



**Briefing on the Commission proposal for a Regulation amending Council Regulation (EC) 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)**

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**At the European Union level, ECRE pursues an agreed programme of policy initiatives, research and advocacy, aimed at stimulating new thinking on refugees and legislative reform in Europe. Its actions are also intended to counteract the manifestation of racism, xenophobia and social exclusion that undermine the institution of asylum.**



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## Summary of views

The European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, better known as **Frontex**, was established by Council Regulation (EC) 2007/2004 adopted on 26 October 2004 and became operational in May 2005. Frontex economic and personnel resources have grown rapidly, and such increase has been accompanied by requests that its efficiency be enhanced and its operational role expanded. In response, the European Commission published a **proposal for a Regulation amending Council Regulation (EC) 2007/2004 on 24 February 2010**. The present briefing comments on the main elements of the Commission proposal.

### 1. Role and responsibilities of Frontex vis-à-vis Member States

The Frontex Regulation emphasises that the **responsibility for the control and surveillance of the external borders** lies with the Member States. The fact that Frontex is not responsible for guarding the external borders of the EU is, however, unclear to many stakeholders, including some Member States. Ambiguity over the respective roles and responsibilities of the different actors involved in operational activities creates a gap in accountability and potentially permits Member States to engage in border management with impunity. Concerns are compounded by the fact that the current framework for accountability is very weak.

The Commission proposal increases this ambiguity. It strengthens the Agency's mandate by giving Frontex a **co-leading role for the implementation of operations** together with the host State. The additional powers envisaged for the Agency reinforce the argument that Frontex would exercise a sufficient degree of control over operations to render itself liable for the possible violations of fundamental rights that may occur. Yet, there is no suggestion to establish proper political and legal accountability of the Agency.

**Amnesty International and ECRE recommend that Frontex be subject to full accountability by the enhancement of democratic oversight of the Agency before the European Parliament, in addition to judicial oversight by the European Courts for legal protection against unlawful actions, and by effective implementation of the requirement to give access to prompt, objective and reliable information on its activities. In particular, accountability should be enhanced by providing for the following: 1) Relevant information, including risk analysis, should be transmitted to the European Parliament to enable adequate scrutiny of Frontex activities; 2) Independent observation should be enabled at the meetings of the Management Board; 3) Frontex programme of work should be subject to public consultation.**

The Commission proposal also gives the Agency formal responsibility for **drawing up the operational plan for a joint operation or pilot project** and provides for the inclusion of a reporting and evaluation scheme containing detailed provisions on **"incident reporting"**. Detailed evaluation reports of joint operations should be transmitted to the Management Board within 60 days. However, incident reporting does not unequivocally include breaches of fundamental rights and operational plans do not devise the procedural steps necessary to ensure fundamental rights compliance.

**Evaluations transmitted by the Agency following each operation to the Management Board must include an independent assessment of compliance with fundamental rights and not be limited to assessing fulfillment of operational objectives. This will allow the Commission to react to any shortcomings in the application of EU law, including with regard to fundamental rights, which result from joint operations. Preamble recital 17 should be brought within the operative part of the text addressing incident reporting to clarify beyond doubt that it applies to allegations of incidents which entail breaches of fundamental rights.**

Equally, the scheme devised has an inherent limitation in the absence of independent monitoring of joint operations. Owing to its own involvement in the operations, Frontex is unsuited to monitor compliance with EU law and human rights obligations. In addition, the current framework does not guarantee satisfactory follow up by the authorities when breaches of EU law occur. Frontex is given the power to interrupt an operation if the conditions to conduct them are no longer fulfilled. What is meant by "conditions" remains unclear, particularly whether it includes non-compliance with EU law. Frontex is to have also greater involvement in evaluating Member States' management capacity at the

external borders. However, there is no suggestion to enhance the Schengen evaluation system, which similarly lacks transparency and independent monitoring from the point of view of both compatibility with the Schengen Borders Code and compliance with the Charter of Fundamental Rights.

**Amnesty International and ECRE are concerned that obligatory incident reporting and evaluations lack the requisite independence and in themselves cannot ensure proper enforcement of the applicable legal framework for Frontex operations.**

**In line with the monitoring requirements introduced for joint return operations, the revised Regulation should include a mandatory requirement for all Frontex operations to be independently observed and reported on to the EU Institutions from the perspective of compliance with EU law and fundamental rights.**

## **2. The legal framework governing Frontex**

The proposal clarifies the **legal framework of Frontex operations** by stating explicitly that its activities are subject to the Schengen Borders Code and should be undertaken in accordance to relevant international and EU law, obligations related to international protection and fundamental rights. Sea border surveillance activities fall within the remit of the Schengen Borders Code, even if implemented in the high seas, and as such must be conducted without prejudice of the rights of refugees and other persons demanding international protection. The Council Decision setting out rules which apply to joint sea operations further clarifies that all aspects of these operations, including interception and disembarkation, are subject to international obligations arising from refugee and human rights law.

While meant to deal with Member States' disputes over responsibility, the Council Decision also includes non-binding **guidelines**, which must form part of the operational plan drawn up for each Frontex operation and state modalities for disembarkation of persons intercepted or rescued. Yet, these are not detailed enough to ensure that sea operations will meet the requisite standards.

**Amnesty International and ECRE recommend that the new Frontex Regulation includes an explicit requirement that the rules for interception at sea operations be formalized in the operational plan. Moreover, they should be accompanied with detailed measures to ensure that disembarkation meets the requisite standards, in particular by specifying the place of disembarkation and as regards the provision of food, shelter and medical care, as well as access to asylum and protection from refoulement.**

Although the extent of the **extraterritorial application of the EU acquis** remains to be determined, Member States intercepting individuals beyond their territorial waters cannot operate in a legal vacuum. In addition, when border surveillance activities take place in the **territorial waters of a third country**, Member States and Frontex appear to attribute responsibility for any possible human rights breaches to the third country concerned. Adequate measures must also be in place to ensure that those involved in joint operations are able to guarantee refugee and human rights protections in a practical way, both when they act within a territory or territorial waters, as well as extraterritorially

**Amnesty International and ECRE recommend that the proposal sets out the concrete measures by which States can effectively meet their obligations, when these are engaged both territorially and extraterritorially. These should include at a minimum the following: 1) Individuals have the possibility of explaining their circumstances during a personal interview; 2) Those who wish to apply for asylum are helped to access the asylum procedure, including through interpretation and independent legal advice.**

**International cooperation should never be construed as releasing EU Member States from fundamental rights obligations in relation to those intercepted or diverted in the territorial sea of the third state in question.**

To date Frontex has undergone a number of evaluations but none have assessed in any detail the human rights impact of its activities. According to the Commission proposal, an independent external **evaluation** of how effectively the Agency fulfils its mission, to be commissioned by the Management Board every five years, must include a specific analysis of the way the Charter of Fundamental Rights was respected pursuant to the application of the Regulation.

Amnesty International and ECRE welcome the reference in the proposal to the Charter of Fundamental Rights with regard to the independent evaluation of Frontex to be commissioned by the Management Board every five years. However, Amnesty International and ECRE recommend that new Article 33.2b should be amended to require that the evaluation focus on “how the rights under the Charter of Fundamental Rights were guaranteed” rather than how the Charter was respected. The provision should also be linked to evaluations of each operation undertaken under the aegis of Frontex which must include an independent account of how human rights obligations have been observed in practice.

### 3. Strengthening solidarity

The proposal introduces a system of **compulsory solidarity** regarding Member States’ contributions of assets (equipment and personnel) as a way to remove the uncertainty on the extent of the resources Frontex can rely on in real time. Alongside the Frontex Joint Support Teams (FJST), a **coordinating officer** appointed by the Agency is deployed for the operations. While instructions to the FJST are issued by the host Member State in accordance with the operational plan, the Agency, via its coordinating officer, may also communicate its views on those instructions to the host Member State, and such views must be taken into consideration.

**Amnesty International and ECRE recommend that the role of the host State for issuing instructions to the teams is coherent with the responsibility for border control and surveillance remaining with the Member States. The power of Frontex coordinating officer to communicate views on instructions which are binding on the host State confounds responsibility. It should be clear in all instances who retains responsibility for the instructions given.**

### 4. Expanded role for Frontex in cooperating with third countries

The Commission proposal establishes an **enhanced role for Frontex in its cooperation with non-EU States**. This includes the capacity to deploy Immigration Liaison Officers, to conduct technical assistance projects outside the EU and to invite third country officials to participate in Frontex activities as observers.

**The principle, spelled out in the Preamble, that cooperation with third countries should be aimed at promoting the European standards of border management, including the respect of fundamental rights and human dignity, should be brought within the operative part of the Regulation. Amnesty International and ECRE also recommend that this principle should be strengthened by a requirement that support should not be offered to third countries when it can be foreseen that joint operations could lead to breaches of fundamental rights.**

The proposal foresees that Frontex will be allowed to deploy **Immigration Liaison Officers** in third countries. These are representatives of Member States’ immigration services posted abroad to maintain contacts with the authorities of the host country in order to prevent irregular migration. The Commission proposal states that the tasks of Frontex ILOs should be carried out in compliance with EU law and fundamental rights and that they would only be assigned to third countries in which border management practices respect minimum human rights standards. Yet, despite these general safeguards, the deployment of ILOs raises several concerns from a fundamental rights perspective in light of existing Member States’ practices.

**Amnesty International and ECRE recommend that the Regulation is amended to expressly assert that Frontex ILOs will not assume advisory functions vis-à-vis carriers and that the Agency’s liaison officers are explicitly included among the categories of staff which should receive training on EU law and fundamental rights under the new Regulation.**

Furthermore, Amnesty International and ECRE understand that, as a minimum, the following criteria should be taken into account in assessing whether the border management practices of a relevant third country respect the requisite standards regarding human rights and thus Frontex ILOs can be posted in its territory: 1) respect for the prohibition of refoulement and for the right of individuals to leave their country; 2) adherence to the principle of non-discrimination and respect for human dignity by border guards in the performance of border

checks; 3) provision of the necessary humanitarian assistance and adequate reception conditions, including emergency medical care to migrants intercepted within the context of border control operations; 4) existence of procedural and substantial safeguards to prevent unlawful or arbitrary detention and to ensure a humane treatment for detainees.

The Commission proposal aims to strengthen Frontex leverage vis-à-vis third country authorities by allowing the Agency to launch and finance **technical assistance projects in third countries** in the area of border controls through its budget or through the financial instruments supporting the EU's external relations policy, as set up for example by ECHO (the European Commission Humanitarian Aid Department) and AIDCO (the EuropeAid Co-operation Office). These departments are responsible for managing external aid programmes in the humanitarian and development field.

**Amnesty International and ECRE are concerned that allowing Frontex to implement technical assistance projects through funds from the financial instruments set up by ECHO and EuropeAid could lead to the use of humanitarian and development assistance for border control purposes. EU external aid programmes should remain faithful to their original objectives.**

The new Regulation also foresees the **participation of third country officials in Frontex activities**, which reflects current practice. It is not specified in which capacity this participation will take place and what will be their tasks and powers.

**Amnesty International and ECRE recommend that the operational part of the Regulation explicitly asserts that third country officials will only participate in Frontex operations as observers and that their involvement will exclude the performance of executive tasks.**

The inclusion in the Commission proposal of a requirement for Member States to include where appropriate provisions concerning the **role of Frontex in bilateral agreements with third countries** also reflects current practice of some Member States. These bilateral agreements are generally confidential, which makes it virtually impossible to know whether their provisions abide by the obligations of the States party in relation to fundamental rights. Despite the absence of a legal basis in the current Regulation, Frontex has already been involved in border control operations in third countries on the grounds of such agreements – for instance in Joint Operation Hera. The proposal purports to remove these practices from the ambiguous area where they currently are, by giving them a legal standing in EU law. However, this should be accompanied by the introduction of the requisite safeguards.

**Amnesty International and ECRE stress that Frontex activities may not circumvent their own legal basis, which requires adherence to the Schengen Borders Code and to obligations regarding fundamental rights and access to protection, by relying on Member States' bilateral agreements with third countries. Furthermore, a higher degree of transparency is required to open these agreements to public and parliamentary scrutiny. The Regulation should rule out the Agency's engagement in border control operations that rely on Member States practices or bilateral agreements which are not fully compatible with Frontex own legal basis, including concerning respect for human rights within the context of border management, and which do not meet the requisite transparency standards.**

## 5. Frontex joint return operations

Despite a highly unspecified legal framework in this area, there has been a steep increase in the allocation of funding and operational capacity to **Frontex Joint Return Operations (JRO)**. Under the new Regulation, the Agency will have the capacity to decide whether to finance or co-finance return activities. Such financial support will be conditional upon respect for the Charter of Fundamental Rights. Frontex JRO should also take place in full compliance with the Union's return policy, in particular with the rules set out in the Returns Directive which Member States need to transpose by December 2010.

**Amnesty International and ECRE welcome the assertion that financial support by Frontex to return operations is conditional upon the full respect of the Charter of Fundamental Rights as well as the clarification that return cooperation within the framework of the Agency is subject to EU common standards and procedures on return. Acceptance of legal guarantees and**

**procedural safeguards set out in the Returns Directive should be a precondition for Member States to participate in joint return flights.**

Furthermore, the proposal includes a requirement for Frontex to develop a **Code of Conduct** establishing common standardised procedures for joint return flights which ensure that removal occurs in a humane manner and with full respect for fundamental rights. This Code of Conduct should devote particular attention to the establishment of an effective system for the **monitoring of forced returns**, which should be carried out independently and cover the whole return operation. The observations of the monitor shall address the compliance with the Code of Conduct, in particular fundamental rights, and would be available to the Commission, integrated in the internal final report of the JRO and included in an annual reporting mechanism.

**Amnesty International and ECRE welcome the provisions requiring the elaboration of a Code of Conduct for return operations and the establishment of an independent and comprehensive monitoring system for joint return operations. In addition, return monitoring systems should have a number of characteristics to attain its important objectives, including the unimpeded access of monitors to all relevant facilities; the provision of complete information and training to monitors; the design of appropriate follow up mechanisms; the adoption of mechanisms allowing for the suspension of the enforcement of removals when this would violate fundamental rights; and a post-return monitoring component.**

## **6. Training of border guards**

Providing **training on fundamental rights and access to protection** to the authorities responsible for border management is crucial for the development of protection-sensitive entry systems. The Commission proposal to amend the Frontex Regulation enhances the role of the Agency in the area of training and explicitly asserts that fundamental rights and protection issues should be part of the training imparted to border guards

**Amnesty International and ECRE welcome the emphasis placed by the proposed Regulation on the provision of training in EU and international law, including on fundamental rights and access to international protection, to Member States and Frontex personnel participating in the Agency's activities, although noting that in itself the training of border guards cannot solve all protection gaps at the borders. Owing to its outreach to national border services, Amnesty International and ECRE believe that Frontex could contribute to improving standards of border management regarding human rights and protection issues, through a continuous and appropriate development of the CCC standards and its training activities. This should be regarded as an integral component of the objective of promoting a "European Border Guard culture".**

**To ensure that the training offered is comprehensive, high quality and identifies best practice examples, Frontex should develop more structured cooperation with UNHCR, the FRA and the future EASO. Frontex should also ensure that it consults with and substantially involves civil society organizations in developing and implementing training programmes.**



## Introduction

The European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, better known as Frontex, was established by Council Regulation (EC) 2007/2004 adopted on 26 October 2004 (henceforth “Frontex Regulation”).<sup>1</sup> The main tasks entrusted to Frontex are set out in the Regulation and concern coordination of joint operations by Member States at the external sea, land and air borders of the EU, training of border guards, undertaking of risk analysis, development of relevant research, technical and operational assistance to Member States at the external borders, and support for Member States in joint return operations.<sup>2</sup> Frontex’s mission is to “facilitate and render more effective the application of [...] Community measures relating to the management of external borders [...] by ensuring coordination of the Member States’ actions in the implementation of those measures”.<sup>3</sup> By doing so, the Agency is expected to contribute “to an efficient, high and uniform level of control on persons and surveillance of the external borders of the Member States.”<sup>4</sup> In theory, “management” of operational cooperation in border control should be targeted at checking whether persons meet the entry requirements established by EU law or are otherwise to be admitted to EU territory as international protection seekers. In practice, the coordination and facilitation role of Frontex is primarily concerned with Member States’ objective to prevent migrants from reaching the EU’s territory by irregular means.

In 2007, an amending Regulation was adopted,<sup>5</sup> establishing the Rapid Border Intervention Teams (RABIT) for technical and operational assistance to Member States in mass influx situations at the external borders and regulating the powers of guest officers participating in joint operations coordinated by the Agency (henceforth “RABIT Regulation”). This Regulation made the deployment of RABIT – specially trained border guards from Member States who can be deployed at short notice to help a Member State facing unexpected migratory pressure – an additional task of the Agency. RABIT are conceived for situations of emergency and their deployment at short notice is enforced by a mandatory requirement on Member States to make border guards from the RABIT pool available, unless faced with a national emergency themselves.<sup>6</sup> To date there has not been a RABIT deployment. Other revisions to the founding Regulation ensured that guest officers participating in Frontex operations would no longer be restricted to advisory functions but could perform border guard tasks together with the host officers, under the command of the border guard authority of the host country.<sup>7</sup>

This expansion of Frontex’ role and the extension of powers of guest officers reflect the increasing importance of the Agency and the rising expectations by the EU institutions and the Member States that Frontex should act comprehensively in all border management matters. Accordingly, Frontex economic and personnel resources have grown rapidly: from October 2005, when Frontex became operational, to the end of 2009, the number of staff rose from 43 to 226 and the budget granted by the Community, which in the first year of Frontex existence was €6.2 million, increased in the following years manifold to around €83 million in 2009. The increase in funds has been accompanied at every turn by requests that efficiency be enhanced and the operational role expanded. The Agency is expected to undergo significant developments in the future in line with the gradual establishment of an integrated border management system, which is a policy objective inscribed in the Treaty of Lisbon<sup>8</sup> and of which the Agency aspires to be the keystone.<sup>9</sup> In the short term, there is a demand on the Agency to play a greater role in joint operations, particularly joint return flights, and in supporting and building up border management capacity in third countries. The effectiveness of Frontex-coordinated

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<sup>1</sup> Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, [2004] OJ L 349/1.

<sup>2</sup> Frontex Regulation, Article 2(1).

<sup>3</sup> Frontex Regulation, Article 1(2).

<sup>4</sup> *Ibid.*

<sup>5</sup> 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, [2007] OJ L 199/30.

<sup>6</sup> RABIT Regulation, Article 4(3).

<sup>7</sup> RABIT Regulation, Article 12, amending Article 10 of the founding Regulation.

<sup>8</sup> Article 77 Treaty on the Functioning of the European Union, [2008] OJ C 115/75. With regard to Frontex future development, see also the Commission Communication on Preparing the next steps in border management in the European Union, COM(2006) 733 final, 30 November 2006.

<sup>9</sup> Frontex General Report 2009, p.2.

operations is to be enabled also by common operational procedures containing clear rules of engagement for joint operations at sea.<sup>10</sup>

On 24 February 2010, the European Commission published a proposal for a Regulation amending Council Regulation (EC) 2007/2004.<sup>11</sup> This is the third substantive revision of the External Borders Agency's mandate. The Commission proposal responds to the numerous calls to reinforce Frontex, including through revision of its legal framework, and aims to address the shortcomings identified by the evaluations which have been conducted of the Agency.<sup>12</sup> The main elements of the proposal which this briefing will comment on concern the following:

1. Enhancement of Frontex' role in the implementation of joint operations and pilot projects
2. Clarification of the legal framework governing Frontex, including human rights and access to protection aspects
3. Strengthening solidarity by reinforcing access to means at Frontex' disposal
4. Expansion of the role of Frontex in cooperating with third countries
5. Clarification of the role of Frontex regarding joint return operations
6. Enhancement of obligations regarding training of border guards

## 1. Role and responsibilities of Frontex vis-à-vis Member States<sup>13</sup>

The Frontex Regulation emphasizes in both the Preamble recitals and Article 1(2) that "the responsibility for the control and surveillance of the external borders lies with the Member States". The fact that Frontex is not responsible for guarding the external borders of the EU is, however, unclear to many stakeholders, including some Member States.<sup>14</sup> Some ambiguity over the respective roles and responsibilities of Frontex and Member States may be explained by the fact that the mandate of Frontex envisages the exercise of executive powers by Agency staff and Member States' experts acting on the territory of another Member State. There is no definition of "executive powers" and the founding Regulation only regulated their exercise by making them "subject to the national law of that Member State".<sup>15</sup> The RABIT Regulation, which explicitly conferred border control and surveillance powers to guest officers, amended this provision to read that "while performing the tasks and exercising the powers guest officers shall comply with Community law and the national law of the host Member State."<sup>16</sup> Guest officers are defined as "officers of border guard services of Member States other than the host Member State participating in joint operations and pilot projects" and are required to observe the following rules:

- Only perform tasks and exercise powers under instruction from and, as a general rule, in the presence of border guards of the host Member State;<sup>17</sup>
- Wear a blue armband with the insignia of Frontex on their own uniform, identifying them as participating in a joint operation or pilot project, and present on request an accreditation document (in the official language of the host Member State) for the purpose of identification vis-à-vis the national authorities of the host Member State and its citizens;<sup>18</sup>

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<sup>10</sup> These were proposed by the Commission and adopted by the Council in the form of rules implementing the Schengen Borders Code. See further below, in the section of the briefing dealing with guidelines for joint operations at sea.

<sup>11</sup> COM (2010) 61 final, 24 February 2010.

<sup>12</sup> See particularly, Council Conclusions on the management of the external borders of the Member States of the European Union, Justice and Home Affairs Council meeting of 5 and 6 June 2008; Report of the Informal High Level Advisory Group on the Future of European Home Affairs Policy (The Future Group), June 2008; European Pact on Immigration and Asylum, European Council, October 2008; European Parliament Resolution of 18 December 2008 on the evaluation and future development of Frontex and Eurosur, P6\_TA(2008)0633; European Council Conclusions of June 2009; European Council Conclusions of October 2009; Stockholm Programme adopted by the European Council on 10 and 11 December 2009; Conclusions on 29 measures for reinforcing the protection of the external borders and combating illegal immigration, Justice and Home Affairs Council meeting, 25 February 2010.

<sup>13</sup> For the purpose of this briefing, the term Member State will subsume the countries associated with the implementation, application and development of the Schengen *acquis*. These are Norway, Iceland, Switzerland and Liechtenstein.

<sup>14</sup> See COWI, *External evaluation of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union: Final report*, January 2009, p.6 (henceforth "COWI evaluation report").

<sup>15</sup> Frontex Regulation, Article 10.

<sup>16</sup> Frontex Regulation, Article 10(2), as amended by RABIT Regulation.

<sup>17</sup> Frontex Regulation, Article 10(3), as amended.

<sup>18</sup> Frontex Regulation, Articles 10(4) and 10a, as amended.

- Carry service weapons, ammunition and equipment according to the home Member State's national law and provided the same is permissible under the law of the host Member State, and use them, including for defence or self-defence, with the consent of the home Member State and the host Member State and in accordance with the national law of the host Member State.<sup>19</sup>

There is no corresponding regulation of the exercise of executive powers by Agency staff, although the Agency can deploy its experts to give Member States technical or operational assistance (Article 8(2)(b)), or to act as Coordinating Officer, who would take instructions only from the Agency, in the context of a RABIT operation (Article 8g). Under the new proposal, Frontex would also be able to deploy its own Immigration Liaison Officers (ILOs), an aspect that is examined further below.

With the new powers given to guest officers, the 2007 amendments to the Frontex Regulation also regulated the civil and criminal liability of border guards participating in joint operations and pilot projects.<sup>20</sup> Nothing similar appears to have been envisaged for Frontex staff, whose liability when deployed in operations therefore remains unclear.<sup>21</sup> In addition, the following applies under the current legal framework:

- Decisions to refuse entry in accordance with the Schengen Borders Code can be taken only by border guards of the Member State whose territory the person seeks to enter.<sup>22</sup>
- While not explicit in the legal framework governing Frontex, this would also apply to a decision related to the return of an individual, which can only be taken by a national authority of a Member State. Neither guest officers nor Frontex staff can take decisions related to the return of a given person to a third country.<sup>23</sup>
- Regarding both refusal of entry and return decisions, any appeals or allegations of misconduct must be addressed by the relevant public authority of the Member State that has made the decision.<sup>24</sup>

While these rules are intended to ensure that decision-making power is retained by the host state and is transferred neither to guest officers nor to Frontex staff, in practice the exercise of executive powers by the Agency's staff and by the Member States' experts acting on the territory of another Member State, creates a degree of ambiguity as to who bears responsibility for the active border checks and surveillance tasks performed. This has emerged for instance, in relation to the implementation of the joint operation, Poseidon 2009 and the pilot project, "Attica" in Greece.

Poseidon 2009, which provides operational assistance to Greece, was composed of several projects covering land and sea borders and was complemented by a return capacity building project named "Attica". Pilot project "Attica" took place in the last quarter of 2009. Its aim was to assist the Greek authorities in identifying and screening irregular migrants, acquisition of travel documents and returning irregular migrants to their home countries. To that end, representatives of Frontex and experts from Member States assisted Greek officers in interviewing people who crossed the border illegally or were being detained in a local reception centre. According to the Frontex General Report 2009, "the deployment of interpreters speaking different languages enabled the identification of irregular migrants and led to the discovery of a significant number of persons passing themselves off as nationals of countries undergoing civil war or facing ethnic violence."<sup>25</sup> While it is not clear whether these interpreters were experts deployed by the Member States or Frontex advisors, under the current legal framework, guest officers and advisors are only allowed to support the national law enforcement authorities, which retain a leading role. In practical terms, this means that interpreters limit their services to helping to identify and establish the nationalities of migrants without being involved in the decision-making retained by the Greek authorities.

<sup>19</sup> Frontex Regulation, Article 10(5)-(7), as amended.

<sup>20</sup> Frontex Regulation, Articles 10b and 10c, as amended.

<sup>21</sup> Article 19 of the Frontex Regulation covers contractual and non-contractual liability of the Agency but the personal liability of its staff is governed by the Staff Regulations and Conditions of employment.

<sup>22</sup> Frontex Regulation, Article 10(10) as amended.

<sup>23</sup> European Commission, *Impact Assessment*, SEC (2010) 149, 24 February 2010, p.41.

<sup>24</sup> *Ibid*, pp.40-41.

<sup>25</sup> Frontex General Report 2009, pp.26-27.

The activities undertaken in the framework of this pilot project received some media attention, after one local legal representative denounced Frontex officials for their failure to coordinate with him before identifying the country of origin of 85 migrants detained in Samos and forwarding them to Athens for repatriation. It was alleged that Frontex personnel were interviewing detained migrants in person and that the operational supervision of the selection and transportation of these people was conducted by Frontex. A group of local NGOs based on the island of Samos, from which return operations were being run, claimed that amongst those tagged for deportation were people at risk of *refoulement*.<sup>26</sup> There have also been instances of registration of incorrect nationalities.<sup>27</sup> The ambiguity over the roles and responsibilities of Member States' guest officers, the host Member State border officers and Frontex staff made it difficult to challenge the administrative decisions taken within the framework of this joint operation and subject such decisions to review.<sup>28</sup>

**Amnesty International and ECRE are concerned that ambiguity over the respective roles and responsibilities of Member States' guest officers, the host Member State border officers and Frontex personnel in the practical implementation of joint operations and pilot projects creates a gap in accountability and potentially permits Member States to engage in border management with impunity.**

These concerns are compounded by the fact that the current framework for accountability is very weak and also makes it impossible to check the responsibilities of the respective parties in the framework of the Agency's operational activity.<sup>29</sup> Despite being an Agency of the Union, the governance structure of Frontex is largely intergovernmental: the Executive Director reports to the Management Board which comprises the Member States' heads of national border guard services and two Commission officials. The Frontex Regulation provides that the Management Board may invite any person "whose opinion may be of interest" to participate in its meetings, as an observer, but does not as such require independent monitoring and control.<sup>30</sup> On an annual basis the Executive Director prepares a draft work programme and an activity report for adoption by the Management Board,<sup>31</sup> which are then sent to the Council, the Commission and the European Parliament and made publicly available.<sup>32</sup> There is no public consultation on the work programme and the annual reports only provide a broad overview of activities carried out in any given year. More detailed information, particularly on ongoing activities, is neither made available nor publicly accessible, despite an express requirement in the founding Regulation, that in the interest of transparency "the public and any interested party are rapidly given objective, reliable and easily understandable information with regard to its work."<sup>33</sup> With the exception of having control of the budget, the European Parliament has no formal means of scrutinising the work of the Agency and ensuring that Frontex is held accountable for the manner in which it fulfills its mandate. It can invite the Executive Director to report on his work,<sup>34</sup> and has done so routinely, but the information made available on operations and pilot projects Frontex has coordinated is very superficial and gives no adequate account of how EU law and human rights obligations have been observed.

## Frontex co-leading role in operations

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<sup>26</sup> "Migration: Fortress Europe Starts With Greece", Inter Press Service, 31 January 2010.

<sup>27</sup> Amnesty International, *Irregular Migrants and Asylum Seekers Routinely Detained in Sub-Standard Conditions*, 27 July 2010, AI Index EUR 25/002/2010, p.26.

<sup>28</sup> See, to this effect, the UNHCR Office in Greece recommending in a press release, of 16 June 2010, that the legal framework of cooperation between the Greek authorities and Frontex be clarified so as to allow the review of administrative decisions which are taken within this framework and determine the treatment of foreign nationals. Available at <http://www.unhcr.gr/Press-Rel/2010/dt16-06-2010.htm>.

<sup>29</sup> On this aspect see, amongst others, Johannes Pollak and Peter Slominski, "Experimentalist but not Accountable Governance? The Role of Frontex in Managing the EU's External Borders", *West European Politics*, Vol. 32, No.5 (2009): 904; Andreas Fischer-Lescano, Tillmann Löhner and Timo Tohidipur, "Border Control at Sea: Requirements under International Human Rights and Refugee Law", *International Journal of Refugee Law* 21 (2009): 256; Anneliese Baldaccini, "Extraterritorial Border Controls in the EU: The Role of Frontex in Operations at Sea", in Bernard Ryan and Valsamis Mitselgas (eds), *Extraterritorial Immigration Control*, Martinus Nijhoff Publishers (2010), pp.236-238.

<sup>30</sup> Frontex Regulation, Article 23(5).

<sup>31</sup> Frontex Regulation, Article 25(3)(c).

<sup>32</sup> Annual reports are forwarded also to the European Economic and Social Committee and the Court of Auditors. See Article 20(2)(b).

<sup>33</sup> Frontex Regulation, Article 28(2).

<sup>34</sup> Frontex Regulation, Article 25(2).

While underlining that no decision-making power is transferred to Frontex, the Commission's proposal seeks to strengthen the Agency's mandate by giving Frontex a co-leading role together with the host state for the implementation of operations. Currently, Article 3 of the Frontex Regulation provides that "[t]he Agency may itself, and in agreement with the Member State(s) concerned, launch initiatives for joint operations and pilot projects in cooperation with Member States." This would be amended to read that "[t]he Agency may itself initiate joint operations and pilot projects in cooperation with Member States." This amendment appears negligible as even in its power to *initiate* joint operations, the Agency needs agreement with the Member States for the purpose of cooperation. The Commission itself in its Impact Assessment makes it clear that "Frontex **cannot impose** any activity on the territory or at the border of a Member State **without the consent** of that Member State".<sup>35</sup> Wider in scope is the proposal to give the Agency responsibility for ensuring the operational implementation of all organizational aspects of joint operations and pilot projects (Article 3a.3), powers to decide not solely to co-finance, but moreover to finance them entirely (Article 3.5) and to terminate them if the conditions for conducting these initiatives are no longer fulfilled (Art.3.2). In addition, the Agency is to have an increased role with respect to third country cooperation and there is to be formalization of its role and competences in bilateral agreements concluded by Member States with third countries (Article 14.5, see further below). Furthermore, the Agency's views (communicated via a nominated "coordinating officer") must be taken into account in the instructions given by the host Member State to the guest officers participating in the Frontex joint support teams (Article 3c.2, see further comments below).

**The additional powers which the Commission proposal envisages for the Agency reinforce the argument that Frontex would exercise a sufficient degree of control over the conduct of operations to render the Agency itself liable for possible violations of fundamental rights that may occur during any operation.**

Indeed, the Commission's assessment of a Frontex co-leading role in operations is that the "risks of having an EU body and its staff exposed to situations of possible violations of fundamental rights would increase".<sup>36</sup> The Court of Justice of the European Union must therefore be able to react to potentially unlawful practices of the Agency, under its new power, stemming from the Treaty of Lisbon, to review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties.<sup>37</sup> Even in the absence of a "legal act" produced by the Agency, a valid argument exists that Frontex gives instructions and takes decisions that produce legal effects.

There are other specific responsibilities which should be directly traceable to Frontex and which derive from the tasks the Agency is required to perform. For instance, the Agency is responsible for carrying out risk analyses based on information collected from Member States and Frontex officers; such information provides the foundation for operational activities. In undertaking this task, Frontex is effectively initiating the coordination in which it engages, with responsibilities deriving from its planning and coordinating role. The new proposal further enhances Frontex' risk analysis role: Member States would have an obligation to provide the Agency with all necessary information regarding the situation and possible threats at the external borders, whilst simultaneously tasking the Agency with regularly evaluating the capacity of Member States to face migration challenges and accordingly to present a yearly report to the Management Board (Article 4). Given that risk analyses are confidential intelligence products, and there is no scrutiny of their quality and reliability, it is not possible to know whether information gathered and analyzed for risk analysis purposes takes into account the humanitarian context of the countries of origin and the risks of refoulement entailed in viewing all people who are trying to flee their countries as would-be "illegal immigrants" – a point which is reiterated with regard to information facilitated by ILOs.

**Amnesty International and ECRE are concerned that, against the increased decision-making powers of Frontex, there is no suggestion of establishing proper political and legal accountability of the Agency. Frontex should be subject to full accountability by the enhancement of democratic oversight of the Agency before the European Parliament, in addition to judicial oversight by the European Courts for legal protection against unlawful actions, and by effective implementation of the requirement to give access to prompt, objective**

<sup>35</sup> *Impact Assessment*, SEC (2010) 149, p.40. Emphasis in the original.

<sup>36</sup> *Impact Assessment*, SEC (2010) 149, pp.29-30.

<sup>37</sup> New Article 263 TFEU.

and reliable information on its activities. In particular, accountability should be enhanced by providing for the following:

- Relevant information, including risk analysis, should be transmitted to the European Parliament to enable adequate scrutiny of Frontex activities;
- Independent observation should be enabled at the meetings of the Management Board;
- Frontex programme of work should be subject to public consultation.

## Operational plan and incident reporting

Under the new proposal, the Agency is also granted formal responsibility for drawing up the operational plan for any joint operation or pilot project (Article 3a(1)), although this is already common practice and reflects similar responsibilities with regard to the deployment of RABIT.<sup>38</sup>

As envisaged with respect to RABIT, the operational plan is to set out details such as: *modus* and *locus operandi*, objectives of deployment, operational aim, duration of operation, description of tasks and special instructions for guest officers, composition of teams of guest officers, command and control provisions, and the technical equipment to be deployed. In addition, the proposal provides for the inclusion of a reporting and evaluation scheme containing detailed provisions on “incident reporting” (Article 3a.1(h)), and with regard to sea operations, “specific requirements regarding the applicable jurisdiction and maritime law provisions concerning the geographical area where the joint operation takes place” (Article 3a.1(i)). However, the proposal does not explicitly define the procedures which are necessary to ensure compliance with the Charter of Fundamental Rights, nor does it explicitly devise any mechanism for monitoring joint border operations.

Moreover, the new Regulation requires the Agency to transmit detailed evaluation reports of joint operations to members of the Management Board within 60 days (Article 3.4), a requirement which is intended to increase efficiency and transparency. Currently, evaluation reports drawn up by the Agency following operations are submitted only to Member States participating in specific operations, whereas the Management Board has wider representation, including from the Commission. This is a welcome amendment, although these evaluations are confined to the question of whether a specific operation has met its operational objectives and do not concern Member States’ compliance with EU law.

**Evaluations transmitted by the Agency to the Management Board following each operation must include an independent assessment of compliance with fundamental rights and not be limited to assessing fulfillment of operational objectives. This will allow the Commission to react to any shortcomings in the application of EU law, including those regarding fundamental rights, which result from joint operations.**

The absence of detailed rules on implementation of human rights obligations in the Operational Plan also risks compromising the added value of incident reporting mechanisms, which are to be enforced by Frontex. According to the Impact Assessment, “incident reporting and evaluations would ensure that any alleged breaches of [EU] law would be followed up by the competent authorities and, within its competences, by the Commission.”<sup>39</sup> Proposed Preamble recital 17 states that “[t]he incident reporting scheme shall be used by the Agency to transmit, to the relevant public authorities and the Management Board, any information concerning credible allegations of breaches of, in particular Regulation 2007/2004 or the Schengen Borders Code, including fundamental rights, during joint operations and pilot projects.” The notion of “incidents” would therefore appear to include possible fundamental rights breaches. However there is no corresponding provision in the operative part of the proposed Regulation, therefore leaving a degree of ambiguity around this point. Examples of incidents which have been documented in the practice of interception operations are related to the use of coercion in transferring migrants from vessels to effect their pushback, and which have resulted in serious injuries to migrants.<sup>40</sup> Would the fact that migrants’ requests for protection go unheeded also amount to an incident? Amnesty International and ECRE argue that this should be the case. However,

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<sup>38</sup> Under current Article 8e, it is the Executive Director and requesting Member State that must agree on an operational plan detailing the precise conditions for deployment of the RABIT.

<sup>39</sup> *Impact Assessment*, SEC (2010) 149, p.29.

<sup>40</sup> Report to the Italian Government on the visit to Italy carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 27 to 31 July 2009, Strasbourg, 28 April 2010, pp.15, 19.

this evidently presupposes that operational plans of Frontex operations clearly establish which procedures need to be followed and what facilities need to be afforded for international human rights and refugee law requirements to be met.

**Preamble recital 17 should be brought within the operative part of the text addressing incident reporting to clarify beyond doubt that it applies to allegations of incidents which entail breaches of fundamental rights.**

Equally, the scheme devised has an inherent limitation in the absence of independent monitoring on whether incidents are in fact reported, and how they are reported and followed up. For instance, if there is a failure to log incidents there is no means to verify the circumstances in which an alleged incident has taken place. It would appear to be the role of Frontex itself to enforce this mechanism by observing and reporting with regard to Member State compliance with EU law during joint operations. However, Frontex cannot, and should not, perform this role, as it is the responsibility for the Commission as guardian of the Treaty. Furthermore, it is unclear who would be responsible for scrutinising the actions of Frontex itself.

There is a more general need to ensure independent evaluation and democratic oversight of the uniform application of, and compliance with, the EU border *acquis*, including the procedural and fundamental rights guarantees, by border authorities in the management of external borders.<sup>41</sup> As already mentioned, the Commission proposal mandates the Agency to “regularly evaluate the capacity of the Member States to face upcoming challenges, including present and future threats and pressures at the external borders of the European Union”, particularly by assessing national structures, equipment and resources, and reporting annually to the Management Board on the result of these evaluations (Article 4). In considering options for mandating the Agency to evaluate Member States’ border management performance (in the Impact Assessment), the Commission rules out Frontex’s role in facilitating the application of EU law on the ground, as it would effectively result in Frontex wearing two hats: simultaneously supporting them to better control their borders; and inspecting whether they are complying with their obligations.<sup>42</sup> The Agency’s involvement in border operations – particularly in view of the co-leading role assigned to it under this proposal – makes Frontex similarly unsuited to carry out such a monitoring role in the context of joint operations and pilot projects.

The current proposal misses the opportunity to address the lack of an efficient, independent and publicly available evaluation of how Member States’ authorities apply the Schengen border rules and procedures on the ground and comply with fundamental rights obligations. Regrettably, this means that scrutiny of the correct application of the EU external border *acquis* will remain as a peer-reviewed system. This system lacks a fundamental rights focus and is carried out in complete secrecy by the Member States themselves, in the context of the ‘Schengen evaluation mechanism’ in which the Commission participates as observer and from which the European Parliament is completely absent.<sup>43</sup>

Finally, even in cases where breaches of EU law are reported, Amnesty International and ECRE believe that the current framework does not guarantee satisfactory follow-up by the authorities. Frontex action is limited to the interruption of an operation if the conditions to conduct them are no longer fulfilled (see above). What is meant by “conditions” is also unclear, although the Impact Assessment assumes these to include non-compliance with EU law.<sup>44</sup>

**The Commission should urgently consider enhancing the Schengen evaluation system by developing a mechanism for the efficient and independent evaluation of the management of the EU’s external borders from the point of view both of compatibility with the Schengen Borders Code and compliance with the Charter of Fundamental Rights.**

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<sup>41</sup> See for instance, Sergio Carrera, *Towards a Common European Border Service?*, CEPS Working Document No. 331/June 2010.

<sup>42</sup> *Impact Assessment*, SEC (2010) 149, p.39.

<sup>43</sup> See for instance, the EU Schengen Catalogue on External Borders Control, Return and Readmission, updated in 2009, which is used as a guiding document for the Schengen Evaluations and makes few references to fundamental rights.

<sup>44</sup> *Impact Assessment*, SEC (2010) 149, p.29.

**In respect to the current proposal, Amnesty International and ECRE are concerned that obligatory incident reporting and evaluation lack the requisite independence and in themselves cannot ensure proper enforcement of the applicable legal framework for Frontex operations.**

**In line with the monitoring requirements introduced for joint return operations, the revised Regulation should include a mandatory requirement for *all* Frontex operations to be independently observed and reported on to EU Institutions from the perspective of compliance with EU law and fundamental rights.**

## **2. The legal framework governing Frontex**

The Commission proposal clarifies the legal framework governing all operations of Frontex by explicitly stating that its activities are subject to the Schengen Borders Code and should be undertaken in accordance with relevant EU law, international law and obligations related to international protection and fundamental rights. It is therefore incumbent on Frontex to ensure that in the context of its activities, the Member States that carry the operational responsibilities, faithfully and fully comply with relevant EU laws, particularly the Schengen Borders Code which codifies the majority of measures relevant to the external border crossing.<sup>45</sup> The Schengen Border Code also explicitly underlines Member States' human rights obligations. Preamble recital 20 requires states to respect the principles contained in the Charter of Fundamental Rights. The Preamble recital reference to the Charter means that the Charter has been and remains applicable to the actions of EU Member States when applying the Schengen Borders Code, including before 1 December 2009 on which date the Charter became legally binding.<sup>46</sup> Within the operative part, Article 3 requires the Code is to be applied "without prejudice to the rights of refugees [...], in particular as regards *non-refoulement*", while Article 5(4)(c) envisages the possibility of derogating from normal entry requirements on account of humanitarian considerations and international obligations. Article 13(1) establishes that entry refusal "shall be without prejudice to the application of special provisions concerning the right of asylum and to international protection". Also of importance is Article 6 on the conduct of border checks, which provides that border guards must, in performing their duties, fully respect human dignity and that any measure taken in performing their duties must be proportionate to the objectives pursued by those measures. Furthermore, Article 6(3) includes a non-discrimination clause, prohibiting border guards, while carrying out border checks, to discriminate against persons on grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

Likewise, Member States must comply with fundamental rights as laid down in the Charter when applying EU law. The Commission's proposal reiterates these obligations in the preamble reference to the Charter of Fundamental Rights, particularly the obligation to observe human dignity, the prohibition of torture and inhuman or degrading treatment or punishment, the right to liberty and security, the rights to the protection of personal data, the right to asylum, *non-refoulement*, non-discrimination, the rights of the child and the right to an effective remedy (Preamble recital 4). Preamble recital 10 further reiterates that while strengthening the operational capabilities of the Agency, it must be ensured "that all measures taken are proportionate to the objective pursued and fully respect fundamental rights and the rights of refugees and asylum seekers, including in particular the prohibition of refoulement." Other specific human rights requirements have been introduced with respect to incident reporting (Preamble recital 17), training (Article 2 and Preamble recital 18), joint return operations (Article 9.1 to 9.3 and Preamble recital 21) and third country cooperation (Preamble recital 23). These are addressed in the relevant sections of this briefing.

Amnesty International and ECRE welcome a clear restatement of the EU law and fundamental rights obligations which are incumbent on Member States and Frontex when taking part in joint operations. The amendments proposed by the Commission unequivocally confirm that relevant EU standards, as

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<sup>45</sup> Regulation (EC) No. 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), [2006] OJ L 105/1.

<sup>46</sup> See joined cases C-175/08, C-176/08, C-178/08, C-179/08 *Abdulla v Bundesrepublik Deutschland*, March 2010, para.54 (on the effect of Recital 10 of the Qualification Directive): the legal effect of the reference to the Charter in the recital is that, from its coming into force in October 2006, the provisions of the Schengen Borders Code had to "be interpreted in a manner which respects the fundamental rights and principles recognised...by the Charter".



well as international human rights and refugee law, are applicable to all border operations carried out by Member States under the auspices of Frontex and to all other activities entrusted to the Agency.

The fundamental rights protections and legal safeguards provided in the EU border *acquis* must be guaranteed to migrants in all Frontex operations, including those which have the express goal of preventing and curbing migration movements. However, the effective enforcement of these protections and safeguards requires that information should be made available on operations and pilot projects which Frontex has coordinated, and that an adequate account of how these obligations have been observed in the evaluation of the results is provided by the Agency.<sup>47</sup> This requires, amongst other measures, the collection of relevant information, relating for instance to individuals with protection needs. It is difficult to envisage how an evaluation can assess whether the right to asylum under Article 18 of the Charter of Fundamental Rights was guaranteed in the course of specific Frontex joint operations, if Frontex can claim, as it has in the past, that it is ignorant of whether any asylum applications were submitted during the operations as it does not collect data in this respect.<sup>48</sup>

## Guidelines for joint operations at sea

As detailed above, the Commission's proposal states that operational plans must include specific requirements regarding the applicable jurisdiction and maritime law provisions. Lack of agreement on issues relevant to interception operations at sea, such as identification of the places of disembarkation for migrants, has in the past resulted in delays in starting planned Frontex operations.<sup>49</sup> There have also been various highly publicized episodes of distress calls, involving boats carrying migrants, going unheeded owing to disputes between Member States over which country held the search and rescue responsibility, thus putting lives at risk.<sup>50</sup>

The EU has recently adopted a Council Decision supplementing the Schengen Borders Code regarding the surveillance of external maritime borders, in the context of the operational cooperation coordinated by Frontex, which is intended to deal with such disputes over responsibility.<sup>51</sup> The purpose of this Decision is "to ensure that the international rules relevant to the maritime border surveillance operations [...] coordinated by the Frontex Agency [...] are uniformly applied by all the Member States taking part in these operations."<sup>52</sup> The rules establish that "measures taken for the purpose of surveillance operations shall be conducted in accordance with fundamental rights and in a way that does not put at risk the safety of the persons intercepted or rescued as well as of the participating units."<sup>53</sup> They restate the applicable international human rights framework by establishing that "no person shall be disembarked in, or otherwise handed over to the authorities of, a country in contravention of the principle of *non-refoulement*, or from which there is a risk of expulsion or return to another country in contravention of that principle" and require that "the person intercepted or rescued shall be informed in an appropriate way so that they can express any reasons for believing that disembarkation in the proposed place would be in breach of the principle of *non-refoulement*."<sup>54</sup> They set out applicable rules on interception operations in the contiguous zone or territorial waters of Member States and on the High Seas beyond the contiguous zone.

The Council Decision includes non-binding guidelines, which must form part of the operational plan drawn up for each operation coordinated by Frontex. These include modalities for disembarkation of

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<sup>47</sup> See Article 3.3 Frontex Regulation.

<sup>48</sup> Letter to the Immigration Law Practitioners' Association, Ref. 12425, 21 January 2009.

<sup>49</sup> "EU patrols on hold as states grapple over destination of rescued illegal immigrants", Timesofmalta.com, 27 April 2008.

<sup>50</sup> "UN rebuke as governments squabble over immigrants found clinging on tuna nets", The Guardian, 29 May 2007; "Italy allows ship with rescued migrants to dock", The Guardian, 19 April 2009; "UNHCR questions delays in rescue-at-sea operation off Malta", Briefing Notes, 8 June 2010.

<sup>51</sup> Council Decision supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of the operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders, [2010] OJ L 111/20. The European Parliament is challenging the Decision before the Court of Justice of the European Union on the ground that the Council exceeded the implementing powers set out in Article 12(5) of the Schengen Borders Code to adopt additional measures governing border surveillance: Case C-355/10 *European Parliament v. Council of European Union*. Pending the challenge and the opinion of the Court the effects of the measure will be retained.

<sup>52</sup> Proposal for a Council Decision supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of the operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders, COM (2009) 658, para.2.

<sup>53</sup> *Ibid*, para.1.1.

<sup>54</sup> *Ibid*, para.1.2.

people who are intercepted or rescued, which should be in accordance with international law, and give priority to “disembarkation in the third country from where the ship carrying the persons departed or through the territorial waters or search and rescue region of which that ship transited” and failing that, “in the host Member State unless it is necessary to act otherwise to ensure the safety of these persons.”<sup>55</sup> The Guidelines further provide that the operational plan should determine which follow-up measures may be taken when disembarkation of persons risks breaching the principle of *non-refoulement*.<sup>56</sup>

The Guidelines clarify states’ obligations as they already exist in international law when intercepting individuals at sea. Contrary to what the term ‘guidelines’ suggests these are obligations which are not as such negotiable. Moreover, despite being ‘guidelines’, they are not sufficiently detailed to ensure that interception and rescue operations will meet the requisite standards. For instance, they provide that people should be informed of disembarkation to allow them to express a risk of refoulement but do not prescribe what steps must be taken in this respect. Nor do they detail specific procedures for particularly vulnerable people among those intercepted, such as unaccompanied minors, pregnant women, victims of torture or prescribe that qualified staff should be available to identify and support vulnerable people. Also they are ambiguous in terms of follow-up measures when the third country of disembarkation is not safe, or cannot be presumed to be safe, and regrettably they seem to imply that there is a margin of manoeuvre regarding the decisions which may be taken in these circumstances.

**Amnesty International and ECRE consider that the Council Decision setting out rules which apply to external sea borders operations coordinated by Frontex has the merit of clarifying that all aspects of operations at sea, including search and rescue, interception and disembarkation, are subject to international obligations arising from refugee and human rights law.**

**Amnesty International and ECRE recommend that the new Frontex Regulation should include an explicit requirement that the rules for interception-at-sea operations be formalized in the operational plan. Moreover, they should be accompanied by detailed measures to ensure that disembarkation meets the requisite standards, in particular by specifying the place of disembarkation and regarding the provision of food, shelter and medical care, as well as access to asylum and protection from refoulement.**

## **Extraterritorial application of the EU border *acquis***

While the extent to which the EU *acquis* applies extraterritorially, on the high seas beyond the contiguous zone, remains to be determined from the perspective of EU law, Member States intercepting individuals beyond their territorial waters cannot operate in a legal vacuum. A relevant question on the applicable Community framework was raised to the Commission by the European Parliament’s Civil Liberties Committee concerning Italy’s policy of intercepting migrants and sending them back to Libya (referred to as the ‘push-back’ policy). The Commission expressed its views that sea border surveillance activities aimed at preventing unauthorised border crossings, whether carried out in the territorial waters of the Member States, in the contiguous zone, in the exclusive economic zone or on the high seas, fall within the remit of the Schengen Borders Code. As such they must be carried out in compliance with the principle of *non-refoulement* and without prejudice to the rights of refugees and other people demanding international protection.<sup>57</sup>

In practice, when EU Member States and Frontex carry out interception operations at sea, they do not appear to apply the Schengen Borders Code or act with a clear understanding of what international law specifically requires in cases of intercepting migrants at sea. In the case of Italian-Libyan controls, there has in practice been an alarming disregard for even the principle of *non-refoulement*. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), on investigating Italy’s push-back policy, concluded that Italy had violated the

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<sup>55</sup> *Ibid*, para.4.1.

<sup>56</sup> *Ibid*, para.4.2.

<sup>57</sup> Letter of former Vice-president Jacques Barrot to Mr Lopez Aguilar, President of the Committee on Civil Liberties, Justice and Home Affairs of the European Parliament, 15 July 2009.

principle of *non-refoulement* by denying migrants who had been intercepted the opportunity and facilities to seek international protection.<sup>58</sup>

Similarly, Member States and Frontex appear to attribute responsibility for possible breaches of human rights and refugee law which occur in the course of, or as a result of joint operations exclusively to the third country in whose territorial waters the operation was carried out. For example, in the context of Joint Operation HERA, which is aimed at preventing irregular migration to the Canary Islands, bilateral agreements have been negotiated by Spain to allow interception not just on the high seas but also inside Senegalese and Mauritanian territorial waters. According to Frontex, these arrangements allow the diversion of would-be immigrants' boats, intercepted off the African coast, back to their points of departure, making Mauritania or Senegalese law enforcement officers present on board of deployed Member States' assets always responsible for the diversion. However, states are prohibited from contracting out of international obligations through a bilateral agreement to carry out border control operations on the high seas or in the coastal waters of another state.<sup>59</sup> In the execution of such agreements, states remain subject to their international obligations, and are not allowed to eschew responsibility for their possibly wrongful acts.<sup>60</sup>

**International cooperation should never be construed as releasing EU Member States from fundamental rights obligations concerning people who are intercepted or diverted in the territorial sea of the third state in question.**

European human rights law is clear in its articulation of the well-established existence of extraterritorial jurisdiction.<sup>61</sup> In particular, jurisdiction has been found to exist in specific situations: (a) when, in respect of the alleged conduct, the person concerned is under the effective control of the state in question, or (b) when effective control is exercised over another state's territory or territorial waters. Extraterritorial jurisdiction may also be based on the activities of the state's diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of, that state.<sup>62</sup> These situations engage a state's responsibility and make it answerable for any infringement of the rights and freedoms protected by the international human rights law committed against individuals placed under its jurisdiction. When operations take place jointly, between a Member State and third countries under bilateral agreements, or between Member States under the aegis of Frontex, cooperating states are jointly and severally liable for any foreseeable breaches of international human rights and refugee law. The fact that interception operations occur in a joint way does not result in a cessation of international duties or permit a state to release itself from its international responsibilities. For instance, with Frontex Operation HERA, although the actual denial of onward passage is conducted by Senegalese authorities on board Spanish ships, the flag state of the intercepting vessels arguably retains effective control. However, the latest developments in joint interception patrols between Italy and Libya have seen Italy supplying interception vessels to Libya, but staffed by both Italian and Libyan officials (or provided by Italy but staffed by Libyan officials). In such situations the case for establishing direct Italian jurisdiction becomes all the more difficult, though a claim may still be made for indirect Italian responsibility in the context of aiding another state conducting migration control which may violate human rights obligations. Aiding and abetting can exist in various forms, including where infrastructure, technical utilities, or funds are provided.<sup>63</sup>

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<sup>58</sup> See for instance, the 2010 CPT Report to the Italian Government on the visit to Italy, p.25.

<sup>59</sup> See Violeta Moreno Lax, "Searching Responsibilities and Rescuing Rights: Frontex, the Draft Guidelines for Joint Maritime Operations and Asylum Seeking in the Mediterranean", REFGOV Working Paper FR-28 (2010), pp.16-17. Available at <http://refgov.cpdr.ucl.ac.be/?go=publications&dc=4a2b8c178d483e30715e8a1996bc0a6e480ea139>.

<sup>60</sup> *T.I. v UK*, Application No. 43844/98, 7 March 2000, p.15: "Where States establish [...] international agreements to pursue co-operation in certain fields of activities, there may be implications for the protection of fundamental rights. It would be incompatible with the purpose and object of the [ECHR] if Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such [agreements]." See also *K.R.S. v UK*, Application No 32733/08, 2 December 2008, p.15.

<sup>61</sup> For a discussion on the extraterritorial application of international law and the link between control and responsibility, see also ECRE, *Defending Refugees' Access to Protection*, pp.19-25.

<sup>62</sup> See, amongst others, *Al-Saadoon and Mufdhi v UK*, Application No. 61498/08, judgment of 2 March 2010; *Bankovic and Others v Belgium and Others*, Application No. 52207/99, admissibility decision of 12 December 2001; *Loizidou v Turkey*, Application No. 15318/89, judgment of 18 December 1996; *Issa and others v Turkey*, Application No. 31821/96, judgment of 16 November 2004; *Khavara v Italy and Albania*, Application No. 39473/09, admissibility decision of 11 January 2001, in which Italy was found accountable before the Court for the acts of its patrol boat on the high seas. See also Anja Klug and Tim Howe, "The Concept of State Jurisdiction and the Applicability of the Non-refoulement Principle in Extraterritorial Interception Measures", in Bernard Ryan and Valsamis Mitselgas (eds), *Extraterritorial Immigration Control*, (cited above), pp.69-102.

<sup>63</sup> On State responsibility for outsourcing border controls see Maarten den Heijer, "Europe beyond its Borders: Refugee and Human Rights Protection in Extraterritorial Immigration Control", in Bernard Ryan and Valsamis Mitselgas (eds), *Extraterritorial*

Even if these obligations are clearly understood, there must be an adequate procedural system in place which is able to guarantee refugee and human rights protections in a practical way, both within a territory or territorial waters, as well as extraterritorially. This reflects the fundamental principle that a right requires a procedural means of access to that right – a principle firmly established in other substantive areas of EU law and reflected in the amendments proposed by the Commission to the Asylum Procedures Directive to ensure effective access by asylum seekers to asylum procedures in the EU.<sup>64</sup> Thus, the new Regulation should, at the very least, include a requirement that border guards, police and immigration authorities and all other authorities involved in Frontex operations effectively identify all those who need protection, and verify their personal circumstances, particularly with regard to minors, pregnant women and other vulnerable groups, and that they are trained to respond to asylum requests or refer to an authority able to facilitate an application. In whatever manner migrants arrive within the jurisdiction of a state, including extraterritorially, they must be given access to linguistic and legal assistance so as to express their protection needs.<sup>65</sup>

**Amnesty International and ECRE welcome the Commission proposal's clarification of the legal framework in which Frontex operates, including on such matters as human rights law and access to protection. However, States also have to ensure, by organizational measures, that those involved in joint operations observe all human rights obligations, particularly the principle of *non-refoulement*. Amnesty International and ECRE recommend that the proposal sets out the concrete measures by which states can effectively meet their obligations, when these are engaged both territorially and extraterritorially. These should include at least the following:**

- **Individuals have the possibility of explaining their circumstances during a personal interview;**
- **Those who wish to apply for asylum are helped to access to the asylum procedure, including through interpretation and independent legal advice.**

## Evaluation

A final proposal, aimed at addressing the human rights issues raised by various stakeholders with regard to Frontex operations, concerns the evaluation provisions. Accordingly, under amended Article 33.2b, an independent external evaluation of how effectively the Agency fulfils its mission, to be commissioned by the Management Board every five years, must “include a specific analysis of the way the Charter of Fundamental Rights was respected pursuant to the application of the Regulation.”

Frontex has undergone several evaluations to date but none has assessed in any detail the human rights impact of its activities. An internal evaluation of the Agency's performance was conducted by the Commission as mandated by the European Council in the 2004 Hague Programme.<sup>66</sup> The Commission's assessment was made public in February 2008.<sup>67</sup> It reviewed the Agency's performance from October 2005, when the Agency became operational, to the end of 2007, and focused on quantifiable results of the Agency's work in contrasting irregular migration. Thus, according to the report, in 2006-2007 more than 53,000 people were apprehended or denied entry at the border during these operations, more than 2,900 false or falsified travel documents detected and 58 facilitators of illegal migration arrested. These results were considered “impressive”.<sup>68</sup> The evaluation contained no data on the make-up of the groups of people involved – their age, gender, the number of people with protection concerns – nor was there information on what happened to people who were intercepted or diverted, or where they were returned or diverted to.<sup>69</sup> Yet, in the same report the

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*Immigration Control*, (cited above), pp.190-196. Also Ruth Weinzierl and Urzula Lisson, *Border Management and Human Rights. A study of EU Law and the Law of the Sea*, German Institute for Human Rights, December 2007, p.78-79.

<sup>64</sup> See Proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection, COM(2009) 554 final, 21 October 2009 (Asylum Procedures Directive), and ECRE, *Comments from the European Council on Refugees and Exiles on the European Commission Proposal to recast the Asylum Procedures Directive*, May 2010, p.12.

<sup>65</sup> See Articles 6 and 7 of the recast Asylum Procedures Directive.

<sup>66</sup> In the 2004 Hague Programme the European Council requested the Commission to submit a political evaluation of the Frontex Agency by the end of 2007. [2004] OJ L 349/1. See also the Hague Programme Action Plan [2005] OJ C 198/1.

<sup>67</sup> Report on the evaluation and future development of the FRONTEX Agency, COM(2008) 67final, 13 February 2008.

<sup>68</sup> COM (2008) 67 final, p.3, para.9.

<sup>69</sup> Anneliese Baldaccini, “Extraterritorial Border Controls in the EU: The Role of Frontex in Operations at Sea”, in Bernard Ryan and Valsamis Mitiselgas (eds), *Extraterritorial Immigration Control*, (cited above), p.242.

Commission admits that “experience gained from joint operations show that border guards are frequently confronted with situations involving persons seeking international protection or crisis situations at sea”.<sup>70</sup> Asylum statistics corroborate the need for joint border operations to be protection-sensitive. Prior to the Italian pushback operations which began in May 2009, and have reduced arrivals in Italy to 1,300 people in the four-month period May-August 2009 from 14,000 people in the same period in 2008, approximately 75 per cent of migrants arriving in Italy by sea requested asylum and around 50 per cent of those obtained some form of protection.<sup>71</sup> In 2008, 52 per cent of migrants – mainly from Somalia, Eritrea and Sudan – who arrived in Malta and applied for asylum were granted refugee or subsidiary protection status.<sup>72</sup> Yet, follow-up is limited to proposing that special training be delivered through the Agency “on relevant provisions of European and international rules on asylum, the law of the sea and fundamental rights, in order to contribute to the full respect of these norms and to a consistent approach to situations involving search and rescue coordination.”<sup>73</sup>

In 2008, the Management Board of the Agency commissioned an independent evaluation as required by Article 33 of the Frontex Regulation. This evaluation, published in January 2009, was carried out by a private contractor – the COWI Consultancy Company, based in Denmark, providing services in the fields of engineering, environmental science and economics.<sup>74</sup> Although, in response to the Commission’s report on Frontex, the European Parliament had explicitly urged that it should “fully evaluate Frontex’s activities with regard to their impact on fundamental freedoms and rights, including the responsibility to protect”,<sup>75</sup> the COWI evaluation also failed to engage in this aspect. There is acknowledgement of the short-term displacement effect of Frontex operations but not of the fact that this leads to significantly more dangerous routes for migrants and higher risk to life. The recommendation is to repeat operations more regularly.<sup>76</sup> Despite well-documented instances of human rights violations of migrants in third countries, the impact of cooperation with third countries in preventing irregular migration and in the interception and diversion practices is also not assessed.. Amnesty International has reported how operational cooperation on migration between the EU and Mauritania has given rise to arbitrary arrests and other violations of fundamental rights of foreign nationals in Mauritania.<sup>77</sup> An Amnesty International report on Libya published in June 2010 comes to similar conclusions in respect of violations which occur in response to pressure from the EU and its members to control migration from Libya to Europe.<sup>78</sup> The only mention of the human rights impact of Frontex operations in the conclusions reached by the external contractor is that: “the operations have a positive impact on the human rights of the migrants as they see their chances of survival increasing!”<sup>79</sup> This conflation of human rights with the humanitarian benefits of rescue is a common occurrence in sea operations. Indeed, some states justify interception measures by claiming that they are aimed at protecting the lives and security of migrants as well as stopping the trade in people smuggling.<sup>80</sup> Despite such claims, there are ongoing protection obligations in refugee and human rights law which bind further action taken by states. In other words, as the recently adopted Guidelines on sea operations have made clear, search and rescue obligations do not operate independently from other international obligations arising from refugee and human rights law.<sup>81</sup>

The requirement to carry out a human rights evaluation is a welcome addition to the provisions governing Frontex and it should ensure that future evaluations incorporate a strong human rights component, and that independent contractors have a degree of relevant human rights expertise. However, such scrutiny should not be reduced to checking the *respect* for the Charter of Fundamental Rights as a matter of policy. It is incumbent on the institutions and bodies of the EU, and the Member

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<sup>70</sup> COM (2008) 67 final, p. 5.

<sup>71</sup> UNHCR Policy Development and Evaluation Service “Refugee protection and international migration: a review of UNHCR’s operational role in southern Italy”, September 2009.

<sup>72</sup> Eurostat newsrelease, *Asylum in the EU in 2008*, STAT/09/66, 8 May 2009.

<sup>73</sup> COM (2008) 67 final, p. 5.

<sup>74</sup> See [www.cowi.com](http://www.cowi.com)

<sup>75</sup> EP Resolution of 28 December 2008 on the evaluation and future development of the FRONTEX Agency and of the European Border Surveillance System (EUROSUR) (2008/2157(INI)) P6\_TA(2008)0633, para.23.

<sup>76</sup> COWI evaluation report, p.42.

<sup>77</sup> See Amnesty International, *Mauritania: arrests and collective expulsions of migrants denied entry into Europe*, AI Index: AFR 38/001/2008. Also recent submission to the UN Universal Periodic Review: “Even though recent figures show that the number of people arrested and detained while allegedly trying to reach Europe has slightly decreased, in 2009 more than 1,750 people suspected of trying to migrate to Europe were arbitrarily arrested and detained for a few days before being expelled to Senegal or Mali.” AI Index: AFR 38/001/2010.

<sup>78</sup> Amnesty International, *Libya of Tomorrow: What Hopes for Human Rights?*, 23 June 2010, AI Index: MDE 19/007/2010.

<sup>79</sup> COWI evaluation report, p.43.

<sup>80</sup> Amnesty International, *Living in the Shadows – A primer on the human rights of migrants*, AI Index: POL 33/006/2006, p.39.

<sup>81</sup> For a detailed analysis, see Violeta Moreno Lax, “Searching Responsibilities and Rescuing Rights”, (cited above).

States when implementing EU law, to promote the application of the Charter's rights and principles.<sup>82</sup> The evaluation should therefore address the extent to which the rights of the Charter - which represent primary law guarantees by virtue of the Charter having equal status to the EU Treaties - have been *guaranteed* in practice. This necessarily requires that the evaluation should be linked to Frontex's own assessment of the results achieved as joint operations and pilot projects are concluded and which, as suggested above, should include an independent account of how human rights obligations have been observed through an effective monitoring system of border authorities and Frontex staff practices.

**Amnesty International and ECRE welcome the reference in the proposal to the Charter of Fundamental Rights regarding the independent evaluation of Frontex to be commissioned by the Management Board every five years. However, Amnesty International and ECRE recommend that the new Article 33.2b should be amended to require that the evaluation focuses on “how the rights under the Charter of Fundamental Rights were guaranteed” rather than how the Charter was respected. The provision should also be linked to evaluations of each operation undertaken under the aegis of Frontex which must include an independent account of how human rights obligations have been observed in practice.**

### 3. Strengthening solidarity

The proposal introduces a system of compulsory contribution of assets (equipment and personnel) as a means of removing uncertainty about the extent of the resources Frontex can rely on in real time. Member States would be required to make border guards available for deployment within the context of the Frontex Joint Support Teams (FJST), through a national pool created on the basis of defined profiles (Article 3b.1). Frontex will also contribute to the FJST through the deployment of national experts seconded to the Agency. In the performance of their tasks and exercise of their powers, members of the FJST must “fully respect fundamental rights and human dignity.” It is also specified that any measures taken must be “proportionate to the objectives pursued by such measures” and that members of the team must “not discriminate against persons on grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation” (Article 3b.4). Alongside the FJST, a coordinating officer appointed by the Agency is deployed for the operations (Article 3b.5). The coordinating officer is an expert from the staff of the Agency (see Article 8g.1). We understand that FJST subsume the notion of RABIT, which in any event have never been used.

Instructions to the FJST are issued by the host Member State in accordance with the operational plan. However the proposal further envisages that the Agency, through its coordinating officer, may also communicate its views on those instructions to the host Member State, and that such views must be taken into consideration (Article 3c.2).

**Amnesty International and ECRE recommend that the role of the host state in issuing instructions to the teams is coherent with the responsibility for border control and surveillance retained by the Member States. The power of the Frontex coordinating officer to communicate views on instructions which are binding on the host state confounds responsibility. It should therefore be clear in all instances who retains responsibility for the instructions given. Proposed Article 3c.2 should be without prejudice to Article 10(2) which establishes that guest officers may only perform tasks and exercise powers under instructions from the borders guards of the host Member State.**

As regards equipment, the proposal renders it compulsory for Member States to contribute to a Technical Equipment Pool, of which a centralized record is kept by the Agency (Article 7.3). Member States' contributions to the Pool are reviewed each year. The deployment of equipment from the pool is entirely financed by the Agency whereas deployment of equipment that Member States offer, without committing themselves, will only be co-funded to a maximum of 60 per cent of the eligible expenses (Article 7.5). This is intended to respond to the practice of allocating equipment to Frontex operations which had already been deployed in the relevant area as part of a national operation.

In addition, the proposal continues to allow for prospective Frontex operational independence by enabling the Agency to purchase or lease its own equipment (Article 7.1 – see previous 8.3). The new

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<sup>82</sup> Article 51 Charter of Fundamental Rights of the European Union [2007] OJ C/303/1, 14 December 2007.

Regulation however, reflects the fact that even if Frontex were to acquire or lease its own equipment it could not be the sole registered owner (“flag state”) of equipment such as vessels or aircraft, nor provide the crew from its own staff with such equipment. Technical equipment would have to be registered in a Member State and the Member State of registration provides the necessary experts and technical crew.

#### 4. Expanded role for Frontex in cooperating with third countries in border management

Cooperation with third countries has been identified as one important strand of the tasks of the Agency and a critical element in the implementation of the EU integrated border management strategy.<sup>83</sup> The COWI external evaluation notes that some Member States describe joint operations as “futile” where third countries refuse to participate in joint patrols or to take persons intercepted at sea back to their territories.<sup>84</sup> Frontex Executive Director, Mr. Ilka Laitinen has noted that in these circumstances the Agency’s operational activities could even act as a “pull factor”.<sup>85</sup> Hence, the further development of structured operational cooperation with neighbouring Mediterranean countries and key countries of origin has been singled out as the Agency’s “overriding priority for 2010”, including by pursuing alternative routes of *ad hoc* cooperation when the competent authorities indicate that they are not ready or willing to conclude formal agreements.<sup>86</sup> More generally, however, it is understood that the current Regulation does not sufficiently empower Frontex to collaborate pro-actively and efficiently with countries outside the EU.<sup>87</sup>

Article 14 of the Frontex Regulation tasks the Agency with facilitating operational cooperation between the Member States and third countries in the areas under its remit, within the context of the EU external relations policy and in the framework of working arrangements. The European Commission has proposed several amendments to Article 14 with a view to expand the mandate of Frontex in relation with non-EU states:

- The Agency would be permitted to deploy immigration liaison officers in third countries. Frontex ILOs would be integrated into the local or regional cooperation networks of Member State liaison officers which have been founded pursuant to Council Regulation (EC) No 377/2004.<sup>88</sup>
- Frontex may benefit from funding under the relevant instruments supporting the EU’s external relations policy. The Agency is also given the capacity to carry out technical assistance projects in third countries by using either its own budget or the EU’s external financial programmes on matters covered by the Regulation.
- Frontex would be able to invite third country officials to participate in joint operations, pilot projects, risk analyses and training activities. Prior to their participation those officials would receive appropriate training.
- When concluding agreements with third countries, Member States would be required to include, where appropriate, provisions regarding the role and competences of Frontex, in particular with respect to the exercise of executive powers by members of the teams deployed by the Agency during joint operations and pilot project at the external borders.

Regarding further changes in this area, the proposed Regulation provides that the conclusion by Frontex of working arrangements with third countries and the deployment of liaison officers would be subject to receiving a favourable opinion from the Commission (Article 14.7). It is also established that the facilitation of operational cooperation between Frontex and third countries would encompass human rights issues. In this respect, Preamble recital 23 notes that “[e]stablishing cooperation with third countries is relevant also with regard to promoting the European standards of border management, including the respect of fundamental rights and human dignity”. Importantly, the Impact Assessment stresses that support “to operations which could lead to violations of fundamental rights

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<sup>83</sup> See for example *Impact Assessment*, SEC (2010) 149, p. 14.

<sup>84</sup> COWI evaluation report, p. 64.

<sup>85</sup> “Frontex chief warns about failure to reduce migration”, *European Voice*, 11 September 2008.

<sup>86</sup> Frontex, *General Report 2009*, p. 10.

<sup>87</sup> *Impact assessment*, SEC (2010) 149, pp. 14-15.

<sup>88</sup> Council Regulation (EC) No 377/2004 of 19 February 2004 on the creation of an immigration liaison officers network, [2004] OJ L 64/1.

(e.g. allowing for excessive use of force, breach of privacy, and refoulement) should not be offered to third countries”,<sup>89</sup> a key principle which should be brought into the text of the Regulation to ensure it is duly safeguarded.

**Preamble recital 23, asserting that the promotion of European standards of border management, including with regard to fundamental rights and human dignity, constitutes an objective of Frontex’s cooperation with third countries, should be brought within the operative part of the proposed Regulation. Amnesty International and ECRE also recommend that this principle should be strengthened by a requirement that support should not be offered to third countries when it can be foreseen that joint operations could lead to breaches of fundamental rights, as currently stated in the Impact Assessment.**

## Deployment of immigration liaison officers (ILOs)

Council Regulation (EC) No 377/2004 (henceforth “ILO Regulation”) defines an immigration liaison officer as “a representative of one of the Member States posted abroad by the immigration service or other competent authorities in order to establish and maintain contacts with the authorities of the host country with a view to contributing to the prevention and combating of illegal immigration, the return of illegal immigrants and the management of legal migration”.<sup>90</sup> The concept commonly includes “airline liaison officers” (ALOs) who work at third countries’ international airports to assist carriers and local officials in checking that travellers hold valid documents. Recourse to ILOs and ALOs is currently widespread among the EU Member States, with the UK, the Netherlands and France being amongst the EU countries which use ILOs the most.<sup>91</sup> The ILO Regulation sets out an obligation to establish forms of cooperation among Member States’ liaison officers posted in the same countries or regions, including through regular meetings and exchanges of information via ICONet, a web-based platform for information sharing on irregular migratory movements among Member States’ Migration Management Services.<sup>92</sup> In July 2009 the Commission tabled a proposal to amend the ILO Regulation so as to strengthen links between Frontex and the ILO network, arguing that the information gathered by ILOs posted in third countries could provide a substantial contribution to Frontex risk analyses.<sup>93</sup>

The Commission’s proposal amending the Frontex Regulation goes a step further by giving Frontex the capacity to have permanent representation in non-EU countries by deploying its own ILOs. According to the Impact Assessment, this would allow the Agency to improve information flow on the situation in third countries, enrich its risk analyses and better target joint operations.<sup>94</sup> In describing the mission of Frontex liaison’s officers, the proposal mirrors the definition included in the ILO Regulation as set out above, while adding that their tasks should be carried out in compliance with EU law and fundamental rights (Article 14.3). Frontex ILOs could be posted in third countries where few Member States have liaison officers, to complement the geographical coverage of the EU ILO network. The proposal prioritises deployment in third countries which are countries of origin or transit of irregular migration flows according to the information provided by risk analyses, although establishing that liaison officers would only be sent to third countries “in which border management practices respect minimum human rights standards” (Article 14.2).

Despite the inclusion of general safeguards, the potential deployment of ILOs by Frontex needs to be critically examined from a human rights perspective, drawing on available evidence on the role and impact of national out-posted officials, even if the tasks of the Agency’s liaison officers may not be identical to those of the latter. It is commonly agreed that “the basic aim of having a Liaison Officer [...] in a foreign country is to reduce the number of improperly documented passengers travelling from or to that country”.<sup>95</sup> ILOs thus fall under the category of pre-frontier migration management measures

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<sup>89</sup> *Impact Assessment*, SEC (2010) 149, p. 33.

<sup>90</sup> Council Regulation 377/2004, Article 1.

<sup>91</sup> For an overview of Member State’s ILOs posted abroad, see Council of the European Union, Draft Common Manual for Immigration Liaison Officers (ILOs) posted abroad by the Member States of the European Union, Council document No 8418/06, 15 April 2006.

<sup>92</sup> Council Decision 2005/267/EC of 16 March 2005 establishing a secure web-based Information and Coordination Network for Member States’ Migration Management Services, [2005] OJ L 83/48.

<sup>93</sup> European Commission, Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 377/2004 on the creation of an immigration liaison officers network, COM(2009) 322 final, 8 July 2009.

<sup>94</sup> *Impact Assessment*, SEC (2010) 149, p. 31.

<sup>95</sup> The International Air Transport Association (IATA)/Control Authorities Working Group, A Code of Conduct for Immigration Liaison Officers, October 2002, Section 1.



which purport to contain would-be irregular migrants as closely as possible to their regions of origin.<sup>96</sup> As research shows, this may seriously impair the chances of refugees to flee and find protection from persecution when they do not possess the necessary travel documents.<sup>97</sup> In particular, it has been demonstrated that when ILOs act in an advisory capacity, carriers are likely to follow their recommendations to refuse boarding to certain passengers so as to avoid being fined by the migration authorities of the destination country in application of carriers' liability legislation.<sup>98</sup> In this regard, unlike the Code of Conduct for Immigration Liaison Officers of the International Airport Transport Association, which provides that if ILOs receive requests for asylum "applicants should be directed to the office of the UNHCR, to the appropriate diplomatic mission(s) or to an appropriate local Non-Governmental Organization (NGO)", the ILO Regulation is silent about Member States' international obligations concerning refugees and people in need of protection. Research carried out by ECRE also indicates that there are important gaps in the training followed by ILOs, as this generally addresses asylum and human rights issues only marginally.<sup>99</sup>

Even if Frontex ILOs were not to take up the advisory functions characteristic of national officials and focus on information gathering – which is *a priori* not clear according to the wording of the Commission proposal – their task of maintaining contacts with, and assisting third country authorities in order to prevent potential migrants from leaving those countries' territories and reaching EU borders may be in conflict with fundamental rights; in particular everyone's right to leave any country, including one's own,<sup>100</sup> and the obligation to respect the principle of *non-refoulement*. As noted above, owing to the fact that risk analyses remain as classified documents it is impossible to evaluate whether the intelligence passed by ILOs to Frontex considers the humanitarian context in countries of origin and transit. Moreover, the proposal does not explicitly include ILOs among the categories of personnel which according to new Article 2.1a would be required to follow training in relevant EU and international law, including on fundamental rights and access to international protection.

In terms of geographical deployment of ILOs as framed in the Commission proposal, experience shows that Member States have indeed given priority to countries of origin and transit of significant migration flows, including of asylum seekers, when developing their own ILO networks. Most recently, for example, the Finnish border guard service has sent officials to train Turkish Airlines staff in identifying and intercepting passengers, mostly of Chechen origin, who were boarding flights to Russia via Helsinki. The aim was to prevent a person from lodging an asylum claim during the stopover in Finland,<sup>101</sup> despite concerns that individuals intercepted at Istanbul International Airport are systematically denied access to the asylum procedure, have difficulty in communicating with UNHCR and relevant NGOs, and are at risk of being *refouled*.<sup>102</sup> Therefore, while making the deployment of ILOs conditional on respect for fundamental rights in the realm of border management practices represents a welcome safeguard, a set of specific criteria is necessary to ensure the translation of this general principle into actual practice.

**Amnesty International and ECRE believe the posting of ILOs in third countries raises several concerns from a fundamental rights perspective, in particular regarding the right of individuals to leave a country, including their own, and that of asylum seekers to flee and find protection from persecution.**

**Amnesty International and ECRE welcome the fact that the proposal subjects the performance of the duties by Frontex ILOs to various safeguards, including compliance with EU law and fundamental rights. However, Amnesty International and ECRE recommend that Article 14 is amended to expressly assert that Frontex ILOs will not assume advisory functions vis-à-vis**

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<sup>96</sup> For a discussion on pre-frontier controls, see ECRE, *Defending Refugees' Access to Protection*, December 2007.

<sup>97</sup> Refugee Council, *Remote Controls: how UK border controls are endangering the lives of refugees*, December 2008, available at: [http://www.refugeecouncil.org.uk/policy/position/2008/remotecocontrols/remoteco\\_controls\\_report.htm](http://www.refugeecouncil.org.uk/policy/position/2008/remotecocontrols/remoteco_controls_report.htm)

<sup>98</sup> IATA Code of Conduct, Paragraph 2.3

<sup>99</sup> Between July and September 2007 ECRE conducted exploratory research on the activities of ILOs, the conclusions of which are available on file.

<sup>100</sup> The right to leave any country, including her/his own, is enshrined, amongst others, in Article 12(2) International Covenant on Civil and Political Rights; Protocol 4, Article 2(2) of the European Convention on Human Rights and Fundamental Freedoms.

<sup>101</sup> See for instance web magazine Uusi Suomi (13.11.2009) and the newspaper Helsingin Sanomat (20.11.2009).

<sup>102</sup> Report by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, following his visit to Turkey on 28 June – 3 July 2009, CommDH(2009)31, available at: <http://www.unhcr.org/refworld/docid/4ac459e90.html>; UN High Commissioner for Refugees, *Written Submission by the Office of the United Nations High Commissioner for Refugees in the Case Abdolkhani and Karimnia v. Turkey (Application No. 30471/08)*, January 2009, available at: <http://www.unhcr.org/refworld/docid/4991ad9f2.html>; Helsinki Citizen's Assembly, *Viewpoints on Migration Control and Asylum in Turkey*, February 2009; Helsinki Citizen's Assembly, *Unwelcome Guests: The Detention of Refugees in Turkey's "Foreigners' Guesthouses"*, November 2007, available at: [http://www.hyd.org.tr/staticfiles/files/rasp\\_detention\\_report.pdf](http://www.hyd.org.tr/staticfiles/files/rasp_detention_report.pdf)

carriers and that the Agency's liaison officers are explicitly included among the categories of staff who should receive training on EU law and fundamental rights under new Article 2.1a.

Furthermore, Amnesty International and ECRE understand that, as a bare minimum, the following criteria should be taken into account in assessing whether the border management practices of a relevant third country respect the requisite standards regarding human rights such that Frontex ILOs can be posted in its territory:

- respect for the prohibition of refoulement and for the right of individuals to leave their country;
- adherence to the principle of non-discrimination and respect for human dignity by border guards in performing border checks;
- provision of the necessary humanitarian assistance and adequate reception conditions, including emergency medical care to migrants intercepted within the context of border control operations;
- existence of procedural and substantial safeguards to prevent unlawful or arbitrary detention and to ensure humane treatment for detainees.

## Frontex technical and financial assistance to third countries

Frontex currently cooperates with third countries in the framework of working arrangements. This cooperation takes the form of "letters of intent", aimed at establishing a structured dialogue with non-EU countries and setting the scene for operational cooperation to counter irregular migration through border controls. By the end of 2009, twelve working arrangements had been signed and several more were under negotiation with countries including Turkey, Libya, Senegal, Mauritania and Morocco.<sup>103</sup>

However, the Agency's inability to provide technical and financial assistance to third countries is seen as a shortcoming which undermines Frontex's capacity to secure their commitment to cooperate with operational activities in the field of border control. Amended Article 14 thus aims to strengthen Frontex's leverage vis-à-vis third country authorities by allowing the Agency to launch and finance technical assistance projects outside the EU in the area of border controls through its budget or through the financial instruments which support the EU's external relations policy. According to the Impact Assessment, "Frontex, as a Community Agency, would thus become eligible to become a beneficiary/implementing partner of the EU's financial and technical supporting programmes set up by ECHO [the European Commission Humanitarian Aid Department]/AIDCO [the EuropeAid Cooperation Office]/RELEX [the Directorate General for External Relations] towards third countries".<sup>104</sup>

In relation to these potential sources of funding, it must be noted that both ECHO and EuropeAid are responsible for managing external aid programmes in the humanitarian and development fields. The mandate of ECHO is "to provide emergency assistance and relief to the victims of natural disasters or armed conflict outside the European Union".<sup>105</sup> The assistance provided by EuropeAid aims to make a contribution to the EU's development objectives, as well as to achieving the UN Millennium Development Goals.<sup>106</sup> The possibility that this funding is redirected to finance technical projects in the area of border controls is a cause of concern, as it runs counter to the original goals of the programmes implemented under these instruments, namely facilitating humanitarian relief and promoting development.

**The Commission's proposal purports to enhance Frontex's leverage over third countries by allowing the Agency to launch and fund capacity-building projects outside the EU through its budget or through the financial instruments set up within the framework of the EU's external relations policy, for example by ECHO and EuropeAid. Amnesty International and ECRE are concerned that this might lead to the use of humanitarian and development assistance for border control purposes, and stress that the EU's external aid programmes should remain faithful to their original objectives.**

## Participation by third country officials in Frontex activities

<sup>103</sup> COWI evaluation report, p. 63; Frontex, General Report 2009, p. 9.

<sup>104</sup> *Impact Assessment*, SEC (2010) 149, p. 31.

<sup>105</sup> [http://ec.europa.eu/echo/about/what/history\\_en.htm](http://ec.europa.eu/echo/about/what/history_en.htm) [last accessed on 7 September 2010].

<sup>106</sup> [http://ec.europa.eu/europeaid/who/about/index\\_en.htm](http://ec.europa.eu/europeaid/who/about/index_en.htm) [last accessed on 7 September 2010].

The proposed Article 14.3 would allow Frontex to invite representatives of third countries to participate in joint operations and pilot projects at the EU's external borders, including Frontex joint support teams, as well as risk analyses and training activities, subject to the prior provision of appropriate training by the Agency. This amendment reflects existing practices: Frontex General Report 2009 reveals, for instance, that Albanian, Croatian, Moldavian, Russian, Serbian and Ukrainian border guard officers actively participated in six joint operations during that year.<sup>107</sup>

However, the Commission's proposal does not clarify in which capacity third countries officials will take part in Frontex activities. The brief explanation included at the beginning of the Commission's proposal states that the purpose of amendment to Article 14 is *inter alia* to allow the Agency "to invite observers". The same term is used in the 2009 General Report to refer to participating third country officials. However neither the preamble nor the operational part of the Regulation clarifies this explicitly.

As to the extent of the involvement by third country officials, the 2009 General Report suggests that this was quite broad although it did not include executive functions: "Officers from neighbouring countries were not only taking part in the implementation phase through the exchange of operational information but were also involved in planning and evaluation of joint operations".<sup>108</sup> Nevertheless, unlike in the case of guest officers deployed as part of the FJST, the new Regulation does not specify the tasks and powers of third country officials, nor of the legal framework and rules on liability applicable to them.

**The Commission proposal does not specify in which capacity third country officials will be able to take part in Frontex activities. Amnesty International and ECRE recommend that the operational part of the Regulation explicitly asserts that their involvement will be as observers and will exclude the performance of executive tasks.**

## Member States' bilateral agreements with third countries

Member States are required under proposed Article 14.5 to include where appropriate, provisions concerning the role and competences of the Agency, and the exercise of executive powers by the teams it deploys, in their bilateral agreements with third countries. This amendment is designed to provide explicit legal coverage to current practices of some Member States.

For example, Spain has concluded agreements with several non-EU countries, including Senegal, Mauritania and Cape Verde, to carry out joint patrols and to intercept and push back irregular migrants within those countries' territorial waters. A similar arrangement is in place between Italy and Libya. As explained above, these agreements generally work under the assumption that the responsibility corresponds to the third country, as opposed to the EU Member State. In addition, they tend to be presented as technical agreements, and therefore are generally not accessible to the public or subject to the control of national parliaments. Their confidential character makes it virtually impossible to know whether their provisions abide by the obligations of the states party in relation to fundamental rights,<sup>109</sup> and creates difficulties in building a legal case against EU countries involved in any human right breaches that have occurred during control operations.<sup>110</sup>

Despite the absence of a legal basis in its founding Regulation, Frontex has already been involved in border control operations in third countries relying on such agreements – for instance in Joint Operation Hera mentioned above. The amended Regulation purports to remove these practices from the ambiguous area where they currently take place, by giving them a legal standing in EU law. However, it should be stressed that, irrespective of whether they occur within the framework of Member States' bilateral cooperation with third countries, Frontex activities need to be carried out in accordance with EU law, in particular the Schengen Borders Code, and obligations regarding fundamental rights and access to protection, as provided in the Regulation. The involvement of Frontex, an EU Agency, in Member States' bilateral cooperation with third countries also calls for

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<sup>107</sup> Frontex, General Report 2009, p. 28.

<sup>108</sup> *Ibid.*

<sup>109</sup> ECRE, *Defending refugees' access to protection*, December 2007. For further details on these practices, see Paula García Andrade, "Extraterritorial strategies to tackle irregular immigration by sea: A Spanish perspective", in Bernard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial Immigration Control* (cited above): 311-46; Sergio Carrera, *The EU Border Management Strategy: FRONTEX and the Challenges of Irregular Immigration in the Canary Islands*, CEPS, 22 March 2007.

<sup>110</sup> Thomas Gammeltoft-Hansen and Tanja Aalberts, "Sovereignty at Sea: The Law and Politics of Saving Lives in the Mare Liberum", *DIIS Working Paper*, 2010:18, pp. 20-21.

greater openness to public scrutiny. In this respect, Frontex should not engage in border control operations that rely on Member States' practices or agreements which are not fully compatible with the Agency's own legal basis and which do not meet the requisite transparency standards.

As argued above, a framework allowing for the independent oversight of surveillance activities is required to prevent a lack of transparency to the detriment of the rights of people apprehended in the course of border control operations. Such independent oversight of Frontex operations should be combined with monitoring of conditions on interception and return to third countries, for example by concluding partnerships with organizations present in those countries' territories.

**Despite the lack of an explicit legal basis in the founding Regulation, Frontex has been involved in border control operations on the basis of bilateral agreements between Member States. The amendment proposed by the Commission, requiring Member States to include where appropriate provisions concerning the role and competences of the Agency in their bilateral agreements with third countries, thus reflects existing practice.**

**Amnesty International and ECRE stress that Frontex activities may not circumvent their own legal basis, which requires adherence to the Schengen Borders Code and to obligations regarding fundamental rights and access to protection, by relying on Member States' bilateral agreements with third countries. Furthermore, a higher degree of transparency is required to open these agreements to public and parliamentary scrutiny.**

The Regulation should rule out the Agency's engagement in border control operations that rely on Member States' practices or bilateral agreements which are not fully compatible with the Agency's own legal basis, including respect for human rights within the context of border management, and which do not meet the requisite transparency standards.

## 5. The role of Frontex in Joint Return Operations (JRO)

It is not obvious why Frontex, an Agency which is primarily concerned with steering operational cooperation in the management of EU Member States' external borders in accordance with the Schengen Borders Code, should be involved in return operations. Yet, the drive to return irregular migrants occurring at national level has led Member States to urge Frontex to devote greater capacity to organising joint flights to remove irregularly staying third country nationals.<sup>111</sup> In spite of a largely unspecified legal framework in this area,<sup>112</sup> there has been a steep increase in the allocation of funds and operational capacity to return activities. The number of co-financed joint return flights and implemented returns doubled in 2009 compared to the previous year, from 15 to 32 flights and from 801 to 1622 people, most of whom were returned to Nigeria, Colombia, Georgia and Kosovo.<sup>113</sup> Almost all Member States and Schengen-associated countries participated in Joint Return Operations (JRO), with ten such states acting as the lead country.<sup>114</sup> The amount of funding spent on JROs soared by around 500 per cent in 2009 reaching €5.25 million, and is expected to rise again in 2010 (to €9.34 million).<sup>115</sup>

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<sup>111</sup> Most recently, see the Council Conclusions on 29 measures for reinforcing the protection of the external borders and combating illegal immigration, para 7.

<sup>112</sup> See Sergio Carrera, *The EU Border Management Strategy*, (cited above), p. 17.

<sup>113</sup> Frontex, 2009 General Report, p. 18.

<sup>114</sup> *Ibid.*

<sup>115</sup> *Ibid.*; Frontex, Programme of Work 2010, p. 10.

The current Regulation establishes that one of the Agency's tasks is to "provide Member States with the necessary support in organizing joint return operations" (Art.2.1(f)). This would be amended to the following: "provide Member States with necessary support, including, on request, coordination regarding organizing joint return operations" (Article 3). However, the Impact Assessment clearly states that currently there is mismatch between legal basis and reality: while the legal basis only talks about Frontex "assisting" Member States, the Agency has already taken on a "coordinating" role in cooperation with leading Member States.<sup>116</sup> Thus, the amendment proposed by the Commission effectively corresponds to the role that the Agency has been largely assuming. Member States would remain responsible for initiating the organization of a joint flight, as JROs are demand driven and the Agency cannot anticipate Member States' concrete needs and priorities.

Operations are also subject to the issue of return decisions by the Member States and obtaining agreement from the third country concerned. Frontex would facilitate the communication among the Member States by providing the necessary information via the IConet, as it currently does. Member States would remain as the main contact for the country of return, in particular with a view to obtaining the necessary travel documents and permission, although this will not bar Frontex from direct contact with the country of return and from taking the lead in organizing missions ("advance parties") there. The principle of a leading Member State is maintained as a means to guarantee that there is legal certainty regarding the applicable legal framework on board.<sup>117</sup>

While Frontex will not assume responsibility from Member States in terms of the organization of JROs, the new Regulation does give the Agency the right to decide whether to finance or co-finance activities in the area of return through its budget. Allegedly, this would prevent JROs from absorbing an even greater share of the Agency's resources and prevent Frontex from becoming a type of "return Agency". Furthermore, under the new proposal, both recital 21 of the Preamble and Article 9 are unequivocal that financial support in this area is conditional on respect for the Charter of Fundamental Rights.

Even if Member States retain responsibility for individual return decisions as well as the treatment of persons before, during and after return, in accordance with EU law and fundamental rights, the new Frontex Regulation clearly acknowledges that JROs coordinated by the Agency should take place "in full compliance with the Union's return policy" (Preamble recital 21). Therefore, the proposed amendments set Frontex facilitated return cooperation within the framework of EU common standards and procedures on return, as laid down in Directive 2008/115/EC (the so-called "Returns Directive") which the Member States are obliged to transpose by December 2010.<sup>118</sup>

As the proposal firmly anchors the returns assistance facilitated by Frontex within the standards and procedures set out in the Returns Directive, a logical requirement would be that their acceptance constitutes a pre-condition for Member States to take part in JROs in order to safeguard legal security and to ensure consistent treatment for returnees. We recall that currently some Member States, such as the UK, which regularly take part in Frontex joint return flights, are not subject to the rules that are applicable to their counterparts, having not opted in to the Directive.

**Amnesty International and ECRE welcome the assertion that financial support by Frontex to return operations is conditional on the full respect of the Charter of Fundamental Rights as well as clarification that return cooperation within the framework of the Agency is subject to EU common standards and procedures on return. Acceptance of legal guarantees and procedural safeguards set out in the Returns Directive should be a precondition for Member States to participate in joint return flights.**

Article 9 of the proposal specifies the standards governing JRO coordinated by Frontex. The Agency is required to develop a Code of Conduct establishing common standardised procedures for joint return flights which ensure that removal takes place "in a humane manner and with full respect for fundamental rights, in particular the principles of human dignity, prohibition of torture and of inhuman or degrading treatment or punishment, right to liberty and security, the rights to the protection of

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<sup>116</sup> *Impact Assessment*, SEC (2010) 149, p. 16.

<sup>117</sup> *Ibid*, pp. 37-8.

<sup>118</sup> 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, [2008] OJ L 348/98. For a detailed analysis of the Directive's provisions, see Amnesty International EU Office, *Amnesty International's comments on the Directive of the European Parliament and the Council on common standards and procedures in member states for returning illegally residing third-country nationals*, June 2009; ECRE, *Information Note on the 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*, January 2009.

personal data and non discrimination". In accordance with Article 8.6 of the Returns Directive, this Code of Conduct should devote particular attention to the obligation to put in place an effective system for monitoring forced returns, which should be carried out independently and cover the whole return operation, from the pre-departure phase to the handover of returnees in the country of return. The observations of the monitor will address compliance with the Code of Conduct, in particular fundamental rights. To increase transparency, observations would be available to the Commission, integrated in the internal final report of the JRO and included in an annual reporting mechanism. In view of the proposed safeguards, the amended Article 9 could make a positive contribution to the development of monitoring systems which are conducive to a more transparent return process.

**Amnesty International and ECRE welcome the provisions requiring the development of a Code of Conduct for return operations and the establishment of an independent and comprehensive monitoring system for joint return operations. If adopted, such standards could contribute to the promotion and the development of monitoring systems which are conducive to a more transparent return process.**

Presumably, the design of a monitoring system for Frontex operations will build on the Chapter on Forced Return Monitoring which has been drafted by Frontex in cooperation with the Commission, the Fundamental Rights Agency and Member States for its updated "Best Practices for the Removal of Illegally Present Third-country Nationals by Air".<sup>119</sup> However, further guidance should be drawn from the standards developed by the Committee for the Prevention of Torture on deportation of foreign nationals by air,<sup>120</sup> as well as from the experience of human rights institutions and NGOs involved in return issues.<sup>121</sup>

**In particular, Amnesty International and ECRE recommend that monitoring mechanisms should fulfill several requirements to fully achieve their important objectives:**

- **As laid down in the proposed Regulation, monitors should be independent from the authorities enforcing return. Furthermore, comprehensive and effective monitoring of the return process requires that monitors are allowed unimpeded access to all relevant facilities, including detention centres and aircrafts.**
- **Given that by their nature Frontex return operations are joint operations which bring together several Member States, monitors should have the capacity to oversee the conduct of all escorts and the treatment of all returnees on board, irrespective of which Member State they come from, in order to ensure consistency.**
- **Monitors should be given clear information on their role during the procedure and receive appropriate training. Such training should address in particular the applicable legal framework, human rights protection issues, monitoring methods, and mediation and conflict resolution skills.**
- **The effectiveness of reporting mechanisms should be ensured not only by guaranteeing that monitors are in the position to raise any breach in fundamental rights which occurs during the removal procedure, but also through the establishment of follow-up mechanisms whereby the authorities investigate and respond to reported incidents.**
- **There should also be mechanisms in place allowing to suspend the enforcement of a return decision and to refer the person concerned back to a procedure if there is reason to believe that the return decision has not respected essential quality standards, or that the removal would lead to a violation of fundamental rights.**
- **Monitoring should continue after returnees reach a third country, so as to ascertain that their rights are respected and that they are not subject to chain refoulement. Cooperation**

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<sup>119</sup> Frontex, General Report 2009, p. 19.

<sup>120</sup> European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (CPT), *The CPT Standards: "Substantive" Sections of the CPT's General Reports*, 2006, pp. 44-49.

<sup>121</sup> See for example, EKD, *Monitoring Forced Returns: A model for implementing article 8 (6) of the EU Return Directive*, April 2010. Another practical example of return monitoring is the project on "Monitoring safe and dignified return and conditions of detention" which is being implemented by the ECRE Eastern Europe Regional Project in cooperation with 10 NGO partners in Belarus, Moldova, Russia and Ukraine, with support from the EU Migration Thematic programme for 2009 and 2010. The programme focuses on the provision of additional capacity to NGOs in the target countries to allow them to carry out independent monitoring of border facilities, return cases as well as to provide legal assistance. In addition, it aims to carry out consistent training of local authorities involved in border management and refugee issues, alongside NGO partners.

**networks could be established between monitoring parties at both sides of the EU borders to this effect.**

## **6. Training border guards**

As defined in the current Regulation, Frontex should assist Member States in training national border guards, as well as in establishing common training standards across the EU. The Agency's training activities aim to improve the professionalism of national border guards, advance harmonisation in implementing common provisions, and increase interoperability, i.e. the capacity of border guards from different Member States to work together. The provision of training also acts as a means to enhance operational cooperation with third countries.<sup>122</sup>

Since its creation, Frontex has assumed a leading role in the development of the Common Core Curriculum (CCC),<sup>123</sup> which defines the knowledge and skills that border guards should acquire during the training process in relation to four modules; one of general content and the remaining three focused on air, land and sea borders. In addition, Frontex has undertaken to develop specific training on return in accordance with the Conclusions of the Justice and Home Affairs Council Meeting of 27-28 April 2006.<sup>124</sup> National training coordinators have been identified in each of the EU Member States and Schengen-associate countries and tasked with implementing training activities under the guidance of the Agency.<sup>125</sup>

Frontex reports offer data on budgetary allocations and the number of courses as a measure of the relevance that training has acquired in the Agency's activities over recent years. The share of the budget earmarked for training increased from 8 per cent in 2008 to 11 per cent in 2009, and constituted the second largest proportion of Frontex's operational budget after Joint Operations at sea.<sup>126</sup> According to the General Report 2009, that year the "Frontex Training Unit reached its goal of harmonizing the national training and education for Border Guards through 153 specific training courses and seminars as well as an implementation of the common training tools in Member States via training coordinators."<sup>127</sup> Frontex also notes that there has been an increasing emphasis on fundamental rights considerations in the context of the training developed by the Agency, accompanied by *ad hoc* cooperation in this area with UNHCR and the Fundamental Rights Agency (FRA).<sup>128</sup> However, on the basis of the general information provided by Frontex and the list of training courses annexed to annual reports, it is still not possible to evaluate the impact of training on the treatment of the people intercepted during border control operations,<sup>129</sup> nor even the actual weight given to fundamental rights in training programmes, especially since the CCC is not public.

**Amnesty International and ECRE recommend that the contents of the Common Core Curriculum, in particular of the sections dedicated to training in relevant EU and international law standards, as well as fundamental rights, are disclosed.**

The Commission's proposal to amend the Frontex Regulation enhances the role of the Agency in the area of training and explicitly asserts that fundamental rights and protection issues should be part of the training given to border guards:

- The proposed Regulation establishes an obligation for all staff from Member States and the Agency taking part in Frontex activities, such as border control operations and joint return operations, to receive appropriate training in EU and international law including a focus on fundamental rights and access to international protection (Article 2.1a).

<sup>122</sup> See for example <http://www.frontex.europa.eu/structure/training/> [last accessed on 31 May 2010]

<sup>123</sup> Previously, the CCC was the task of the Ad hoc Centre for Border Guard Training, financed by ARGO from October 2003 to December 2005.

<sup>124</sup> Council of the European Union, *Improved operational cooperation on joint return operations by air - Council conclusions*, Justice and Home Affairs Council meeting of 26-28 April 2006, Council doc No: 8402/06, pp. 36-9.

<sup>125</sup> Frontex, Annual Report 2006, p. 17.

<sup>126</sup> Frontex, General Report 2008, p. 32; General Report 2009, p. 23.

<sup>127</sup> Frontex, General Report 2009, p. 29.

<sup>128</sup> *Ibid.*, p. 11. See also Frontex, General Report 2008, pp. 10-12.

<sup>129</sup> See for example UNHCR, *Q&A: Working for refugees on Europe's outer borders*, 18 May 2010. Available at: <http://www.unhcr.org/print/4bf29c8b6.html>

- Member States are required to integrate the standards developed by Frontex in the context of the CCC in training their national border guards. The Agency would provide training at EU level for national instructors, including on fundamental rights, and may organize training activities in cooperation with Member States on their territory (Preamble recital 18 and Article 5.1).
- In addition, representatives of third countries should receive appropriate training prior to their participation in Frontex activities (Article 14.4).

The provision of training on fundamental rights and access to protection to the authorities responsible for border management is crucial for the development of protection-sensitive entry systems.<sup>130</sup> While training cannot be regarded as a panacea for all protection gaps at the border, border management authorities must have complete information on the implications of human rights and asylum law for border controls. Moreover they must possess the appropriate qualifications to provide access to the asylum procedure to those who need international protection, as well as addressing the needs of separated children, victims of trafficking and other people who are particularly vulnerable.

Frontex is in a strong organizational position to promote awareness of human rights and protection issues relevant to border controls among staff of national border services through the CCC, and through its ongoing training activities by means of formal training and socialization.<sup>131</sup> The COWI evaluation reveals that training provided by the Agency is highly appreciated not only by Member States but also by third countries, and that officials particularly value the opportunities to exchange information and network which arise from the Agency's training events.<sup>132</sup> The proposed Article 5.1 requiring Member States to incorporate the CCC into their national training for border guards, together with the fact that national personnel assigned to Frontex operations rotate on regularly, would allow the training standards developed by the Agency to reach an increasing pool of border officials. Promoting full respect for fundamental rights within the context of border management activities should be regarded as a key element in relation to Frontex's objective of fostering the development of a "European Border Guard culture".<sup>133</sup>

**Amnesty International and ECRE welcome the emphasis placed by the proposed Regulation on the provision of training in EU and international law, including that on fundamental rights and access to international protection, to Member States and Frontex personnel participating in the Agency's activities, although noting that by itself the training of border guards cannot solve all protection gaps at borders.**

**Owing to its outreach to national border services, Amnesty International and ECRE believe that Frontex could contribute to improving standards of border management regarding human rights and protection issues, through a continuous and appropriate development of the CCC standards and its training activities. This should be regarded as an integral component of the objective of promoting a "European Border Guard culture".**

To ensure that the training offered is comprehensive, high quality and identifies best practice examples, Frontex should evolve towards more structured cooperation both with UNHCR and the Fundamental Rights Agency (FRA). In this respect the recent Working Arrangement signed with FRA constitutes a particularly welcome development, as it reflects a shared commitment to cooperate and exchange expertise with a view to promoting the mainstreaming of fundamental rights into the training of border guards.<sup>134</sup> Close collaboration should also be established with the European Asylum Support Office (EASO), which will have a leading role in developing training on asylum issues.<sup>135</sup>

Furthermore, Frontex should ensure that it consults with and substantially involves civil society organizations in developing and implementing training programmes. In many European countries, both

<sup>130</sup> The importance of training to immigration officials has been repeatedly highlighted by UNHCR and ECRE. See UNHCR, *Refugee Protection and Mixed Migration: The 10-Point Plan in action*, June 2009, Provisional release, Chapter 3, available at: <http://www.unhcr.org/refworld/pdfid/4aca0af82.pdf>; UNHCR, *Refugee Protection and Mixed Migration: A 10-Point Plan of Action*, January 2007, Rev.1, available at: <http://www.unhcr.org/refworld/pdfid/45b0c09b2.pdf>; ECRE, *Defending Refugees' Access to Europe*, December 2007.

<sup>131</sup> See for example Jorrit J. Rijpma, *Frontex: Successful Blame Shifting of the Member States?*, ARI 69/2010 - 13/4/2010.

<sup>132</sup> COWI evaluation report, pp. 43-5.

<sup>133</sup> This objective was emphasised by Frontex Executive Director, Ilka Laitinen in the speech he delivered on 24 May 2010 on the occasion of the 5<sup>th</sup> Anniversary of the Agency. A copy of his speech is available at:

[http://www.ed4bg.eu/files/Ilkka\\_Keynote\\_Speech\\_for\\_ED4BG\\_24\\_May2010.rtf](http://www.ed4bg.eu/files/Ilkka_Keynote_Speech_for_ED4BG_24_May2010.rtf) [last accessed on 13 September 2010]

<sup>134</sup> See Article 5 of the Cooperation arrangement between the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union and the European Union Agency For Fundamental Rights, 27 May 2010.

<sup>135</sup> Article 6 of the Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office, [2010] OJ L 132/11.



within and outside the EU, NGOs are regularly involved in providing training to border authorities on protection issues, sometimes on the basis of formal agreements with border services and in cooperation with UNHCR.<sup>136</sup> Lessons should also be drawn from the good example set by the European Asylum Curriculum (EAC) project which is being developed by the General Directors' Immigration Service Conference (GDISC), whereby NGOs (among them ECRE) and Intergovernmental Organizations (including UNHCR), are members of the Reference Group which help develop training modules.

**To ensure that any training offered is comprehensive, high quality and identifies best practice examples, Frontex should evolve more structured cooperation with UNHCR, the FRA and the future EASO. Similarly, Frontex should ensure that it consults with and substantially involves civil society organizations in developing and implementing training programmes.**

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<sup>136</sup> For a review of some existing practices, see UNHCR, *Refugee Protection and Mixed Migration: The 10-Point Plan in action*, June 2009, Provisional release, pp. 52-8. Examples of training activities conducted by NGO partners in neighbouring countries in the East European border is also available on file with ECRE.

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