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COMMENTS ON THE EUROPEAN COMMISSION'S PROPOSAL FOR A EUROPEAN BORDER AND COAST GUARD COM(2015) 671 FINAL

Our organisations represent Churches throughout Europe – Anglican, Orthodox, Protestant and Roman Catholic – as well as Christian agencies particularly concerned with migrants, refugees, and asylum seekers. As Christian organisations we are deeply committed to the inviolable dignity of each human being created in the image of God, as well as to the concepts of the common good, of global solidarity and of the promotion of a society that welcomes strangers. We also share the conviction that the core values of the European Union being an area of freedom and justice must be reflected in day-to-day politics.

Some of our organisations are members of the Frontex Consultative Forum on Fundamental Rights and have gained experience with the current work of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex).

Our comments on the proposal for a European Border and Coast Guard have been developed in close cooperation with the Brussels' office of the *Protestant Church in Germany (EKD)*.

THE COMMISSION'S PROPOSAL

On 15 December 2015, the European Commission issued a proposal for a Regulation that would create a “European Border and Coast Guard” with a “European Border and Coast Guard Agency” built on Frontex and the Member States' border and coast guard units.¹ The proposal entails a new and broader mandate for the Frontex agency, i.e. more competencies and additional staff and equipment. In particular, the size of Frontex permanent staff as well as of the pool of national experts would increase substantially. In addition, the European Commission would have the competence to launch an operation in a Member State without the agreement of this Member State. Frontex would have a mandate to operate in third countries and its role in return operations would be increased.

¹ *Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Decision 2005/267/EC - COM(2015) 671 final.* This proposal is linked with two others, i.e. a *Proposal for a Regulation of the European Parliament and of the Council amending Regulation No 562/2006 (EC) as regards the reinforcement of checks against relevant databases at external borders – COM (2015) 670 final;* and a *Proposal for a Regulation of the European Parliament and of the Council on a European travel document for the return of illegally staying third-country nationals - COM(2015) 668 final.* We will, however, focus on the first document.

A European Border and Coast Guard is a step towards upgrading current Frontex coordination of joint operations, that could help ensuring a more harmonised application of EU law and sharing the responsibility of guarding the external EU borders and protecting the Schengen area without internal borders.

However, all newly assigned competencies have to be designed as appropriately, proportionately and adequately balanced as possible in order to ensure respect for fundamental rights and the common good. We would therefore appreciate if references to fundamental rights obligations were formulated more stringently and consistently in the concept of Integrated Border Management throughout the text of the new Regulation, particularly with regard to ensuring access to asylum procedures through information, identification and referral. We would also support the proposal that Article 1 of the proposed Regulation refer to fundamental rights obligations together with the need to safeguard the free movement of people.

DEFINING RESPONSIBILITIES AND ACCOUNTABILITY

1. As mission and tasks of the new European Border and Coast Guard affect the fundamental rights of individuals, in particular when it comes to accessing international protection, respect for the principle of *non-refoulement* and removals to countries of origin or transit, the need for control mechanisms is apparent. Therefore, and in addition to the agency being accountable to the European Commission, the Executive Director has to be accountable to the European Parliament and the EU Council. As the competencies are far-reaching, the European Parliament should be involved in setting the priorities for and monitoring regularly the activities of the new Agency. The Parliament should be empowered also to set up a specific control committee to oversee in particular the intelligence activities of the Agency which shall have access also to classified or restricted documents relating to planned or ongoing operations.

2. The proposal does not *per se* establish a “European border and coast guard”, but **combines different national and European authorities** into one body. This could result in the perpetuation of the already existing accountability problems. We are aware of the difficulty of shared responsibility between Member States’ authorities and the Agency to follow-up particular fundamental rights violations. Nevertheless, we are convinced that a clearer definition regarding follow-up and consequences of fundamental rights violations within joint operations, including penalties, will be necessary. Of particular concern is that there is no provision on how the compliance with fundamental rights would be safeguarded in case of participation of third country’s officials in border guarding activities, as their authorities are not bound by the EU Charter of Fundamental Rights. A clear definition of responsibilities and accountability of each authority (Member States, European level, third countries) involved in such activities is needed.

3. The Executive **Director** will have far-reaching powers to adopt binding decisions setting out corrective measures he deems fit to be taken by the Member State concerned to reach a proper level of external border protection. Therefore, he can oblige national authorities to take certain adjustment measures. While not all details can be prescribed in the Regulation, we would recommend that the Agency and its Executive Director would have to elaborate possible measures for various scenarios with clear reference to fundamental rights obligations. Clear criteria should be publically available to allow for transparency and credibility of decisions in this sensitive area.

4. If the Executive Director’s binding decisions are not properly implemented by the Member State concerned, the European Commission shall have the power to require the new Agency to start an operation **without the agreement of that Member State**. Such a decision should be adopted after consultation and agreement with the European Parliament. Moreover, it is not clear who, in such a case, could be held accountable for fundamental rights violations: will it be the new Agency leading the operation, or the Member State within whose territorial jurisdiction the operation takes place, even though it did not give its consent to this operation and has no influence on operational decisions?

SAFEGUARDING FUNDAMENTAL RIGHTS

5. We appreciate that the proposal obliges the Agency to set up a **complaint mechanism** on fundamental rights violations as we consider the creation of an effective complaint mechanism of utmost importance. The European Parliament in its resolution P8_TA-PROV(2015)0422 of 2 December 2015 on the Special Report of the European Ombudsman in own-initiative inquiry OI/5/2012/BEH-MHZ concerning Frontex (2014/2215(INI) has called for such a mechanism, which could ensure that any incident or serious risk of infringement of fundamental rights is not only reported but actually acted upon. However, the Regulation should oblige the Agency to establish the complaint mechanism, but not to limit this to mere reporting as the current wording suggests. We share the opinion expressed by other organisations that an effective complaint mechanism requires some autonomy to be able to investigate and report more independently. Annual reports on the activities with regard to complaints should be delivered to the European Parliament. A clear link to and a role for the Fundamental Rights Officer should be foreseen in the complaint mechanism.

6. The wording in Art. 26, par. 1 can be interpreted that the envisaged **Return Office** will be responsible for all removal operations from the territory of the EU. If this was indeed the case, clear lines of reporting and accountability have to be established. More safeguards for the protection of fundamental rights ought to be foreseen when it comes to new competencies regarding the **forced removal of** migrants to their countries of origin or transit. Even if Article 8(6) of Directive 2008/115/EC (“Return Directive”) requires Member States to establish an effective monitoring system, such a system is not in place in all Member States and at all airports. While the pool of monitors draws on existing monitoring systems in Member States, drawing on the pool should not absolve them from developing their own monitoring system according to the Return Directive. Building on the experience and expertise of monitoring forced removals by civil society organisations, Churches and religious organisations, such models, including the reporting on the monitoring, ought to be included in the stipulations for the operations of the envisaged Return Office. E.g., an annual meeting of removal monitors with the Consultative Forum on Fundamental Rights could be foreseen. Regarding the planned pool of return monitors, furthermore, the ratification of the European Convention on Human Rights (ECHR) by third countries cannot be regarded as sufficient to safeguard fundamental rights and to justify joint return operations, since the ratification of the ECHR does not automatically ensure that the rules are applied and human rights respected. Consequently, third countries should only participate in joint return operations if proper and specific safeguards for the respect of fundamental rights of the returned persons are in place.

7. Particularly based on the experiences of search and rescue operations in the Mediterranean Sea in 2014 and 2015, we are convinced that a clear and strong mandate on **search and rescue** has to be included in the Regulation. It is not sufficient that the Agency should take “*into account that some situations may involve ... rescue at sea*”. Over the past years, an increasing number of migrants have lost their lives in the Mediterranean region. Emergency situations require operations to save life at sea, and as the Agency will be a key player in managing movements across borders, this obligation should be clearly identified and resourced. We therefore urge that specific guidelines in line of international obligations are developed to deal with situations of migrants and asylum seekers in distress in order to ensure that all necessary measures are taken to prevent further loss of lives. Especially with regard to search and rescue, the division of responsibilities between the Agency and Member States as well as between different Member States still needs to be further clarified.

8. Even though there is the possibility for Frontex under the current mandate to **terminate or suspend an operation** in the case of serious violations of fundamental rights, it has not yet been used. The new provision on withdrawing funding may be more easily applied than the overall suspension of an operation. However, as stated above, concrete and clear criteria for “a serious fundamental rights breach” need to be spelled out and the procedure for suspension or withdrawing funding ought to be clarified to make this workable. The threshold of suspension may, however, be even higher with the planned involvement of third countries and the possibility of imminent diplomatic controversy.

9. The efforts and achievements of Frontex in providing **training for border and coast guards** should be enhanced in the proposed Agency, and adequately resourced. Particularly the training on fundamental rights in border and coast guard operations, identification of vulnerability of persons, sensitivity towards different cultures, and knowledge of appropriate referral mechanisms for persons applying for international protection has to become a European standard upheld throughout all operations and activities of the Agency. Therefore, we recommend that relevant staff, including deployed staff and experts, shall either have proven knowledge or be offered such training. We are convinced that these efforts will contribute to developing standards in line with fundamental rights.

10. As the powers and competencies of the Agency are expanded, the role and competencies of the Fundamental Rights Officer must also be strengthened in the Agency. The Officer has to be granted a level of autonomy which allows the effective monitoring of the Agency's operations. The Fundamental Rights Officer must be provided with adequate competencies, resources and capacities that allow her or him to perform these important tasks.

11. Art. 60 of the proposal foresees that the Fundamental Rights Officer and the **Consultative Forum on Fundamental Rights** are included in the Agency's administrative structure. This may hamper the independence of both bodies. Instead, at least the Consultative Forum should be clearly designed as a body independent from the administration. Moreover, the Fundamental Rights Officer should report to the Consultative Forum, and the enlarged mandate of the Agency should be matched by the allocation of adequate capacities and resources also to the Consultative Forum.

RESPONDING TO THE CURRENT INSTITUTIONAL CRISIS

12. The current refugee and migration crisis is not just a matter of border controls, and therefore further elements should also be considered in a holistic view. While, of course, proper registration and identification is necessary at the borders, we wish to point to the fact that the majority of persons who have arrived particularly in Greece in 2015, and many of those who have arrived in Italy are likely to be in need of international protection. Therefore, resources and efforts have to be made available at the same time to enhance reception capacities, and standardise the implementation of international protection rules. The application of EU asylum law in EU Member States needs to be monitored by the European Commission and the role, capacity and competencies of the European Asylum Support Office will have to be strengthened. More efforts have to be undertaken to address the situation based on the principles of solidarity and responsibility sharing.

13. The aim of establishing a European Border and Coast Guard Agency should, therefore, clearly be to share the responsibility of jointly guarding the external borders and not to unduly reduce the number of persons seeking international protection. More orderly international movements of people can also be achieved by providing safe and legal ways into international protection. In this context, we recall our policy paper of November 2014² in which we have called for the development of a 'tool-box' with measures that would facilitate the legal entry to Europe of persons in need of protection. The respective 'tools' are already laid down in existing EU law and should be combined in a comprehensive and holistic policy. Over the last two years, many civil society organisations, Churches and religious organisations have stepped in where States, EU and non EU alike, have failed to sufficiently respond when many asylum seekers and refugees arrived: providing food and shelter, social, health and legal services and advice. Thus we would like to recommend a more systematic cooperation with them in order to address the current challenges. This is also relevant for the respect of fundamental rights in border control and return operations.

Brussels, 19 April 2016

² http://www.caritas.eu/sites/default/files/christian_group_recomm_for_safe_legal_paths_to_protection_final.pdf