

SHARED PROJECT

Joint Guidelines on “Shared Responsibility” for European Integrated Border Management

The *Joint Guidelines on ‘Shared Responsibility’ for European Integrated Border Management* are the outcome of a collaborative effort involving a diverse array of stakeholders, including EU actors, NGOs, UN bodies, and academic experts. The guidelines intend to provide clarity and direction to navigate the complex terrain of shared responsibilities arising in the context of multi-actor interventions engaging the European Border and Coast Guard Agency's (EBCGA) operational and legal regime. The responsibility shared between the EBCGA and national authorities as well as other EU bodies, agencies, and third countries, though acknowledged in the relevant legislation, lacks a clear delineation of its scope and legal repercussions. Spanning XII comprehensive sections, this document meticulously identifies and addresses pressing issues related to the definition and operationalization of shared responsibility, providing a roadmap for both policymakers, legal professionals, and scholars. Crafted as an interpretative instrument with a view to enhancing legal certainty and facilitate compliance with EU principles and values, this tool offers insights into the intricate landscape of European integrated border management (EIBM). Most propositions are drafted as recommendations addressed to specific bodies. When no specific addressee is identified, it is left for the Union and the Member States to select the best-suited actor with the power and expertise to implement the guideline concerned. The collective understanding of the drafters is that these 112 guidelines can be implemented and operationalised without the need for legislative reform of the EBCGA Regulation 2019/1896.

TABLE OF ABBREVIATIONS

Abbreviations	Definitions
ARSIWA	Articles on the Responsibility of States for Internationally Wrongful Acts
ARIO	Articles on the Responsibility of International Organizations
CJEU	Court of Justice of the European Union
CF	Consultative Forum
CFR	Charter of Fundamental Rights
CPT	European Committee for the Prevention of Torture
CSDP	Common Security and Defense Policy
DPA	Data Protection Authority
DPO	Data Protection Officer
EUAA	European Asylum Office
EBCGA	European Border Coast Guard Agency
ED	Executive Director
EDPS	European Data Protection Supervisor
EIBM	European Integrated Border Management
EU	European Union
EUNAVFOR	European Union Naval Force
EUROSUR	European Border Surveillance System
FRA	Fundamental Rights Agency (of the European Union)
FRM	Fundamental Rights Monitor
FRO	Fundamental Rights Office (of Frontex)
FSWG	Frontex Scrutiny Working Group
GDPR	General Data Protection Regulation
HEC	Horizontal Enabling Conditions
ICC	International Coordination Centre
ICM	Individual Complaint Mechanism
ILC	International Law Commission
IT	Information Technology
LIBE	Committee on Civil Liberties, Justice, and Home Affairs of the European Parliament
MB	(Frontex) Management Board
MoU	Memorandum of Understanding
MRCC	Maritime Rescue Coordination Centre
NCC	National Coordination Centre
NGO	Non-Governmental Organization
OLAF	(European Union) Anti-Fraud Office
PAD	Public Access to Documents
PRD	Public Register of Documents
SAR	Search and Rescue
SC	Standing Corps
SBC	Schengen Borders Code
SIR	Serious Incidents Report
SOLAS	International Convention for the Safety of Life at Sea
SOP	Standard Operating Procedure
TFEU	Treaty on the Functioning of the European Union
UNCLOS	United Nations Convention on the Law of the Sea
UN	United Nations
WA	Working Arrangement

I. Overarching Legal Background and Definitional Aspects

- 1) All actors involved in EIBM are required to act in line with existing EU and international legal obligations, including rule of law standards, democratic guarantees, and fundamental rights.
- 2) All EIBM activities have the potential to impact the rights that individuals derive from EU and international law, including absolute rights, such as the right to life, the prohibition of ill treatment, the right to asylum, and the principle of *non-refoulement*. This requires all EIBM activities to be performed in a manner that respects, protects, and promotes compliance with fundamental rights at all times.
- 3) Fundamental rights are an integral part of EIBM, concerning not only the activities of the EBCGA (Frontex) but also those of the Member States. Although most of the fundamental rights provisions of the EU borders *acquis* are addressed to Frontex, the Member States remain subject to the observance of fundamental rights when acting within the scope of application of EU law, including when implementing EIBM on their own (Art 51 EU Charter of Fundamental Rights (CFR)).
- 4) The EU borders *acquis* establishes EIBM as a 'shared responsibility' (Art 7 EBCGA Regulation). However, nowhere has the EU legislator defined the term or provided for its specific regulation. This is despite increasing joint action at the common external borders of the Union, involving different actors, and the extraterritorial implementation of EIBM with or in third countries.
- 5) The lack of a definition does not absolve the relevant actors from their respective obligations. This makes it important to resolve terminological uncertainties and establish the legal implications in secondary instruments, such as a Commission Decision and/or in standards adopted by the Frontex Management Board (MB).
- 6) The Commission and the Frontex MB should adopt clear definitions of 'shared responsibility' (including in contradistinction to 'shared competence'), 'primary responsibility', 'exclusive responsibility', and 'ultimate responsibility' in the context of EIBM to provide for a common understanding and ensure a consistent interpretation and application of these concepts in law, policy, and practice.
- 7) In so doing, both the Commission and the Frontex MB should take into account that EU law constitutes a distinct legal framework, but that it remains part of the international legal system. To avoid fragmentation, unnecessary conflicts and promote coherence, 'shared responsibility' should be construed in line with international law and EU legal standards in related domains (*Kočner v. Europol*).

- 8) The ensuing regime should align with the provisions of the International Law Commission (ILC) Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) and Articles on the Responsibility of International Organizations (ARIO). It should specify rules that determine the *ex ante* distribution of responsibility for the performance of tasks and duties and establish the *ex post* distribution of liability in cases of non-compliance with the relevant obligations. This should be achieved by reflecting and refining international principles and adapting them to the EU context.

II. **A Framework for 'Shared Responsibility'**

- 9) The notions of 'integrated', 'nexus-based' and 'relational' responsibility, put forward within the [SHARED project](#), are complementary and provide a basis for the rationalisation of the 'shared responsibility' framework to be devised by the Commission and/or the Frontex MB in a way that responds to the needs of the EIBM system of the EU. This framework should be developed in line with EU constitutional law principles, the Schengen *acquis* and the ARSIWA and ARIO provisions. The primary goal should be addressing the problem of 'many hands', taking account of the complementary and overlapping roles of the different actors involved in joint interventions, including private entities and other non-State actors. This involves formulating concrete and actionable provisions that allocate *ex ante* and *ex post* responsibility in a manner that is transparent, predictable, and equitable.
- 10) The Frontex MB should adopt a coherent and operational 'shared responsibility' framework that clarifies command-and-control structures and the distribution of competences, tasks, duties, and functions of Frontex, taking into account its executive decision-making powers and the overlap with Member States' responsibilities (see III) in all types of joint interventions. A clear distribution of responsibility between Frontex, the EU Member States and the actors collaborating with them, is necessary to allow for an effective *ex ante* allocation of responsibilities within EIBM teams.
- 11) In case of a breach of obligations, in light of the wording of Art 7 EBCGA Regulation, the regime should be constructed as entailing a presumption of 'shared responsibility' among the actors concerned. This 'shared responsibility' should be interpreted as 'joint and several responsibility' pursuant to Art 48(1) ARIO and general principles common to the domestic traditions of the Member States.
- 12) 'Joint and several responsibility' should be understood as each actor being responsible for the collective (joint) outcome and being individually required (several) to make full reparation to the victim if/when requested. In accordance with this rule, the injured party may bring a case against any of the responsible actors for the entirety of the harm endured as a result of their wrongful conduct taken as a whole. The rule must, however, take account of the prohibition of double recovery, and the right of recourse

of the actor who has provided reparation against the other responsible actors for an equitable distribution of liability.

- 13) Within this framework, it should thus be possible for all damage claims to be addressed to Frontex, as the coordinator of joint interventions, following the model established in *Kočner v. Europol*. The establishment of ‘ultimate responsibility’ will be subsequent to and independent from redress offered to victims.
- 14) Both *ex ante* and *ex post* ‘shared responsibility’ rules, deriving from the presumption of ‘shared responsibility’ established by Art 7 EBCGA Regulation, are to be included in operational plans for all actors to understand their duties and, in case of a breach, to ensure that injured parties can access an effective remedy. This approach will guarantee a rule of law-compliant implementation of EIBM in practice.

III. Specification of Obligations and Distribution of Ex Ante ‘Shared Responsibility’

- 15) The Frontex MB should adopt overarching rules distributing responsibility for tasks and duties conducted or coordinated by Frontex, its different units and agents, particularly those that may impact the rights of individuals. These rules should include a clear demarcation of the roles of Frontex, national authorities, and any other entities involved in joint operations, such as National Coordination Centres (NCC) and the International Coordination Centre (ICC). Such rules should cover all operational aspects, including data collection and data processing and be incorporated into and further specified in operational plans.
- 16) The MB needs to specify the responsibilities of Frontex’s statutory staff, especially of Standing Corps (SC). The general EU Staff Regulations are not detailed enough and do not sufficiently account for the specific operational nature of the SC, including the use of force and possible recourse to firearms, which should be strictly monitored and limited. The command-and-control structure, reporting channels, communication lines, and all operational, technical, and organisational arrangements need to be fully clarified. Training is required to meet the needs of their specific responsibilities.
- 17) Art 88 EBCGA Regulation requires the Agency and the host Member State to determine the specific responsibilities for compliance with data protection obligations in a transparent manner before each joint activity (see V). This same model should apply in relation to the other fundamental rights responsibilities relevant to the operation and regarding all participating actors/entities.
- 18) A shared responsibility-based interpretation of EIBM requires that the human rights obligations of Frontex, national authorities, and any other entities with which they may collaborate be concretised, rather than formulated in the abstract. General calls for Member State officials (e.g. in the Schengen Borders Code 2016/399 (SBC)) and

Frontex (e.g. Arts 1, 80 EBCGA Regulation) to respect fundamental rights need detailed specification, particularly in relation to the conduct of border checks, surveillance, detection, search and rescue (SAR), information collection/sharing, interception, and return/expulsion activities at the common external borders and in third countries.

- 19) The rules should be clear and precise enough to determine which specific conduct the actor concerned should/should not engage in before, during, and after its intervention with a view to fulfilling its existing fundamental rights duties as per the EBCGA Regulation and related instruments (including the SBC, the Maritime Surveillance Regulation 656/2014, the EUROSUR Regulation 1052/2013, the Common European Asylum System instruments, and the CFR).
- 20) Training on the content of obligations and the specific actions to be or not to be undertaken by the individual actors should be provided prior to any joint activity. The Agency's training curricula should be revised and updated to reflect this shared responsibility-based interpretation of EIBM and the related fundamental rights obligations of all actors intervening in joint operations.
- 21) The EU, in light of its own international obligations under the UN Convention on the Law of the Sea (UNCLOS) (given its accession to the Convention per Council Decision 98/392), under international customary law and on the basis of fundamental rights duties it shares with the Member States (Art 51 CFR), should develop an effective SAR mechanism that clearly allocates the relevant duties amongst all intervening actors.
- 22) Implementing SAR obligations in good faith involves enhancing the rescue capacity of joint operations, in line with Frontex's expanded SAR mandate under the EBCGA Regulation, and providing effective support to rescue efforts by other actors at sea. Effective SAR services must be provided within the SAR zones of the EU coastal Member States, with the EU's assistance, in a way that satisfies the obligations of the EU and its Member States under international maritime and fundamental rights law.
- 23) This includes ensuring that Frontex and EUNAVFORMED deployments are properly equipped to perform rescues and that any aerial and other assets contribute effectively to overall rescue efforts, leading to the disembarkation of survivors in a place of safety (discarding Libya and other countries without an effective asylum system) ensuring compliance with the principle of *non-refoulement* and the right to access international protection.
- 24) Command-and-control structures, division of labour, and clear instructions on when and how to release mayday signals and proceed to the rescue of persons in distress, including when confronted with the silence or opposition of the competent Maritime Rescue Coordination Centre (MRCC), are necessary. The Frontex MB should adopt

rules in this regard, with input from the Fundamental Rights Office (FRO), which should be allowed to oversee compliance throughout the duration of operations.

- 25) The MB should specify the role and responsibilities of the Frontex Coordinating Officer explicitly in the command-and-control structure of joint operations, demarcating oversight duties and accountability for addressing any violations. In case of grave danger or imminent loss of life, s/he should be allowed to act of his/her own initiative and order life-saving interventions to participating units and in particular Frontex's own personnel, including within SC deployments.
- 26) The Executive Director (ED) should ensure the incorporation of a clear identification of SAR tasks and functions of each participating actor in all operational plans, in line with the overarching rules developed by the MB. This should cover all relevant processes as well as the links and transitions between them, detailing the specific roles of Team Leaders, Liaison Officers, Intelligence Officers, and Team members within well-defined provisions that ensure smooth communication, efficient coordination, and the effective delivery of assistance at sea to avoid loss of life.
- 27) In the context of interventions at land borders, specific duties with regard to the facilitation of access to international protection and the asylum procedure need to be itemised both in the overarching rules to be developed by the MB and in all operational plans prior to deployment. The link between the borders *acquis* and the instruments of the Common European Asylum System need to be fully clarified in training materials, command-and-control regimes, and Standard Operating Procedures (SOPs).
- 28) Regarding return operations, clear definitions of all relevant concepts (e.g. of 'assisted return', 'voluntary return', or 'voluntary departure') should be provided by the MB and in operational plans to ensure the uniform interpretation of EU law.
- 29) An adequate number of staff with sufficient capacity, including within the pool of forced-return monitors, must be ensured by Frontex and the Member States. Without such provision, the Agency should refrain from starting or engaging in return operations for lack of compliance with the relevant legal standards.

IV. Transparent Decision-Making and Access to Information

- 30) In line with the principle of good governance (Art 41 CFR), decision-making processes before, during, and after joint actions coordinated by Frontex should be transparent towards both EU institutions and the general public. Although specific rules may distinguish between the two and be governed by different thresholds, democracy, rule of law, and fundamental rights considerations require a minimum level of transparency to be guaranteed in all cases. While security concerns may play a role in

the determination of access to information, ensuring compliance with EU values and the effectiveness of rights should remain the key priority, especially as concerns the chain of command and the allocation of responsibility for human rights duties.

- 31) The chain of command and the division of tasks and duties in all Frontex-led activities should be disclosed and always remain ascertainable, including any changes adopted in the course of an operation.
- 32) The EBCGA's transparency regime, adopted by the MB, should be revised with respect to access to documents, taking into account EU Ombudsman and European Parliament recommendations. The Agency is subject to Regulation 1049/2001, which needs to be interpreted and applied in a way that complies with good governance standards, allowing individuals access to information. This is necessary to guarantee their EU rights.
- 33) Transparency obligations should not be limited to access to documents. The Agency should adopt a proactive approach to transparency, in accordance with Regulation 1049/2001 and the recommendations of the EU Ombudsman and the European Parliament. This approach should include, among others, proactive communication of information to the European Parliament on all Frontex's activities, expenditure, and interactions with Member States and third parties. This is essential to guarantee the legitimacy and democratic accountability of the Agency.
- 34) The MB should oversee the completion of the Public Register of Documents (PRD) to encompass all documents concerning decision-making, planning, procurement, or projects undertaken by Frontex, and references to all documents produced or received by the Agency.
- 35) In light of the Agency's extraterritorial activities, the right of access to Frontex documents should be expanded to all individuals, including third-country nationals not resident in the EU. Access to documents requests should be processed with no reference to the nationality or country of residence of the requester. This expansion should allow for legitimate exceptions, while still ensuring oversight, scrutiny, and accountability of operational conduct, decision-making, and policies that affect individuals outside the EU.
- 36) For this purpose, the MB should update the practical arrangements for the application of Art 114 EBCGA Regulation. This update should reflect the enhanced need for transparency triggered by the increase in powers allocated to the Agency and remove the limitations imposed by the 25/2016 Decision of the MB in this regard.
- 37) In this line, the Public Access to Documents (PAD) team of the Agency should be restructured: Frontex should create a separate unit that is independent, adequately

resourced, and fully operational. This unit should have expertise in transparency obligations, EU administrative law and fundamental rights, and be dedicated to handling access to documents and related transparency measures.

V. Data protection

- 38) Operational plans should explicitly assign roles and responsibilities in relation to data collection and data processing tasks, taking account of the decisions and guidelines of the European Data Protection Supervisor (EDPS), the relevant case law of the Court of Justice of the EU (CJEU), as well as decisions of the EU Ombudsman. This requires clear delineation of the different responsibilities of Frontex, national authorities, and other EU agencies (see III), especially in 'joint controllership' situations.
- 39) Clear and publicly available documentation in this regard should be provided to ensure transparency (see IV) and enable individuals to seek remedies if necessary (see XII). It is essential to establish mechanisms for effective judicial protection for any data breaches. The Kočner 'joint and several liability' model should apply by default.
- 40) A detailed data protection regime must be adopted, in close cooperation with the EDPS and the Data Protection Officer (DPO) of the Agency, to ensure compliance at all times by all partners intervening in joint activities with the General Data Protection Regulation 2016/679 (GDPR), general principles of EU law and fundamental rights. Unauthorised access, transfers, and data sharing processes must be avoided, especially vis-à-vis third countries and private entities not directly bound by or capable of complying with the relevant standards (such as the Libyan Coastguard). MB Decisions 68/2021 and 69/2021 should be revised in this regard.
- 41) Following the EDPS advice, regular or structural data transfers with third countries, e.g. in the context of interdiction or return activities, require the negotiation of legally binding (and enforceable) agreements with the States concerned (see VII and XII).
- 42) Such detailed data protection regime needs to pay close attention to data processes regarding EUROSUR to avoid data protection breaches and specify the *ex ante* allocation of shared responsibilities between the Agency and the Member States. This is particularly urgent on consideration of the apparent misalignment of Arts 28 and 89 EBCGA Regulation and the increasing capacities of the system as well as its potential future expansion, e.g. through the interoperability of existing databases.
- 43) Coordinated supervision, led by the EDPS in collaboration with national data protection authorities (DPAs), is essential to monitor all the data processing activities of Frontex. These bodies should adopt, together with the Frontex DPO, specific guidelines and SOPs outlining the processes and requirements for effective supervision in line with the GDPR.

- 44) The MB should ensure that the DPO is properly resourced to allow it to carry out his/her tasks effectively.
- 45) In this context, the EDPS and national DPAs should use their powers to hold all responsible actors accountable and rectify any wrongly attributed roles. Supervisory authorities should actively exercise their powers, including conducting inspections at closed centres and at border locations (see X).

VI. Funding and Operational Support

- 46) Prior to the allocation or disbursement of any EU funding supporting border control or migration management initiatives, the European Commission and/or Frontex should carry out comprehensive and transparent *ex ante* human rights impact assessments based on relevant EU and international standards and taking account of public consultations, expert opinions, and information/recommendations by the Fundamental Rights Agency (FRA), the EU Ombudsman, the EU Anti-Fraud Office (OLAF), the European Court of Auditors, and the European Parliament before approving EU funded projects and/or assistance to Member States or third countries. The findings of assessments should be made public to ensure transparency and enable accountability (see IV).
- 47) The Agency's risk and vulnerability assessments should incorporate an evaluation of the human rights implications of all joint interventions. Any risks identified should be mitigated beforehand. If mitigation is not possible, the activity and/or the assistance envisaged should be withheld and not proceed until such time as the circumstances allow for compliance with fundamental rights up to the necessary level.
- 48) Throughout the lifespan of EU-funded projects, their implementation should be regularly monitored for continued compliance with the relevant EU and international standards. In particular, a dedicated monitoring mechanism to oversee fulfilment of horizontal enabling conditions (HEC), generally applicable to EU funding, and specific conditionality clauses should be established, especially with a view to ensuring the protection of fundamental rights.
- 49) The European Commission should require beneficiary countries and Member States to demonstrate effective measures for compliance with fundamental rights as a precondition for receiving EU funding or assistance. This should include establishing independent monitoring bodies and effective remedies for any breaches of the relevant obligations (see X, XI and XII).
- 50) Under the FRO's leadership and making full use of the Agency's Fundamental Rights Monitors (FRMs), a robust framework should be introduced with specialised officers

to check project implementation and compliance with fundamental rights at regular intervals, including through periodic monitoring and evaluation reports and unannounced visits to key sites. Prompt action should be adopted to suspend and/or recover funds in cases of non-compliance.

- 51) The European Parliament should play an enhanced supervisory role in this framework, by obtaining regular updates from the Commission, Frontex, and other relevant actors on project implementation in Member States and/or third countries, focusing on measures to prevent fundamental rights violations, and assessing the effectiveness of third-party monitoring mechanisms (see X and XI).
- 52) The European Parliament should be able to monitor and review how the European Commission determines and assesses the fulfilment of HEC by Member States, engaging civil society in the review process and taking account of information and/or recommendations by FRA, the EU Ombudsman, OLAF, and the European Court of Auditors.
- 53) FRA, the European Court of Auditors, OLAF, and the EU Ombudsman should strengthen their review and oversight roles, within the scope of their respective mandates, by allocating adequate time and resources to review respect with fundamental rights as part of compliance with the principle of sound financial management (see X).

VII. Cooperation with third countries

- 54) All forms of cooperation with third countries, including in the context of information exchange and capacity building, should be subject to legally binding agreements that establish the framework and conditions for joint action, including enforceable guarantees to ensure sufficient legal protection to individuals.
- 55) Working Arrangements (WAs) concluded prior to EBCGA Regulation are misaligned with the applicable legal framework. As soft law instruments, they should only be utilised to implement pre-existing hard law commitments, to clarify the specific terms of the intended cooperation and/or to facilitate EU law-compliant implementation. WAs should not be used to replace, even less to subvert, legal protections, especially individual rights.
- 56) Consequently, the WAs currently in force should be rescinded and replaced with legally binding agreements or revised and adapted as implementation instruments of pre-existing legal accords. The European Commission and/or the MB should provide a new standardised format that explicitly takes account of the specific and judicially actionable fundamental rights, including data protection, obligations of the EU, Frontex, and the Member States with which the third country concerned will

collaborate (see III). The precise ways in which these will be safeguarded and enforced on the ground and in each individual case should be spelt out in the legally binding agreement to which the WA relates and then reiterated in the WA itself, including an indication of individual remedies and effective legal guarantees (see XII).

- 57) Revised WAs concluded between Frontex and third countries should be drafted in precise and actionable terms, particularly in sensitive areas, such as security, border control, and migration management, as well regarding any conduct likely to have an impact on individuals. Adhering to such guidelines is essential for upholding good governance standards and ensuring compliance with basic rule of law requirements, including fundamental rights.
- 58) Frontex should not initiate or continue to pursue cooperation with or in third countries where recurring human rights violations against migrants have been documented by reliable sources, including civil society, domestic/international courts, or international organisations. *Ad hoc* risk and vulnerability assessments, considering fundamental rights, including data protection impacts, should be conducted before any cooperation is launched.
- 59) If violations occur during the implementation of any activity or operation deployed with or in a third country, funding to the activity or operation should be withdrawn, cooperation should be suspended and, if no appropriate guarantees and mitigation mechanisms have been adopted, fully terminated (Art 46 EBCGA Regulation).
- 60) All deployments of Frontex officials and SC should be subjected to Status Agreements without exception.
- 61) Status Agreements should always be conditional upon a human rights risk and vulnerability assessments. The EU should refrain from concluding Status Agreements with non-Refugee Convention parties and with countries whose human rights record has deteriorated/is rapidly deteriorating (such as Libya or Tunisia). These agreements should contain specific provisions on fundamental rights protection, including enforceable remedies and effective guarantees (see XII).
- 62) The current Model Status Agreement contains different clauses of jurisdictional immunities. These jurisdictional immunities should, however, not translate into legal impunity from civil and criminal liability and should be specified accordingly.
- 63) Participation in or contribution to human rights violations perpetrated in the course of, or resulting from, joint actions should not escape liability. Prosecution, whether through EU or domestic channels, should proceed in line with rule of law and fair trial guarantees to ensure appropriate redress to injured parties.

- 64) A neutral decision-making body, such as a special Tribunal or the General Court of the EU, with power to establish responsibility and provide redress, should decide on a case-by-case basis on the jurisdictional immunities to be granted to Frontex officers and staff from the participating Member States, applying them only to conduct performed strictly in discharge of official functions.
- 65) The decision to waive immunities should be adopted following a well-defined procedure, with a clear set of criteria determining when the waiver applies, including circumstances where the waiver becomes mandatory, given the gravity of the conduct concerned. The procedure and the criteria should be set out in the Status Agreement or in a separate claims agreement. The misapplication of this procedure should allow the injured party to lodge an appeal before the CJEU.
- 66) The decision on the waiver of immunities of Frontex and/or Member State staff should be made public, and anonymised only when privacy or security considerations demand it.
- 67) In this regard, specific SOPs, including a clear responsibility regime for Category 1 (Frontex's own staff) within the Standing Corps is necessary for full alignment with the 'shared responsibility' framework (see III).
- 68) The use of force, including the use of firearms, should be strictly monitored and subjected to tightly defined rules that align with domestic and international legal standards and ensure compliance with fundamental rights by all actors concerned. The current supervisory mechanism on the use of force by statutory staff, including SC (MB Decisions 7/2021 and 61/2022), should be revised to unambiguously include deployments with or in third countries, specifying civil and criminal liability provisions, and the conditions under which immunities will be waived. Operational plans should reflect these arrangements.

VIII. Cooperation with other EU Agencies and Bodies

- 69) Binding legal agreements, rather than soft law WAs or Memoranda of Understanding (MoUs), should regulate inter-agency cooperation with the European Asylum Agency (EUAA), Europol, or any other EU bodies and organs with which Frontex may collaborate, unless used for the implementation of pre-existing legally binding instruments. The use of soft law instruments should be avoided to prevent a lack of enforceability and accountability (see VII).
- 70) The European Commission should provide a general template for inter-agency agreements with a clear, legally binding allocation of responsibilities, tasks, and functions (see III). Such distribution should adhere to Treaty provisions, in particular

the limits imposed by Arts 72 and 73 TFEU, observe data protection rules and abide by fundamental rights (Art 51 CFR).

- 71) This general template may then be adapted to the specific requirements of individual operations on a case-by-case basis, which, however, should not subvert the general distribution of duties and responsibilities established through legally binding means. Any such adaptations should be included, and become operational only upon inclusion, in the operational plan of the joint operation/activity concerned.
- 72) The same scheme should apply to any collaboration established with CSDP missions, including EUNAVFORMED deployments. Tailor-made arrangements per operation should be subjected to strict transparency criteria to determine and clarify the specific tasks assigned to each actor and the kind of support they should provide to Frontex and/or the Member States when requested (see III).
- 73) As far as collaboration with Europol is concerned, it should remain clear that Frontex lacks any law enforcement powers of its own and its role is limited by its current mandate. Although an operational Agency with executive powers, neither the Treaties nor the EBCGA Regulation provide a legal basis for law enforcement action. When defining the specific tasks and duties of Frontex in this regard (see III), the Commission and/or the MB must pay attention to this element and clearly delineate the exact boundaries of the Agency's contribution to the prevention, detection and countering of cross-border crime, including when involving third-country nationals.

IX. Cooperation with Private Entities

- 74) Collaboration with private entities in the context of joint interventions, be it security providers, merchant ships, commercial carriers, or SAR NGOs, remains subject to strict observance of the applicable EU and international legal framework.
- 75) Stable collaborations should only be established through legally binding service contracts that comply with EU law, and include 'objective responsibility' clauses to avoid accountability gaps and human rights lacunae.
- 76) *Ad hoc* forms of cooperation, e.g. during interdiction or SAR operations, are to be conducted in compliance with EU legal protections and international norms concerning detention, rescue, asylum, and human rights obligations, in particular the right to life, the prohibition of ill treatment, the right to asylum, and the principle of *non-refoulement*, including both substantive and procedural entitlements. Private entities cannot be relied upon as proxy enforcers of EIBM to perform conduct in contravention with fundamental rights.

- 77) Humanitarian action performed at sea, as well as at the external borders of the EU and within the territory of the Member States, should never entail criminalisation. Both the EU and the Member States should comply with their obligations under the SAR and SOLAS Conventions, the UN Protocols on the Smuggling of Migrants and Trafficking of Human Beings, and engage in the identification of victims and their protection, in line with international and EU fundamental rights provisions.
- 78) In the context of pushbacks and violations of SAR obligations, criminal offences may be committed by private actors or national/Frontex/other EU authorities. Next to their civil and human rights liability, also the criminal liability of perpetrators should be prosecuted at the national and EU levels.

X. Monitoring Mechanisms

- 79) Frontex, under the current EBCGA Regulation, has been entrusted with a series of tasks that may generate a conflict of interest. Operational coordination of and assistance to Member States and third countries, on the one hand, should be separated from monitoring and oversight responsibilities, on the other. This is why mechanisms of *internal* monitoring of mandate discharge in line with EU law should be distinguished from mechanisms of *external* monitoring of effective compliance by the Agency with its legal obligations.
- 80) Effective *internal* monitoring requires reinforcing the power and capacity of the existing FRO, including by increasing the number of FRMs, to ensure credible oversight and the adequate implementation of his mandate. The interactions between the FRO, the ED and the MB should be clarified by establishing concrete procedures and timelines for responses and follow up to the FRO's recommendations. The FRO should be considered competent to investigate all violations occurring in the course of joint activities and operational plans should include rules for the Agency and national authorities to engage with and facilitate the FRO's investigations.
- 81) Risk and vulnerability assessments also constitute *internal* monitoring tools that the Agency can utilise to enhance compliance with the EU *acquis*, including fundamental rights. The MB should adopt clear rules on the enforcement of the results of these evaluations to ensure that observations and recommendations are acted upon and followed up by the Member States, who should notify implementation within the established timelines.
- 82) Fully independent monitoring *external* to the Agency requires a separate body with powers and resources sufficient to ensure effective oversight and able to action consequences for non-compliance.

- 83) Establishing a well-resourced and independent body, with adequate knowledge and expertise, responsible for the *external* monitoring of Frontex's actions and ensuring EU-wide adherence to EIBM rules would facilitate compliance with the relevant standards, ensure better access to redress in cases of non-compliance, and credibly uphold the principles of independence, transparency, and separation of powers/checks-and-balances, contributing to a rule of law culture that would improve trust and acceptance of Frontex's role.
- 84) Such an *external* body should be mandated to monitor all joint actions for compliance with the EU Charter and related instruments. It should have a mandate to access the EBCGA's entire operational area and all ongoing, recently closed, and planned actions, including all relevant documentation.
- 85) A revised version of the Consultative Forum (CF), if properly staffed and equipped, could fulfil this role collecting information, carrying out on-the-spot visits, and providing independent advice on fundamental rights. Clear procedures and timelines should be agreed for engagements with the CF to provide access to sites and information and respond to its recommendations in a full and timely manner.
- 86) The execution of operational plans and the support of Frontex to the operation concerned should be conditional upon the provision by the host Member State/third country of unrestricted access of the *internal* and *external* monitoring bodies, including the existing FRMs, to the whole operational area and all relevant information. They should be able to observe debriefing interviews with third-country nationals; monitor joint patrolling, surveillance, and return procedures; and collect information to assess the overall fundamental rights situation in which Frontex conducts its activities, whether in a Member State, at sea, or a third country. If these requirements are not met, Frontex should withhold funding and any other support.
- 87) A specialised fundamental rights monitoring mechanism should also be established at national level to oversee the domestic implementation of EIBM at all sections of the common external borders, especially when Frontex is not involved.

XI. Democratic Control and Non-Judicial Accountability

- 88) The European Parliament should utilise its democratic control prerogatives to regularly evaluate Frontex's activities, including the use of surveillance assets (such as drones); SAR, interception and return operations; EUROSUR capabilities; data transfers and information sharing practices; and cooperation with third parties. Parliamentary questions and inquiries should be employed by all parliamentary groups to hold Frontex to account for any involvement in human rights violations.

- 89) In order for the European Parliament to properly exercise its role, in addition to the attendance of the ED and Chairperson of the MB at meetings to which they are invited (Art 112(2) EBCGA Regulation), Frontex should provide the Parliament with timely, accurate and comprehensive information proactively and at all times when requested.
- 90) The European Parliament Frontex Scrutiny Working Group's (FSWG) recommendations should be implemented in full. The FSWG should keep actively holding the Agency accountable. It should be constituted as a permanent structure of the LIBE Committee, entrusted with the continuous monitoring of joint EIBM action.
- 91) The EU Ombudsman should be allowed to follow up on individual complaints originating in the 'individual complaints mechanism' (ICM) of Frontex and submit judicial review/appeal requests to the CJEU *ex officio*.
- 92) Alongside or as part of the *external* monitoring mechanism (see X), other actors should contribute to the continued oversight of EIBM. This could take the form of an independent committee or commission of inquiry, involving the European Parliament, the EU Ombudsman, the FRA, the EDPS, the European Court of Auditors, OLAF, the European Committee for the Prevention of Torture (CPT), UNHCR, other international organisations, NGOs, and National Human Rights Institutions and Ombudspersons, with the power to issue reports, evaluations and recommendations, non-compliance with which should immediately prompt a European Commission investigation and lead to an infringement procedure.
- 93) A due diligence procedure, fully in line with EU and international legal standards of human rights protection, should be introduced by the Commission and/or the MB for the activation of Art 46 EBCGA Regulation. This would ensure that Frontex exercises its powers and duties with care, attentiveness, and adherence to the applicable legal and operational standards (see III).
- 94) This due diligence procedure should indicate the specific criteria and timeline for decisions, incorporate input from the CF, the FRO and the FRA, and distinguish steps of possible mitigation, suspension and termination of the activity concerned. The procedure should indicate the type of information to be taken in consideration and establish specific accountability measures for the ED. In situations of well-known grave and/or persistent human rights violations, this should include dismissal for refusing to trigger Art 46 of the Regulation in defiance of the advice received.
- 95) In the event of suspension or termination of the activity concerned, special provisions should be contemplated to allow the continued presence of the FRO, alongside the other *external* monitoring bodies (see X), to ensure the continued assessment of the fundamental rights situation on the ground.

- 96) The European Commission should actively investigate and address credible reports and evidence by reliable sources of involvement by Frontex/the Member States in human rights violations, including any participation in/contribution to facilitating pushbacks and pullbacks of individuals at the external borders or within/from third countries hosting a EIBM deployment.
- 97) In addition to any civil or criminal liability, disciplinary measures should be imposed, including dismissal in situations of grave misconduct, on EU staff engaged by or responding to Frontex and related EU agencies.
- 98) The current ICM should be reinforced and revised to improve accessibility, transparency, independence, and effectiveness, introducing elements of legal enforceability and external monitoring so as to guarantee compliance with good governance and effective remedy standards (see X). There are concerns regarding the ICM's scope and capacity to provide an efficient tool for reporting, examining, and addressing fundamental rights violations, according to the EU Ombudsman and multiple organisations. The possibility to file anonymous and *ex officio* complaints should be provided; the assessment of the merits should be entrusted to an independent body (the FRO rather than the ED or the national authorities of the domestic official concerned); and the possibility of appealing decisions and obtaining redress is necessary for alignment with Art 47 CFR.
- 99) National parliaments, independently and in cooperation with the European Parliament, should play a more active role in monitoring the activities of the Agency and the Member States in the implementation of EIBM. Additionally, inter-parliamentary committees could be established, in conformity with Art 112 EBCG Regulation or Art 9 Protocol 1 TFEU, to enhance oversight and political accountability.
- 100) Given Frontex's reliance on IT systems and its role in the management of EUROSUR, the EDPS should assess compliance with data protection rules on a periodic and systematic basis, especially on consideration of the specific challenges posed by the interoperability of EU databases. Its recommendations should be implemented in full by the Agency as a matter of urgency to ensure compatibility with data protection and fundamental rights on a continued basis.
- 101) The Agency should revise its 'Serious Incident Report' (SIR) procedure, enhancing the FRO's capacity and resources to effectively identify, categorise, investigate, and follow up alleged fundamental rights violations immediately upon receiving reliable reports, ensuring a swift and impartial response. While the FRO should be able to act *ex officio* and raise SIRs of his own motion, access for potential complainants should be eased. The MB should adopt a mechanism to protect whistle-blowers effectively and to eliminate obstacles and disincentives to reporting, including consequences for non-reporting. The mechanism should also specify the timelines and procedures for

national authorities to cooperate with the FRO and respond timely and appropriately to his conclusions providing redress. A dedicated 'SIR team' should be established to adequately discharge the FRO's mandate in a context of increased Frontex capacity and expanding joint EIBM activities.

XII. Legal Accountability, Effective Remedies and Judicial Protection

- 102) The effective allocation of *ex post* shared responsibility to address situations of breach of obligations (see III) requires the clarification of the rules regarding legal accountability, effective remedies and individual judicial protection by the Commission and the MB.
- 103) The EU should reinforce its commitment to international law, particularly to UNCLOS, by explicitly criminalising the failure to render assistance at sea through the adoption of dedicated legislation. This will contribute to ensuring legal accountability and promoting the protection of life and rights in the context of joint maritime operations.
- 104) It should also be clearly established in operational plans that Frontex and other actors collaborating in joint operations and interventions operate under the obligation to respect domestic law, especially when it offers more favourable fundamental rights provisions than EU law. This is crucial to ensure that the highest standards of protection are upheld, in line with Art 53 CFR.
- 105) The procedural safeguards applicable during joint operations need to be strengthened. Debriefing interviews with individuals arriving at the common external borders should entail effective legal guarantees. In consideration of the impact these may have on subsequent asylum/relocation/return processes regarding access to safety and international protection, legal assistance, representation, and effective remedy guarantees, in line with Arts 41 and 47 CFR, should be introduced. The MB should adopt specific SOPs in this regard.
- 106) FRMs should accompany interviewees throughout debriefing and subsequent asylum/relocation/return processes and make sure the aforementioned guarantees are duly implemented in practice. To this end, it is essential to increase the number of FRMs so as to cover the full spectrum of Frontex operations.
- 107) Avenues to obtain effective judicial protection and redress for fundamental rights violations in relation to all types of joint interventions need to be clearly designated and rendered accessible to potential victims. The Commission and/or the MB should adopt Decisions to clarify the necessary arrangements.

- 108) In this connection, lifting existing hurdles, simplifying conditions, and making EU and domestic remedies accessible for individuals is necessary for compliance with the principles of effective legal and judicial protection. These should include measures that guarantee effective access to legal representation, interpretation services, and information about rights and obligations within the relevant procedures.
- 109) Where the EU system does not provide for effective legal protection, national judicial mechanisms should play a gap-filling role, in light of the principles of effectiveness and equivalence of domestic remedies, and on the basis of Art 19(1) TEU and Arts 41 and 47 CFR.
- 110) In the face of a violation, once initial (*prima facie*) evidence has been submitted, the burden of proof should be deemed to shift to the (co-)perpetrators. On the basis of the presumption of shared responsibility (see I), it becomes their task to show they were not jointly responsible and to establish instead the exclusive responsibility of the individual actor(s) concerned. This is in line with European and international case law (*Kočner v. Europol*), which places a due diligence obligation on State officials to preserve human rights regarding all actions/omissions within their jurisdiction.
- 111) The CJEU's stringent causal link requirements in the context of individual damage claims (*WS et al. v Frontex*), reveal a critical accountability gap in 'many hands' environments. To avoid situations where individuals are left without an effective remedy, the Court is invited to reassess its existing test for EU liability in a way that accounts for shared responsibility and is reflective of the enmeshed nature of multi-actor collaboration in the context of joint operations.
- 112) The test developed in *Kočner v. Europol* offers a model of 'joint and several liability' that addresses limitations related to causation (factual control, double attribution, complementary/indirect responsibility) and rules regarding jurisdiction (implementing joint responsibility under the same judicial forum) for the Court to replicate in the framework of Frontex-coordinated interventions. In application of the 'joint and several liability' paradigm, the Court is invited to assess the conditions in which Frontex may be held accountable for the actions of its own personnel as well as those of the Member States/third countries/private actors with which it collaborates and vice-versa. The model offers a promising avenue to operationalise 'shared responsibility' per Art 7 EBCGA Regulation in a way that tallies with the requirements of the rule of law and effective remedy standards.

[SHARED PROJECT](#)