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Cc: IYIGUENGOER Aydan (FRA)
Emne: Frontex Consultative Forum - Annual Report

Dear all,

On July 29, the European Union Borders Agency **Frontex** published the first Annual Report of the **Frontex Consultative Forum on Fundamental Rights**:
http://frontex.europa.eu/assets/Partners/Consultative_Forum_files/Frontex_Consultative_Forum_AR2014_WEB.pdf
http://fra.europa.eu/en/news/2014/frontex-consultative-forum-fundamental-rights-publishes-first-annual-report

The key task of the Consultative Forum, which FRA and the Jesuit Refugee Service Europe (JRS) have co-chaired since its inauguration in October 2012, is to provide advice to Frontex on fundamental rights issues. Core areas on which the Consultative Forum is consulted include the further development and implementation of Frontex' Fundamental Rights Strategy and Code of Conduct.

Following its establishment, the Consultative Forum began by assessing which Frontex activities may give rise to major fundamental rights concerns, in cooperation with the Fundamental Rights Officer, Frontex staff and the Frontex Management Board. This resulted in a decision for the Consultative Forum to work on selected issues in the fields of strategic planning, joint operations, risk analysis and training.

The Annual Report provides an overview of the activities undertaken by the Consultative Forum in 2013 and contains the main recommendations made to Frontex and its Management Board, as well as the subsequent impact of these on the Agency's work.

The Frontex Consultative Forum comprises the following organisations:

- Amnesty International European Institutions Office (AI EIO)
- Caritas Europa
- Churches' Commission for Migrants in Europe (CCME)
- Council of Europe (CoE)
- European Asylum Support Office (EASO)
- European Council on Refugees and Exiles (ECRE)
- European Union Agency for Fundamental Rights (FRA)
- International Catholic Migration Commission (ICMC)

- International Commission of Jurists (ICJ)
- International Organization for Migration (IOM)
- Jesuit Refugee Service Europe (JRS)
- Organisation for Security and Co-operation in Europe, Office for Democratic Institutions and Human Rights (OSCE / ODIHR)
- Platform for International Cooperation on Undocumented Migrants (PICUM)
- Red Cross EU Office
- United Nations High Commissioner for Refugees (UNHCR)

Should you require any further information, please do not hesitate to contact Aydan Iyiguengoer: Aydan.IYIGUENGOER@fra.europa.eu

Best wishes,
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Helping to make fundamental rights a reality for everyone in the European Union

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Helping to make fundamental rights a reality for everyone in the European Union

FRA handbook to strengthen guardianship systems for children with no parental care now available:
http://fra.europa.eu/en/press-release/2014/help-end-child-trafficking-through-better-guardianship

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ANNUAL REPORT

Frontex Consultative Forum on Fundamental Rights

2013

ANNUAL REPORT
Frontex Consultative Forum on Fundamental Rights

Consultative Forum Members as of October 2013:

- Amnesty International European Institutions Office (AI EIO)
- Caritas Europa
- Churches' Commission for Migrants in Europe (CCME)
- Council of Europe (CoE)
- European Asylum Support Office (EASO)
- European Council on Refugees and Exiles (ECRE)
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1 INTRODUCTION

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While Frontex has been operational since 2005, the obligation to set up a Consultative Forum was introduced in a revision of the Frontex Regulation in October 2011,[1] under the heading *"Fundamental Rights Strategy"* (Article 26 (a)).

The composition of the Consultative Forum is partly prescribed by the Frontex Regulation and partly decided upon by Frontex. EASO, FRA and UNHCR are mandatory members. *"Other relevant organisations"* are invited by the Agency to participate in the Consultative Forum by decision of the Frontex Management Board (MB), as proposed by the Executive Director.[2]

In light of the responses received to a call for expressions of interest, the Management Board decided on the following composition of the Consultative Forum:[3]

(i) two European Union Agencies:

- European Union Agency for Fundamental Rights (**FRA**)
- European Asylum Support Office (**EASO**)

(ii) four UN Agencies and Intergovernmental Organisations:

- United Nations High Commissioner for Refugees (**UNHCR**)
- International Organization for Migration (**IOM**)
- Organisation for Security and Co-operation in Europe, Office for Democratic Institutions and Human Rights (**OSCE / ODIHR**)
- Council of Europe (**CoE**)

1 Council Regulation (EC) No. 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex Regulation), OJ L 349, 25.11.2004, p. 1, as last amended.

2 Frontex Regulation, Article 26a (2), first paragraph.

3 Management Board Decision No. 12/2012 of 23 May 2012 on the Composition of the Frontex Consultative Forum.

(iii) nine Civil Society Organisations:

- Amnesty International European Institutions Office (**AI EIO**)
- Caritas Europa (**CE**)
- Churches' Commission for Migrants in Europe (**CCME**)
- European Council on Refugees and Exiles (**ECRE**)
- International Commission of Jurists (**ICJ**)
- International Catholic Migration Commission (**ICMC**)
- Jesuit Refugee Service Europe (**JRS**)
- Platform for International Cooperation on Undocumented Migrants (**PICUM**)
- Red Cross EU Office.

These key international institutions and civil society organisations working in the area of the protection of the fundamental rights of migrants in Europe were asked to appoint representatives and substitute members to the Consultative Forum.

Costs related to the participation of Members in Consultative Forum meetings are borne as a rule by Frontex.[4]

The Consultative Forum was officially established in October 2012 and started its activities in January 2013.

At the inaugural meeting of the Consultative Forum, the representative of FRA, Aydan Iyigüngör, was elected Chair, and Stefan Keßler of JRS Co-Chair of the Consultative Forum. It should be noted that the Working Methods set out that the Consultative Forum Chair *"shall be elected among the three organisations explicitly mentioned in the Article 26a (2) of Frontex Regulation and shall rotate among them afterwards"*, whereas the Co-Chair "*shall be elected among the remaining*

4 Management Board Decision No 18/2012 on the working methods of the Frontex Consultative Forum and modalities of the transmission of information to the Frontex Consultative Forum, 26 September 2012 (hereafter: the Working Methods), Title I, Article 4.3. Available at: http://frontex.europa.eu/assets/Partners/Consultative_Forum_files/Working_Methods.pdf

Consultative Forum members". The duration of their mandates is one year and is renewable.[5]

The first year of functioning of the Consultative Forum has shown that its diverse composition and collective knowledge and expertise of the Consultative Forum have put it in a position to provide Frontex with holistic analyses on fundamental rights issues. The Members of the Consultative Forum can indeed collect, within their respective organisations and spheres, a wide range of information of a social, legal and technical nature. This allows the Consultative Forum to produce evidence-based advice.

This first year was also needed for the 15 Consultative Forum members to understand the functioning of Frontex and to develop the Consultative Forum's own working methodology.

Pursuant to the Frontex Regulation, the Consultative Forum has to submit a publicly available annual report.[6]

This is the first such report. It intends to explain the functioning of the Consultative Forum, retrace Consultative Forum's activities in 2013 and give a short outlook for 2014.

The report contains the main recommendations that the Consultative Forum made to Frontex and its Management Board in 2013 and the impact of those.

The Consultative Forum hopes that its first annual report will be disseminated widely among the policy makers and practitioners concerned with border management.

5 Working Methods, Title I, Article 3.1.

6 Frontex Regulation, Article 26a (2), third paragraph. According to the Working Methods (Title I, Article 3.6) the annual report has to be presented to the Management Board before being "made publicly available". This happened for the present report at two meetings, on 27 March and 25 April 2014.

2 THE ROLE OF THE FRONTEX CONSULTATIVE FORUM

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What does the Consultative Forum do?

According to the Frontex Regulation, the key role of the Consultative Forum is *"…to assist the Executive Director and the Management Board in fundamental rights matters"*.[7]

Core areas, on which the Consultative Forum has to be consulted, are *"the further development and implementation of the Fundamental Rights Strategy, Code of Conduct and common core curricula"*.[8]

By the time the above article was added to the Frontex Regulation, Frontex had already developed a Fundamental Rights Strategy.[9] This Strategy, is implemented by Frontex in accordance with a Fundamental Rights Action Plan outlining twenty-one actions.[10]

The Working Methods of the Consultative Forum specify that the Consultative Forum *"is a knowledge and expertise resource to enable Frontex and its Management Board to gain information and advice relevant to the aim of developing and promoting the respect of Fundamental Rights in all Frontex activities"*. The Consultative Forum *"offers strategic opinions, recommendations and a pool of information on how Frontex can structurally improve the respect and promotion of fundamental rights in its various activities"*.[11]

The Consultative Forum works in the public eye. Public access to the opinions and recommendations issued by the Consultative Forum is to be provided by Frontex in accordance with the relevant EU rules.[12]

7 Frontex Regulation, Article 26a (2), first paragraph.

8 Frontex Regulation, Article 26a (2), second paragraph.

9 The Frontex Fundamental Rights Strategy was approved by the Management Board on 31 March 2011.

10 The Fundamental Rights Action Plan was adopted by Frontex on 29 September 2011.

11 Working Methods, Introduction.

12 Working Methods. Title I, Article 3.6.

How does the Consultative Forum work?

According to the Frontex Regulation, it is the Management Board that decides on the Working Methods of the Consultative Forum.[13] In reality the Working Methods were a result of negotiations, which the Consultative Forum appreciated. Their revision by the Management Board is foreseen *"at the latest three years after [their] entry into force"*.[14] This will be an occasion for improvements.

The Consultative Forum holds formal and informal meetings at the Frontex headquarters in Warsaw. In 2013, three meetings took place, in January, May and October. Formal meetings are attended by the Management Board Chairperson or a representative, the Executive Director or deputy, the Fundamental Rights Officer as well as senior Frontex staff.[15]

The Consultative Forum plans its work, to the greatest extent possible, through Annual Work Plans, that are adopted at the beginning of the year. But the Work Plan remains flexible to react to issues that may arise during the year.

In order to be able to cover more ground, the Consultative Forum has decided to not only work in plenary but also in Working Groups. Four Working Groups were set up:

- Working Group on Border Joint Operations (chaired by UNHCR),
- Working Group on Return Operations (chaired by CCME),
- Working Group on Risk Analysis (chaired by AI EIO),
- Working Group on Training (chaired by EASO).

13 Frontex Regulation, Article 26a (2) First Paragraph: *"On a proposal by the Executive Director, the Management Board shall decide on […] the working methods of the Consultative Forum and the modalities of the transmission of information to [it]"*.

14 Working Methods, Title III, Article 1.2.

15 Working Methods, Title I, Article 2.3.

On average, each member of the Consultative Forum takes part in two Working Groups.

The Consultative Forum is asked to *"operate according to the principles of transparency, mutual respect, open process, informed participation, collegiality and consensus"*.[16]

One sensitive issue that required an understanding between Frontex and the Consultative Forum was to what extent and under which modalities the Consultative Forum Members would have access to internal Frontex information and documentation. The principle is contained in the Frontex Regulation: just as the Fundamental Rights Officer, the Consultative Forum "shall have access to all information concerning respect for fundamental rights, in relation to all activities of the Agency".[17]

The solution put in place is that, following a written commitment by each Consultative Forum Member to respect the confidentiality rules of Frontex, a reserved space for Consultative Forum members was created on Frontex' FOSS database in which relevant Frontex information is placed on an on-going basis.[18] Otherwise, the Frontex Consultative Forum Secretariat *"acts as single contact point for the request and transmission of information"* to and from Frontex.[19] It is clear, however, that there cannot be full equivalence between the information received by the Fundamental Rights Officer and the Consultative Forum members.

Another sensitive issue that was discussed at length between the Consultative Forum and Frontex was upon whose initiative and on what issues the Consultative Forum would work and to whom it would address its opinions, recommendations and annual reports.

16 Working Methods. Title I, Article 1.

17 Frontex Regulation, Article 26a (3).

18 Working Methods, Title II.

19 Working Methods, Title I, Article 4.1.

As a result of these discussions, the Working Methods set out that the Consultative Forum *"may act in the form of an opinion at the initiative of the Management Board or the Executive Director"* and *"in the form of a recommendation at the initiative of the Consultative Forum Members"*.[20]

The Consultative Forum *"adopts its opinions and recommendations by consensus of its members, individual opinions and discussions of the […] Members […] remain confidential (so-called Chatham House Rule). When consensus cannot be reached, the Chair may exceptionally proceed to voting by simple majority of the […] members where also minority positions will be recorded"*.[21]

As to the question of the addressees, the Working Methods indicate that the Consultative Forum *"may only adopt and deliver opinions and formulate recommendations to the Management Board and to the Executive Director"* and that those as well as the annual reports have to be *"transmitted to the Executive Director and the Management Board"*.[22]

These provisions bar the Consultative Forum from addressing opinions and recommendations to Member States or EU bodies and rule out *direct* transmission of its opinions and recommendations to the media.

Access to Consultative Forum documents has to be granted by Frontex, like by other EU Agencies.[23]

Between its meetings, the Consultative Forum interacts on a regular basis with the mentioned interlocutors, as well as with stakeholders such as the European Commission, the European Parliament and oth-

20 Working Methods, Title I, Article 3.5, first paragraph (emphasis added).

21 Working Methods, Title I, Article 3.4.

22 Working Methods, Title I, Article 3.5 third and fourth paragraph (emphasis added).

23 Title I, Article 3.6 and Title II of the Working Methods.

ers. There is, of course, also on-going interaction between the members of the Consultative Forum.

Frontex may invite members of the Consultative Forum to visit a joint operation as observers. The approval of the Member States concerned with that activity is required, as well as the agreement of the Member State that hosts the operation.[24] This means that Consultative Forum members can visit joint operations, but not by unilateral decision, randomly or at short notice. Nor is there a right to such visits.

In line with the provision that it *"shall have access to all information concerning respect for fundamental rights, in relation to all the activities of the Agency",*[25] the Consultative Forum has asked to be invited to send members on occasional visits to Frontex coordinated operations. The aim is not to monitor, but to be in a position to issue recommendations on joint land or sea border operations that are based on observations of how things work in practice and not only on the examination of rules, instructions and reports that are on paper.

24 Frontex Regulation, Article 13.

25 Frontex Regulation, Article 26a, paragraph 4.

What can the Consultative Forum not do?

- Handle individual complaints

It is outside the mandate of the Consultative Forum to deal with individual complaints.

- Systematically assess fundamental rights compliance in all Frontex activities

The Consultative Forum works on selected areas of Frontex activities in the framework of jointly agreed annual work programmes, as well as upon *ad hoc* requests by Frontex and further to decisions it makes itself in the course of the year, as appropriate. The Consultative Forum does not have the resources to systematically screen all Frontex activities and documents for fundamental rights issues and, even less, compliance. The oversight by the European Parliament, national parliaments, civil society and where necessary the judiciary, thus, remains important.

Co-operation with the Fundamental Rights Officer and with the Consultative Forum Secretariat

Cooperation with the Fundamental Rights Officer (FRO) is crucial for the effectiveness and success of the work of the Consultative Forum, because their respective roles are understood as complementary.

Contrary to the Consultative Forum, the Fundamental Rights Officer has a clear monitoring role that covers all Frontex coordinated operations and activities. She receives all incident reports and individual complaints and has unfettered access to documents and officials. She can also observe operations *in situ* and participate in internal Frontex briefings, debriefings and discussions.

The Consultative Forum is glad to underline that close and trusting cooperation was established in 2013 with the Fundamental Rights Officer who had been appointed in December 2012 and who *"report[s] directly"* to the Consultative Forum.[26]

The Fundamental Rights Officer does not only participate regularly in the meetings of the Consultative Forum but is also in on-going contact with its Chair, Vice-Chair and members, namely to exchange information and discuss issues.

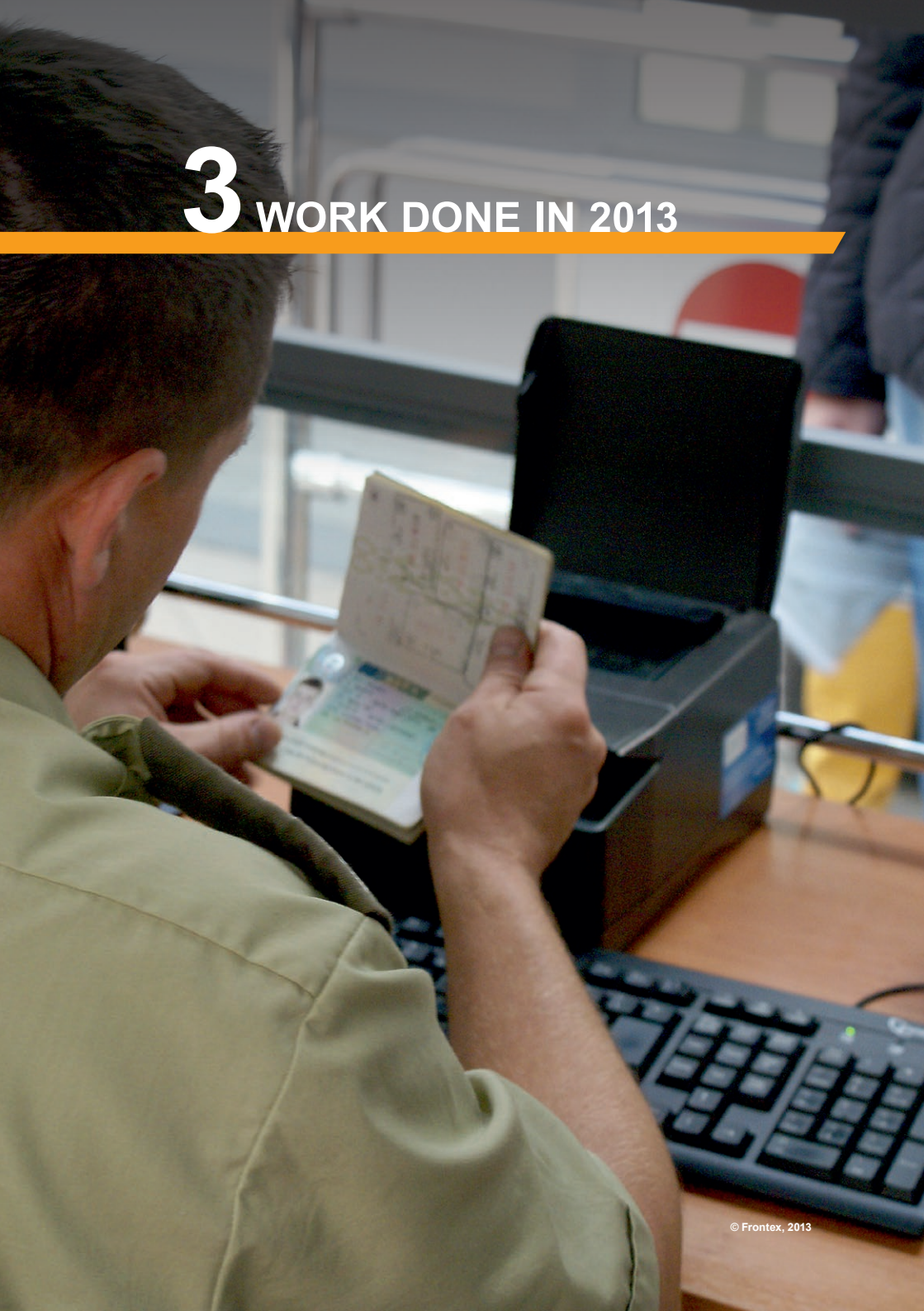
For examlpe, the field visit of members of the Consultative Forum to Joint Operation Poseidon (see chapter 3.2.2 of this report) was organised and carried out together with the Fundamental Rights Officer, who accompanied the Consultative Forum delegation upon invitation.

The Consultative Forum wishes to underline that it is also very pleased with the way in which the Frontex Consultative Forum Secretariat provides it with efficient administrative support.[27]

26 Frontex Regulation, Article 26a (3).

27 In line with the Working Methods, Title II, Article 4.1.

3 WORK DONE IN 2013



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The starting point for the Consultative Forum's work was a mapping of Frontex activities in which major fundamental rights concerns may arise. That assessment was done in cooperation with the Fundamental Rights Officer, Frontex staff and the Management Board. On the basis of this, the Consultative Forum decided to work on selected issues in the fields of strategic planning, joint operations, risk analysis and training.

The Consultative Forum's Work Programme for 2013[28] was adopted on 31 January 2013 following its presentation to the Frontex Management Board.

3.1. Strategic Planning and Frontex Programme of Work 2014

Frontex submitted its draft Programme of Work 2014 to the Consultative Forum for comment. The Consultative Forum responded with a set of general and specific observations and recommendations. The final version of the Programme of Work 2014 reflected the Consultative Forum's advice in a number of aspects.[29]

The Consultative Forum's comments on the Programme of Work for the year 2014 can also be seen to a considerable extent as advice for Frontex' Multi-Annual Strategy 2013-16.

The gist of the comments and recommendations of the Consultative Forum on the draft Programme of Work was that it contained only a few activities relating to fundamental rights and that those appeared as separate and stand-alone activities, rather than as an integral part

28 Frontex Consultative Forum, "Work Programme 2013", 31 January 2013, available at: <http://frontex.europa.eu/assets/Partners/Consultative_Forum_files/CF_work_programme.pdf> [accessed 4 March 2014].

29 The Programme of Work of Frontex had two annexes. Annex I is "restricted" and contains operational plans; the Consultative Forum had no access to this annex (and did not ask for it). Annex II is the training plan; it was not yet ready by the time the Consultative Forum was given the draft Programme of Work for comment.

of Frontex coordinated joint operations. The Consultative Forum believes that the Frontex Programmes of Work should have a genuine fundamental rights dimension.

For example, in 2014 the implementation of the European Border Surveillance System (Eurosur) will be a priority for Frontex. The Eurosur Regulation contains a number of fundamental rights safeguards, such as in its Article 2 (4): *"Member States and the Agency shall comply with fundamental rights, in particular the principles of non-refoulement and respect for human dignity and data protection requirements, when applying this Regulation. They shall give priority to the special needs of children, unaccompanied minors, victims of human trafficking, persons in need of urgent medical assistance, persons in need of international protection, persons in distress at sea and other persons in a particularly vulnerable situation".*[30] The Programme of Work does not elaborate on how this provision will be implemented.

30 Article 2 (4) of Regulation (EU) Nr 1052/2013 of 22 Oct 2013 on the establishment of a European Border Surveillance System (Eurosur), OJ L 295, p. 11.

Main recommendations of the Consultative Forum:

1. The report of the Parliamentary Assembly of the Council of Europe (PACE)[31] on Frontex suggests that Frontex can become a beacon for the respect of fundamental rights in the course of border guard operations in Europe. The inquiry of the European Ombudsman[32] insists on the public interest in Frontex accepting such a role. This is why the Consultative Forum recommends that the Agency's Programmes of Work treat the respect of fundamental rights not as one chapter among many but as a priority. The consideration for the protection of fundamental rights should be mainstreamed in the entire range of Frontex activities.

   Outcomes:

   Frontex staff have, in general, become more sensitive to fundamental rights issues. Furthermore, the Programme of Work 2014 envisages the harmonisation of the education and training of European Border Guards within all stages of their careers and the integration of fundamental rights into the training design as underpinning principles.

   However, the Programme of Work does not yet sufficiently reflect that the protection of fundamental rights is considered a **priority** in all activities of the Agency.

2. Concerning its future work in implementing the Eurosur Regulation, Frontex should express the intention to coordinate cooperation with Member States with a direct view to the saving of the lives of migrants, which is an explicit objective of the Regulation.

   Outcomes:

   This recommendation was not taken on in the Agency's Programme of Work 2014.

31 "Frontex: human rights responsibilities", Report of the Parliamentary Assembly of the Council of Europe (PACE), Committee on Migration, Refugees and Displaced Persons, 8 April 2013 (http://assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=19547&Language=EN); Resolution (http://assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=19719&Language=EN); Recommendation (http://assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=19721&Language=EN).

32 European Ombudsman own-initiative inquiry OI/5/2012/BEH-MHZ concerning the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex), case opened on 6 March 2012. All related documents available at: http://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/11316/html.bookmark

3. Frontex should be careful to refrain from any generalisations and implied value judgments such as by referring to 'illegal" migration.

   Outcomes:

   Assessments concerning the accession of individual states to the Schengen area and its potential impact on migration routes were indeed removed from the text of the Programme of Work 2014. However, the final text does still use references to 'illegal' migration; the argument of Frontex being that this is the official EU terminology. Also, migrants are still portrayed as people who use the asylum system to enter EU territory.

4. When developing effective protection measures for vulnerable persons such as children and victims of trafficking, Frontex should consider consulting civil society organisations and other stakeholders working in that environment.

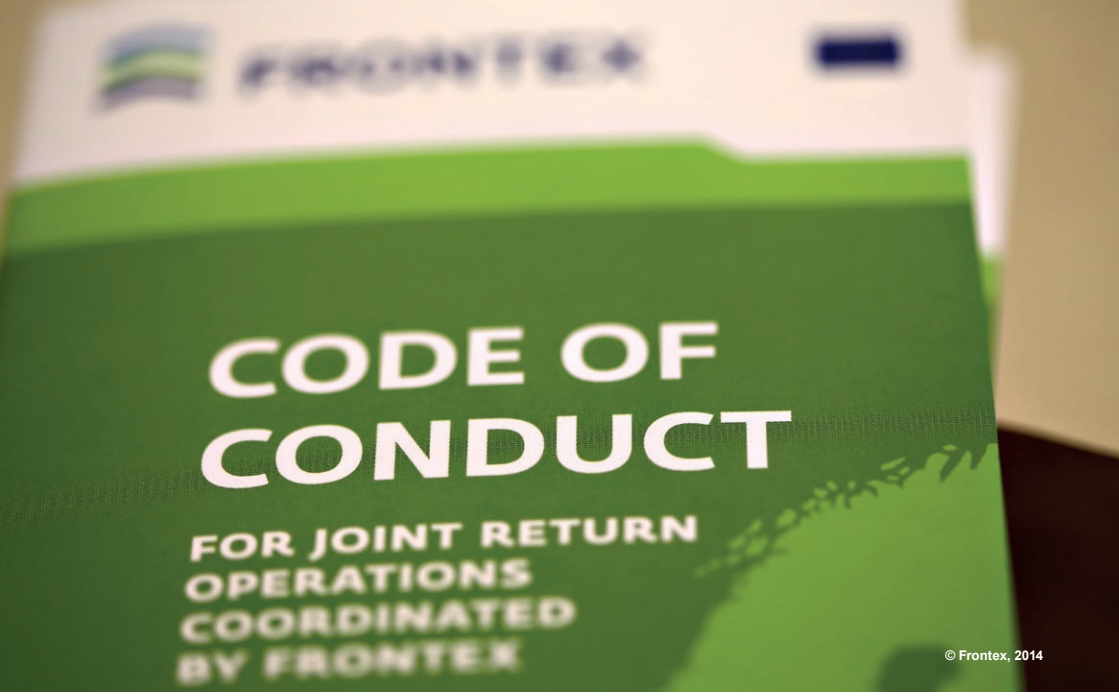
   Outcomes:

   Frontex did not follow this recommendation, arguing that this issue was rather in the competence of the Member States.

5. Frontex should incorporate dialogue with the Consultative Forum as an integral part in its annual planning cycle and should allow the Consultative Forum sufficient time for quality input.

   Outcomes:

   The Consultative Forum appreciates that the Frontex Programme of Work for 2014 contains clear references to the cooperation with the Consultative Forum, including the exchange of relevant information and the need to consult it on strategic matters.



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3.2. Operations

3.2.1. Code of Conduct for Joint Return Operations (CoC JROs)

The Frontex Regulation, in its Article 9 (1a), requires Frontex to develop a code of conduct for the return of irregularly present third-country nationals which is to be applied during all joint return operations coordinated by the Agency. The CoC JROs[33] sets out common principles and main procedures to be observed in such operations and complements the general provisions of the 2011 Code of Conduct for all persons participating in Frontex activities (CoC).

The Frontex Regulation calls expressly for consultation with the Consultative Forum on the Codes of Conduct. The Consultative Forum was indeed consulted from a very early stage of the drafting process and provided recommendations to Frontex throughout the entire process. The Consultative Forum welcomes the open and inclusive process in which the CoC JROs was developed.

33 Code of Conduct for Joint Return Operations coordinated by Frontex, http://frontex.europa.eu/assets/Publications/General/Code_of_Conduct_for_Joint_Return_Operations.pdf

Numerous recommendations of the Consultative Forum relating *inter alia* to the use of force and coercive measures, to the health assessment, to the monitoring of return flights and to the mechanism to file complaints by returnees were considered in the final version of the CoC JROs.

The CoC JROs[34] came into force on 8 October 2013. It will be part of all operational guidelines and will be distributed to deployed officers ahead of the Joint Return Operations. Already existing norms and guidelines (such as the Council of Europe's Twenty Guidelines on Forced Return[35]) which are not included in the CoC JROs will be provided to deployed staff in an additional information sheet.

There is no doubt that the CoC JROs is a positive step towards the establishment of clear common rules and procedures that should govern forced return operations coordinated by Frontex. It explicitly refers to most of the specific fundamental rights norms that are relevant. It also foresees the possibility for returnees to lodge complaints, which is an important achievement.

However, in the view of the Consultative Forum, the CoC JROs does not completely reflect the desired highest level of fundamental rights protection. Specifically, while its purpose is to provide clear operational guidance to deployed staff, the CoC JROs does not provide sufficiently detailed and concrete provisions on several essential issues.

For example, concerning the already mentioned possibility for the returnee to lodge a complaint, the CoC JROs remains unclear as to when and how complaints can be made in practice, by whom and how they will be processed. These questions are of paramount importance.

34 The CoC JROs was adopted by Decision of the Frontex Executive Director No. 2013/67 of 7 October 2013.

35 Council of Europe Twenty Guidelines on Forced Return, September 2005: http://www.coe.int/t/dg3/migration/archives/Source/MalagaRegConf/20_Guidelines_Forced_Return_en.pdf

Also, the Code does not require individual identification of the escorts. It merely requires their distinction from the returnees. The Consultative Forum considers this insufficient in light of the applicable standards in international human rights law, including the Council of Europe's Twenty Guidelines on Forced Return.[36] The identification of individual officers is a prerequisite for the establishment of accountability.

Another concern for the Consultative Forum is that the rule on the medical assessment of returnees prior to the flights does not render 'fit to travel' certificates mandatory for all returnees. Who will decide for which returnees a certificate will be required and for whom not and according to which criteria?

The provision on reporting back to Frontex by independent monitors remains weak in the CoC JROs, as the decision to inform Frontex is left to the discretion of the Member States to whom the monitors belong. The Consultative Forum stresses that the reports of independent monitors and the follow-up by Frontex with the Member States on potential complaints are crucial for achieving accountability and providing access to effective remedy.[37] The monitors' reports are important for the evaluation of return operations by Frontex also when there were no complaints made, in order to constantly improve the process.

36 See Guideline 18.4 and its explanation: "According to this paragraph, the members of the escort should be identifiable. For instance, the members of the escort could present themselves by name or they could have their name or a number indicated on a badge".

37 Art 47 of the EU Charter of Fundamental Rights.

Recommendations made by the Consultative Forum:

1. The CoC JROs must be brought to the attention of Member States and other stakeholders and should become part of standard training for officers involved in JROs as well as for monitors.

   Outcomes:

   This recommendation is reflected in Article 15 of the CoC JROs: *"All participants in the JRO, prior to their engagement in the operation, are required to get acquainted with the content of this Code and fundamental rights through appropriate training".*

2. Independent monitors should be present at all Frontex JROs.

   Outcomes:

   This recommendation is reflected in Article 13 (2) of the CoC JROs: *"[…] MSs taking part in a JRO are required to ensure that they have in place an effective forced return monitoring system. Failing to meet this condition could ultimately lead to postponement or cancellation of the participation of the respective MS".*

   Frontex has announced that it is ready to bear the costs of independent monitors on JROs and that it shares the aim that virtually all JROs should be subject to independent monitoring and that the monitors are to be involved in briefings and debriefings on joint return operations.

3. Frontex should receive in a timely fashion and in full all the reports made by independent monitors.

   Outcomes:

   This recommendation is reflected in Article 14 (6) of the CoC JROs: *"Unless contrary to national rules and procedures, the report(s) of the monitors is (are) sent to Frontex in a timely manner after the end of a JRO and their observations are included in the Final Return Operation Report to be delivered to Frontex".*

4. Effective measures need to be taken to enable returnees to exercise their right to lodge complaints. Returnees must be informed in a language they understand about this right. It must be clarified who receives complaints and who handles them and according to which procedure.

Outcomes:

This recommendation is partly reflected in two provisions of the CoC JROs:

Article 5 (2): *"The competent authorities of the MSs are expected to give sufficient and clear information to the returnees about the JRO, including the possibility to lodge a complaint concerning alleged ill-treatment during the operation".*

Article 17 (4): *"The returnee may request information and should be informed of the measures taken and his/her possible right to compensation".*

5. All escorts on board should be individually identifiable by name or identification number.

Outcomes:

This recommendation is partly reflected in Article 9 of the CoC JROs: *"The participants should be identifiable and fully distinguishable from returnees. For this purpose official vests, armbands, badges or some other distinguishing signs are required to be worn while on duty".*

6. Any use of coercive measures must be subjected to the principle of strict necessity and proportionality and should be documented and reported to Frontex.

Outcomes:

The recommendations is reflected in three provisions of the CoC JROs:

Article 6 (1): *"Coercive measures may be used only when strictly necessary on returnees who refuse or resist removal, or in response to an immediate and serious risk of the returnee escaping, causing injury to herself/himself or to a third party, or causing damage to property (2). The use of coercive measures must be proportional, not exceeding reasonable force, and with due respect to the returnee's rights, dignity and his/her physical integrity".*

Article 6 (4): *"The OMS and Frontex decide on a list of authorised restraints in advance of the JRO. This list must be distributed to the relevant PMSs prior to the JRO. The use of sedatives to facilitate the removal is forbidden without prejudice to emergency measures to ensure flight security".*

Article 16: In case of illegal use of coercive measures, *"any participant in the JRO who has reasons to believe that a violation of this Code or of fundamental rights has occurred is required to report it to Frontex via the appropriate channels, for example via the Frontex Serious Incident Reporting system".*

7. The returnees should be free of handcuffs or other restraining measures when handed over. The CoC JROs should be shared with the receiving countries.

   Outcomes:

   This recommendation is reflected in two provisions of the CoC JROs:

   Article 15 (2): *"Frontex will ensure that the content of this Code is communicated to the national authorities of the countries of return"*;

   Article 6 (1): *"Coercive measures may be used only when strictly necessary on returnees who refuse or resist removal, or in response to an immediate and serious risk of the returnee escaping, causing injury to herself/himself or to a third party, or causing damage to property. (2): The use of coercive measures must be proportional, not exceeding reasonable force, and with due respect to the returnee's rights, dignity and his/her physical integrity".*

8. Clear criteria for the termination or suspension of a JRO in line with Article 3.1 (a) should be developed.

   Outcomes:

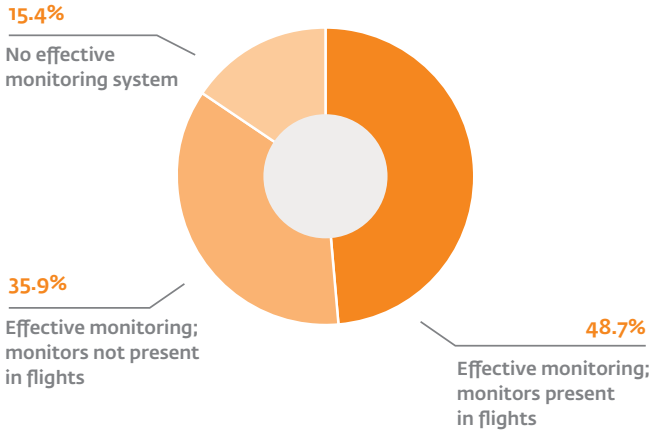
   Frontex finally decided not to follow this recommendation because, it is argued, the short duration of a JRO renders the very idea of terminating or suspending an operation that has started by and large unrealistic.

9. The CoC JROs should include gender specific provisions reflecting the different needs and vulnerabilities of men and women in the return process (e.g. handling of female returnees by female officers).

   Outcomes:

   Article 4 of the CoC JROs sets out general principles on the respect for fundamental rights in the course of JRO and more detailed rules can be defined in the Best Practices.

Frontex coordinated return operations and presence of monitors (39 in total) in 2013:[38]



38 Figures are provided by Frontex. Frontex categorisation is in accordance to the FRA's determination of effective forced return monitoring systems in the EU. It takes into account the number of joint return operations coordinated by Frontex where there was a possibility of having an effective monitoring system, either by the organising or participating Member States. In this category, it is differentiated between flights effectively with monitors and those others where there were no monitors during the operation (despite possibilities for them being there). On the other hand, it points out the number of return operations where there was no possibility of having a monitoring system. According to the FRA's Annual Report 2013 the following Member States have a monitoring system in place: Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, Denmark, Estonia, Germany, Hungary, Malta, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Romania, Slovakia and the United Kingdom. Member States that do not have a monitoring system in place are: Finland, France, Greece, Italy, Portugal, Slovenia, Sweden, and Spain. See FRA, "Fundamental Rights: challenges and achievements in 2013 – Annual Report 2013" June 2014, http://fra.europa.eu/en/publication/2014/fundamental-rights-challenges-and-achievements-2013 .

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3.2.2. Joint sea / land border operations

The Consultative Forum wishes to thank the Greek and Bulgarian authorities for having agreed to a visit by Consultative Forum members to Joint Operation Poseidon at the Greek-Turkish sea / land borders and at the Bulgarian-Turkish land border in July 2013. That Joint Operation was selected because it is one of the main operations coordinated by Frontex and because it is at the forefront of the increasing number of Syrians seeking protection in Europe.

Frontex Joint Operations are undertaken at the request of the Host Member State. The authorities of the Host Member State remain responsible for the border operations, including the granting and denying of access to the territory and the provision of protection to those in need. Frontex coordinates and supplies equipment and deploys guest officers, interpreters and other experts from other Member States, as well as providing training for national border guards and the deployed guest officers.

The delegation of the Consultative Forum consisted of UNHCR and CCME and included their members operating in Greece. The visit was

planned and carried out together with the Fundamental Rights Officer, to whom the Consultative Forum also expresses its gratitude. While that was not its primary purpose, this field visit provided an opportunity to explain the role of the Consultative Forum and of the Fundamental Rights Officer to local stakeholders.

The following locations were visited and/or meetings were held with: UNHCR Office in Athens, Greece; Frontex Operational Office (FOO) in Piraeus, Greece; Police Headquarters in Alexandroupolis, Greece, including participation in an evening patrol; Police station / Regional Coordination Centre in Orestiada, Greece (Evros region); First Reception Centre in Fylakio, Greece (Evros region); Administrative Detention Centre in Lyubimetz, Bulgaria; Border Crossing Point in Captain Andreevo, Bulgaria; Meeting with Frontex Operations Coordinator and Frontex Guest Officers, border guards deployed by Member States to take part in Frontex operations in Mytilini (Lesvos island, Greece); Local Coordination Centre in Mytilini (Lesvos island, Greece); attendance of debriefing interviews with asylum-seekers at Police Headquarters in Myitilini (Lesvos island, Greece); meeting with Amnesty International's Europe and International Secretariat in Lesvos, Greece; Police headquarters in Samos island, Greece; Coast Guard Headquarters in Samos island, Greece; Detention Centre in Samos island, Greece.

According to the agreed terms of reference for the visit, the delegation looked specifically into:

- Implementation of the principle of *non-refoulement*
- Identification and protection of members of vulnerable groups.

The Consultative Forum delegation reported on the visit and findings at the meeting of the Consultative Forum in October 2013. The observations made on the ground during such visits inform also the recommendations of the Consultative Forum on various issues of substance and procedure (e.g. training, risk analysis).

Based on the report, the Consultative Forum started to identify concerns and elaborate recommendations which the Consultative Forum seeks to convey to and discuss with Frontex Executive Director and Management Board of Frontex in 2014.

3.3. Risk analysis

Risk Analysis provides the basis for the decisions on Frontex coordinated joint operations. The Risk Analysis Unit (RAU) provides analysis at a strategic and operational level. Based on the strategic analysis, RAU issues recommendations for joint operations to be launched or continued. Risk anaylsys recommendations also informs the operational plans of all joint operations. Evaluations of joint operations then feed into further analysis of risks.

RAU collates information from the Member States, EU bodies, international organisations and the media with the aim of creating a picture of the situation at the EU's external borders both with regard to cross-border criminality and migratory trends. In the view of the Consultative Forum this information does not sufficiently cover the fundamental rights situation in countries of transit and critical political and other developments in countries of origin and transit that might trigger new migration flows.

One key element of Frontex risk analysis is the Annual Risk Analysis Report, which is a forecast looking 18 months ahead and is updated twice a year. Based on it, Frontex identifies the priorities for support to Member States. Specific issues are analysed in tailored risk assessment reports. Based on the operational evaluations further risk analysis is carried out.

Trends and situational analysis are continuously updated. It is important to mention that Frontex risk analysis not only serves internal purposes but also informs decision makers at EU and national levels.

The Frontex Fundamental Rights Strategy underlines the need to pay attention to the particular situation of persons seeking international protection and to the particular circumstances of vulnerable individuals or groups in need of protection or special care. The Fundamental Rights Strategy also foresees an impact assessment with regard to fundamental rights when proposing or preparing operational responses.

The consideration of the fundamental rights situation in third countries when collecting data to analyse and assess risk was one of the initial proposals that the Consultative Forum offered. The Consultative Forum member organisations have considerable information about this and could provide such information directly to RAU. The accessibility of Frontex' risk analysis related work posed an obstacle to providing such hands-on and tailored recommendations.

Screening is a mandatory part of the registration process and seeks to identify the nationality of the intercepted migrants. It is mandatory for the migrant and done as a rule by officers of the Host Member State, who can be assisted by Guest Officers.

Debriefing, by contrast, is voluntary for the migrant and seeks to produce intelligence about country of origin, reasons for travelling, routes and involvement and *modus operandi* of facilitators. Debriefings are

done by national border guards with or without experts deployed by Frontex, during interviews with the migrants that are distinct from the screening interviews. Debriefings provide RAU with intelligence that is essential for its work. This is why one of RAU's key activities is the preparation of debriefings.

RAU assured the Consultative Forum that debriefing interviews are only conducted with the consent of the migrant. The collected information is processed and then turned into intelligence for further analysis that is used for preparing decisions on joint operations. According to RAU's statements in meetings with the Consultative Forum, neither personalised information about the interviewees nor any figures relating to their individual nationality, gender and/or age are recorded.

This poses the question of if (and how) information concerning migrants' protection needs is recorded and processed. Fundamental rights violations which may have occurred during travel, including trafficking, or other protection relevant information can come up in debriefings. For such cases, appropriate follow-up procedures, including referral mechanisms, need to be established.

Guidelines for Debriefing Activities were developed by RAU in 2013. The Consultative Forum could only provide some ad hoc input on the spot at a joint meeting. The finalised Guidelines are now part of Operational Plans. Whilst feedback already given is partly reflected in the Debriefing Guidelines, the Consultative Forum still has some concerns regarding the debriefing procedure.

Recommendations of the Consultative Forum

1. Frontex should ensure that all debriefers deployed by Member States are able to identify cases where fundamental rights violations may have occurred during travel or upon arrival, to handle vulnerable and traumatised persons accordingly and to refer such persons to the relevant national authorities under the relevant referral procedures.

2. Frontex should record figures of referrals to national mechanisms.

   Outcomes:

   Frontex has taken these recommendations into account for the present version of the Debriefing Guidelines with regard to several details. The Guidelines foresee:

   - debriefers receiving general information on the human rights situation in the countries of origin and of transit prior to their assignment;
   - priority being given to address the basic needs of the migrants and to the provision of medical assistance;
   - the debriefing being an opportunity for asylum claims to be made and alleged instances of fundamental rights violations to be reported;
   - debriefing procedures duly taking into account gender specifications.

   The recording of numbers of referrals is still to be regulated.

3. Frontex should insist that interviewees are systematically informed in a language they understand on the role of the debriefer, the specific purpose of the debriefings and the possibilities of referral for persons who seek international protection.

   Outcomes:

   Frontex has taken this on. Furthermore, according to the Guidelines, interpreters must be clearly instructed to provide neutral, accurate and full interpretation.

4. Reporting of fundamental rights breaches should not be dependent on whether or not migrants lodge official complaints and should be adequately investigated in any event.

5. In cases where migrants complain about fundamental rights violations that have allegedly occurred under the jurisdiction a Member State, Frontex should follow-up with the respective Member State under procedures and mechanisms that need to be clearly defined.

   Outcomes:

   These issues are still to be discussed. The Debriefing Guidelines, however, regulate that the migrant should not face negative legal consequences with regard to his or her immigration process as a result of the debriefing.

6. Frontex should ensure that European data protection standards are applied to all personal data collected concerning migrants, if Frontex starts processing the personal data of migrants.

   Outcomes:

   The Consultative Forum is still discussing with Frontex the details of this issue.

7. The Debriefing Guidelines should be further developed in order to ensure that disclosing information about smugglers, other migrants, etc does not put the interviewees at risk of retaliation.

8. Migrants should not be subjected to several interviews for different purposes, as this might be confusing and put additional strain on them.

9. The development of guidelines relating to screening procedures should be a priority for 2014.

10. An assessment is needed of the use that is made of the Debriefing Guidelines on the ground.

    Outcomes:

    The Consultative Forum will discuss these issues with Frontex in the context of the evaluation and further development of the Debriefing Guidelines.

3.4. Training

3.4.1. Common Core Curriculum

The Common Core Curriculum is the framework developed by Frontex to standardise a set of skills and knowledge for basic-level border guard training in the EU. Modules include topics such as detection of false documents, stolen cars, human rights, international law and leadership. All Frontex training tools and activities build on the Common Core Curriculum. The Common Core Curriculum is anchored in the Frontex Regulation and its use is mandatory for the Member States.

The Frontex Regulation calls for the Consultative Forum to work with Frontex *"on the further development and implementation"* of the Common Core Curriculum.[39]

A Consultative Forum member participated in the Interoperability Assessment Programme, which is seeking to build an assessment tool of the national implementation of the Common Core Curriculum. The

39 Article 26a (2), second paragraph.

Consultative Forum stands ready to participate in any further work on the Common Core Curriculum.

3.4.2. Training of European Border Guard Teams (EBGT)

The EBGT Induction Training is preparatory training prior to the operational deployment of officers.

Consultative Forum members participated in two five-day sessions and reviewed the structure, methodology and content of the training, the training materials used, as well as the composition and profiles of the pool of 16 trainers. They also looked into the selection of trainees.

The Consultative Forum members were satisfied with the structure of the training, which was built around three core issues:

- basic knowledge about EU institutions, Frontex' organisational structure, the Frontex Regulation and Code of Conduct (CoC);
- basic knowledge about fundamental rights and access to international protection (including asylum, smuggling and trafficking);
- practical border guarding issues covering the operational plan.

The methodology was a blend of group exercises, presentations including the use of visual media as well as group discussions. Practical exercises helped the trainees link theory with the practical application of legal frameworks in different operational scenarios. The trainers had a non-judgmental attitude and were able to give practical and relevant examples from the field.

As to content, fundamental rights were explained very clearly and the emphasis was placed on the border guard's role to "protect the rights of those who are crossing the border", including the prohibition of torture or degrading treatment, freedom from slavery, freedom of movement and the limits to detention, the right to a fair hearing, the *non-refoule-*

ment principle as well as the difference between an asylum seeker and persons in need of other forms of international protection.

The trainers were insistent with regard to the obligation to give information about national asylum legislation and procedure in a language the person can understand and to take care of their immediate needs. The challenges that can be posed by different cultural references were pointed out.

The trainers drew attention to the special needs of female migrants. The latter issue was discussed during the session on human rights protection and reiterated by concrete examples as well as questions to the participants throughout the training.

In the session on trafficking, the crucial role of border guards in the identification of victims of trafficking was highlighted. With regard to child victims of trafficking, the trainers underlined the need to involve child-care organisations and that the child's best interests must always be the primary consideration.

The initial selection of trainees is carried out by the Member States on the basis of profile recommendations issued by Frontex. Participants had different levels of experience and expectations. This diversity of profiles made it difficult for the trainers to match individual expectations. Some trainees felt unchallenged while others felt over challenged. Also the level of knowledge of English varied significantly between trainees.

A final test is organised at the end of the each training session. However, trainees will be deployed even if they fail the final test.

It has been observed that a lot of time may elapse between the Induction Training and the actual deployment of an officer.

Recommendations of the Consultative Forum

1. Frontex should help Member States improve the selection criteria for national officers to be designated for the EBGT pool (profile recommendations) as well as the information provided to them on their future tasks with Frontex.

   Outcomes:

   The Frontex Training Unit has informed the Consultative Forum that they have been working on the further development of the EBGT members' profiles and on the training with regard to specific job-competences (e.g. the Border Surveillance Officer Sea / Land).

2. All officers in the EBGT pool should receive an Induction Training prior to deployment. All trainers of trainers should receive specific training on the respect of fundamental rights in border guard practice.

   Outcomes:

   Significant changes to the EBGT Induction Training have been initiated in the second semester of 2013 and will have to be implemented in 2014. It is foreseen that all officers who participate in the EBGT pool will receive Induction Training and that part of this training covers respect for fundamental rights in practice.

3. The Induction Training should better prepare trainees for the reality in the field, where border guards can be confronted with situations dramatically contrasting with their regular routine at home (e.g. massive influx, humanitarian crisis). Practical exercises can help them reflect on how, in practice, they can promote fundamental rights, including by identifying the special assistance needed by vulnerable migrants. Video footage and testimonies from both migrants and border guards (former trainees) should be used, including material that is critical of Frontex coordinated operations, such as films which show an operation from the migrant's perspective.

   Outcomes:

   More practical training for border guards is foreseen in the amended training programmes.

4. Outside experts (such as asylum experts or experts from NGOs deployed in the field) should be invited to contribute to the sessions of the Induction Training that relate to fundamental rights.

   Outcomes:

   The Frontex Training Unit has expressed their openness to this proposal.

5. Trainees who fail the test at the end of the Induction Training should not be deployed.

6. Induction Training should not be held more than six months before deployment. If participation in such training dates back more than six months from moment of deployment, officers in the EBGT pool should receive mandatory refresher training prior to deployment.

7. Refresher training should be delivered to all officers in the EBGT pool at regular intervals. Such training should have a large interactive component in which the practical experiences made by the trainees during their deployment are used for the benefit of both trainees and trainers.

8. A multilingual glossary of the expressions used in Frontex coordinated joint operations should be given to trainers and trainees to ensure linguistic consistency across the different training sessions and serve as an aide-memoire for trainees. This would also help avoid inapproriate terminology.

9. Because it is essential that Frontex instructions are well understood during operations, mandatory English courses should be given to those officers of the EBGT pool whose tests at the end of training show linguistic problems.

   Outcomes:

   These recommendations address issues that are partly within Member States' competences. The Consultative Forum is still discussing with the Frontex Training Unit which of these recommendations can be taken on in further training programmes.

3.5. Recommendations of the European Ombudsman

"In view of […] the considerable interest taken by civil society in the EU's management of external borders, including its fundamental rights dimension" European Ombudsman Nikiforos Diamandouros opened in March 2012 an own-initiative inquiry into the way in which Frontex implements Article 26 (a) of the Frontex Regulation.

The procedure began with a set of detailed questions which the Ombudsman addressed to Frontex and to which Frontex replied on 17 May 2012. The Consultative Forum was not at that time involved in this correspondence (as it had not yet been created).

On 9 April 2013, the European Ombudsman presented a draft recommendation consisting of 18 action points (numbered A to M) to the Executive Director of Frontex and asked to receive *"a detailed opinion"* back from Frontex by 31 July 2013. As indicated by Mr Diamandouros *"the detailed opinion could consist of the acceptance of |his] draft recommendation and a description how it has been implemented"*.

The European Ombudsman's recommendations touched upon six areas: Frontex Fundamental Rights Strategy, its Action Plan to implement the Strategy, Frontex Codes of Conduct, the possibility to terminate or suspend operations, the Consultative Forum and the Fundamental Rights Officer.

In a letter dated 7 June 2013, the Executive Director shared the draft response of Frontex to the European Ombudsman with the Consultative Forum and asked for comments. The comments were sent to Frontex on 21 June 2013. The final answer of Frontex was sent to the European Ombudsman on 25 June 2013. On 12 November 2013, the European Ombudsman closed its own-initiative inquiry, acknowl-

edging its overall satisfaction with Frontex' efforts, mentioning that Frontex has adequately addressed the 12 recommendations of the European Ombudsman.

Frontex sent its 13-page response to the European Ombudsman by the requested deadline.[40]

40 Frontex answer on recommendation of the EO to Frontex on Fundamental Rights, 25 June 2013, EO inquiry OI/5/2012/BEH-MHZ, page 13.

A number of the "comments" made by the Consultative Forum on 21 June 2013 with respect to the draft response of Frontex to the European Ombudsman could be seen as recommendations. The format of the "comments" and the number of issues addressed make it slightly difficult to follow, in this case the format of the other chapters of this annual report where the recommendations and the outcomes are systematically compared. It is therefore sufficient to indicate that the Consultative Forum was generally satisfied with the official reply sent by Frontex. There are, however, two major recommendations which the Consultative Forum has made in line with, or building on, the recommendations of the European Ombudsman which still need implementation.

Recommendations of the Consultative Forum:

1. The "*effective mechanism to monitor the respect for fundamental rights in all the activities of the Agency*", which Frontex is required to put in place, pursuant to the Frontex Regulation, should comprise a procedure for acting upon allegations of serious fundamental rights infringements.

   Outcomes:

   The setting up of an effective monitoring mechanism was put on the work programmes for 2014 of both the Fundamental Rights Officer and Frontex. Consistently the Consultative Forum will contribute.

2. The said fundamental rights monitoring mechanism should also offer an effective complaints mechanism for individuals who consider that their fundamental rights have been violated in the context of a Frontex coordinated operation.

   Outcomes:

   In its response to the European Ombudsman Frontex did not accept this recommendation arguing that *"the competences of the Fundamental Rights Officer, as defined in the Frontex Regulation, do not include resolving external and individual complaints as she has no executive powers as such. For this purpose, other institutions are competent (e.g. national and EU courts)"*.[35]

4 CONCLUSIONS FOR 2013

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The EU's border policies and their impact on the human rights of migrants have been critically discussed in several reports published in 2013.[41] There is consensus in the Consultative Forum that Frontex' role in the context of border management has developed far beyond mere coordination of Member States' activities.

In doing so, as an EU Agency, Frontex is bound by the EU Charter of Fundamental Rights and by the rules of international human rights law, which are part of *jus cogens* or international customary law (such as the *non-refoulement* principle) or are contained in EU law, including by reference to international human rights and refugee law instruments. Frontex has to take into consideration the rights and obligations enshrined in the European Convention on Human Rights and the jurisprudence of the European Court of Human Rights, which have been accepted as legally binding by all the EU member states and constitute general principles of EU law.[42]

41 See Pro-Asyl, *Pushed back. Systematic human rights violations against refugees in the Aegean Sea and at the Greek-Turkish land border*, November 2013, available at: <http://www.proasyl.de/fileadmin/fm-dam/l_EU_Fluechtlingspolitik/proasyl_pushed_back_24.01.14_a4.pdf>; Amnesty International, *Frontier Europe: Human rights abuses on Greece's border with Turkey*, July 2013 (Index: EUR 25/008/2013), available at: <http://www.amnesty.org/en/library/asset/EUR25/008/2013/en/d93b63ac-6c5d-4d0d-bd9f-ce2774c84ce7/eur250082013en.pdf>; United Nations, General Assembly, Report of the Special Rapporteur on the human rights of migrants, François Crépeau: "Regional study: management of the external borders of the European Union and its impact on the human rights of migrants", Doc. A/HRC/23/46, 24 April 2013, available at: <http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.46_en.pdf>; Council of Europe, Parliamentary Assembly, Resolution 1932 (2013). *Frontex: human rights responsibilities*, 25 April 2013, available at: <http://assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=19719&Language=EN>; European Ombudsman, "Special Report of the European Ombudsman in own-initiative inquiry OI/5/2012/BEH-MHZ concerning Frontex", supra note 10; Recommendations of the European Ombudsman – www.ombudsman.europa.eu/en/cases/draftrecommendation.faces/en/49794/html.bookmark; EU Fundamental Rights Agency (2013): Fundamental Rights at Europe's southern sea borders - accessible at http://fra.europa.eu/en/publication/2013/fundamental-rights-europes-southern-sea-borders.

42 Article 6 of the Treaty of the European Union.

This means that Frontex must ensure it is not complicit in any act that would violate human rights.[43] To avoid this risk, the Frontex Regulation requires the Frontex Executive Director to *"suspend or terminate, in whole or in part, joint operations" if human rights violations occur and "if he/she considers that [they] are of a serious nature or likely to persist"*.[44] In the case of joint return operations, Frontex is required to refuse funding of a certain operation if such violations occur.[45]

However, in spite of the guidance provided by the current legal framework, the responsibilities remain to some extent unclear in practice when it comes to interpreting the rules. Frontex has in place various procedures on reporting and the conduct of officers. It is commonly agreed that the actors need to respect the rules and obligations that arise from the EU Charter of Fundamental Rights, the Schengen Borders Code, international obligations and other legal instruments. The question remains as to how fundamental rights are effectively implemented in daily practice and mainstreamed into the procedures within joint operations. The currently established monitoring mechanism under the lead of the Frontex Fundamental Rights Officer could improve this and can contribute to the definition of effective measures in cases of non-compliance.

The Consultative Forum relies on Frontex' management to consider the recommendations and to change certain processes to enhance the fundamental rights compliance. The Consultative Forum in close

43 According to Article 41 of the *UN Draft Articles of the International Law Commission on the international responsibility of international organisations for wrongful acts under international law*, which should be used to assess the international liability of the EU and that of its agencies also under the Charter, the EU may be responsible if it or one of its bodies "aids or assist a State or another international organisation in the commission of an internationally wrongful act by the State or the latter organisation", if it "does so with knowledge of the circumstances of the internationally wrongful act" and "the act would be internationally wrongful if committed by that organisation".

44 Frontex Regulation, Article3.1 (a), fourth paragraph. See also the chapter on Joint Operations, above.

45 Frontex Regulation, Article 9; CoC JROs, Article 18.

cooperation with Frontex and the MB intends to follow-up on the impact of its recommendations.

The Consultative Forum can follow up on the impact and implementation of its recommendations by

- asking Frontex or the Management Board for information and proposing action;
- cooperating with the Fundamental Rights Officer in specific areas where only she has a clear monitoring mandate and access to information.

In its first year the Consultative Forum has benefited greatly from the excellent cooperation with the Frontex Fundamental Rights Officer. The work of both bodies has proven to be complementary.

Visiting joint operations has turned out to be indispensable if the Consultative Forum wants to base its recommendations on the actual developments and information from 'the field'. Additionally, access of the Consultative Forum to certain sets of Frontex documents must be improved if the Consultative Forum is expected to produce more meaningful recommendations. A positive experience, which should be considered as good practice for future consultation, was that Frontex invited Consultative Forum members to 'review meetings' with national experts. This allowed for a powerful exchange of ideas with national experts and is considered a good way to avoid diverging fundamental rights analyses.

More time is needed for the consultation processes (including the preparation of expert meetings) as the timelines should allow for the con-

sultation of relevant experts within the organisations and institutions that are represented on the Consultative Forum.

The budget allocated to the Frontex Consultative Forum covers the travel and subsistence costs of up to three meetings per year. The costs of participation of Consultative Forum members in Frontex activities are covered by the respective project budget of Frontex. All other work (analyses, drafting of reports or contributions, consultations with other Consultative Forum members, exchange and engagement with other stakeholders, etc) is carried out by the Consultative Forum members within their regular working time and with their organisations' resources; it must therefore be reconciled with their other duties. This limits the time and means members can devote to the work of the Consultative Forum.

Very good working relations have been established during this first year of the functioning of the Consultative Forum and between the Consultative Forum and the respective Frontex units. Joint meetings, activities and exchanges took place in an open and constructive atmosphere. Candid discussions were possible because all involved managed to establish a mutually respectful and trusting relationship.

Given that the field of fundamental rights protection at the EU's external borders is not only a technical matter but also a highly politicised one, it was not self-evident that this level of working relations could be achieved. It remains crucial for the future work to continue

to cherish trust in order to be effective. The lessons learned from the first year will help in this respect.

The Consultative Forum is ambitious with regard to demonstrating that cooperation between the broad spectrum of civil society which it represents and Frontex can help improve the fundamental rights protection at the EU's external borders and invites Frontex staff members, Frontex Management Board members and national authorities to proactively engage with the Consultative Forum.

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In 2014, the priorities for the Consultative Forum will be as follows:

- assist Frontex in the further development, revision and implementation of the Frontex Fundamental Rights Strategy;
- provide recommendations to Frontex strategic planning processes and documents, such as the Agency's draft Programme of Work 2015;
- assist Frontex in designing and putting in place "an effective mechanism to monitor the respect for fundamental rights in all the activities of the Agency" as required by the Frontex Regulation;[46]
- assist Frontex in translating the provisions on fundamental rights protection that are contained in the Eurosur Regulation[47] and the Maritime Borders Surveillance Regulation[48] into practice.
- assess the way in which the Frontex Code of Conduct for Joint Return Operations is translated into practice during Frontex coordinated operations and the extent to which this Code of Conduct has or has not inspired national returns operations.

In terms of Working Methods the Consultative Forum will:

- propose amendments to its own Working Methods to the Management Board;
- ask to be invited to send delegations on visits to Frontex coordinated operations in order to collate information and data that allow the Consultative Forum to develop realistic recommendations in line with a full understanding of Frontex' daily practices.

46 Article 26a (1).

47 Regulation (EU) No 1052/2013 of the European Parliament and of the Council of 22 Oct. 2013 establishing the European Border Surveillance System (Eurosur), OJ L 295, p. 11.

48 See the Commission's proposal for a regulation of the European Parliament and of the Council establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by FRONTEX - COM (2013) 197 final.

- seek closer contact and more intensive direct dialogue with the Management Board.[49]
- propose the participation of specialised Consultative Forum members in thematic workshops.

The Consultative Forum will also assess the impact of the recommendations it has made to Frontex.

When Frontex will be evaluated by an external consultancy (evaluation under Art. 33 of the Frontex Regulation), the Consultative Forum is ready to contribute to the part concerning fundamental rights compliance, as has been proposed by Frontex.

49 Consultative Forum members were invited twice to meet with the Management Board in 2013 and found the exchanges held on those occasions fruitful and important.

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FRONTEX

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