructions on the use of the complaints handling mechanism, the standardized complaints form, as well as the obligation to inform potential complainants on their right to redress in the form of a remedy and/or follow-up to address deficiencies.*

## 8. Consultative Forum on Fundamental Rights

**Mandate of the Consultative Forum**

UNHCR welcomes Article 70, which provides for the establishment of a Consultative Forum, and broadly replicates the role and tasks currently exercised by the Frontex Consultative Forum on Fundamental Rights. In particular, UNHCR welcomes Article 70 (5), which stipulates that the Consultative Forum would be granted access to all information concerning the respect for fundamental rights, including by carrying out on-the-spot visits to joint operations or rapid border interventions, which is integral to the proper and meaningful discharge of the tasks of the Forum.

[51] 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 Frontex (2014/2251(INI))*, 2 December 2015, available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2015-0422+0+DOC+XML+V0//EN

**Status of the Consultative Forum**

UNHCR notes that the current proposal of the Commission defines the Consultative Forum under Article 60 as part of the administrative and management structure of the Agency, alongside a Management Board, an Executive Director, a Supervisory Board and a Fundamental Rights Officer.

*UNHCR recommends that Article 60 be amended to better reflect the independent nature of the Forum as a collegial advisory body to the Agency's executive management and the Management Board. Consideration could be also given to the reinforcement of the Consultative Forum Secretariat to assist the Consultative Forum member organisations in fulfilling the Forum's enhanced responsibilities.*

## 9. Data Protection

**Storing and transfer of personal data**

Protection of personal data, in particular of persons in need of international protection, is essential for the proper functioning of the Common European Asylum System. UNHCR welcomes, in this respect, Article 44 (4), which prohibits the transfer of personal data processed by the Agency and its onward transfer by EU Member States to authorities of third countries or third parties.

*UNHCR recommends that:*

- *Where the Agency transmits the personal data of returnees to the carrier in the context of return operations and return interventions as provided for in Article 47 (4), the carrier be required to delete the data once return is completed.*
- *Any extension of the duration of storage of personal data in accordance with Article 47 (3) be justified and in line with applicable human rights and personal data protection obligations.*
- *An obligation to inform persons whose personal data is collected and processed on the purposes of these actions, as well as provisions concerning data storage, access, sharing, and destruction, be included in Section 2 of the proposal.*

## 10. Participation in the Management Board of the Agency

**Provision on participation**

In line with Article 65 (6), the Management Board of the Agency may invite any person whose opinion may be of interest to attend its meetings as an observer.

*UNHCR recommends that full use be made of this provision and reiterates its readiness and availability to attend and contribute to discussions held at Management Board meetings on an ad-hoc basis, replicating the good practice of the Management Board of the European Asylum Support Office.*

April 2016