

## MANAGEMENT BOARD DECISION 7/2021 of 20 January 2021

### establishing a supervisory mechanism to monitor the application of the provisions on the use of force by statutory staff of the European Border and Coast Guard Standing Corps

#### THE MANAGEMENT BOARD OF THE EUROPEAN BORDER AND COAST GUARD AGENCY,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to the European Border and Coast Guard Regulation<sup>1</sup> (hereinafter ‘the Regulation’), in particular Article 55(5)(a) thereof,

Having regard to the Staff Regulations of Officials (hereinafter ‘the Staff Regulations’) and the Conditions of Employment of Other Servants of the European Union (hereinafter ‘the Conditions of Employment’) of the European Union, laid down by Council Regulation (EEC, Euratom, ECSC) No 259/68<sup>2</sup>, and in particular Articles 86 and 110(2) of the Staff Regulations, and Articles 2(3) and 30 of Annex IX thereto.

Having regard to the agreement of the European Commission pursuant to Article 110(2) of the Staff Regulations C(2021) 183 final, Brussels, 8.1.2021,

After consulting the Staff Committee.

Whereas:

- (1) Pursuant to Article 55(5)(a) of the Regulation, on the basis of a proposal from the Executive Director, the Management Board is to establish an appropriate supervisory mechanism to monitor the application of the provisions on the use of force by statutory staff, including rules on reporting and specific measures, such as those of a disciplinary nature, with regard to the use of force during deployments.
- (2) Pursuant to Article 43(6) of the Regulation, statutory staff deployed as members of the teams are to be subject to disciplinary measures as provided for in the Staff Regulations and the Conditions of Employment and measures of a disciplinary nature provided for in the supervisory mechanism referred to in point (a) of Article 55(5) of the Regulation.
- (3) Pursuant to Article 82(8) of the Regulation, members of the teams, including statutory staff, are to be authorised for the relevant profiles by the host Member State<sup>3</sup> to perform tasks during a deployment that require the use of force, including the carrying and use of service weapons, ammunition and equipment, and are to be subject to the consent of either the home Member State or, for statutory staff, the Agency. The use of force, including the carrying and use of service weapons, ammunition and equipment, is to be exercised in accordance with the national law of the host Member State and in the presence of border guards of the host Member State. The host Member State may, with the consent of the home Member State or the Agency, where appropriate, authorise members of the teams to use force on its territory in the absence of border guards of the host Member State.
- (4) Pursuant to the second subparagraph of Article 82(7) of the Regulation, the ability to carry and use service weapons, ammunition and equipment by the statutory staff who are deployed as members of the teams is to be subject to the framework and detailed rules laid down in Article 82 and Annex V to the Regulation.

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<sup>1</sup> Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulation (EU) 1052/2013 and Regulation (EU) 2016/1624 (OJ L 295, 14.11.2019, p. 1).

<sup>2</sup> OJ L 56/01, 4.3.1968.

<sup>3</sup> For the purpose of this Decision, the term “Member States” includes also the States participating in the relevant development of the Schengen acquis within the meaning of the Treaty on the Functioning of the European Union and its Protocol (No 19) on the Schengen acquis integrated into the framework of the European Union.

- (5) The administrative inquiries and disciplinary proceedings initiated by the Agency following an event involving the use of force involving a statutory staff in a Member State are without prejudice to any judicial proceedings or administrative proceedings based on the same grounds initiated by the Member State and the recital 10 below.
- (6) The special character of events involving the use of force requires specific measures of a disciplinary nature, including tailor-made rules on administrative inquiries, pre-disciplinary proceedings and disciplinary proceedings. In all cases those specific measures of a disciplinary nature need to fully respect the relevant provisions of the Staff Regulations in particular Article 86 and its Annex IX as well as Article 50a and 119 of the CEOS which continue to apply.
- (7) In line with Article 44(3) of the Regulation, the coordinating officer and the fundamental rights monitors should cooperate as regards the protection of fundamental rights, including, where relevant, sharing information related to the incidents involving the use of force.
- (8) The annex to this decision provides tailor-made rules on **administrative inquiries** and **predisciplinary proceedings** which apply only to incidents involving the use of force by statutory staff of the European Border and Coast Guard Standing Corps ('Standing Corps') instead of Management Board decision adopting general implementing provisions on the conduct of administrative inquiries and disciplinary procedures<sup>4</sup>.
- (9) In relation to **disciplinary proceedings** concerning incidents involving the use of force by statutory staff of the Standing Corps, the Annex to this decision complements the existing rules on disciplinary proceedings<sup>5</sup> by providing a list of specificities.
- (10) The use of force may trigger national criminal investigation, prosecution, trial and conviction which are independent from the supervisory mechanism. However, the final decision in the disciplinary proceedings conducted against the person concerned under the supervisory mechanism should not be taken before the final judgment has been handed down by the court hearing the case in a criminal prosecution.
- (11) Pursuant to the second subparagraph of Article 55(5) of the Regulation, in relation to the rules referred to in Article 55(5)(a), the Commission should give an opinion on their compliance with the Staff Regulations and the Conditions of Employment, in accordance with Article 110(2) of the Staff Regulations,
- (12) The Executive Director consulted the *ad interim* Fundamental Rights Officer on the proposal with regard to the rules.

## HAS DECIDED AS FOLLOWS:

### *Sole Article*

#### **Object**

The supervisory mechanism to monitor the application of the provisions on use of force by statutory staff of the Standing Corps, as set out in the Annex to this Decision, is hereby adopted.

This Decision shall take effect on the day following that of its adoption.

Done in Warsaw, 20 January 2021

For the Management Board

[signed]

Marko Gašperlin  
Chairperson

**ANNEX: Supervisory mechanism to monitor the application of the provisions on the use of force by statutory staff of the Standing Corps**

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<sup>4</sup> [reference to be adapted when Frontex will adopt new rules Management Board Decision 26/2018 of 25 October 2018 adopting general implementing provisions on the conduct of administrative inquiries and disciplinary procedures.]

<sup>5</sup> *Ibid.*

## ANNEX

# Supervisory mechanism to monitor the application of the provisions on the use of force by statutory staff of the European Border and Coast Guard Standing Corps

### PART I - GENERAL PROVISIONS

#### Article 1 Scope

1. This annex establishes a supervisory mechanism to monitor the application of the provisions on use of force by statutory staff of the European Border and Coast Guard Standing Corps ('Standing Corps') deployed as members of the teams (hereinafter 'statutory staff of the Standing Corps') in accordance with Article 55(5)(a) of the European Border and Coast Guard Regulation<sup>6</sup> (hereinafter 'the Regulation').
2. The supervisory mechanism includes rules on reporting and measures of a disciplinary nature for statutory staff of the Standing Corps with regard to the use of force during deployments.
3. This supervisory mechanism is not applicable to any measure, such as those of a disciplinary nature, which do not relate to the use of force.

#### Article 2 Definitions

For the purpose of this annex, the following definitions apply:

1. 'use of force' refers to recourse by statutory staff of the Standing Corps to physical means for the purposes of performing their functions or ensuring self-defense, which includes the use of hands and body and the use of any instruments, weapons, including firearms, or equipment.
2. 'incident involving the use of force' means the use of force by statutory staff of the Standing Corps, resulting in death or a serious injury<sup>7</sup>, or a significant damage<sup>8</sup> to property, or where the firearm was used (fired or discharged), including warning shots, or where it is reasonable to believe that the use of force by statutory staff of the Standing Corps failed to comply with the applicable operational plan, or the national law of the host Member State or Third Country, or with the core principles and specific rules referred to in Annex V to the Regulation<sup>9</sup>, or with respect for fundamental rights as guaranteed under international and Union law<sup>10</sup>, or with the Agency's code of conduct provisions related to the use of force.
3. 'initial assessment' means the assessment carried out by the coordinating officer to evaluate whether the reported use of force shall qualify or not as an incident involving the use of force.
4. 'precautionary and suspension measures' has the meaning set out in Article 19 (a-e) of the present annex.
5. 'coordinating officer' has the meaning set out in Article 44 of the Regulation.
6. 'duty officer' is the staff member in charge of verification of the initial assessment assigned to Situation Centre of the Agency.
7. 'verification of the initial assessment' means the verification following the initial assessment, carried out by a duty officer in the Situation Centre of the Agency.

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<sup>6</sup> Regulation (EU) 2019/1896 of 13 November 2019 on the European Border and Coast Guard (OJ L 295, 14.11.2019, p. 1).

<sup>7</sup> Serious injury is such that requires admission in a hospital as an in-patient for at least one overnight stay.

<sup>8</sup> Significant damage is where the damage is estimated at 5 000 EUR or more.

<sup>9</sup> Part 1 and Part 2 of the Annex V to the Regulation.

<sup>10</sup> In particular, under the Charter, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, and the United Nations Code of Conduct for Law Enforcement Officials.

8. 'staff member' means the Agency's officials and former officials within the meaning of the Staff Regulations of Officials<sup>11</sup> (hereinafter 'the Staff Regulations'), as well as servants and former servants within the meaning of the Conditions of Employment.
9. 'statutory staff of the Standing Corps' means staff member deployed as members of the teams.
10. 'person concerned' means any statutory staff of the Standing Corps whose conduct is the subject of a preliminary assessment, an administrative inquiry, pre-disciplinary proceedings, disciplinary proceedings and/or suspension and/or precautionary measures.
11. 'other person' means any person involved in preliminary assessment, administrative inquiry, pre-disciplinary proceedings, and disciplinary proceedings other than staff members of the Agency, including seconded national experts, and members of the team who are not statutory staff of the Standing Corps.
12. 'witness' means any person who is requested to provide information relating to facts which are the subject-matter of a report, a preliminary assessment, an administrative inquiry, pre-disciplinary proceedings and/or disciplinary proceedings.
13. 'appointing authority' means the appointing authority and authority authorised to conclude contracts of employment in the Agency, as set out in the Management Board decision delegating the powers of the appointing authority and the authority authorised to conclude contracts of employment.<sup>12</sup>

#### *Article 3*

#### **Supervisory mechanism to monitor the use of force**

1. The Executive Director shall be responsible for monitoring the application of the provisions on the use of force by statutory staff of the Standing Corps ('the supervisory mechanism').
2. In performing his or her tasks referred to in paragraph 1, the Executive Director shall be advised by the Advisory Committee on the Use of Force in accordance with Article 8.
3. The reporting within the supervisory mechanism shall be a distinct mechanism from the Serious Incident Reporting (hereinafter 'SIR')<sup>13</sup>. The Executive Director shall ensure the consistency between the reporting within the supervisory mechanism and other reporting obligations including the SIR.
4. The supervisory mechanism shall be without prejudice to the rights and duties of the Fundamental Rights Officer, in particular without prejudice to the complaints mechanism and reporting from the Fundamental Rights Monitors to the Fundamental Rights Officer as provided for in the Regulation<sup>14</sup>.

#### *Article 4*

#### **Overview of the procedure**

1. The supervisory mechanism shall monitor the application of the provisions on the use of force by statutory staff of the Standing Corps in accordance with this Annex.
2. Every instance of the use of force shall be subject to the following steps to be taken in accordance with this Annex:
  - a) The use of force shall be reported in accordance with Article 10;
  - b) Once reported, the use of force shall be subject to an initial assessment by the coordinating officer in accordance with Article 11 and a verification assessment in accordance with Article 12 shall be conducted;

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<sup>11</sup> OJ L 56/01, 4.3.1968.

<sup>12</sup> Management Board Decision No 26/2016 of 6 October 2016 delegating the powers conferred by the Staff Regulations of Officials on the appointing authority and by the Conditions of Employment of Other Servants of the European Union on the authority empowered to conclude contracts of employment to the Executive Director of the European Border and Coast Guard Agency.

<sup>13</sup> Executive Director's Decision 2014/55 of 28 July 2014 on the adoption of the Frontex Standard Operating Procedures on Serious Incident Reporting, or its successor.

<sup>14</sup> The tasks of the Fundamental Rights Officer are, inter alia, set out in Article 109(2) of the Regulation.

- c) Where the verification assessment concludes that the use of force is to be qualified as an incident involving the use of force, an administrative inquiry may be conducted in accordance with Part III, Chapter I, III and IV and pre-disciplinary proceedings might be mandated in accordance with Part III, Chapter V;
  - d) If initiated, the disciplinary proceedings in relation to the person concerned shall be conducted in accordance with Part III, Chapter VI.
3. At any time during the procedure under paragraph 2, including prior to initiating an administrative inquiry, pre-disciplinary or disciplinary proceedings, the Executive Director may decide on the application of one or more of the administrative and suspension measures referred to in Part III, Chapter II.

#### *Article 5*

#### **Role of the Executive Director with regard to the supervisory mechanism**

The Executive Director shall be responsible for:

- a) Deciding on the application of precautionary and suspension measures regarding incidents involving the use of force;
- b) Initiating administrative inquiries regarding the incidents involving the use of force;
- c) Deciding on the initiation of pre-disciplinary proceedings, disciplinary proceedings regarding incidents involving the use of force and informing the Fundamental Rights Officer of that decision;
- d) Informing the Fundamental Rights Officer and the Consultative Forum, upon closing the case, of the closure of the case and of the final decisions resulting from the investigations.

#### *Article 6*

#### **Role of the coordinating officer with regard to the supervisory mechanism**

The coordinating officer shall be responsible for:

- a) monitoring all available information on events involving the use of force by statutory staff of the Standing Corps, including when this information was received through the chain of command in accordance with the coordination structure established for each operation, in particular, the reports on the use of force;
- b) where necessary, liaising with the authorities of a Member State or a Third Country, to verify facts, to the extent possible, and clarify the reports on the use of force;
- c) carrying out the initial assessment;
- d) reporting the outcome of the initial assessment;
- e) taking the necessary actions regarding incidents involving the use of force, including the immediate informing of the duty officer in the Situation Centre of the Agency (hereinafter the 'duty officer') by phone;
- f) ensuring the follow-up of the use of force reports or incident involving use of force reports in coordination with the duty officer, and
- g) Informing the competent authorities of the host Member State or Third Country of any incidents involving the use of force that occurred where members of the teams were authorised to use force in the absence of border guards of the host Member State or Third Country, as described in the operational plan.

#### *Article 7*

#### **Role of the duty officer with regard to the supervisory mechanism**

The duty officer shall be responsible for:

- a) verifying the initial assessment and comprehensiveness of the reports;
- b) deciding on the qualification of the use of force;
- c) following up on the reports, timely reporting to the Executive Director<sup>15</sup> and to the Fundamental Rights Officer and informing the Head of Inspection and Control Office and the Director of Deployment Management Division<sup>16</sup>;

And with the support of the relevant entity of the Agency:

- d) Maintaining the register of the reports on the use of force and reports on incidents involving the use of force;
- e) Maintaining statistics on the use of force;
- f) Ensuring, where necessary, support to the Advisory Committee on the Use of Force, and
- g) Preparing an annual stocktaking on the use of force by statutory staff of the Standing Corps to be included in the annual report of the Agency that has to be submitted to the Executive Director before 31 March each year.

#### *Article 8*

##### **Role of the Advisory Committee on the Use of Force with regard to the supervisory mechanism**

1. The members of the Advisory Committee on the Use of Force (hereinafter 'the ACUF') shall be appointed by the Executive Director.
2. The ACUF shall be responsible for:
  - a) Issuing recommendations to the Executive Director regarding the supervisory mechanism, and
  - b) Upon a request of the Executive Director or the Management Board, analysing specific topics related to the supervisory mechanism established by this Annex and providing recommendations in this regard.

#### *Article 9*

##### **Role of the Fundamental Rights Officer and the Fundamental Rights Monitors with regard to the supervisory mechanism**

1. The Fundamental Rights Officer shall, within the framework established by Annex V to the Regulation<sup>17</sup>, ensure that incidents involving the use of force are thoroughly investigated in accordance with Article 109(2)(b) of the Regulation and the results of those investigations are transmitted to the Executive Director, Consultative Forum and the Management Board.
2. To this end, incidents involving the use of force reports shall be transmitted to the Fundamental Rights Officer in accordance with Part II.
3. Fundamental Rights Monitors shall have access to all areas in which the operational activity of the Agency takes place and to all its documents relevant for the implementation of that activity.

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<sup>15</sup> Including the executive management, according to internal duty arrangements where applicable.

<sup>16</sup> Head of Task Force Deploy Management, or its successor.

<sup>17</sup> The relevant part of Annex V to the Regulation states that all activities related to the use of force weapons, ammunition and equipment shall be regularly monitored by the Fundamental Rights Officer, and all incidents shall be reported in the Fundamental Rights Officer's reports as well in the annual report of the Agency.

4. The Management Board and the Executive Director shall be informed by the Fundamental Rights Officer about any diverging conclusions of the investigation of the Fundamental Rights Officer in accordance with paragraph 1 of this Article and the conclusion of the verification by the duty officer in accordance with Article 12(1).
5. The Fundamental Rights Officer shall be informed in a timely manner of all of the decisions taken by the Executive Director in accordance with Articles 5(b) and (d) as well as with 30.

## PART II - REPORTING

### *Article 10*

#### **Reporting on the use of force**

1. Incidents involving the use of force shall be immediately reported to the coordinating officer.
2. Any event involving the use of force shall be reported to the coordinating officer without delay, as part of the reports to be drafted following their shift, by statutory staff of the Standing Corps who has applied the use of force including full details of the circumstances in which such use arose.
3. Any participant in the operational activity may be requested by the coordinating officer to report on the use of force, if he or she may have relevant information on it.
4. As a general rule, reporting shall be made in writing. If necessary, information may be provided by any means of communication to the coordinating officer or to the duty officer especially in cases where the situation evolves rapidly or no easy access is provided to a portable computer.
5. Use of force reports and Incident involving the use of force reports shall be classified as **RESTREINT UE/EU RESTRICTED**<sup>18</sup> by the duty officer. These reports shall retain their classification level for only as long as necessary.
6. The Executive Director shall adopt a template for the reports including categories of use of force which will facilitate their drafting and the drawing up of statistics.

### *Article 11*

#### **Initial assessment**

1. Once the coordinating officer becomes aware of any event involving the use of force, including but not limited to by receiving a report on it pursuant to Article 10 or upon an information provided by the Fundamental Rights Officer or a Fundamental Rights Monitor assigned to the operational activity he or she is responsible for, he or she shall initially assess, within a maximum of 48 hours, whether the actual or the alleged use of force qualifies as an incident involving the use of force.
2. Any event involving the use of force, which resulted in death, serious injury or a significant damage to property, shall always be qualified as an incident involving the use of force.
3. In case where a firearm was used (fired/discharged), including warning shots, by the statutory staff of the Standing Corps, the event shall always be qualified as an incident involving the use of force.
4. In all events involving the use of force, the coordinating officer shall evaluate whether statutory staff of the Standing Corps complied or failed to comply with the operational plan and national law of the host Member State or Third Country, as well as with the principles of necessity, proportionality and precaution, and specific rules referred to in Annex V to the Regulation<sup>19</sup>, with respect for fundamental rights as guaranteed under international and Union law<sup>20</sup> and with the Agency's code of conduct provisions related to the use of force.

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<sup>18</sup> The unauthorised disclosure of these reports could be disadvantageous to the general interests of the Agency.

<sup>19</sup> Part 1 and Part 2 of the Annex V to the Regulation.

<sup>20</sup> In particular, under the Charter, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, and the United Nations Code of Conduct for Law Enforcement Officials.

5. Where necessary during the initial assessment, the coordinating officer may consult the host Member State or Third Country authorities. This consultation shall be without prejudice to the potential further steps taken by the Agency or the host Member State or Third Country.

#### *Article 12*

#### **Verification of the initial assessment**

1. After receiving the use of force report or the incident involving the use of force report from the coordinating officer, the duty officer shall verify within a maximum of 24 hours whether the event described in the initial assessment does or does not qualify as an incident involving the use of force.
2. Where necessary for the purpose of the verification, the duty officer may request the coordinating officer to supplement the report including by collecting further evidence or evaluations. The duty officer may also seek, if deemed necessary, an opinion of the Head of the Inspection and Control Office of the Agency<sup>21</sup>.
3. Where the duty officer concludes that the use of force shall be qualified as an 'incident involving the use of force', he or she shall immediately report by sending the incident involving the use of force report to the Executive Director<sup>22</sup> and to the Fundamental Rights Officer, and inform the Head of Inspection and Control Office and the Director of Deployment Management Division by sending them a copy of that report.
4. Any use of force report and incident involving the use of force report shall be shared with the Head of Inspection and Control Office by the duty officer, for subsequent reference should an investigation concerning the facts and circumstances contained in these reports be triggered later by the Executive Director. The Inspection and Control Office may also anonymise these reports for the purpose of raising awareness on good practices and to be included as reference in training sessions related to the use of force.

### **PART III - PRELIMINARY ASSESSMENTS, ADMINISTRATIVE INQUIRIES, PRE-DISCIPLINARY AND DISCIPLINARY PROCEEDINGS**

#### **CHAPTER I - General rules**

#### *Article 13*

#### **General principles**

1. The persons in charge of preliminary assessments, administrative inquiries, pre-disciplinary and disciplinary proceedings conducted in accordance with this Annex shall carry out all their tasks objectively and impartially, in conformity with the principles of legality, proportionality and confidentiality.
2. The presumption of innocence shall apply at all procedural stages.
3. In line with Article 25 of Annex IX to the Staff Regulations, where the person concerned is prosecuted for the same acts which are the subject of the administrative inquiry, pre-disciplinary and disciplinary proceedings conducted against the person concerned, a final decision on disciplinary measures shall be taken only after a final judgment has been handed down by the court hearing the case. Where criminal and disciplinary proceedings concern the same facts, the appointing authority shall be bound by the factual findings of the decision in the national criminal proceedings. The appointing authority may impose a disciplinary penalty for facts constituting non-compliance with obligations under the Staff

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<sup>21</sup> Executive Director decision No ED-2018-159 on Frontex internal Structure and Rules of Procedure. Inspection and control office is tasked with "carrying out pre-checks, fact finding missions and administrative enquiries. Acting as the main reporting channel for whistleblowing, verifying facts, investigating and/or providing advice on reported and suspected irregularities/improprieties or serious wrongdoing. Preparing inspection reports and providing advice and recommendations wherever deemed necessary.

<sup>22</sup> Including the executive management, according to internal duty arrangement where applicable.

Regulations regardless of whether the national criminal proceedings have resulted in a criminal conviction.

4. Where both the present decision and the decision of the Management Board adopting provisions on the conduct of administrative inquiries and disciplinary procedures are applicable, the present decision will prevail.

#### *Article 14*

##### **Duration of proceedings**

All proceedings shall be carried out within a reasonable period of time. The inquiry team shall always strive to keep the duration of the proceedings commensurate with the circumstances and the complexity of the case.

#### *Article 15*

##### **Rights of the person concerned**

1. The person concerned shall be informed of his or her rights and obligations applicable to the proceedings at the moment he or she is informed for the first time that any of the proceedings subject to this Annex have been opened.
2. The person concerned shall have the right not to incriminate him or herself.
3. The person concerned may, at any stage of the proceedings, put forward facts and circumstances in relation to the case. That right shall not be used to unduly delay the proceedings.

#### *Article 16*

##### **Rights of the witnesses**

1. Witnesses requested to testify in the course of the proceedings shall be informed of their rights and obligations before being heard orally or submitting written statements for the first time in the course of such proceedings.
2. In addition to the general right set out in paragraph 1, the witnesses shall have the specific rights listed below under administrative inquiries and pre-disciplinary proceedings as well as in the Management Board decision adopting general implementing provisions on the conduct of administrative inquiries and disciplinary procedures<sup>23</sup> under disciplinary proceedings not involving the Disciplinary Board.

#### *Article 17*

##### **General obligations**

1. In accordance with their duty of loyalty to the Agency, staff members called upon to provide information shall cooperate and provide all requested information available to them, subject to obligations regarding confidentiality.
2. The person concerned shall remain at the disposal of the Agency as long as the procedure concerning him or her is ongoing.
3. All participants in operational activities and other persons involved in these proceedings shall be prohibited from any unauthorised disclosure of information relating to the proceedings. This is without prejudice of the right of the person concerned to be accompanied, assisted or represented in the proceedings.
4. Information obtained or forwarded in the course of the proceedings, in whatever form, shall be subject to confidentiality and shall enjoy the protection given by Regulation (EU) 2018/1725<sup>24</sup>.

#### *Article 18*

##### **Protection of whistle-blowers**

If the information that leads to the triggering of the proceedings laid down in this annex has been submitted on the basis of the procedure set out in Article 22(a) of the Staff Regulations, the provisions of the Agency's guidelines on whistleblowing<sup>25</sup> shall be taken into account in the context of the proceedings referred to in this Annex.

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<sup>23</sup> [reference to be adapted when Frontex will adopt new rules] Management Board Decision adopting general implementing provisions on the conduct of administrative inquiries and disciplinary procedures.]

<sup>24</sup> Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC (OJ L 295, 21.11.2018, p. 39.).

<sup>25</sup> Management Board Decision 17/2019 of 18 July 2019 adopting the Frontex Guidelines on Whistleblowing.

## CHAPTER II - Precautionary and suspension measures

### *Article 19*

#### **Precautionary and suspension measures**

1. The Appointing Authority may, at any time, including prior to initiating an administrative inquiry, predisciplinary or disciplinary proceedings, decide, including on the basis of the reporting on the use of force in part II, on the application of one or more of the following precautionary measures in relation to the person concerned:
  - a) Reassignment to a profile or a function not requiring the use of executive powers e.g. coordination or supporting duties;
  - b) Withdrawal from the operational activity;
  - c) Reassignment to another operational activity;
  - d) Suspension of the authorisation to carry and use weapons;
  - e) Termination of the authorisation to carry and use weapons;
  - f) Participation in a specific training regarding the use of force.
2. The Appointing Authority may immediately suspend the person concerned for a specified or indefinite period pursuant to Article 23 and 24 of Annex IX to the Staff Regulations.
3. Save for exceptional circumstances in duly justified cases, in particular, where an immediate decision is required, the person concerned must be heard before any of the measures provided for in paragraph 1 is taken.
4. The decision provided for in paragraphs 1 and 2 shall always be inserted in the personal file of the person concerned.
5. The Appointing Authority shall be entitled to delegate his or her powers under this provision except for measures set out in paragraph (1) (e) of this Article to the persons of his or her choice from the executive, senior and middle management of the Agency. In case the decision is delegated, the Appointing Authority, who delegated the respective power, shall be informed about the respective decision.

### *Article 20*

#### **Suspension proceedings**

1. Save in exceptional circumstances in duly justified cases, in particular, where an immediate decision is required, before deciding on suspension, the appointing authority shall hear the person concerned orally.
2. Without prejudice to the powers conferred to it by Article 23(2) of Annex IX to the Staff Regulations, the appointing authority may mandate a person, who may be a member of the inquiry team, to hear the person concerned orally on its behalf. The record of the hearing shall be transmitted to the appointing authority. The hearing may be audio recorded.
3. Prior to the hearing, and save in exceptional circumstances, the person concerned shall be informed of the alleged misconduct and, subject to the protection of the legitimate interests of third parties and the confidentiality of pending national or administrative proceedings, of copies of documents relating directly to the alleged misconduct.
4. The person concerned may be accompanied or assisted at the hearing by a person of his or her choice.
5. If, for objective reasons, the person concerned cannot be heard in person, he or she shall be given the opportunity to be represented by a person of his or her choice, or may be asked to submit comments in writing, by a fixed deadline.
6. Where the person concerned fails to be represented or to submit written comments by the deadline referred to in paragraph 5, the appointing authority shall take its decision, in the interest of the proceedings, on the basis of the file.

### *Article 21*

#### **Access rights of the suspended staff member**

1. During the period of suspension, the staff member's rights of access to the Agency's premises, to Agency's assets and/or to operational area, and/or to IT services may be limited or withdrawn.
2. The decision on suspension shall specify the extent to which these rights are limited.

## CHAPTER III - Preliminary assessment

### *Article 22*

#### **Preliminary assessments**

1. Upon receiving, regardless of the source, any information indicating a possible breach of statutory obligations related to the use of force by the statutory staff of the Standing Corps, the appointing authority may mandate an entity, among others the Inspection and Control Office, to carry out a preliminary assessment of the information and accompanying evidence.
2. The preliminary assessment shall be aimed at evaluating the information received in order to determine the appropriate follow-up. In this context, the mandated entity may request complementary information, in particular from the relevant entities and from the source of the initial information.
3. Where information received concerns or could concern facts for which OLAF is competent, the Agency shall transmit the information to OLAF without delay, unless otherwise agreed with OLAF.
4. At the end of the preliminary assessment, the mandated entity shall draw up an assessment note for the appointing authority so that the latter could decide whether the case is to be closed without further action (non-case) or warrants a follow-up.

## CHAPTER IV - Administrative inquiries

### *Article 23*

#### **Opening of an administrative inquiry**

1. On the basis of the report on an incident involving the use of force submitted in accordance with Article 12(3), or on the basis of an assessment note drawn up in accordance with Article 22(4), the appointing authority may open an administrative inquiry.
2. An administrative inquiry shall not be opened in respect of events involving the use of force older than 10 years. That period shall begin on the day on which the event involving the use of force occurred.
3. Unless otherwise agreed with OLAF, before the opening of an administrative inquiry, Frontex shall consult OLAF to ascertain that it is not conducting an investigation for its own purposes and/or does not intend to do so.
4. Where OLAF is conducting an investigation within the meaning of Regulation of the European Parliament and of the Council (EU, Euratom) No 883/2013<sup>26</sup> or informs the Agency that it is considering whether or not to do so, no administrative inquiry shall be opened regarding the same facts unless otherwise agreed with OLAF.

### *Article 24*

#### **Mandate**

1. The appointing authority shall issue a mandate setting out the purpose and scope of each administrative inquiry it decides to open.
2. The Executive Director shall adopt a decision, for each administrative investigation, establishing the inquiry team to be responsible for conducting the inquiry from the Agency staff, such as members of the Inspection and Control Office of the Agency, complemented, where necessary, with other persons of specific expertise. The inquiry team shall establish the facts and determine the individual responsibility of the person concerned in respect of the facts and circumstances of the case.
3. In the event of exceptional circumstances, such as failure to comply with the provisions of this Annex, the unexpected unavailability of a member of the inquiry team or where the inquiry reveals a conflict of interest, the Executive Director may replace any member of the inquiry team.
4. The appointing authority may decide to enlarge the scope of the mandate, at any time during the inquiry, in particular in order to cover additional facts.

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<sup>26</sup> Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999, OJ L 248, 18.9.2013, p. 1.

#### *Article 25*

##### **The exercise of powers as regards the administrative inquiry**

1. The inquiry team shall exercise its powers independently within the scope of the mandate. It shall neither seek nor receive instructions regarding the conduct and findings of the inquiry.
2. The inquiry team shall have the power to request documents and other data relevant to the case in any format, summon any staff member or any other person to provide information.
3. The inquiry team shall have the power to carry out on-the-spot visits to any joint operation, rapid border intervention, pilot project, migration management support team deployment, return operation or return intervention, or to any other relevant operational activities, including in third countries, where relevant to the inquiry.
4. The inquiry team shall have the power to request the cooperation of any participant in operational activities to gather facts related to any incident involving the use of force and reported pursuant to Part II of this Annex.
5. The inquiry team shall have the power to request documents and other relevant information from the authorities of the Member State or Third Country, as a general rule, in coordination with the coordinating officer.
6. The inquiry team shall coordinate with the authorities of the host Member State or the Third Country.

Where necessary due to the application of the Protocol No. 7 on the Privileges and Immunities of the European Union in the event of a case occurring on the territory of a Member State, or the application of a Status Agreement in the event of a case occurring on the territory of a Third Country, while waiting for the competent authorities to take action, the inquiry team shall have the capacity to take measures to preserve evidence including the collection of items belonging to the Agency connected with a purported criminal offence. The sharing of any such items between authorities and the inquiry team may be made subject to their return within the terms specified by the authority or the inquiry team.

#### *Article 26*

##### **Information regarding the opening of an administrative inquiry**

1. The appointing authority shall inform the person concerned as soon as an administrative inquiry has been opened in his or her regard provided that that information does not hinder the inquiry. The information shall indicate, in particular, the nature of the facts concerned and when they are alleged to have occurred.
2. The appointing authority shall inform the Director of the Deployment Management Division as soon as an administrative inquiry has been opened provided that information does not hinder the inquiry.
3. In case the appointing authority decides to enlarge the scope of the mandate pursuant to Article 24(4), the person concerned shall be informed accordingly unless first paragraph applies.

#### *Article 27*

##### **Conduct of the administrative inquiry**

1. Investigative measures shall be directed at establishing the facts and circumstances of the case including those which may attenuate the individual responsibility of the persons concerned or exonerate them entirely from their responsibility.
2. While an inquiry is ongoing, the person concerned shall not have access to the file.

#### *Article 28*

##### **Collecting statements**

1. The inquiry team may collect statements from staff members and any other person who may have information relevant to the administrative inquiry, either by calling them to a hearing or requesting them to submit written statements.
2. Hearings may be conducted in person or by videoconference, phone or any equivalent media.
3. Staff members or any other person called to a hearing may be accompanied or assisted by a person of their choice.

4. Before staff members or any other person are being heard or requested to submit written statements, the inquiry team shall inform them of their procedural status, rights and obligations regarding the ongoing procedure as well as the subject of the inquiry.
5. Where the hearing of a witness produces evidence that he or she may be a person concerned, the hearing shall be terminated. The witness shall be informed forthwith of his or her rights as a person concerned and be given a copy of the records of statements that he or she has already made in the course of the inquiry.
6. The hearing shall be recorded in a document signed by the staff member or any other person who was heard and by the interviewers once it has ended. Documents submitted by the staff member or any other person during the hearing shall be attached to it. The hearing may be audio recorded.

#### *Article 29*

##### **Administrative inquiry report**

1. Once the administrative inquiry has been completed and before written conclusions referring by name to the person concerned are drawn up, the person concerned shall be given the opportunity to comment on the facts concerning him or her.
2. Where absolute secrecy is required in relation to investigative procedures by a national judicial authority, the obligation to invite the person concerned to comment may be deferred by the appointing authority.
3. The inquiry team shall invite the person concerned to submit his or her comments in writing. The invitation shall indicate the deadline for submitting comments, which shall not be less than 10 working days from receipt of the invitation, unless otherwise agreed with the person concerned.
4. The report of the inquiry shall be drawn on the basis of the information gathered and comments of the person concerned, should those comments have been given.
5. The report shall elaborate on the potential breaches by a statutory staff of the Standing Corps, in performing his or her activities, of the rules applicable to the use of force in relation to the facts and circumstances established by the inquiry. The report shall be accompanied by copies of all documents and statements relevant to the case.
6. The inquiry team shall transmit the report to the Executive Director.

#### *Article 30*

##### **Closure of the case without further action**

1. Where the Executive Director decides to close the case without further action, he or she shall decide on the withdrawal of all precautionary measures imposed pursuant to Article 20 and inform the person concerned of its decision in writing. Without prejudice to paragraph 2, at the request of the person concerned, this decision may be inserted in his or her personal file.
2. Concerning the authorisation to carry and use weapons, reassignment to another profile and/or withdrawal from operational activity, the decision shall always be inserted in the personal file of the person concerned.
3. The closure of the case shall not prevent the inquiry from being reopened on the basis of new facts in accordance with Article 28 of Annex IX to the Staff Regulations.
4. The Executive Director shall inform the Consultative Forum and the Fundamental Rights Officer about the closure of the case, in accordance with Article 5(d).

### **CHAPTER V - Pre-disciplinary proceedings**

#### *Article 31*

##### **Mandate for pre-disciplinary proceeding hearing**

1. Without prejudice to the powers conferred upon it by Article 3 of Annex IX to the Staff Regulations, the Executive Director may mandate a member of the inquiry team ('mandated person'), to conduct the hearing pursuant to Article 3 of Annex IX to the Staff Regulations on his or her behalf.
2. The mandate shall refer to the potential breaches by a statutory staff of the Standing Corps, in relation to the facts and circumstances to the person concerned as established in the inquiry report.

3. At any time during the pre-disciplinary proceedings, the appointing authority may decide to open an administrative inquiry or refer the case to OLAF, in particular in order to cover additional facts outside the scope of the mandate.

#### *Article 32*

##### **Rights of the person concerned**

1. The Executive Director or the mandated person shall notify the person concerned of the mandate and invite him or her to a hearing.
2. The notification referred to in paragraph 1 shall include all documents relating to the potential breach of the statutory obligations, including the administrative inquiry report except when this affects legitimate interests of confidentiality. In such cases, some of those documents or parts thereof may be withheld for a period of time proportionate to the protection of such interests and the person concerned shall be informed accordingly.

#### *Article 33*

##### **Pre-disciplinary proceedings hearing**

1. The hearing shall take place no less than 10 working days after the person concerned has received the invitation to the hearing, unless otherwise agreed with the person concerned.
2. The hearing shall take place, in principle, in the physical presence of the person concerned. In justified circumstances, it may be conducted by videoconference, phone or other equivalent media.
3. The person concerned may be accompanied or assisted by a person of his or her choice.
4. The person concerned shall be informed before the hearing of his or her rights and obligations in respect of the ongoing proceedings and of their potential follow-up. If, for objective reasons, the person concerned cannot be heard in person, he or she shall be given the opportunity to be represented by a person of his or her choice, or may be asked to comment on the documents referred to in Article 33(2) and to reply to appointing authority's or the mandated person's questions in writing, by a fixed deadline. A hearing report shall be drawn up. It shall be signed by the person concerned and/or by the person accompanying, assisting or representing him or her. The person concerned shall receive a copy of the hearing report as well as a copy of any document presented to him or her during such hearing. The hearing may also be audio recorded.
5. Where the person concerned fails to attend the hearing or to sign the hearing report or to submit written comments and/or replies by the deadline set by the Agency, the Executive Director shall decide, in the interest of the proceedings, on the appropriate follow-up of the case.

#### *Article 34*

##### **Additional verifications**

1. Where certain facts relating to the allegations against the person concerned require further verification, the results of the verification shall be communicated to the person concerned for comments before the Executive Director decides on the appropriate follow-up of the pre-disciplinary proceedings.
2. Where it appears necessary to hear staff members or any other person, in particular at the request of the person concerned, the reports of those other hearings shall, subject to the legitimate interests of third parties, be communicated to the person concerned for comments when the facts mentioned are directly linked to the allegations.

#### *Article 35*

##### **Follow-up by the Executive Director**

1. On the basis of the record of the hearing referred to in Article 33 (4) and all other relevant documents the Executive Director, acting as the appointing authority, shall take one of the decisions provided for in Article 3 of Annex IX to the Staff Regulations.
2. Where the Executive Director decides that no case can be made against the person concerned pursuant to Article 3(1)(a) of Annex IX to the Staff Regulations, the Executive Director shall decide on the withdrawal of all precautionary measures imposed pursuant to Article 20. Without prejudice to paragraph 3, the person concerned may request that a copy of the decision be inserted in his or her personal file.
3. Concerning the authorisation to carry and use weapons, reassignment to another profile and/or withdrawal from operational activities, the decision shall always be inserted in the personal file of the person concerned.

4. Where the Executive Director decides to address a warning to the person concerned pursuant to Article 3(1)(b) of Annex IX to the Staff Regulations, it shall be inserted in his or her personal file. The person concerned has the right to add comments on the warning which shall also be inserted in the personal file. After 18 months of the date of the warning, the person concerned may ask the appointing authority to have it removed from his or her personal file.

## **CHAPTER VI - Disciplinary proceedings**

### *Article 36*

#### **Disciplinary proceedings**

1. The disciplinary proceedings in relation to the person concerned shall be conducted in accordance with the relevant decision of the Management Board adopting provisions on the conduct of administrative inquiries and disciplinary procedures in the Agency<sup>27</sup>.
2. The relevant decision of the Management Board adopting provisions on the conduct of administrative inquiries and disciplinary procedures in the Agency shall be applied subject to the following:
  - a) When considering the nature of the misconduct and the circumstances in which it occurred in order to determine the seriousness of the misconduct and when deciding upon the disciplinary penalty, the appointing authority shall also consider the gravity of the incident involving the use of force, in particular whether the incident resulted in death or a serious injury to a person or a significant damage to property, and whether the use of firearm resulted in no injury or damage.
  - b) At least one member of the Disciplinary Board shall be appointed from among the statutory staff of the Standing Corps. The Disciplinary Board shall not be common to other agencies (Common Disciplinary Board).
  - c) Where relevant, the Disciplinary Board may call the relevant coordinating officer as witness in the disciplinary proceedings in order to ascertain whether the use of force was in compliance with the applicable Operational Plan. This hearing may be conducted via video or telephone conferencing means.
  - d) Where relevant, the Disciplinary Board may call representatives of the host Member State or Third Country as witnesses in the disciplinary proceedings in order to ascertain whether the use of force was in compliance with the applicable national law of the host Member State or Third Country. This hearing may be conducted via video or telephone conferencing means.

## **CHAPTER VII - Prevention and publicity**

### *Article 37*

#### **Training and awareness**

The Agency shall provide training and undertake other awareness-raising activities on disciplinary matters for the statutory staff of the standing corps.

### *Article 38*

#### **Publicity of disciplinary cases**

Summaries of the disciplinary decisions adopted shall be published annually in an anonymised format by the Agency.

## **PART IV - FINAL PROVISIONS**

### *Article 39*

#### **Application**

The supervisory mechanism shall not apply to events involving the use of force which occurred before the date of taking effect of this Annex.

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<sup>27</sup> [reference to be adapted when Frontex will adopt new rules Management Board Decision 26/2018 of 25 October 2018 adopting general implementing provisions on the conduct of administrative inquiries and disciplinary procedures. ]