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## THE INDEPENDENT MONITORING MECHANISM IN THE NEW PACT ON MIGRATION AND ASYLUM AND ITS INTERRELATIONS WITH OTHER MONITORING MECHANISMS

SOMMARIO: 1. Introduction: the Proposal for a new monitoring mechanism. – 2. The existing national monitoring mechanisms at EU borders. – 2.1. National Human Rights Institution (NHRIs). – 2.2. Ombudsman institutions. – 2.3. The National Preventive Mechanisms (NPMs). – 3. The existing European monitoring mechanisms at EU borders. – 3.1. Schengen Evaluation and Monitoring Mechanism (SEMM). – 3.2. European Border and Coast Guard Agency (Frontex). – 3.3. European Union Agency for Asylum (EUAA). – 4. Case study: the border monitoring mechanism in Croatia. – 5. Conclusions.

### 1. *Introduction: the Proposal for a new monitoring mechanism*

The New Pact on Migration and Asylum announced by the European Commission on 23 September 2020 contains the Proposal for a Regulation introducing a screening of third-country nationals at the external borders (hereafter Proposal)<sup>1</sup>. The Proposal objectives are to identify the persons, establish health and security risks as the soonest, and direct them to relevant procedures, be it either asylum or return<sup>2</sup>. In Article 7 of the Proposal, the Commission set up a new independent monitoring mechanism (hereafter IMM) that each Member State shall establish. During the screening, the monitoring relates to compliance with EU law and international law, including the Charter of Fundamental Rights. The provision allows the Fundamental Rights Agency (FRA) to issue general guidance for the Member States on the setting up of such a mechanism and its independent functioning. At the request of the Commission EU, the FRA prepared general guidance that has been recently published.<sup>3</sup> Furthermore, Member States may request the Fundamental Rights

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<sup>1</sup> Proposal 2020/0278 (COD) for a Regulation of the European Parliament and of the Council introducing a screening of third-country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817

<sup>2</sup> *Ibidem*, art.1

<sup>3</sup> FRA, *Establishing national independent mechanisms to monitor fundamental rights compliance at EU external borders*, 14 October 2022, <https://fra.europa.eu/en/publication/2022/border-rights-monitoring>

Agency to support them in developing their national monitoring mechanism, including the safeguards for the independence of such mechanisms, as well as the monitoring methodology and appropriate training schemes<sup>4</sup>.

Although the need for a border monitoring mechanism involving human rights institutions and non-governmental bodies was underlined by European institutions and civil society on several occasions<sup>5</sup>, some Member States are still opposed to it. The Greek government, for instance, has variously suggested that such a mechanism should be kept in-house and should not include independent bodies or organizations, has rejected it as a threat to national sovereignty and has claimed it might constitute a rule of law violation<sup>6</sup>. Independent bodies agree that there is a gap between the information collected and recommendations made, and the way national and regional authorities rely (or do not) on such inputs when formulating policies and legislation that will impact the ground<sup>7</sup>. The current negotiations for the EU Pact on Migration and Asylum offer an opportunity for bridging this gap, providing that information and recommendations from human rights defenders are duly taken into account<sup>8</sup>. From that perspective, the article would like to investigate the interrelationship between the new independent monitoring mechanism set up by Article 7 of the Proposal and existing monitoring bodies. The first part of the contribution aims to explore how the IMM could enjoy the participation of other national bodies already involved in border monitoring. It will, therefore, focus on the origin, structure, roles and competencies of selected national bodies - Ombudsmen, Human Rights Institutions, and Optional Protocol to the Convention Against Torture (OPCAT) National Preventive Mechanisms - to understand the opportunity of their participation in the IMM, trying to underling possibles strengths and risks linked to such participation. The second part of the contribution, instead, would like to investigate how other European monitoring mechanisms operating at the border could enjoy the new mechanism's existence. The focus will be on the function of the Schengen Evaluation and Monitoring Mechanism (SEMM) and on the origin, structure, and competencies of the internal monitoring and complaints mechanism to respond to claims of breaches of fundamental rights in the context of the European Border and Coast Guard Agency (Frontex) and European Union Agency for Asylum (EUAA) operations. Finally, the recently created border monitoring mechanism in Croatia will be analyzed as a case study, to understand if it is possible to consider it to be a mechanism that meets the conditions of the Screening Proposal and could serve as an example for other countries. In conclusion, precautions that should be taken in setting up the new independent monitoring mechanisms at the border screening will be drawn.

<sup>4</sup> *Ibidem*, art.7(2)

<sup>5</sup> See FRA, *Independent monitoring at the EU external borders and rights violations*, 8 May 2020, <https://fra.europa.eu/en/news/2020/independent-monitoring-eu-external-borders-and-rights-violations>; International Organization For Migration (OIM), *Humanitarian Border Management*, 22 August 2019, <https://www.iom.int/sites/g/files/tmzbd1486/files/documents/humanitarian-border-management.pdf>

<sup>6</sup> European Council on Refugees and Exiles (ECRE), *Greece: Tone Changes on Independent Border Monitoring, Ombudsman Calls for Re-examination of Rejected NGO Registration, German Court Rules in Favour of Asylum Seeker Over Inhumane Treatment Risk*, 17 December 2021, <https://ecre.org/greece-changing-tone-on-independent-border-monitoring-ombudsman-calls-for-re-examination-of-rejected-ngo-registration-german-court-rules-in-favour-of-asylum-seeker-over-inhumane-treatment-risk/>

<sup>7</sup> A. KUTAY, *Governance and European Civil Society, Governmentality, Discourse and NGOs*, London, 2014 p.145

<sup>8</sup> L. JAKULEVICIENE, *Pre-Screening at the Border in the Asylum and Migration Pact: A Paradigm Shift for Asylum, Return and Detention Policies?* in D. THYM (ed.) *Reforming the Common European Asylum System, Opportunities, Pitfalls, and Downsides of the Commission Proposals for a New Pact on Migration and Asylum*, Baden-Baden, 2022, p. 81 ss.

## 2. The existing national monitoring mechanisms at EU borders

According to the Proposal, «Member States may invite relevant national, international and non-governmental organizations and bodies to participate in the monitoring». Each Member State has several national and non-governmental bodies already committed to border monitoring. Among these, Ombudsmen, Human Rights Institutions, and Optional Protocol to the Convention Against Torture (OPCAT) National Preventive Mechanisms stand out. They are present in almost all Member States, and although they were created for different purposes and have different functions, sometimes they are represented by a single institution<sup>9</sup>. The Ombudsman often functions both as a complaint mechanism and human rights monitor in its capacity as an NPM<sup>10</sup>. This is the case, for example, of Austria, Bulgaria, Greece, and Hungary, where the Ombudsman oversees the implementation of the Convention Against Torture (CAT) but is also entitled to receive and investigate complaints, and in some cases can recommend or prescribe different forms of reparations (e.g. the release of third country nationals when it is found that their detention is arbitrary or unlawful; or the payment of compensation) in case of abuse<sup>11</sup>. Thanks to the characteristics highlighted below, they appear to be the most appropriate bodies to grant independence and reliability to the mechanism. Their participation in IMM is therefore recommended, taking into account some specific issues that the next paragraphs will address.

### 2.1. National Human Rights Institution (NHRIs)

A National Human Rights Institution has been defined by the United Nations as «a body which is established by a Government under the constitution, or by law or decree, the functions of which are specifically designed in terms of the promotion and protection of human rights»<sup>12</sup>. NHRIs are bound to the Paris Principles<sup>13</sup>, a set of criteria for evaluating both NHRIs' independence from government interference – granting adequate resources and financial autonomy - and their effectiveness in promoting and protecting human rights<sup>14</sup>. Part of the legitimacy of the Paris Principles and their enduring value comes from the fact

<sup>9</sup> On the dangers of centralising different competencies in one institution, see P. DOUBEK, *The National Preventive Mechanism. A Key Human Rights Component of Well-Functioning Democracy*, in *Taiwan Journal of Democracy*, 2019, pp. 165 ss.

<sup>10</sup> See V. O. AYENI, *Ombudsmen as Human Rights Institutions*, in *Jour. Hum. Rights*, 2014, pp. 498 ss.

<sup>11</sup> S. CARRERA, M. STEFAN, *Complaint Mechanisms in border management and expulsion operations in Europe, Effective remedies for victims of human rights violations?* Centre for European Policy Studies (CEPS), Brussels, p. 28

<sup>12</sup> United Nations Centre for Human Rights, UN Doc. HR/P/PT 4 1995, *National Human Rights Institutions: A Handbook on the Establishing and Strengthening of National Institutions for the Promotion and Protection of Human Rights*, Professional Training Series No. 4, p. 6

<sup>13</sup> UN General Assembly, Resolution 48/134 of 20 December 1993, *Principles relating to the Status of National Institutions (The Paris Principles)*, at <https://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx>.

<sup>14</sup> G. DE BECO, R. MURRAY, *A Commentary on the Paris Principles on National Human Rights Institutions*, Cambridge, 2016 p. 8. Some authors have challenged the usefulness of the instrument, arguing that the Paris Principles pay more attention to formal requirements and fail to examine the actual effectiveness of NHRIs on the ground: see O. C. OKAFOR, S. C. AGBAKWA, *On Legalism, Popular Agency and "Voices of Suffering": The Nigerian National Human Rights Commission in Context*, in *Hum. Righ. Quart.*, 22 pp. 662 ss.

that they were drafted by NHRIs themselves<sup>15</sup>, to determine their relationship towards the State<sup>16</sup>. The Sub-Committee on Accreditation (SCA) of the International Coordinating Committee (ICC) of NHRIs assesses whether applying NHRIs are compliant with the Paris Principles or not<sup>17</sup>. As a result of the accreditation procedure, NHRIs get an A-, B-, or C-status; only A-status means the NHRI is Paris Principles compliant<sup>18</sup>. For example, in the European Union framework, 11 of the 27 Member States have NHRIs that are not Principles-compliant A-status, as of June 2020<sup>19</sup>. Five Member States, instead, do not have an NHRI at all<sup>20</sup>. While NHRIs' specific functions vary from country to country, in the last years NHRIs have contributed to a growing body of evidence indicating widespread violations of migrants' human rights at the European borders, in line with the concerns raised by civil society organizations and international and regional human rights bodies<sup>21</sup>. In 2021, several NHRIs – from France<sup>22</sup>, Greece<sup>23</sup>, Serbia<sup>24</sup>, and Slovenia<sup>25</sup> – have developed national monitoring reports with the result of their human rights monitoring at borders. They conducted investigations and official inquiries into human rights issues, including monitoring crossing points and other places at the borders. Indeed, a Paris Principles-compliant NHRI could conduct a national inquiry without an explicit 'inquiry power' by relying on a composite of its general functions and powers, including investigatory powers enabling it to compel the production of information<sup>26</sup>. While the Paris Principles do not specifically refer to inquiry powers, they do establish the core elements which an inquiry requires, namely, that NHRIs must be free to consider any questions falling within their competence, as well as hear any person and obtain any evidence relevant to their human rights mandate<sup>27</sup>. NHRIs' role has

<sup>15</sup> R. GOODMAN, T. PEGRAM, *National Human Rights Institutions, State Conformity and Social Change*, Cambridge, 2012 p. 9

<sup>16</sup> G. DE BECO, R. MURRAY, *A Commentary*, *cit.*, p. 2

<sup>17</sup> ICC Sub-Committee on Accreditation General Observations as Adopted in May 2013 (SCA General Observations).

<sup>18</sup> Global Alliance of National Human Rights Institutions (GANHRI), ICC Accreditation, Office of the High Commissioner for Human Rights (OHCHR), Article 6.3 (c); (i) ICC Sub-Committee on Accreditation Rules of Procedure, as amended 15 April 2008 at <http://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Pages/default.aspx>; see also K LINOS, T. PEGRAM, *Architects of Their Own Making: National Human Rights Institutions and the United Nations*, in *Hum. Rts. Q.*, 2016, p. 1110

<sup>19</sup> FRA, Strong and effective National Human Rights Institutions, 2020, at [https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2020-strong-effective-nhris-summary\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-strong-effective-nhris-summary_en.pdf)

<sup>20</sup> Czechia, Estonia, Italy, Malta and Romania

<sup>21</sup> S. WOLFE, *The Security Sector Governance–Migration Nexus, Rethinking how Security Sector Governance matters for migrants' rights*, London, 2021 p. 44

<sup>22</sup> French National Consultative Commission on Human Rights, *National Report on the situation of human rights of migrants at the borders*, May 2021, <https://ennhri.org/wp-content/uploads/2021/08/French-National-Report-CNCDH.pdf>

<sup>23</sup> Greek National Commission for Human Rights, *National Report on the situation of human rights of migrants at the borders*, May 2021, <https://ennhri.org/wp-content/uploads/2021/08/Greek-National-Report.pdf>

<sup>24</sup> Protector of Citizens of the Republic of Serbia, *National Report on the situation of human rights of migrants at the borders*, May 2021, <http://ennhri.org/wp-content/uploads/2021/08/Serbian-National-Report.pdf>

<sup>25</sup> Human Rights Ombudsman of the Republic of Slovenia, *National Report on the situation of human rights of migrants at the borders*, May 2021, <http://ennhri.org/wp-content/uploads/2021/08/Slovenian-National-Report.pdf>

<sup>26</sup> K. LINOS, T. PEGRAM, *The Language of Compromise in International Agreements. International Organization*, 2016, p. 598

<sup>27</sup> Paris Principles, UN Doc A/RES/48/134 annex 'Methods of Operation' arts (a)–(b). See also ICC General Observations, above n 28, [1.2], [1.6], [2.10]; G. DE BECO, R. MURRAY, *A Commentary*, *cit.* p.94

been recognized by a variety of actors, such as the Council of Europe Committee of Ministers and the European Parliament, which has recently adopted two resolutions recommending that NHRIs, alongside other human rights defenders, should be a part of the IMM to be established<sup>28</sup>. Indeed, they can also report to and engage with regional and international human rights systems, and provide training to national authorities, such as border authorities, on human rights obligations<sup>29</sup>. Some NHRIs can also receive individual complaints, including from migrants who believe they had their rights violated and can issue formal conclusions and recommendations to national authorities<sup>30</sup>. In this function, they can act as quasi-judicial bodies and, upon hearing and investigating a complaint, they can issue recommendations, decisions, or resolutions to the relevant national authorities. In countries where NHRIs handle individual complaints, this mandate is accompanied by an obligation of other authorities to pay due regard to the views of the NHRI, and at least to respond to the recommendations on an individual case within a reasonable time<sup>31</sup>. Also, how NHRIs and the courts interact is central to the implementation of human rights protections. According to Amnesty International, «NHRIs should have the legal power to bring legal cases to protect the rights of individuals or to promote changes in law and practice»<sup>32</sup>. However, not all NHRIs have been given the power to file a case on behalf of victims of human rights abuse, but in any case, NHRIs can provide them with simple advice such as how or where to file a suit, or also with a higher level of assistance, including the provision of legal advice, the granting of money to hire a lawyer or the provision of a referral of a lawyer willing to provide pro bono services<sup>33</sup>. Most NHRIs are also permitted to intervene on behalf of litigants in court proceedings, and almost all NHRIs can affect the outcome of a pending lawsuit without actually becoming a party to the suit through the submission of *amicus curiae*, or ‘friend of the court brief’<sup>34</sup>. Furthermore, while NHRIs most often approach the court to ask permission to submit an *amicus* brief, in some circumstances the dynamic is reversed, and the court will ask the NHRI to submit an *amicus* brief on a particular issue<sup>35</sup>. Finally, NHRIs could have a role in the implementation of the judgments of the European Court both at the European and national levels<sup>36</sup>. Therefore, the participation of NHRIs in the IMM should be encouraged, since NHRIs are uniquely positioned to address the violations of human rights and guarantee IMM compliance with Paris Principles.

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<sup>28</sup> European Parliament resolution (2020/2047(INI)) of 10 February 2021 on the implementation of Article 43 of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, in *OJ C* 465 of 17 November 2021, p. 47 ss.

<sup>29</sup> D. LANGTRY, K. ROBERTS LYER, *National Human Rights Institutions, Rules, Requirements, and Practice*, Oxford, 2021 p. 255

<sup>30</sup> *Ibidem*, p. 222

<sup>31</sup> *Ibidem*, p. 262

<sup>32</sup> Amnesty International’s Recommendations on Effective Protection and Promotion of Human Rights’, AI Index IOR 40/007/2001, at <https://www.amnesty.org/en/documents/IOR40/007/2001/en/>

<sup>33</sup> A. WOLMAN, *National Human Rights Institutions and the Courts in the Asia-Pacific Region*. in *Asia Pac. Law Rev.*, 2011, p. 248

<sup>34</sup> K. LINOS, T. PEGRAM, *What Works in Human Rights Institutions?*, in *The American Journal of International Law*, 2017, pp. 678

<sup>35</sup> A. WOLMAN, *National Human Rights Institutions*, cit., p. 250

<sup>36</sup> G. DE BECO, *Role of National Human Rights Institutions in the Implementation of the Judgments of the European Court of Human Rights*, at <http://www.bristol.ac.uk/media-library/sites/law/migrated/documents/gauthierdebepres.pdf>

Some challenges NHRI face should however be drawn. The first challenge consists in finding the right distance with the Government<sup>37</sup>. NHRIs' inquiry reports are frequently met with government hostility and rejected by some sectors of the community<sup>38</sup> and it is one of the reasons why the impact of national inquiries is often incremental<sup>39</sup>. Other issues are the lack of stakeholder understanding of the NHRI mandate, limited enforcement powers and consistent follow-up<sup>40</sup>. Also, a lot of emphases has been placed on the potential role NHRIs can play in providing access to remedy. Yet, practice to date shows that the number of NHRIs that have the mandate to provide access to remedy is strict and actually complaint handling is quite limited<sup>41</sup>. Furthermore, the enforceability of remedies issued by NHRIs is very weak, as they do have not the power to make legally binding awards as an outcome of complaints resolution and investigation<sup>42</sup>. In this regard, increased collaboration—such as between NHRIs and judicial actors at the national level<sup>43</sup>, or between NHRIs in the cases of human rights abuses with a transnational dimension—is likely to be key to unlocking NHRIs' further potential. More challenges concern the lack of resources. As stated in the Paris Principles, NHRIs should be independent of the State in terms of policies, administration, how it spends its funds etc. At the same time, most NHRIs are more or less fully funded by the State, which means that they are in reality financially dependent on the State. This means that NHRIs need to act independently of the State while at the same time recognising that the survival of the NHRI is dependent on the state. Several NHRIs have recently experienced drastic downsizing of their budgets or the addition of new functions without additional resources<sup>44</sup>. In this regard, the participation of NHRIs in the IMM shouldn't result in a burgeoning workload with serious consequences for NHRIs' ability to carry out their work effectively. Therefore, the European Network of National Human Rights Institutions (ENNHRI), emphasizes that the creation or designation of border monitoring mechanisms

<sup>37</sup> The challenge is about striking a balance between being an adviser to the government, and at the same time being the watchdog. Indeed, if the NHRI moves too much into the adviser role and becomes too close to the government, the NHRI will lose its legitimacy, especially in the eyes of human rights victims and other actors. If the NHRI becomes, instead, too loud and too much of an adversary to the government, the NHRI may appear strong, but in reality, it may not have a lot of influence as the government stops listening. See Danish Institute for Human Rights, *What are some challenges to the effectiveness of NHRIs?* At <https://www.humanrights.dk/learning-hub/content-topic/national-human-rights-institutions/what-are-some-challenges>

<sup>38</sup> L. C. REIF, *Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection*, in *Harv. Hum. Righ. Jour.*, 2000, p. 23

<sup>39</sup> S. CARDENAS, *Chains of Justice: The Global Rise of State Institutions for Human Rights*, Pennsylvania, 2014, p. 61

<sup>40</sup> O. EL HAJJÉ, *La sauvegarde des institutions internationales et leur renforcement sont indispensables pour la promotion et la protection des droits de l'homme*, in *OIDU*, 2016, vol. 7, p. 8

<sup>41</sup> N. JÄGERS, *National Human Rights Institutions: The Missing Link in Business and Human Rights Governance?*, in *ICL Journal*, 2020, p. 310

<sup>42</sup> L. MANCA, *Il fenomeno corruttivo nella prassi degli organi di controllo delle Nazioni Unite sulla tutela dei diritti umani*, in *OIDU*, 2020, vol. 3, p. 12

<sup>43</sup> V. CASAMASSIMA, *I diritti fondamentali europei tra processi di positivizzazione normativa e ruolo dei giudici (e della politica). Riflessioni intorno ad alcuni recenti sviluppi in materia di rapporti tra Corte costituzionale, Corte di giustizia e giudici comuni*, in *Rivista AIC*, 2019, pp. 404 ss.

<sup>44</sup> Council of Europe, *Paris Principles at 25: Strong National Human Rights Institutions Needed More Than Ever*, 18 November 2018, [https://www.coe.int/en/web/commissioner/blog/-/asset\\_publisher/xZ32OPEoxOkq/content/paris-principles-at-25-strong-national-human-rights-institutions-needed-more-than-ever?\\_101\\_INSTANCE\\_xZ32OPEoxOkq\\_languageId=en\\_GB](https://www.coe.int/en/web/commissioner/blog/-/asset_publisher/xZ32OPEoxOkq/content/paris-principles-at-25-strong-national-human-rights-institutions-needed-more-than-ever?_101_INSTANCE_xZ32OPEoxOkq_languageId=en_GB)

should not hurt the existing broad mandates of NHRIs and their compliance with the UN Paris Principles<sup>45</sup>.

## 2.2. Ombudsman institutions

Ombudsman institutions have become a common feature of most countries' institutional frameworks. However, their role, mandate and scope of intervention can differ from one country to another as they take into account different political, institutional and historical contexts. Since the establishment of the first ombudsman institution in Sweden in 1809, the mandates of Ombudsman institutions have evolved based on countries' specific needs<sup>46</sup>. The Ombudsman institution, in its classical form, has been defined as «an office provided by the constitution or by the action of the Legislature or Parliament and headed by an independent high-level public official, who is responsible to the Legislature or Parliament, who receives complaints from aggrieved persons against government agencies, officials and employees, or who acts on his [or her] own motion and who has the power to investigate, recommend corrective action, and issue reports»<sup>47</sup>. While narrowly-defined classical Ombudsman institutions do not have an express human rights mandate<sup>48</sup>, their work can increasingly also involve resolving complaints with human rights aspects, and they have a key role to play in the protection of human rights, the consolidation of democracy, and the promotion of the rule of law<sup>49</sup>. Human rights Ombudsmen «are those ombudsmen that have been given express human rights protection and/or promotion mandates in their governing legal framework»<sup>50</sup>. In the present European context, nearly all Ombudsman institutions use human rights standards, alongside other normative sources<sup>51</sup>. The Council of Europe has consistently promoted the creation and strengthening of Ombudsman institutions<sup>52</sup> and the

<sup>45</sup> ENNHRI, *Opinion on Independent Human Rights Monitoring Mechanisms at Borders under the EU Pact on Migration and Asylum*, March 2021, <http://www.ennhri.org/wp-content/uploads/2021/03/ENNHRI-Opinion-on-Independent-Human-Rights-Monitoring-Mechanisms-at-Borders-under-the-EU-Pact-on-Migration-and-Asylum.pdf>

<sup>46</sup> On the origin of institution see W. GELLHORN, *The Swedish Justitie Ombudsman*, in *The Yale Law Jour.*, 1965, Vol. 75, pp. 1-2; G. NAPIONE, *L'Ombudsman. Il controllore della pubblica amministrazione*, Milano, 1969, pp. 2-4; A. DI GIOVINE, *L'Ombudsman in Scandinavia*, in C. MORTATI (eds.), *L'Ombudsman (il Difensore civico)*, Torino, 1974, p. 15; M. G. GUARENTE, *Il difensore civico l'Ombudsman svedese e la sua diffusione nel mondo*, in *Amministrazione e contabilità dello Stato e degli Enti pubblici*, 2000, pp. 551 ss.

<sup>47</sup> Ombudsman Committee, *International Bar Association Resolution*, Vancouver, 1974, p. 1 s. See also: R. BOUSTA, *The Ombudsman proposal for a definition*, in L. REIF (ed.) *The International Ombudsman Yearbook*, The Hague, 2005 p. 36 ss.

<sup>48</sup> T. BULL, *The Original Ombudsman: Blueprint in Need of Revision or a Concept with More to Offer?* in *Eur. Pub. Law*, 2000, p. 334 ss; A. CARACCIOLLO LA GROTTIERA, *Note critiche sulla figura del difensore civico*, in *Foro Amministrativo*, 1979, p. 478 ss.

<sup>49</sup> L. REIF, *The Ombudsman, Good Governance and the International Human Rights System*, Dordrecht, 2004, p. 12. See also G. KUCSKO-STADLMAYER (eds.), *European Ombudsman-Institutions. A comparative legal analysis regarding the multifaceted realisation of an idea*, Wien, 2008.

<sup>50</sup> L. REIF, *The International Ombudsman Yearbook*, Boston, 2002, p. 28

<sup>51</sup> See C. PINELLI, *La protection des droits de l'homme dans les Constitutions de l'Europe orientale entre Ombudsmans e Cours constitutionnelles*, in *Diritto pubblico comparato ed europeo*, 2000, pp. 637 ss.; M. REMAC, *Standards of Ombudsman Assessment: A New Normative Concept?* in *Utrecht Law Review*, 2013, p. 69 s.; V. AYENI, *Ombudsmen as Human Rights Institutions* in *Int. Jour. Hum. Rights*, 2014, p. 498 s; L. REIF, *Transplantation and adaptation: The evolution of the Human Rights Ombudsman*, in *Bost. Col. Thi. Wor. Jour.*, 2011, p. 315

<sup>52</sup> Council of Europe Assembly, Recommendation n. 757(1975) of 29 January 1975, *Conclusions of the meeting of the Assembly's Legal Affairs Committee with the Ombudsmen and Parliamentary Commissioners in Council of Europe member states*; Recommendation n. 1615 (2003), of 8 September 2003, *The institution of Ombudsman*; Resolution n. 1959

Venice Commission adopted, on 15 March 2019, the Principles on the Protection and Promotion of the Ombudsman Institution (the “Venice Principles”)<sup>53</sup>. This is the first international set of standards for Ombudsman institutions, equivalent to the Paris Principles for NHRIs. The Venice Principles state that independence, objectivity, transparency, fairness, and impartiality are the core principles of Ombudsman institutions, which should enjoy adequate resources and financial autonomy<sup>54</sup>. Principle n.15 states that «any individual or legal person, including NGOs, shall have the right to free, unhindered and free of charge access to the Ombudsman, and to file a complaint». Therefore, any natural or legal person claiming a legitimate interest should be able to submit a complaint to an Ombudsman institution, including foreigners and stateless persons<sup>55</sup>. Experience has shown the Ombudsmen's ability to deal with complaints related to human rights violations in different contexts<sup>56</sup>. The majority of Ombudsmen in the EU are formally and generally entitled to receive and address complaints related to fundamental rights infringements committed by public authorities in the context of border control, border surveillance, and expulsion operations<sup>57</sup>. The Greek Ombudsman, for example, has consolidated experiences in the investigation into the complaint received by third-country citizens concerning rights protections at the border<sup>58</sup>. Therefore, the participation of the Ombudsmen in the IMM could bring great expertise in handling complaints of violations that occurred in the screening procedures, and guarantee IMM compliance with Venice Principles. However, some challenges the Ombudsmen face in their activities should be underlined. For example, few Ombudsmen have legal powers to compel the appearance of witnesses and the production of evidence in investigating complaints<sup>59</sup>. Furthermore, Ombudsman has no direct power of

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(2013) of 4 October 2013, Strengthening the institution of ombudsman in Europe; Committee of Ministers Recommendation No. R (80) 2 of the 11 March 1980 concerning the exercise of discretionary powers by administrative authorities; Recommendation No. R (85) 13 of 23 September 1985 on the institution of the ombudsman; Recommendation No. R (97) 14 of 30 September 1997 on the establishment of independent national institutions for the promotion and protection of human rights; Recommendation No. R (2000) 10 of 11 May 2000 on codes of conduct for public officials; Recommendation CM/Rec (2007)7 of 20 July 2007 on good administration; Recommendation CM/Rec(2018)11 of 28 November 2018 on the need to strengthen the protection and promotion of civil society space in Europe.

<sup>53</sup> Venice Commission, CDL-AD(2019)005-e of 15-16 March 2019, *Principles on the Protection and Promotion of the Ombudsman Institution ("The Venice Principles")*

<sup>54</sup> M. LA BELLA, *Cultura istituzionale e strumenti di accountability. Il contributo dell'Ombudsman alla qualità della democrazia*, Milano, 2012 p. 238 s.

<sup>55</sup> M. HERTOGH, R. KIRKHAM (EDS.), *Research Handbook on the Ombudsman*, Cheltenham, 2019, p. 99

<sup>56</sup> M. A. QUIROZ VITALE, *L'Ombudsman et la défense des droits humains*, in *Società e diritti*, 2018, pp. 94 ss.; See also M. A. QUIROZ VITALE, *Ombudsman e giustizia nella pubblica amministrazione*, in M. A. QUIROZ VITALE (eds.), *Il difensore civico e la burocrazia. Diritto, discrezionalità e controllo*, Milano-Udine, 2010; E. SANTORO, *Diritto e diritti: lo stato di diritto nell'era della globalizzazione*, Torino, 2008; F. SERNIA, *Il difensore civico nazionale: una innovazione proprio inutile? Considerazioni sulla base dell'esperienza del Mediatore francese*, in *Rivista amministrativa*, 1985; M.A. HADI, *L'extension de l'Ombudsman: triomphe d'une idée ou déformation d'une institution?*, in *Revue Internationale des sciences administratives*, 1977.

<sup>57</sup> Ombudsman from Bulgaria, Greece, Hungary, Romania, and Slovakia are competent to receive human rights complaints (non-judicial)

<sup>58</sup> See Greek Ombudsman, *Human Rights Recent Interventions*, <https://old.synigoros.gr/?i=human-rights.en.home>

<sup>59</sup> G. DE VERGOTTINI, *Modelli comparati di difensore civico: accentrato e decentrato di una funzione di tutela in corso di tipizzazione* in *La Comunità Internazionale*, 1994, pp. 3 ss.



enforcement and in some cases neither legal power to ensure that the relevant authority – to whom the recommendations have been addressed - gives a response<sup>60</sup>.

Because of their increasing activities involving border monitoring and human rights protections, in the last years, there have been many cases showing certain Member States' ambivalence towards the institution of the Ombudsman and their attempts to discredit Ombudspersons or limit their powers<sup>61</sup>. Ombudsman institutions are particularly targeted in countries still undergoing democratic transition, but even in some countries with long-standing democratic cultures, such institutions are subject to challenges and threats when operating in the migration field<sup>62</sup>. Despite this being a clear sign of the high quality of the Ombudsmen's work, it also constitutes an important challenge. The political context in which the Ombudsmen operate can, indeed, pose a danger to their effective independence. For example, the Hungarian government intervened in the Ombudsman's reorganisation, in a case then led to the sentencing of the Hungarian State by the European Court of Justice<sup>63</sup>. Therefore, the Proposal should be aware of the resources and mandate of the Ombudsmen and provide a guaranteed level of independence for participation in the monitoring system.

### 2.3. *The National Preventive Mechanisms (NPMs)*

The IMM should «ensure compliance with national rules on the detention of the person concerned, in particular concerning the grounds and the duration of the detention»<sup>64</sup>. The primary responsibility for the monitoring of detention conditions lies on National Preventive Mechanisms (NPMs), established under the 2002 Optional Protocol to the United

<sup>60</sup> N. POSTERARO, *L'amministrazione contenziosa: le "Alternative Dispute Resolution" (con particolare riguardo alla figura del difensore civico)*, in *Il processo*, 2021, pp. 28. See also C.T. BURBRIDGE, *L'ombudsman: problemi d'applicazione*, in *Rivista trimestrale di scienza dell'amministrazione*, 1975, pp. 126 ss.

<sup>61</sup> See Council of Europe, Report Doc. 14953 (2019) of 20 August 2019, *Ombudsman institutions in Europe - the need for a set of common standards*, par. 2.3. The Committee on Legal Affairs and Human Rights of the Council of Europe recollects a few examples: legislative amendments aimed at weakening the institution (in Croatia); downsizing the Ombudsman's budget (in Poland); launching an unjustified audit (in Cyprus); denial of access to files or information (in Croatia, the border police recently denied the Ombudsman access to its files, in a clear violation of her investigative powers, and Malta, the Venice Commission has noted «widespread refusal by the administration to provide the information needed for the work of the Ombudsman»), parliament's rejection of Ombudsman annual reports (in Croatia in 2016) or politicians' public statements criticizing Ombudspersons (in France, Georgia, Serbia, Poland or Slovakia) or unjustified lawsuits lodged against them (in Poland). In the Czech Republic, there have recently been controversies around the election of a deputy Ombudsman, who was considered to be too close to the authorities

<sup>62</sup> *Ibidem*. The IOI has reported cases of the proliferation of institutions with thematic mandates overlapping the powers of the Ombudsman and thus diluting democratic control (in the United Kingdom and Belgium); restrictions on jurisdiction such that key areas of administrative activity are not included (in Ireland); or exclusion of jurisdiction from certain areas of administrative activity following their privatization (in Austria, Belgium, Ireland, the Netherlands, and the United Kingdom)

<sup>63</sup> The Government used its (de facto) power of appointment to remove the former Commissioner Jóri and replace him with a man close to the Prime Minister. The result was an argument - with even judicial implications - between Jóri and the Prime Minister, which led to the condemnation of Hungary in the Judgment of the Court of 18 June 2020, Case C-78/18, *European Commission v. Hungary*, ECLI:EU:C:2020:476. See also: K. L. SCHEPPELE, *Commissione c. Ungheria: come rendere più efficaci le procedure di infrazione*, in *Quaderni costituzionali*, 2014, pp. 725-730

<sup>64</sup> Proposal 2020/0278 (COD), cit. art.7(2)

Nations Convention Against Torture of 2002 (OPCAT)<sup>65</sup>. The main objective of NPMs is to examine the treatment of persons deprived of their liberty, and to strengthen their protection against torture and other cruel, inhuman, or degrading treatment or punishment<sup>66</sup>. By the provisions of the Optional Protocol, the mandate and powers of the NPM should be set out in a constitutional or legislative text<sup>67</sup>. The direct reference to the Paris Principles in the text of OPCAT is a guarantee of independence, and accordingly, NPMs should enjoy functional, operational and financial independence. As the doctrine underlined, the question of NPM independence is a tricky one<sup>68</sup>, since it appears as a multi-faceted concept that very much depends on the context in which NPM operates. It is necessarily influenced by the specifics of the legal system, complexities of the geo-political framework and intricacies of the socio-cultural context of the State Party in question and the individual type or model of its NPM<sup>69</sup>. What makes this picture yet more complicated is the fact that the NPM independence requirement cannot be only attributed to States Parties, as other actors, like the Subcommittee on prevention of torture (SPT), have a significant responsibility in ensuring the proper functioning of an NPM<sup>70</sup>. Looking at financial independence, for example, it is interesting to note that OPCAT requires States Parties only to provide the necessary resources «for the functioning» of an NPM<sup>71</sup> and not the «effective functioning», a rather minimal requirement that has arguably led to some governments claiming that undertaking NPM functions does not require extra funding for the existing institutions now undertaking NPM functions<sup>72</sup>. This was the case of the Parliamentary Ombudsman in Sweden which initially refused its designation as NPM, inter alia, due to the failure of the Swedish government to allocate additional funding<sup>73</sup>. And it was only after these concerns were addressed that the Parliamentary Ombudsman engaged with the NPM mandate<sup>74</sup>. NPMs make recommendations to the relevant authorities on improving the treatment and condition of persons deprived of their liberty, and submit proposals and observations on existing or draft legislation<sup>75</sup>. The legislation establishing NPMs should oblige the competent

<sup>65</sup> UN General Assembly, Resolution A/RES/57/199 of 9 January 2003, *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)*, United Nations, Treaty Series, vol. 2375, p. 237

<sup>66</sup> R. MURRAY, E. STEINERTE, M. EVANS, A. HALLO DE WOLF, *The Optional Protocol to the UN Convention Against Torture*, Oxford, 2011, p.118

<sup>67</sup> E. STEINERTE, R. H. MURRAY, *Same but Different? National Human Rights Commissions and Ombudsman Institutions as National Preventive Mechanisms under the Optional Protocol to the UN Convention against Torture*, in *Essex Hum. Rights Rev., Special Issue*, 2009, p. 57.

<sup>68</sup> B. NAYLOR, E. SANTOW, S. FARTHING, P. WELLER, S. WINFORD, *Foreword to the Special Issue on the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, in *Austr. Jour. Hum. Rights*, 2019, vol. 25, p. 3

<sup>69</sup> E. STEINERTE, *The Jewel in the Crown and Its Three Guardians: Independence of National Preventive Mechanisms under the Optional Protocol to the UN Torture Convention*, in *Hum. Righ. Law Rev.*, 2014, p. 29

<sup>70</sup> *Supra*, p. 26

<sup>71</sup> Article 18(3) OPCAT

<sup>72</sup> This is the case in many States Parties, like The Netherlands, where no additional funding has been allocated to institutions designated as part of the Dutch NPM: see *Inspectorate for Security and Justice, Monitoring Places of Detention: First Annual Report – Mechanisms*, Amsterdam, 2011, p. 15

<sup>73</sup> Subcommittee on Prevention of Torture, *Report on the Visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Sweden*, 10 September 2008, CAT/OP/SWE/I, at para 15

<sup>74</sup> Subcommittee on Prevention of Torture, *Replies from Sweden to the Recommendations and Questions of the Subcommittee on Prevention of Torture in its Report on the First Periodic Visit to Sweden*, 30 January 2009, CAT/OP/SWE/I/Add.1, at para 3

<sup>75</sup> L. C. REIF, *The Ombuds Institutions, Good Governance and the International Human Rights System*, 2020 p. 399

authorities and other stakeholders to examine the recommendations of the NPMs and to enter into dialogue with them regarding their implementation<sup>76</sup>. To comply with the mandate, the State should allow the NPM to visit all, and any suspected, places of deprivation of liberty, as set out in Articles 4 and 29 of the Optional Protocol<sup>77</sup>, which are within its jurisdiction. For these purposes, the jurisdiction of the State extends to all those places over which it exercises effective control<sup>78</sup>. Moreover, the State should ensure that the NPM can carry out visits in the manner and with the frequency that the NPM itself decides. This includes the ability to conduct private interviews with those deprived of liberty and the right to carry out unannounced visits at all times to all places of deprivation of liberty<sup>79</sup>. The increase in the number of places of deprivation of liberty of foreigners is leading to an expansion of the original mandate of the NPM<sup>80</sup> and their progressive centrality in the field of immigration<sup>81</sup>. In some States, such as Greece and Italy, the NPMs regularly conduct monitoring visits to migrant detention facilities and hotspots and publish reports detailing these visits<sup>82</sup>.

The screening procedure set out by the Proposal will have an additional impact on the enjoyment of the right to liberty of migrants and refugees and is already addressing questions related to detention<sup>83</sup>. Indeed, the Proposal suggests that migrants who do not satisfy the conditions for entry in the Schengen Borders Code<sup>84</sup> would be registered and screened to establish their identity and to carry out health and security checks, which may take up to five days<sup>85</sup>, and the Member States are explicitly called upon to adopt measures to prevent the persons concerned from leaving the «locations situated at or in proximity to the external borders»<sup>86</sup> where the relevant procedures are carried out. Despite provisions for detentions,

<sup>76</sup> C. BICKNELL, M. EVANS, R. MORGAN, *Preventing Torture in Europe*, Strasbourg, 2018, p. 24

<sup>77</sup> OPCAT, Article 4: «1. Each State Party shall allow visits, by the present Protocol, by the mechanisms referred to in articles 2 and 3 to any place under its jurisdiction and control where persons are or may be deprived of their liberty, either by an order given by a public authority or at its instigation or with its consent or acquiescence (hereinafter referred to as places of detention). These visits shall be undertaken with a view to strengthening, if necessary, the protection of these persons against torture and other cruel, inhuman or degrading treatment or punishment 2. For the present Protocol, deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority »; Article 29: «The provisions of the present Protocol shall extend to all parts of federal States without any limitations or exceptions»

<sup>78</sup> UN Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, CAT/OP/12/5 of 9 December 2010, *Guidelines on national preventive mechanisms*, point 24

<sup>79</sup> *Ibidem*, point 25

<sup>80</sup> See A. G. HALLO DE WOLF, *Visits to Less Traditional Places of Detention: Challenges under the OPCAT*, in *Ess. Hum. Righ. Law Rev.*, 2009, pp. 73 ss.; E. STEINERTE, R. H. MURRAY AND J. M. LAING, *Monitoring those Deprived of their Liberty in Psychiatric and Social Care Institutions and National Practice in the UK*, in *International Journal of Human Rights*, 2012, pp. 865 ss.

<sup>81</sup> See I. MAJCHER, M. FLYNN, M. GRANGE, *Immigration Detention in the European Union*, Berlin, 2020 p. 15

<sup>82</sup> Greek Ombudsman, *Annual Report 2020*, [https://www.synigoros.gr/resources/annual\\_report\\_2022.pdf](https://www.synigoros.gr/resources/annual_report_2022.pdf), p. 63; Garante nazionale dei diritti delle persone private della libertà personale, *Relazione al Parlamento 2022*, <https://www.garantenazionaleprivatiliberta.it/gnpl/resources/cms/documents/c8c57989b3cd40a71d5df913412a3275.pdf>, p. 61; see also H. SINGH BHUI, M. BOSWORTH, A. FILI, *Monitoring Immigration Detention at the Borders of Europe, Report on a pilot project in Greece, Hungary, Turkey and Italy*, Oxford, 2016- 2017, p. 7

<sup>83</sup> G. CORNELISSE, *The Pact and Detention: An Empty Promise of 'certainty, clarity and decent conditions'* in *EU Immigration and Asylum Law and Policy*, 6 January 2021 (eumigrationlawblog.eu)

<sup>84</sup> Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), in OJ L 77, 23.3.2016, p. 1, art. 3 and 4

<sup>85</sup> Proposal 2020/0278 (COD), cit. art. 6(3)

<sup>86</sup> *Ibidem*, art. 6(1)

no mention of detention conditions is provided in the Proposal<sup>87</sup>. Moreover, the Reception Conditions Directive does not apply, even if according to the LIBE Commission, exemptions to its scope make more complex monitoring obligations compliance to human rights and the EU Charter more complex<sup>88</sup>. It is even suggested that the tasks related to the screening may be carried out in already established hotspot areas<sup>89</sup>, where the experience of the past five years has clearly shown that hotspot areas were managed as places of confinement, in which migrants' freedoms were drastically curtailed even in the absence of formally adopted detention measures<sup>90</sup>. The Proposal states that during the screening, people «shall not be authorized to enter the territory of a Member State»<sup>91</sup>. Member States are «required to apply measures under national law to prevent the persons concerned from entering the territory during the screening», which «in individual cases may include detention»<sup>92</sup>. Concerning these provisions, it should be underlined that the mandate of the OPCAT mechanisms extends to border detention and also extraterritorial processing centres<sup>93</sup>. The Vienna Convention on the Law of Treaties 1969 makes clear that international legal obligations apply to the entire territory of a State party unless specified otherwise<sup>94</sup>. Furthermore, the European Court of Human Rights has stated that it is irrelevant that an airport zone, and by analogy border or another territory, is called an *international zone*; it is still part of the territory of the State and human rights obligations continue to apply<sup>95</sup>. Detention facilities located in so-called *international zones* or in other locations that have been purportedly excised or removed from the application of national asylum or immigration laws, therefore, continue to fall within the mandate of the OPCAT mechanisms<sup>96</sup>. As the doctrine pointed out, indeed, only broad interpretations of what amounts to a deprivation of liberty and a place of detention match OPCAT prevention purposes<sup>97</sup>. In this regard, the addition of further places of detention to monitor without additional resources might constitute a problem. Already in the past, the inadequacy of funding by some States Parties has been to such an extreme level that NPMs have declared their inability to fulfil their mandates. This was the case, for instance, of the German NPM, the National Agency for the Prevention of

<sup>87</sup> The only reference is in Recital 40f of the Reception Conditions Directive Proposal, which mentions that if people are detained in the course of the border procedures, the provisions of the Reception Conditions Directive (RCD) should apply, «including the guarantees for detained applicants and the fact that an individual assessment of each case is necessary, judicial control and conditions of detention» (Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast) COM/2016/0465 final - 2016/0222 (COD)). Analogies are not possible, because the Screening Regulation provides that during the screening the secondary asylum legislation, such as the Reception Conditions Directive does not apply (recital 16 of the Proposal and page 5 of the Explanatory Memorandum of the Proposal).

<sup>88</sup> Draft (2018/0329(COD)) of the Committee on Civil Liberties, Justice and Home Affairs (LIBE) of 21 February 2020 for a report on the implementation of the Return Directive, Amendment 40

<sup>89</sup> *Ibidem*, recital 12

<sup>90</sup> G. CAMPESI, *The EU Pact on Migration and Asylum and the dangerous multiplication of 'anomalous zones' for migration management in Asile Forum*, 27 November 2020 (asileproject.eu)

<sup>91</sup> Proposal 2020/0278 (COD), cit. art. 4(1)

<sup>92</sup> *Ibidem*, recital 12

<sup>93</sup> A. EDWARDS, *The Optional Protocol to the Convention against Torture and the Detention of Refugees*, in *Inter. and Comp. Law Quart.*, 2008, p. 816

<sup>94</sup> Art 29 VCLT

<sup>95</sup> Judgment of ECtHR, 25 June 1996, case 19776/92, *Amour v France*, para 64

<sup>96</sup> See A. EDWARDS, *Tampering with Refugee Protection: The Case of Australia*, 2003, *Int'l J Ref Law*, 2013, p. 192

<sup>97</sup> A. EDWARDS, *The Optional Protocol*, cit. p. 824

Torture<sup>98</sup>. Furthermore, NPMs must operate both during the screening and border procedures. The IMM, instead, will operate only in case of detention during the screening procedure. The Pact suggests that detention - under the screening, the border procedure, and the return procedure - will be in the same places and, consequently, under the same detention condition. The NPMs' participation in IMM, therefore, shouldn't affect NPMs' operability and functionality, as they continue to be entitled to access and monitor any and any suspected places of deprivation of liberty, unannounced.

### 3. The existing European monitoring mechanisms at EU borders

The EU external borders are increasingly a place in which actors belong to different national police forces, agencies of the European Union, to organizations belonging to the United Nations system. Depending on the entity to which they belong, these actors are subject to different liability regimes and remedies<sup>99</sup>. Reacting to the many complaints about human rights violations at the border<sup>100</sup>, the European Parliament pushed for several reforms concerning the main European border actors<sup>101</sup>. The reforms strengthened the already existing monitoring mechanisms and created new ones<sup>102</sup>. The next sections will briefly present the Schengen Evaluation and Monitoring Mechanism (SEMM) functioning and will offer an overview of the emergence of monitoring and complaint-handling functions in the two main European Agencies operating at the EU external Border, the European Border and Coast Guard Agency (Frontex) and the European Union Asylum Agency (EUAA).<sup>103</sup> Understanding their functioning shall foresee their interaction with the IMM and how they could be strengthened by the IMM's existence.

#### 3.1. Schengen Evaluation and Monitoring Mechanism (SEMM)

In June 2021, the Commission proposed to amend the regulation on Schengen Evaluation and Monitoring Mechanism (SEMM)<sup>104</sup> to strengthen the evaluation of respect

<sup>98</sup> Federal Agency for the Prevention of Torture, *Annual Report 2010/2011*, Wiesbaden, 2011, p. 9

<sup>99</sup> S. CARRERA AND M. STEFAN, *Complaint Mechanisms in border management*, cit., p. 37 ss.

<sup>100</sup> A. RADJENOVIC, *Push-backs at the EU's external borders*, EPRS - EP, Bruxelles, 2021; C. DUMBRAVA, *Screening of third-country nationals at the EU's external borders*, EPRS - EP, Bruxelles, 2020 and M. STEFAN, R. CORTINOVIS, *Setting the right priorities: is the new Pact on Migration and Asylum addressing the issue of pushbacks at EU external borders?* in *Asile Forum*, 25 November 2020 (asileproject.eu)

<sup>101</sup> See A. RADJENOVIC, *Reforming asylum and migration management*, EPRS - EP, Bruxelles, 2020 and A. RADJENOVIC, *Search and rescue in the Mediterranean*, EPRS - EP, Bruxelles, 2021.

<sup>102</sup> L. TSOURDI, *Monitoring and Steering through FRONTEX and EASO 2.0: The Rise of a New Model of AFSJ agencies?* in *EU Immigration and Asylum Law and Policy*, 29 January 2018 (eumigrationlawblog.eu)

<sup>103</sup> L. TSOURDI, *Monitoring and Steering through FRONTEX and EASO 2.0: The Rise of a New Model of AFSJ agencies?* at <https://eumigrationlawblog.eu/monitoring-and-steering-through-frontex-and-easo-2-0-the-rise-of-a-new-model-of-afsj-agencies/?print=print>

<sup>104</sup> Regulation (EU) No 1053/2013 on the establishment and operation of an evaluation and monitoring mechanism to verify the application of the Schengen acquis, in OJ L 295, 6.11.2013, p. 27 s. For an overview of the mechanism see J. BALLA JÓZSEF, L. VÁJLOK, L. KUI, *Theory and Practice of the Schengen Evaluation Mechanism*, in *Magyar Rendészet*, 2019, pp. 15 ss.;

for fundamental rights within the Schengen *acquis*<sup>105</sup>. Not a single recommendation on non-refoulements, indeed, was adopted by SEMM, despite numerous reports of violations in the Member States concerned<sup>106</sup>. The new Regulation was adopted in June 2022<sup>107</sup>. It allows the Commission to use the results of external mechanisms and instruments, such as independent national monitoring mechanisms, to prepare evaluation and monitoring activities<sup>108</sup>. The information provided by bodies participating in the IMM could provide the SEMM with more reliable data from cross-organizational feedback<sup>109</sup>. Based on the information provided by the mechanism, unannounced on-site visits shall take place if it is suspected that a Member State is seriously neglecting its obligations under the Schengen *acquis*, including as a result of serious allegations of potential violations of fundamental rights<sup>110</sup>. Attention must, therefore, be paid to the composition and independence of the IMM, as several voices have already pointed out, the lack of such elements would compromise the quality of the information provided<sup>111</sup>. Bringing information from the IMM to the SEMM will shift the level of protection of rights from a national to a European level, forcing the Commission to take action against those countries that act at the border in violation of fundamental rights<sup>112</sup>. On evaluation bases, it should be possible for the European Commission to withhold EU funding by linking the IMM to the monitoring of the effective application and implementation of the EU Charter of Fundamental Rights,

<sup>105</sup> The Report on the functioning of the SEMM under Article 22 of Regulation 1053/13. First Multiannual Evaluation Programme (2015-2019), COM (2020) 779 concluded that the evaluation of respect for fundamental rights was not sufficiently integrated into the evaluation mechanism. See also M. WAGNER, C. KATSIAFICAS, J. LIEBL, L. HADJ-ABDOU, L. DRAŽANOVÁ, J. JEANDESBOZ, *The state of play of Schengen governance: an assessment of the Schengen evaluation and monitoring mechanism in its first multiannual programme*, Study of the European Parliament, Policy Department of Citizens' rights and Constitutional Affairs, 2020/PE 658.699 at <https://hdl.handle.net/1814/69146>

<sup>106</sup> FRA, *Fundamental Rights Report*, 2020, p. 27. See also T. STRIK, *Fundamental Rights as the Cornerstone of Schengen*, in *Eur. Jour. Migr. Law*, 2021, pp. 508 ss.

<sup>107</sup> Council Regulation (EU) 2022/922 on the establishment and operation of an evaluation and monitoring mechanism to verify the application of the Schengen *acquis*, and repealing Regulation (EU) No 1053/2013, in OJ L 160, 15.6.2022, p. 1. The new Regulation included the amendments proposed by the Parliament concerning the strengthening of fundamental rights protections at borders (see European Parliament legislative resolution of 7 April 2022 on the Proposal for a Council regulation on the establishment and operation of an evaluation and monitoring mechanism to verify the application of the Schengen *acquis* and repealing Regulation (EU) No 1053/2013). For the studies on the draft see H. MADATALI, *Revision of the Schengen Evaluation and Monitoring Mechanism*, EPRS: European Parliamentary Research Service, 2021 and V. VIKOLAINEN, *Improving the Schengen evaluation and monitoring mechanism*, EPRS: European Parliamentary Research Service, 2021.

<sup>108</sup> Reg. (UE) 2022/922, cit. art. 10. See M. PORCHIA, *Le deroghe alla direttiva rimpatri all'ombra del Patto: strumentalizzazione dei migranti e riforma del meccanismo di valutazione e monitoraggio di Schengen*, in *European Papers*, 2022, pp. 545 ss.

<sup>109</sup> The Proposal should be made explicit that the IMM can take into account and act upon relevant information provided by international organizations, non-governmental organizations, journalists, EU agencies, and institutions even if they are not part of the IMM.

<sup>110</sup> Reg. (UE) 2022/922, cit. art. 11

<sup>111</sup> M. ASTUTI ET AL., «Per quanto voi vi crediate assolti siete per sempre coinvolti». I diritti umani fondamentali alla prova delle frontiere interne ed esterne dell'Unione Europea in *Diritto Immigrazione e Cittadinanza*, 2022, p. 46

<sup>112</sup> On the Commission's inaction regarding human rights violations at the borders see C. COSTELLO, I. MANN, *Border Justice: Migration and Accountability for Human Rights Violations*, in *Germ. Law Jour.*, 2020, pp. 311 ss.; F. PEERBOOM, *Protecting Borders or Individual Rights? A Comparative Due Process Rights Analysis of EU and Member State Responses to 'Weaponised' Migration*, in *European Papers*, 2022, pp. 583 ss., M. MORARU, *Generalised push-back practices in Europe: The right to seek asylum is a fundamental right*, in *Quaderns IEE: Revista de l'Institut d'Estudis Europeus*, 2022, pp. 154 ss

which is an ongoing exercise and suggested precondition for Member States to receive EU funding in the next EU budget<sup>113</sup>.

### 3.2. European Border and Coast Guard Agency (Frontex)

The European Border and Coast Guard Agency, also known as Frontex, is an Agency of the European Union tasked with border control of the European Schengen Area, in coordination with the border and coast guards of Schengen Area Member States<sup>114</sup>. In the performance of its tasks, the Agency has to respect fundamental rights protections including a non-refoulement obligation per Article 80 of the Frontex Regulation<sup>115</sup>. Following the 2011 amendments to the Frontex Regulation, the position of a Fundamental Rights Officer (FRO) and a Consultative Forum on Fundamental Rights were created and embedded into Frontex's structure<sup>116</sup>. However, allegations of human rights violations have continued<sup>117</sup>. The 2019 Regulation established the function of fundamental rights monitors, who shall constantly assess the fundamental rights compliance of operational activities, provide advice and assistance in that regard and contribute to the promotion of fundamental rights as part of European integrated border management<sup>118</sup>. They shall have access to all areas in which the operational activity of the Agency takes place and to all its documents relevant to the implementation of that activity<sup>119</sup> and be independent in the performance of their duties<sup>120</sup>.

Frontex has three mechanisms for reporting violations of fundamental rights: the complaints mechanism, the serious incident report mechanism, and the supervisory mechanism on the use of force by statutory staff<sup>121</sup>. The complaint mechanism (therefore

<sup>113</sup> M. PORCHIA, *Lo strumento della condizionalità dei fondi erogabili nei contesti di gestione delle frontiere esterne dell'Unione europea*, in *Quaderno AISDUE serie speciale, La Conferenza sul futuro dell'Europa, contributo al dibattito sui valori dell'Unione e sulla protezione della salute e dell'ambiente*, Napoli, 2022, p. 301 ss.

<sup>114</sup> On the transformation from Frontex to European Border and Coast Guard Agency see M. SORMANI, *Da "Frontex" alla guardia di frontiera e costiera europea*, in *Riv. dir. nav.*, 2016, pp. 859 ss.; F. ZORZI GIUSTINIANI, *Da Frontex alla Guardia di frontiera e costiera europea: novità in tema di gestione delle frontiere esterne*, in *Dir. pub.c omp. eur.*, 2017, pp. 523 ss.

<sup>115</sup> Regulation (EU) 2019/1896 of 13 November 2019 on the European Border and Coast Guard, in *OJ L* 295, 14.11.2019, p. 1 s.

<sup>116</sup> On the role and impact of the Consultative Forum see C. LOSCHI, P. SLOMINSKI, *Frontex's Consultative Forum and Fundamental Rights Protection: Enhancing Accountability Through Dialogue?*, in *European Papers*, 2022, p. 195

<sup>117</sup> See M. FINK, *Frontex and human rights: responsibility in 'multi-actor situations' under the ECHR and EU public liability law*, Oxford, 2018; M. CEDERBRATT, *Frontex: Human rights responsibilities*, in *Int. Jour. Refug. Law*, 2013, pp. 407 ss.; A. LIGUORI, N. RICCIUTI, *Frontex ed il rispetto dei diritti umani nelle operazioni congiunte alle frontiere esterne dell'Unione europea*, in *Dir. uomo. dir. int.*, 2012, pp. 539 ss.; A. SPAGNOLO, *La tutela dei diritti umani nell'ambito dell'attività di Frontex*, in *Diritto, immigrazione e cittadinanza*, 2014, pp. 32 ss.

<sup>118</sup> *Ibidem*, art.110(1). For the first observations on fundamental rights monitors' role and competencies see N. PERKOWSKI, *Humanitarianism, Human Rights, and Security. The Case of Frontex*, 2022, London, p. 142; G. CAMPESI, *Policing Mobility Regimes Frontex and the Production of the European Borderscape*, London, 2022, p. 256

<sup>119</sup> *Ibidem*, art. 110(3)

<sup>120</sup> *Ibidem*, art. 110(5)

<sup>121</sup> Moreover, the FRO and the Consultative Forum can recommend the executive director suspend an operation or prevent its launch in case of violations of fundamental rights or international protection obligations, see Regulation (EU) 2019/1896 art. 47(4)(5). On 27th January 2021 Frontex decided, for the first time, to suspend its operations in Hungary (<https://www.infomigrants.net/en/post/29917/frontex-suspends-operations-in-hungary-over-asylum-system>). The decision comes after two rulings of the CJEU last year, in May (Case C-924/19 PPU et C-925/19 PPU ECLI:EU:C:2020:367) and December (Judgment of the Court (Grand Chamber) of 14 May 2020, *FMS and Others v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális*

CM) has been set up for the submission of individual complaints from persons who are directly affected by the actions, or failure to act, of staff involved in Frontex activities, and who consider themselves to have been subject to a breach of their fundamental rights due to those actions or failure to act<sup>122</sup>. The FRO should forward admissible complaints concerning the staff of national authorities participating in Frontex operations to the authority of the Member State concerned and inform the relevant fundamental rights body<sup>123</sup>. Then, the home Member State shall ensure appropriate follow-up, including disciplinary measures as necessary or other measures by national law, report back to the FRO within a defined period on their findings, and follow up on complaints. For each case in which a Member State does not comply with the obligation to report to the FRO, the FRO should be able to refer the matter to the Management Board<sup>124</sup>. As waste discussed by scholars, the CM has several weaknesses triggering its effectiveness<sup>125</sup>. It overlaps with the Agency the competencies of support to the Member States and monitoring their behaviour, with the consequence of hinging on the same subject the role of controller and controlled, which threatens compromising the effectiveness and independence of the CM<sup>126</sup>. The establishment of collaboration between Fundamental Rights Monitors and the IMM might mitigate this lack of independence<sup>127</sup>. Indeed, pieces of evidence of non-respect for fundamental rights regarding the screening involving the Frontex operation could be recollected by the IMM. Then, the Frontex CM lacks access to an effective remedy<sup>128</sup>. The CM proved inefficient because all complaints concerning the actions of Member State personnel were passed on without any substantive review to the Member States<sup>129</sup>, who sometimes are unable to provide appropriate follow-up to complaints<sup>130</sup>. Moreover, it is for the Member States to designate the national authority and fundamental rights body to deal with complaints

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*Igazgatóság and Országos Idegenrendészeti Főigazgatóság*, Case C-924/19 *FMS e et al.* ECLI:EU:C:2020:367) on recurrent violations of the fundamental rights of asylum seekers at the border.

<sup>122</sup> Regulation (EU) 2019/1896 art.111(2). For the first observations on the complaint's mechanism see D. FERNANDEZ ROJO, *The introduction of an individual complaint mechanism within FRONTEX: two steps forward, one step back*, in *Tijd. Men. Best. Pub.*, 2016 pp. 125 ss;

<sup>123</sup> *Ibidem*

<sup>124</sup> *Ibidem*, art. 111(7)

<sup>125</sup> S. CARRERA AND M. STEFAN, *Human rights complaints at international borders or during expulsion procedures* in S. CARRERA, M. STEFAN (eds.) *Fundamental Rights Challenges in Border Controls and Expulsion of Irregular Immigrants in the European Union: Complaint Mechanisms and Access to Justice*, London, 2020; L. KARAMANIDOU, B. KASPAREK *Fundamental Rights, Accountability and Transparency in European Governance of Migration: The Case of the European Border and Coast Guard Agency FRONTEX*, in *Global Migration: Consequences and Responses – Working Paper Series*, 2020; M. GKLIATI, *Frontex Return Operations and their Human Rights Implications* in M. SOYSÜREN, M. NEDELCO (eds.), *Deportation of Foreigners: EU instruments, Nation-State practices and social actors' involvement*, Bern, 2020; M. GKLIATI, J. KILPATRICK, *Frontex cooperation with third countries: examining the human rights implications* in *Forced Migration Review*, 2021 p.16 ss.

<sup>126</sup> L. TSOURDI, *Monitoring and Steering*, cit.

<sup>127</sup> See also Frontex, *Consultative Forum on Fundamental Rights 2020*, p. 51

<sup>128</sup> See M. FINK, *The Action for Damages as a Fundamental Rights Remedy: Holding Frontex Liable* in *Germ. Law Jour.*, 2021 p. 532 s.; L. KARAMANIDOU, B. KASPAREK, *Fundamental Rights, Accountability and Transparency*, cit.; Salvatore Nicolosi, *Access to justice and EU enforcement agencies in the field of migration: an emerging problem*, at <http://blog.renforce.eu/index.php/en/2021/05/11/access-to-justice-and-eu-enforcement-agencies-in-the-field-of-migration-an-emerging-problem-2/>

<sup>129</sup> M. FINK, *Frontex: Human Rights Responsibility and Access to Justice* in *EU Immigration and Asylum Law and Policy*, 30 April 2020 (eumigrationlawblog.eu)

<sup>130</sup> European Ombudsman, Decision in OI/5/2020/MHZ of 15 June 2021 *on the functioning of the European Border and Coast Guard Agency's (Frontex) complaints mechanism for alleged breaches of fundamental rights and the role of the Fundamental Rights Officer*.



concerning their border guards «for further action by their mandate»<sup>131</sup>. In Italy, where there is no HRI or Ombudsman, complaints are forwarded to the Italian Authority for the protection of the rights of people who are detained or deprived of liberty, which is not the appropriate body to deal with them<sup>132</sup>. From one side, the establishment of an IMM participated by bodies capable of handling complaints impartially and independently - at least about violations during the screening stages - would provide the FRO with an appropriate fundamental rights body to forward the complaints<sup>133</sup>. From the other side, the presence of a true independent mechanism – even if the Proposal does not explicitly provide for the monitoring of Agencies when they assist the Member States in the screening – shall guarantee action against all those involved in potential illegitimate actions during the screening phase. Therefore, persons whose rights have been violated by Frontex operations, for example concerning access to the asylum procedure and non-compliance with the principle of non-refoulement during the screening, may have access to the Agencies' complaint mechanisms as well as to the IMM<sup>134</sup>.

### 3.3. European Union Agency for Asylum (EUAA)

The European Union Agency for Asylum (EUAA), replaces the European Asylum Support Office (EASO) with the regulation (UE) 2021/2303<sup>135</sup>. It marks the first of the proposals to reform the Common European Asylum System (CEAS) to be approved and introduces provisions to ensure that the Agency's tasks fully adhere to fundamental rights. A Fundamental Rights Officer (FRO), who will answer to the Agency's Management Board, was appointed and is responsible for the development of the Agency's Fundamental Rights Strategy<sup>136</sup>.

A complaints mechanism was established to respond to claims of breaches of fundamental rights in the context of the Agency's operations<sup>137</sup>. In the case of a complaint

<sup>131</sup> Regulation (EU) 2019/1896, art. 111(4)

<sup>132</sup> Italian Parliament, Parliamentary question E-004336/2017 of 29.06.2017, *Istituzione del Difensore civico nazionale e meccanismo di denuncia delle violazioni dei diritti fondamentali nell'ambito delle operazioni Frontex*

<sup>133</sup> See N. VOGIATZIS, *Frontex: Human Rights Obligations and the Role of the European Ombudsman in The Digital Transformation of the Public Sphere*, A. KARATZOGIANNI, D. NGUYEN, E. SERAFINELLI (eds), 2016

<sup>134</sup> Member States authorities will therefore be forced to provide appropriate follow-up to complaints, arising from two different mechanisms. As in Frontex operations, the level of protection could shift from a national to a European level. Indeed, even if there are no sanction provisions in the Proposal, when complaints are forward to the new mechanism, for each case in which a Member State does not comply with the obligation to report to the FRO, the FRO should be able to refer the matter to the Management Board. Since the European Commission, which monitors national compliance with EU law, sits on the Management Board, this could be an additional means for ensuring compliance.

<sup>135</sup> Regulation (EU) 2021/2303 of the European Parliament and of the Council of 15 December 2021 on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010, in *OJ L* 468, 30.12.2021, p. 1 s.

<sup>136</sup> *Ibidem*, art. 49(1). As in the Frontex Regulation, the new EUAA regulation introduces the possibility for the Executive Director, after consultation with the FRO, to suspend or terminate, in whole or in part, the deployment of asylum support teams in the event of violations of fundamental rights or international protection obligations by the Member State which are serious or are likely to persist (art. 18(6)(c)). The FRO is not supported by a team of human rights observers, with whom the mechanism could collaborate, as is the case for Frontex (art.110(1))

<sup>137</sup> *Ibidem*, art. 51(1). The EUAA Regulation expressly provides that the complaints mechanism should be an administrative mechanism, without prejudice to access to administrative and judicial remedies, and does not constitute a requirement for seeking such remedies. It underlines that it is essential that Member States conduct

concerning an expert of a Member State, including seconded national experts, the FRO shall forward complaints concerning experts participating in an asylum support team to the home Member State; inform the relevant authority or body competent for fundamental rights in a Member State of a complaint, and register and ensure follow-up by the Agency or the Member State concerned<sup>138</sup>. On the other side, the home Member State shall ensure appropriate follow-up, including disciplinary measures as necessary or other measures by national law, report to the fundamental rights officer on the findings, and follow-up made in response to a complaint within a determined period and, if necessary, at regular intervals thereafter<sup>139</sup>. As in the scenario concerning Frontex operations, the establishment of the IMM would provide the FRO with an appropriate fundamental rights body to forward the complaints relating to the violation during the screening phase.

It is too early to assess the impact of these changes on the Agency's work because most provisions still have to be implemented, but it is already observed that the complaint body is not a legally independent Agency separate from EUAA, therefore cannot be considered independent<sup>140</sup>. There is no doubt that the IMM might mitigate the lack of independence of the EUAA internal complaint mechanism by allowing persons whose rights have been violated in EUAA operations related to the screening phase to have access to both the IMM and the Agencies' complaint mechanisms, as well as to administrative and judicial remedies.

#### 4. *Case study: the border monitoring mechanism in Croatia*

Independently of the Proposal in the New Pact on Asylum to establish an independent monitoring mechanism for all Member States at all external borders, the Commission is pursuing bilateral discussions with the several Member States to advance the implementation of monitoring mechanisms where it is most needed, providing funds for the scope. In November 2020, Amnesty International complained to the EU Ombudsman raising doubts about the effective establishment of an independent monitoring mechanism for which the Croatian government received found by the Commission<sup>141</sup>. The European Ombudsman

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criminal investigations, where necessary, ensuring that complaints are properly followed up, and an effective remedy granted

<sup>138</sup> *Ibidem*, art. 51(8). Moreover, the Agency shall follow the matter up where no report is received from the home Member State

<sup>139</sup> *Ibidem*

<sup>140</sup> L. TSOURDI, *Holding the European Asylum Support Office Accountable for its role in Asylum Decision-Making: Mission Impossible?* in *Germ. Law jour.*, 2021, p. 506 s.; S. F. NICOLOSI, D. FERNANDEZ-ROJO, *Out of control? The case of the European Asylum Support Office* in M. SCHOLTEN AND A. BRENNINKMEIJER (eds.), *Controlling EU Agencies*, Cheltenham, 2020, p. 117 ss.

<sup>141</sup> Amnesty argued, in this case, that the Commission had failed to address persistent allegations of serious human rights violations by the Croatian authorities in the context of border management operations for which Croatia had received various types of funding since 2018, including funds from the Emergency Assistance Grant Scheme (EMAS), allocated due to increased migratory pressure. See Communication COM/2019/497 of 22 October 2019 from the Commission to the European Parliament and the Council on the verification of the full application of the Schengen acquis by Croatia, p. 15: «part of the EUR 6.8 million in emergency funding granted to Croatia in December 2018 to strengthen border management was dedicated to a new mechanism for monitoring. This would help to ensure that border control activities by Croatian border guards remain in full compliance with EU law, international obligations, and respect for fundamental rights and rights stemming from the EU asylum acquis, including the principle of non-refoulement [...]». EMAS funds are funding instruments part of FAMI (Asylum, Migration and Integration Fund) funds managed directly by the European

invited the Commission to respond on the existence and nature of the monitoring mechanism<sup>142</sup>, but a pilot project for 'an independent mechanism for monitoring the conduct of police officers in the area of irregular migration and international protection' was announced pending the investigation<sup>143</sup>, making Croatia the first country in the European Union to introduce an independent monitoring border mechanism. Therefore, the Ombudsman closed the investigation<sup>144</sup>. In October 2021, a European Parliamentary Question highlighted that:

«The Croatian media have reported on the new 'border monitoring mechanism'. Unfortunately, there are still grounds for concern. The independence of the organizations involved is questionable. They are not financially independent and lack experience. The mechanism has a limited scope, no unannounced visits have been carried out and there is no clarity on whether and how investigations will take place if incidents of border violence or pushbacks are reported. Finally, the 'cooperation agreement' is not publicly accessible and several implementing partners have not yet seen it, including the Croatian Ombudsman's Office»<sup>145</sup>.

Parliament questioned the Commission on its role under the mechanism and how exactly will the mechanism be financed; how will the independence of the different actors be ensured and which are their measures in place to guarantee the transparency of the process and prevent interference from the relevant ministry; and if the Commission considers this to be a mechanism that meets the conditions of the Screening Proposal and could serve as an example for other countries and why.

In November 2021, the Commission answered, informing that the authorities have set up the Croatian Independent Monitoring Mechanism (thereafter CIMM) and have selected the members providing monitoring activities under it, independently of the authorities and not funded by them. About its role, the Commission was declared to be a member of the Advisory Body linked to the CIMM, with the task to provide recommendations to both the CIMM and the Ministry of the Interior of the Republic of Croatia<sup>146</sup>.

Even if Commission didn't answer about the possibility of the CIMM serving as an example for other countries, an analysis of its implementation could lead to a negative answer.

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Commission - Directorate-General for Migration and Home Affairs. Regulation (EU) No 515/2014, states in Article 7 that, in response to an emergency as defined in the specific regulations, the Commission may decide to provide emergency assistance to the Member States and third countries.

<sup>142</sup> European Ombudsman, Case 1598/2020/VS of 10 November 2020, *How the European Commission ensures that the Croatian authorities respect fundamental rights in the context of border management operations financed by EU funds*. The European Ombudsman called on the Commission also to respond to the actions taken to ensure that border management operations receiving EU funds respect fundamental rights.

<sup>143</sup> Communication COM (2021) 590 of 12 October 2021, from the Commission to the European Parliament, the Council, the European Economic, and Social Committee, and the Committee of the Regions, *'Report on migration and asylum'*.

<sup>144</sup> European Ombudsman, Case 1598/2020/VS, cit. The investigation was closed on 22 February 2022.

<sup>145</sup> European Parliament, Parliamentary question E-004833/2021 of 25 October 2021, on the border monitoring mechanism in Croatia

<sup>146</sup> European Parliament, Answer for question E-004833/2021(ASW) of 21 December 2021, on the border monitoring mechanism in Croatia

The standards of the Paris Principles stipulate that the human rights institution must operate with formal and functional independence<sup>147</sup>. At present, no public procedures appear to have been launched for the selection of the actors involved in the monitoring activity and the selection process and criteria are unknown<sup>148</sup>. All bodies being vocal about pushbacks and helping to bring the issue to light over the past five years have been excluded from the process, and the Ministry of the Interior has reportedly involved actors with whom it already has a “consolidated collaboration”<sup>149</sup>. The Office of Ombudsperson - which has been critical of the government in the past - has been involved not in the CIMM, with an operational role, but in a body with reduced advisory functions<sup>150</sup>.

The Paris Principles also provide that for a human rights protection body to be effective, it must enjoy adequate resources and financial autonomy<sup>151</sup>. As the Ministry acknowledges<sup>152</sup>, the European funds devolved to the instrument are part of the State budget and will therefore be directly managed by the Ministry in the implementation of the CIMM's actions<sup>153</sup>. Financial dependence will necessarily condition its functioning. Moreover, unlike as declared by the Commission<sup>154</sup>, journalistic investigations have revealed that almost half of the 'independent' organizations in charge of monitoring receive funding from the Ministry of Interior<sup>155</sup>.

The consequences of the lack of independence of the CIMM are immediately noticeable. For example, the first report of the CIMM, dated December 2021, accusing the Croatian police of having «illegally turned back migrants in Bosnia and Herzegovina», was quickly withdrawn and replaced with a watered-down version that did not refer to human rights violations on the Croatian side<sup>156</sup>. The second report was published in July 2022, reporting the CIMM supervised the actions of Ministry of Interior police officers, «in the

<sup>147</sup> UN General Assembly, *The Paris Principles*, cit.

<sup>148</sup> The process of setting up the Croatian mechanism has been the subject of several investigations concerning the under-utilization of resources, false statements, and opacity, so much so that the UNHCR and the Croatian Law Centre - the two entities identified as the implementers of the project - initially denied their involvement, made public by the Croatian Government, only to later retract their statements. See L. Tondo, EU 'covered up' Croatia's failure to protect migrants from border brutality, *The Guardian*, 15.06.2020, at <https://www.theguardian.com/global-development/2020/jun/15/eu-covered-up-croatias-failure-to-protect-migrants-from-border-brutality>

<sup>149</sup> Border Violence Monitoring Network (BVMN), *Illegal pushbacks and border violence reports*, May 2022, <https://www.borderviolence.eu/wp-content/uploads/may-report-bvmn.pdf>

<sup>150</sup> To ensure technical support for the operation of the mechanism, the Ministry of the Interior invited representatives of the European Commission, Frontex, FRA, EASO, UNHCR and IOM, the Ombudsperson's Office, and the Prosecutor General's Office of the Republic of Croatia to join the Advisory Board.

<sup>151</sup> UN General Assembly, *The Paris Principles*, cit.

<sup>152</sup> Secretary of State of the Ministry of the Interior Terezija Gras, Klasa: 018-01/19-01/607, Ur.broj: 511-01-131-21-691, 16.9.2021, *Reply by the to an official request from the Centre for Peace Studies, "Zahijev za pristup informacijama o neovisnom mehanizmu nadzora"*, [https://www.cms.hr/system/article\\_document/doc/745/ODGOVOR\\_MUP-a\\_na\\_ZAHITJEV\\_ZA\\_PRISTUP\\_INFORMACIJAMA\\_O\\_NEZAVISNOM\\_MEHANIZMU\\_NADZORA.pdf](https://www.cms.hr/system/article_document/doc/745/ODGOVOR_MUP-a_na_ZAHITJEV_ZA_PRISTUP_INFORMACIJAMA_O_NEZAVISNOM_MEHANIZMU_NADZORA.pdf)

<sup>153</sup> EU Obsdman, Inquiry 1598/2020/VS, cit. The Commission made clear that Croatian independent mechanism will be financed by EMAS funds for one year, until May 2022

<sup>154</sup> Parliamentary question - E-004833/2021(ASW), cit.

<sup>155</sup> Avvenire, *Le prove dell'operazione segreta per respingere i profughi dall'Ue*, 7 Ottobre 2021, at <https://www.avvenire.it/attualita/pagine/migranti-croazia-operazione-segreta-per-respingere-profughi>

<sup>156</sup> Interview to Maddalena Avon of the CMS - Centar za Mirovne Studije (Centre for Peace Studies) in Zagreb at <https://www.unimondo.org/Guide/Politica/Cittadinanza/I-diritti-violati-lungo-la-rotta-balcantica-Croazia-seconda-parte-224707>

presence of authorized Ministry of Interior officers and in line with their instructions»<sup>157</sup>. Lastly, based on information received by the Centre for Peace Studies, the CIMM's mandate would be limited to police stations around the border, border crossing points, and detention centres<sup>158</sup>, and will carry out a maximum of 20 monitoring sessions per year<sup>159</sup>. It also provides for the possibility of access to so-called green borders but only using visits announced<sup>160</sup>.

The analysis confirms that CIMM cannot serve as an example for other countries' mechanisms. Still, it is important “monitor the monitoring”, because any underreported agreement on national mechanism in Croatia that does not align with international standards and best practices risks setting a negative precedent for future border monitoring mechanisms<sup>161</sup>.

## 5. Conclusions

NHRIs, Ombudsmen, and NPMs are among the most appropriate bodies to participate in the IMM. They could guarantee long-standing experience in human rights monitoring, complaints handling, and in places of deprivation of liberty monitoring; their action is bound to international principles, such as Paris Principles, Venice Principles and principles set up by the Optional Protocol to the Convention against Torture, which ensures adequate resources and financial autonomy. The risks linked to their participation are the attempt of limiting their broad mandates, which extend over the screening procedure, and the addition of new functions without adding budget and resources, with serious consequences for their ability to carry out their work effectively. Other risks are linked to challenges and threats these institutions are facing when operating in the migration field.

The existing European monitoring mechanism at the border could benefit from the competencies and the information from a truly independent mechanism, increasing rights protection. The IMM could provide the SEMM with more reliable data from cross-organizational feedback, which could lead to the interruption of funds erogations by the Commission. It might also mitigate the lack of independence of the complaint mechanisms set up by Frontex and EUAA Agencies, providing their Fundamental Rights Officers with an appropriate fundamental rights body to forward the complaints, and providing a complaint mechanism independent from the Agencies against the complaint filed. IMM could also eventually collaborate with Frontex Fundamental Human Rights monitors.

<sup>157</sup> Independent Mechanism for Monitoring (IMM), *Annual Report*, July 2022, <https://www.hck.hr/novosti/nezavisni-mehanizam-nadzora-objavio-prvo-godisnje-izvjesce/11387>

<sup>158</sup> Secretary of State of the Ministry of the Interior Terezija Gras, cit.

<sup>159</sup> ECRE, *Balkan Route: Croatia and Romania Deny Systemic Pushbacks Despite Overwhelming Evidence, NGOs Point to EU Complicity and Urge Stronger Response, Croatian Border Monitoring “Toothless” and “Ineffective”*, 15 October 2021, <https://ecre.org/balkan-route-croatia-and-romania-deny-systemic-pushbacks-despite-overwhelming-evidence-ngos-point-to-eu-complicity-and-urge-stronger-response-croatian-border-monitoring-toothless/>

<sup>160</sup> Council of Europe, *Report to the Croatian Government on the visit to Croatia carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 10 to 14 august 2020*, cfr. p. 32 «to be effective, any such monitoring mechanism should have a mandate to: conduct unannounced inspections of police establishments and access to all files, registers and video recordings in respect of all categories of migrants “diverted” and “intercepted” by the police».

<sup>161</sup> DRC, *Croatia/EU Border Monitoring System: Effective Mechanism Needed - Independent, Broad Mandate, Adequate Resources*, 3 August 2021, <https://drc.ngo/about-us/for-the-media/press-releases/2021/8/croatia-eu-border-monitoring-system-effective-mechanism-needed-independent-broad-mandate-adequate-resources/>

As the Croatian experience showed, the creation of an IMM that is not bound to any international principles could jeopardize the effectiveness of rights protection. As discussed in the paragraph on national monitoring mechanisms, there are huge differences regarding the resources, mandate, and level of independence of the national bodies. Not always they are able (or allowed) to work complying with international principles, and in the several Member States, such institutions are subject to challenges and threats. Therefore, the Proposal must provide for definition or criterion for eligibility for participation. Otherwise, the presence at the border of a non-independent mechanism established by a European regulation would risk providing legitimacy to Member States' policies and practices in violation of human rights.

Also, the Proposal only provides that the allegations of non-respect for fundamental rights «are dealt with effectively and without undue delay», not providing information about legal advice and effective access to justice. The right to an effective remedy is an internationally recognized human right<sup>162</sup> and is also a fundamental right of the Union within the meaning of Article 47 of the Charter. Member States should therefore ensure that persons affected by a violation of the Regulation have proper access to an effective remedy. Could the Proposal's quasi-judicial mechanism qualify as an effective remedy? A systematic examination of regional, international, and supranational human rights law and setting out the minimum standards that could qualify a complaints mechanism as an effective remedy underlines that thorough and prompt investigations require adequate capacity in both procedural and practical terms – a “genuine complaints mechanism” must be based on transparent procedures, the exclusion of large margins of appreciation<sup>163</sup>, and thoroughness in follow-up procedures<sup>164</sup>. Although the participation of the Ombudsmen and HRNIs could bring the necessary experience in handling complaints, the IMM doesn't still reach the minimum standards that could qualify a complaints mechanism as an effective remedy. To qualify, the Proposal needs, at the list, to specify the follow-up process so that authorities do not dismiss the need to act, a common practice in the Member States. No sanctions – even by the Commission - are foreseen in case of non-compliance with recommendations made by the monitoring mechanism. While the introduction of IMM is welcome, it is important to maintain the focus on accountability. Monitoring is not an end in itself, but it is part of the wider system for human rights accountability. CJEU jurisprudence (*Schrems inter alia*)<sup>165</sup> clarified the importance of the collaboration between national sectoral authorities and courts to provide access to the EU system according to art 47 CFREU, as the proliferation of monitoring mechanisms without the strengthening of accountability processes risks rendering the monitoring activity purposeless<sup>166</sup>. The role of national and supranational Courts and their accessibility by the new and the already existing monitoring mechanism should be strengthened, as Courts appear, at present, to be the only bodies with real power to grant the rule of law and redress the violations of the fundamental rights within the area of freedom, security and justice<sup>167</sup>.

<sup>162</sup> Universal Declaration of Human Rights, art. 8; International Covenant on Civil and Political Rights, art. 2(3)

<sup>163</sup> S. CARRERA AND M. STEFAN, *Human rights complaints at international borders*, cit. p. 24

<sup>164</sup> *Ibidem*, p. 36

<sup>165</sup> Case C-446/21 *Schrems* ECLI:EU:C:2020:559.

<sup>166</sup> S. PEERS, J. KENNER, A. WARD, T. K. HERVEY, *The EU Charter of Fundamental Rights: A Commentary*, Baden-Baden, 2021, p. 1250 ss.

<sup>167</sup> C. COSTELLO AND I. MANN, *Border Justice: Migration and Accountability for Human Rights Violations in Germ. Law jour.*, 2021 p. 311 s.