

Addressing pushbacks at the EU's external borders

SUMMARY

In recent years, the migration policy of the European Union (EU) has focused on strict border controls and the externalisation of migration management through cooperation with third countries. Although states have the right to decide whether to grant non-EU nationals access to their territory, they must do this in accordance with the law and uphold individuals' fundamental rights.

Nonetheless, national human rights institutions, international bodies, media and civil society organisations regularly report cases of 'pushbacks' or collective expulsions at the EU's land and sea borders. According to these reports, pushbacks often involve excessive use of force by EU Member States' authorities operating at external borders, and degrading and inhuman treatment of migrants and their arbitrary detention. Furthermore, the European Border and Coast Guard Agency (Frontex), has been accused of failing to safeguard people against human rights violations at the EU's external borders.

Not only do these practices and policies of stopping asylum-seekers and migrants in need of protection at or before they reach the external borders erode EU values as enshrined in the EU Treaties, they may also violate international and European humanitarian and human rights laws.

The European Parliament has repeatedly called for Member States and EU agencies to comply with fundamental rights in their activities to protect the EU's external borders. Several international organisations and other stakeholders have condemned or filed legal actions against the practice of pushbacks carried out at the EU's external borders. In September 2020, the European Commission presented a pact on migration and asylum, including a proposal on pre-entry screening of third-country nationals at EU external borders, in a bid to address these potential breaches of fundamental rights.

This is an updated and expanded edition of a [briefing from March 2021](#), drafted by Anja Radjenovic.



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Introduction

The EU's objectives in the field of external border protection are to safeguard freedom of movement within the Schengen area, an area without internal borders, and to ensure efficient monitoring of people who cross both external Schengen borders and the EU's external borders with countries that are not part of the Schengen area ([Article 3\(2\) of the Treaty on European Union](#) – TEU and [Article 77 of the Treaty on the Functioning of the European Union](#) – TFEU). Border surveillance operations carried out at the EU's external borders must respect international and European human rights and humanitarian law, as well as the international law of the sea. The unprecedented [migration flows](#) of 2015 put management of the EU's external borders to the test, however, with uncontrolled arrivals of migrants and asylum-seekers in the EU eventually leading to the [temporary reintroduction of internal borders](#) between several Member States. Member States cited concerns relating to the situation at the EU's external borders and/or security threats, and have continued to do so in subsequent years, such as currently with the war in Ukraine.

The European Council has gradually been [shifting focus](#) to prioritise strengthening the EU's external borders and preventing irregular migrants from reaching EU territory. To this end, the aim has been to stem illegal migration on all existing and emerging routes and extend the [EU's partnerships with third countries](#), notably [Turkey](#) and [Libya](#). The European Border and Coast Guard Agency ([Frontex](#)) has been [reinforced](#) and provided with stronger means and powers to contribute to this goal. Some of these [EU policies](#) initially seemed to have an impact on the number of [detected irregular border crossings](#) along the EU's external borders, with a significant fall in numbers over the 2017-2020 period. However, [in 2021](#) detected irregular border crossings increased by 60 % compared to 2020 (to 199 900), and in the [first eight months of 2022](#) they were already at 188 200, up 75 % compared with the same period of 2021 and at the highest total for the January-August period since 2016.

At the same time, the EU has been much [criticised](#) for prioritising border controls over migrants' human rights and for externalising border controls in cooperation with third countries. In the past few years, media, international players and NGOs have repeatedly published [reports](#) alleging violations of migrants' fundamental rights by EU Member State authorities at the EU's external borders, particularly in the [Aegean Sea](#) or at the [Spanish-Moroccan border](#), but also at land borders, e.g. between [Hungary](#) and Serbia, [Romania](#) and Serbia, [Croatia](#) and Bosnia, Belarus and [Poland](#), and Belarus and [Lithuania](#). The alleged violations included collective expulsions – '[pushbacks](#)' – by EU Member State authorities, often accompanied by allegations of ill-treatment or excessive use of force by border guards and security forces. Several such reports also mentioned the involvement of Frontex. The Protecting Rights at Borders ([PRAB](#)) Initiative recorded [1 911](#) pushback incidents at the EU's external and internal borders in the first three months of 2022.

Pushbacks in international and EU law

There is **no internationally agreed definition of the term 'pushbacks'** in the area of migration. The special rapporteur on the human rights of migrants at the United Nations Office of the High Commissioner for Human Rights [defines](#) pushbacks as 'various measures taken by States which result in migrants, including asylum-seekers, being summarily **forced back** to the country from where they attempted to cross or have crossed an international border **without access to international protection or asylum procedures or denied of any individual assessment on their protection needs** which may lead to a **violation of the principle of [non-refoulement](#)**'. Pushbacks can also violate other fundamental rights, such as the right to life, the prohibition of torture and inhuman or degrading treatment or punishment, the right to property, and respect for private and family life.

Prohibition of collective expulsions

In various [judgments](#), the European Court of Human Rights (ECtHR) has condemned pushback practices as collective expulsions based on [Article 4 of Protocol No 4](#) to the European Convention

on Human Rights ([ECHR](#)), which prohibits 'collective expulsions of aliens'. The former European Commission of Human Rights defined collective expulsions as 'any measure of the competent authority compelling aliens as a group to leave the country, except where such a measure is taken after and on the basis of a reasonable and objective examination of the particular cases of each individual alien of the group' ([Becker v. Denmark](#)). The definition is still applied by the Court today.

The Court [found](#) a violation of Article 4 of Protocol No 4, among other things, when the procedure for expulsion did not afford sufficient guarantees demonstrating that the personal circumstances of each individual had been genuinely and individually taken into account ([Čonka v. Belgium](#)); when applicants have been effectively prevented from applying for asylum or from having access to any other national procedure that meets the requirements of an effective remedy ([Sharifi and others v. Italy and Greece](#)); and when applicants were refused entry into a state territory without giving proper regard to their individual situation as part of a wider policy of refusing to receive asylum applications ([M.K. and others v. Poland](#)). For example, in 2012 the ECtHR condemned Italy for a 'pushback' practice ([Hirsi Jamaa and others v. Italy](#)) when its coastguard physically intercepted a migrant boat and returned its approximately 200 passengers to Libya. Confronted with the question of the extraterritorial application of the ECHR, the Court asserted that the applicants had been 'under the continuous and exclusive *de jure* and *de facto* control of the Italian authorities'. In this case, the ECtHR found a breach of the prohibition on collective expulsions under Article 4 of Protocol No 4 to the Convention.

More recently, the Court found a breach of the prohibition on collective expulsions in the case of a Pakistani national who had entered Hungary through Serbia and was removed to the external side of the Hungarian border fence, despite his claim that he had stated his wish to apply for asylum ([Shahzad v. Hungary](#)). A breach was also found in the case of an Afghan family that was ordered by Croatian police officers to return to Serbia following the train tracks, without being given genuine and effective access to procedures for legal entry ([M.H. and others v. Croatia](#)). In July 2022, the ECtHR condemned Greece for multiple violations in the [Safi and others v. Greece](#) case concerning the sinking of a fishing boat transporting 27 foreign nationals in the Aegean Sea on 20 January 2014 that resulted in the deaths of 11 people, including relatives of the applicants. The Court considered, among other things, that there had been 'omissions and delays by the national authorities in conducting and organising operation to rescue refugees whose boat had sunk, causing several deaths'.

An action that is still pending is [S.S. and others v. Italy](#) in relation to Libya's abuses against migrants during operations at sea and upon return to the country in November 2017. In this case, applicants claim that Italy breached its obligations under the ECHR by cooperating with Libya to enable its coast guard to intercept people at sea and take them back to Libya. As explained by [experts](#), one key goal of the applicants and their defenders is to have the Court assert its jurisdiction by holding that a state party can retain effective control over persons also when its officers 'only' equip, train, and possibly instruct vessels of a third state. This would build on and expand previous case law, in particular with regard to the Court's assertion of extraterritorial application of the ECHR in the [Hirsi Jamaa and others v. Italy](#) case.

In [2019](#) and January [2021](#), two communications were submitted to the Office of the Prosecutor of the International Criminal Court. [The first](#) argued that EU and Member States' officials and agents have been involved in crimes against humanity, 'committed as part of a premeditated policy to stem migration flows from Africa via the central Mediterranean route, from 2014 to date' (2019). [The second](#) communication argued that '... the combined treatment of refugees in Greece by Greek government officials and their agents, in conjunction with Frontex officials and their agents, since the EU-Turkey Deal's entry into force in March 2016, constitutes a widespread and systematic attack against an identifiable civilian population for the purpose of deterring vulnerable individuals from seeking asylum in Europe, and amounts to crimes against humanity under Article 7 of [the Rome Statute](#)'. [An update on the matter and new evidence](#) from the ground were submitted in November 2021.

The controversies surrounding the accountability of individual actors dealing with boat migrants at sea have been observed not only in the Mediterranean but also in [other parts of the world](#). The reason is varied application and interpretation of different bodies of international law. According to some [experts](#), the [search and rescue](#) (SAR) regime, refugee law, international human rights law, the law of the sea, and the human smuggling and trafficking frameworks are all relevant in this regard. States often deal with these regimes in a fragmented manner, cherry picking provisions that allow them to justify a securitised approach to protecting state interests. It is argued that [harmonising](#) those laws could lead to the establishment of a 'politically realistic legal regime for maritime interceptions'.

Prohibition of *refoulement*

As a general rule, **states have a sovereign right to control the entry and continued presence of non-nationals on their territory**. However, those policies must be applied without prejudice to the **obligations deriving from [international humanitarian law](#) and [international human rights law](#), including in particular the prohibition of *refoulement* as enshrined in the [1951 Refugee Convention](#)**. Article 33(1) provides that states are prohibited from 'expel[ling] or return[ing] a refugee in any manner whatsoever to the frontiers of territories, where his life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion', protecting refugees against being returned to a risk of persecution. **EU law upholds the prohibition of *refoulement* in [Article 78\(1\) TFEU](#) and [Articles 18 and 19 of the Charter of Fundamental Rights of the EU](#)**. Moreover, the principle of non-*refoulement* is **widely reflected in [secondary EU law](#)**, such as in Article 21 of the Qualification Directive ([2011/95/EU](#)), Articles 9, 35 and 38 of the Asylum Procedures Directive ([2013/32/EU](#)) and Articles 4(4) and 5 of the Return Directive ([2008/115/EC](#)) (see section on EU law).

Even though the prohibition of *refoulement* is universal, [grey areas](#) remain that call for more legal clarity. One such aspect is the territorial scope of the principle of non-*refoulement*, which is still under debate, both in scholarly debates and in practice. For example, some [academics](#) support its application wherever competent state authorities perform measures pertaining to border control, while for [others](#) the principle of non-*refoulement* applies to the actions of states, wherever undertaken, whether at the land border, or in maritime zones, including the high seas. The practical consequences of its application at sea are detailed in a [leaflet](#) edited by the United Nations High Commissioner for Refugees (UNHCR) and the International Maritime Organization (IMO). Similarly, the EU Agency for Fundamental Rights (FRA) published [guidance](#) on how to reduce the risk of *refoulement* in external border management when working in or together with third countries, as well as [ten practical 'dos' and 'don'ts' for border guards](#) working at the EU's external borders.

According to other [expert](#) views, states have human rights obligations towards only those individuals who find themselves within their jurisdiction, since legal systems do not recognise state duties towards migrants before they enter the relevant state's jurisdiction. As a rule, anyone within the territory (including the territorial sea) of a state is within that state's jurisdiction. As adjudicated by the ECtHR, states are considered to exercise jurisdiction when their officials are physically present at a particular incident and thereby exercise effective control over the individuals seeking protection ([Hirsi Jamaa and others v. Italy](#)).

Whereas the 1951 Refugee Convention only applies to refugees, Article 3 of the **United Nations (UN) [Convention against Torture](#) expanded the scope of its protection to include expulsion**, stating that state parties may not 'expel, return (*'refouler'*) or extradite a person [regardless of their legal status] to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture'. All EU Member States are party to these UN conventions. **Article 7 of the International Covenant on Civil**

In 1993, in [Sale v. Haitian Centers Council](#), the US Supreme Court concluded that both the international and US statutory prohibition against *refoulement* applied only with regard to actions taken on US territory. Accordingly, it ruled that the US policy to intercept refugees on the high seas and return them to Haiti without any screening or other processing did not violate international law.

and Political Rights (ICCPR) also prohibits return to torture and other forms of ill-treatment. At Council of Europe level, **Article 2 ECHR prohibits the removal of people if it would breach their right to life. Article 3 ECHR on the prohibition of torture** furthermore applies to expulsion cases where the risk of ill treatment comes from non-state agents and if state authorities are unwilling or unable to provide protection (*H.L.R. v. France*). Moreover, **Article 15 ECHR states that no derogation from these rights can be made, not even in time of emergency.**

Although the ECtHR in *N.D. and N.T. v. Spain* found no violation of [Article 4 of Protocol No 4](#) to the ECHR, which prohibits 'collective expulsions of aliens', the Court stated that the prohibition of *refoulement* includes the protection of asylum-seekers in cases of both non-admission and rejection at the border. According to the Court, the notion of 'refugee' covers not only refugees lawfully on the territory of the expelling state but also any person who, being unlawfully on that territory, has applied for refugee status, while his or her application is under consideration. The Court further notes that the wish to apply for asylum does not have to be expressed in a particular form. It may be expressed by means of a formal application, but also by means of any conduct that signals clearly the wish of the person concerned to submit an application for protection. Furthermore, the sole fact that a state refuses to admit to its territory an alien who is within its jurisdiction does not release that state from its obligations towards the person concerned arising out of the prohibition of *refoulement* of refugees.

EU law

EU law enshrines in primary law **the right to asylum and the right to international protection** ([Article 78](#) TFEU and [Article 18](#) of the Charter of Fundamental Rights of the EU). EU law also provides for the **prohibition of collective expulsion and the principle of non-refoulement** ([Article 19](#) of the Charter).

As regards third-country nationals who are staying illegally on the territory of a Member State, the **Return Directive** ([2008/115/EC](#)) sets out the standards and procedures governing their return, 'in accordance with fundamental rights as general principles of Community law as well as international law, including refugee protection and human rights obligations'. Any form of removal under the Return Directive must be in conformity with the right to asylum and the principle of non-*refoulement* (Article 5). The Court of Justice of the European Union (CJEU) in its [judgment](#) of 17 December 2020 (*Commission v. Hungary*) found that Hungary had failed to fulfil its obligations under the Return Directive. Hungarian police forcibly escorted illegally staying third-country nationals to a strip of land between the border fence and the Serbian-Hungarian border without prior compliance with the substantive and procedural safeguards provided for in that directive. This judgment prompted Frontex to suspend its operations in Hungary in accordance with Article 46 of the Frontex Regulation, on the decision to suspend, terminate, or not to launch a Frontex activity, except for assisting the country with return operations.¹

The **Schengen Borders Code Regulation** ([2016/399/EU](#)) stipulates that third-country nationals who do not fulfil all the entry conditions are to be refused entry to the territories of the Member States (Article 14). In such cases, the authorities must issue a decision stating the precise reasons for the refusal, without prejudice to the special provisions concerning the right to asylum and international protection. According to Article 2 of the Return Directive, Member States [may decide](#) not to apply the Directive to third-country nationals who are subject to a refusal of entry, or who are apprehended or intercepted in connection with the irregular crossing of the external border of a Member State and who have not subsequently obtained an authorisation or a right to stay in that Member State. In such cases, Member States may apply simplified national return procedures, but must comply with the conditions laid down in Article 4(4) of the Return Directive, including the principle of non-*refoulement*.

The **Asylum Procedures Directive** ([2013/32/EU](#)) sets out rules on common procedures for granting and withdrawing international protection, including at the border, in the territorial waters or in the

transit zones of the Member States. Applicants must have their applications examined individually, objectively and impartially, be informed in a language they can understand, and have the right to consult a legal adviser and to an effective appeal before a court of tribunal; there are also specific guarantees for vulnerable people. According to Article 9, return procedures need to take into account the principle of non-*refoulement*.

The **Qualification Directive** ([2011/95/EU](#)) lays down the common standards for the identification of non-EU citizens or stateless persons genuinely in need of international protection in the EU and ensures that they can use a minimum level of benefits and rights in all EU Member States. Articles 17 and 21 prohibit *refoulement*.

The **Sea Borders Regulation** ([656/2014/EU](#)) governs surveillance of external sea borders by EU Member States within the context of operational cooperation with Frontex. Article 4 ensures the protection of fundamental rights and the principle of non-*refoulement*. According to Article 4(3), before any rescued person is disembarked, forced to enter, conducted to or otherwise handed over to the authorities of a third country, the Frontex operation must conduct a case-by-case assessment of their personal circumstances and provide information on the destination. The rescued persons must also be given the opportunity 'to express any reasons for believing that disembarkation in the proposed place would be in violation of the principle of non-*refoulement*'.

Frontex's role in SAR operations is enshrined in the Frontex Regulation ([Regulation \(EU\) 2019/1896](#)). It includes operations launched and carried out in accordance with the Sea Borders Regulation and international law, taking place in situations that may arise during border surveillance operations at sea. SAR is a specific objective of the operational plan of every Frontex joint maritime operation. For this reason, vessels deployed by Frontex to an operational area should be ready to provide national authorities with technical and operational assistance in support of SAR operations. It is important to underline that SAR operations are always coordinated by the national maritime rescue and coordination centres (MRCC). The MRCC orders vessels that are closest to the incident, or the most capable, to assist in the rescue. These may include national commercial or military vessels, vessels deployed by Frontex, private boats and others.

The EU and its agencies have no mandate to conduct SAR operations, as this remains a competence of Member States. The regulation constrains Frontex's actions by establishing that 'in accordance with Union law and those instruments the Agency should assist Member States in conducting SAR operations in order to protect and save lives whenever and wherever so required'.² The Agency also has an obligation to set up an independent and effective complaints mechanism to monitor and ensure respect for fundamental rights in all its activities. It must also suspend or terminate any (funding of) activities when serious or persistent violations occur.

Pushbacks in practice

In recent years EU migration policies have focused primarily on securing the external borders and stepping up cooperation with third countries (particularly Libya and Turkey) to curb migration flows, prompting heavy criticism from [academics](#) and [civil society organisations](#). An increasing number of Member States have also set up [fences and border walls](#) on their external Schengen borders to prevent migrants and asylum-seekers from accessing their territory. These barriers have given cause for concern, owing not least to the [poor human rights situation](#) of migrants thereby refused entry.

National and European human rights institutions, international organisations and civil society organisations regularly report cases of persons who are apprehended after an irregular border crossing and later removed, without an individual identification procedure.

In 2019, the Parliamentary Assembly of the Council of Europe adopted a [resolution](#) citing several cases of pushbacks from EU Member States towards non-EU countries. The Assembly expressed concerns over the persistent and increasing practice and policies of pushbacks, in clear violation of

the rights of asylum-seekers and refugees, including the right to asylum and the right to protection against *refoulement*.

A 2020 [report](#) by Refugee Rights Europe and the End Pushbacks Partnership outlines in detail the practice of pushbacks and associated border violence at the external borders of Bulgaria, Croatia, Greece, Hungary, Romania, Poland, Slovakia and Spain, and its detrimental impact on people's lives. The report also underlines the harmful impact of pushbacks at EU level and on European social cohesion in terms of the polarisation of societies and normalisation of violence against newcomers. The European Council on Refugees and Exiles (ECRE) [mentions](#) 1 624 boats carrying 43 476 people being pushed back from Greek islands into Turkish waters between 1 January 2017 and 27 September 2022.

In December 2020, at the request of the European Parliament, [FRA](#) published a [report](#) on fundamental rights compliance at the EU's external land borders. The report focused on pushbacks and fundamental rights violations in connection with these practices, and offered recommendations on how to apply and implement in full the fundamental rights safeguards contained in EU legal instruments relevant to border control. It recalled, inter alia, that, under Article 4 of the Schengen Borders Code, Member States must respect fundamental rights when carrying out border controls as a general safeguard clause. Previously, FRA had worked on a [summary](#) of fundamental rights of refugees, asylum applicants and migrants at the EU borders.

Most of the reports by national human rights institutions, Council of Europe entities and UNHCR of alleged pushbacks and other fundamental rights violations at the EU's land borders between September 2018 and November 2020 concerned Croatia and Greece, but some also referred to Bulgaria, Hungary, Poland, Romania and Spain. At some of these border sections, Frontex was carrying out joint border surveillance operations at the time of the reported incidents. Another [FRA report](#) on 'Migration: Key Fundamental Rights Concerns', published in September 2021, confirmed that concerns at the EU's external borders persist. It says that around 61 000 individuals crossed the external borders irregularly between January and June 2021 (up 59 % from 2020). It also mentions that pushbacks, some of which involved children, were reported by NGOs and the media in several Member States, including Croatia, Cyprus, France, [Greece](#), Hungary, Malta, Romania and Slovenia.

[UNHCR](#) and the International Organization for Migration ([IOM](#)) have also called on the EU and its Member States to take urgent action to end pushbacks, collective expulsions, and the use of violence against migrants and refugees. The UN Special Rapporteur on the human rights of migrants, Felipe González Morales, stated in a [report](#) published in April 2022 that 'pushbacks remain the de facto general policy in many States and continue to seriously impede the enjoyment of the human rights of migrants who cross international borders'. He added that 'the full spectrum of such violations often remains hidden, due to State-led attempts to dismiss or cover up allegations of wrongdoing'. Delphine Rodrik, legal advisor at the European Center for Constitutional and Human Rights, said in a September 2022 [contribution](#) on the EU Migration Law Blog that 'rather than constituting a necessary feature of strengthened security, pushbacks reflect increasing lawlessness and erosion of the rule of law within Europe'.

As early as April 2016, the European Parliament pointed out in a [resolution](#) that any attempt by Member States to 'push back' migrants who have not been given the opportunity to present asylum claims runs contrary to Union and international law, and that the Commission should take appropriate action against any Member State that attempts such 'push backs'. In September 2018, Parliament [invited](#) the Council of the EU to determine whether there was a clear risk of a serious breach by Hungary of the values referred to in [Article 2 TEU](#), including violation of fundamental rights of migrants, asylum-seekers and refugees, owing to the reported pushbacks at Hungary's border with Serbia, and to address appropriate recommendations to Hungary in this regard. Annexed to the resolution was a [proposal for a Council decision](#) under Article 7 TEU. In September 2022, Parliament adopted a [resolution](#) regretting the lack of decisive EU action, in particular the inability of the Council to make meaningful progress in the ongoing Article 7(1) TEU procedure.

Following the commencement of an Article 7 proceeding against Hungary, the CJEU ruled in its [judgment of 16 November 2021](#) (Case C-821/19 *Commission v. Hungary*) that Hungarian legislation restraining the rights of asylum-seekers violates EU law.

Frontex

In October 2020, investigative journalism collective Bellingcat [accused](#) Frontex of being involved in pushbacks of migrants in the Aegean Sea. This accusation prompted the Agency to launch an internal [inquiry](#). A [more recent joint investigation](#) by Lighthouse Reports, *Der Spiegel*, SRF Rundschau, *Republik* and *Le Monde* said it had indications of Frontex involvement 'in at least 22 verifiable cases where people were put on life rafts before being pushed back to Turkey over the course of 18 months between March 2020 and September 2021'.

In November 2020, in response to an urgent [request](#) from the European Commission, the Frontex Management Board held an extraordinary meeting to investigate the incidents at the Greek-Turkish Aegean Sea border, following which the then Frontex Executive Director, Fabrice Leggeri, [reported](#) to the then European Parliament President, David Sassoli, that there had been 'no evidence of a direct or indirect participation of Frontex staff or officers deployed by Member States under Frontex operations in alleged pushbacks in the Aegean Sea' as of that moment.

Moreover, in November 2020, the European Ombudsman opened an [own-initiative inquiry](#) to assess the Frontex complaint mechanism for those who believe their rights have been violated in the context of Frontex border operations, and the role and independence of the [fundamental rights officer](#) (FRO) in this process. The Ombudsman's conclusions pointed to a number of shortcomings, including a very low number of complaints, a lack of transparency, a delay in recruiting 40 fundamental rights monitors (FRMs) and a lack of cooperation between the FRO and the Member States' national authorities.

In March 2021, the Ombudsman opened another [own-initiative inquiry](#) into Frontex's compliance with its fundamental rights and transparency obligations. In the report drawn up following the inquiry, the Ombudsman [invited](#) Frontex to be more transparent, including by publishing summaries of its operational plans and carrying out further training of its FRMs; to publish its reply to each negative opinion of the FRO about a planned activity; and to ensure the presence of 'cultural experts' during screening interviews. On 5 October 2022, the Ombudsman opened a third [inquiry](#) into concerns that the Agency does not carry out prior human rights risk and impact assessments before providing assistance to non-EU countries to develop surveillance capabilities.

On 1 December 2020, members of Parliament's Committee on [Civil Liberties, Justice and Home Affairs](#) (LIBE) demanded answers from Leggeri regarding the alleged involvement of Frontex staff in pushbacks of asylum-seekers by Greek border guards. On 21 January 2021, the Frontex Management Board [asked](#) Leggeri to take urgent measures to clarify several incidents at sea identified as possible pushbacks, to ensure that every incident in the operational area is reported, including regular submission of serious incidence reports to the FRO, and to hire 40 FRMs immediately.

The final [report](#) on fundamental rights and legal aspects of operations in the Aegean Sea, prepared by a Frontex Management Board working group on fundamental rights and legal operational aspects of operations in the Aegean Sea on 1 March 2021, could not confirm beyond any reasonable doubt the Agency's wrongdoing during its operations, as it found no indication of injuries, missing persons or deceased persons in the context of the incidents investigated. The report, however, identifies deficiencies in the incident reporting and monitoring systems and makes recommendations in this regard.

In December 2020, OLAF opened an [investigation](#) into Frontex. Even though the final report has not been publicly disclosed, German magazine *Der Spiegel* [published](#) the report in its entirety on 13 October 2022. The investigation involved allegations of harassment and misconduct within the Agency, in addition to the alleged migrant pushbacks. Based on the evidence collected, OLAF

concluded that Frontex had been involved in severe human rights violations, including pushbacks by Greek authorities covered up by the Agency, and that the Frontex management withheld cases of possible human rights violations from its own FRO.

In Parliament, the final OLAF report was only made accessible to members of the Committee on Budgetary Control (CONT) (Parliament has to grant Frontex discharge for the implementation of its budget). The CONT members [recommended](#) refusing discharge of Frontex's budget for the financial year 2020. Members of the European Parliament followed their reasoning and [refused discharge](#) on 18 October 2022. Parliament welcomed the corrective actions already taken or planned and the positive changes with respect to fundamental rights, while noting that the problems at the Agency might be of a deeper 'structural' nature and go beyond the failings of individuals. MEPs furthermore regretted that Frontex has not implemented some of the conditions set out in Parliament's [previous discharge reports](#).

The OLAF report and the mounting criticisms, coupled with repeated allegations of fundamental rights violations and mismanagement of Frontex, led to Leggeri's resignation in [April 2022](#). He was replaced by Aija Kalnāja as executive director *ad interim*.

Frontex Scrutiny Working Group

January 2021 furthermore saw approval of the establishment of a [Frontex Scrutiny Working Group \(FSWG\)](#) within the LIBE committee. The FSWG formally began work on 23 February with a broad mandate not limited in time. Among other things, it was tasked with addressing and further investigating the 'serious allegations of pushbacks and the management concerns' regarding Frontex. Another key task included investigating not only whether the Agency was involved in violations of fundamental rights but also whether it was aware of violations and did not act.

The FSWG published its [final report](#) and [annex](#) on 14 July 2021. Despite the fact that the scrutiny group 'did not find evidence on the direct performance of pushbacks and/or collective expulsions by Frontex in the serious incident cases that could be examined', the report clearly pointed to serious shortcomings. First, it acknowledged that serious allegations of fundamental rights violations had been 'consistently reported' by 'credible actors' both at national and international levels. Second, it stressed Frontex's failure to take action in order to prevent or even reduce the risk of such violations, and underlined deficiencies in the Frontex monitoring and reporting system for fundamental rights violations. Third, it voiced regret about the significant and unnecessary delay in the recruitment procedure of the FRMs and invited the Agency to be more proactive in order to ensure the fulfilment of its 'negative and positive fundamental rights obligation', which is clearly set out in the founding regulation ([Regulation \(EU\) 2019/1896](#)). Finally, with regard to the European Parliament's oversight of Frontex, the FSWG concluded that Parliament had not been adequately informed; that confidentiality hampered Parliament's scrutiny; and that Leggeri's statements to Parliament 'did not reflect the knowledge he had at the time of his statements'. Frontex [acknowledged](#) the FSWG report and said it is 'determined to uphold the highest standards of border control within our operations' and to see how it can implement the report's recommendations 'to further strengthen the respect of fundamental rights in all our activities'.

In February 2021, the Agency adopted a new [fundamental rights strategy](#) as provided for by Article 80(1) of Frontex [Regulation \(EU\) 2019/1896](#). After recalling the basic principles and values that the Agency must respect, the strategy stresses that Member States and Agency staff are accountable in their professional conduct to the European Parliament and the Council of the EU. In that context, the strategy insists that border checks and border surveillance at sea, on land and in the air must always be conducted in a way that respects fundamental rights, with particular attention to vulnerable categories such as children. Also, whenever the Agency supports Member States in return operations, it must comply with EU and international law, and respect the principle of non-*refoulement* and the prohibition of collective expulsions. The FRO, who is fully independent in the performance of their duties, follows up and reports on the implementation of the strategy. A new [FRO](#), Jonas Grimheden, was appointed in June 2021.

In March 2022, during an [exchange of views](#) with the LIBE committee, FRO Jonas Grimheden confirmed that the Agency had taken action to address the accusations of violations of fundamental rights at the EU external borders, though the situation remained critical, for instance, at the border between Lithuania and Belarus. He confirmed that a cultural change was happening within the Agency, with more frequent incident reports being filed. Executive director *ad interim* Aija Kalnāja – in reaction to the OLAF report – [insisted](#) in October 2022 that Frontex 'takes the findings of investigations, audits and other forms of scrutiny seriously and uses them as opportunities to make changes for the better', and that 'it is committed to deliver a well-functioning and legally compliant Agency that adheres to the best practices of good governance'.

Expert views on the accountability of Frontex with regard to pushbacks are divided. For example, according to [some](#), Frontex's set-up and working methods allow all actors involved to shift the blame to others, while individuals face many practical as well as legal obstacles to bringing Frontex to court. [Others](#), however, insist that illegal pushbacks by Frontex units in the Mediterranean mean the EU incurs 'derivative responsibility' for a violation of the principle of non-*refoulement* and of the duty to assist persons in distress at sea. Furthermore, some [experts](#) argue there may be circumstances where Frontex may be held jointly responsible alongside a host Member State for alleged human rights violations occurring during joint operations (shared responsibility) or where it may incur responsibility for complicity if it assists a state in violation of human rights obligations.

Legal action against Frontex

Three legal actions have already been brought against Frontex before the CJEU. In May 2021, for the first time ever, two applicants brought an action ([T-282/21 SS and ST v. Frontex](#)) against Frontex on the grounds that the Agency had 'failed to act' in accordance with [Article 265 TFEU](#). Their action was supported by three pleas in law. The first was about 'serious or persisting violations of fundamental rights and international protection obligations in the Aegean Sea Region', which resulted in a 'policy of systematic and widespread attack directed against civilian populations seeking asylum in the EU'. The second was about the Agency's failure to fulfil 'its positive obligations under the Charter of Fundamental Rights' or take any action to prevent fundamental rights violations in the context of its operation. The third involved the applicants' claim of having been directly and individually affected by Frontex operations, which resulted in 'unlawful refoulement, collective expulsion, and prevention of access to asylum'. In April 2022, the Court [dismissed](#) the action as inadmissible.

In September 2021, an action for damages ([T-600/21 WS and others v. Frontex](#)) was brought against Frontex before the CJEU on behalf of a Syrian family pushed out of Greece in 2016 on a flight operated by Frontex and Greece. The applicants claimed compensation for material and non-material damages as a result of the return operation. The action was sustained by eight pleas in law that included, among others: alleged violations of several articles of the EU Charter of Fundamental Rights, alleged violations of the Frontex Regulation, and the fact that Frontex failed to take measures to mitigate the risks of violations to fundamental rights.

In March 2022, a new action was brought before the CJEU, ([T-136/22 Hamoudi v. Frontex](#)). The applicant claimed that Frontex owed him compensation for the damages he suffered during and following his collective expulsion from Greece on 28-29 April 2020 in the Aegean Sea. The claimant argued that the Agency had violated Articles 1, 2, 3, 4, 18, 19(1), 19(2) and 21 of the EU Charter of Fundamental Rights, as well as Frontex [Regulation 2019/1896](#), in particular Articles 46(4) and 46(5). Those alleged violations, he believed, would give rise to a non-contractual liability of the Agency. In particular, he argued that: 'the unlawful collective expulsion of the applicant on 28-29 April 2020 is attributable to Frontex, its "true author"', because it was executed in line with the legally binding operational plan for [Rapid Border Intervention Aegean](#), drafted by the Frontex executive director.

In September 2022, Dutch foundation front-LEX also [claimed](#) to have had access to the OLAF report and that it had [decided](#) to take Frontex executive director *ad interim* Aija Kalnāja to the CJEU for 'failing to trigger Article 46 of the Frontex Regulation for its operation in the Aegean Sea'. Article 46 provides that 'the executive director shall suspend or terminate any activity by the Agency, in whole

or in part, if he or she considers that there are violations of fundamental rights or international protection obligations related to the activity concerned that are of a serious nature or are likely to persist'.

New pact on migration and asylum

In July 2020, the European Commission [recognised](#) the need for an institutional response to ensure that EU states uphold fundamental rights while guarding borders. In September 2020, it published a [new pact on migration and asylum](#), claiming that 'all necessary guarantees will be put in place to ensure that every person would have an individual assessment and essential guarantees remain in full, with full respect for the principle of non-*refoulement* and fundamental rights'. The pact includes a legislative proposal intended to address the potential breach of fundamental rights at the EU's external borders.

Screening of third-country nationals at external borders

On 23 September 2020, the European Commission put forward a [proposal](#) for a new regulation on the [screening of third-country nationals at external borders](#), aiming to clarify and streamline the rules on dealing with third-country nationals who arrive at the EU borders in an irregular manner, including following disembarkation after SAR.

According to the [proposal](#), Member States are required to establish an independent monitoring mechanism to ensure the protection of the fundamental rights of the persons concerned, in compliance with EU and international law. They must ensure that allegations of non-respect for fundamental rights in relation to screening, including as regards access to the asylum procedure and non-compliance with the principle of non-*refoulement*, are dealt with effectively and promptly. FRA should establish general guidance and, at the request of the Member States, support the development of the monitoring mechanism for the protection of fundamental rights. Furthermore, Member States may invite relevant national, international and non-governmental organisations and bodies to take part in monitoring. The monitoring mechanism will be part of the governance and monitoring of the migratory situation provided for by the proposal for a new [regulation on asylum and migration management](#).

On 10 February 2021, the European Parliament adopted a [resolution](#) on the implementation of Article 43 of the Directive on Asylum Procedures (2013/32/EU), which the pact on migration and asylum suggests should be replaced by a [new regulation](#). Parliament stresses that, while Member States have an obligation to prevent irregular crossings at the EU's external borders, they must also respect the fundamental rights of migrants, including the principle of non-*refoulement* and the prohibition of collective expulsions. It calls on the European Commission to ensure that Member States comply with these obligations and to suspend EU payments in the event of serious deficiencies.

The provisions establishing a monitoring mechanism for fundamental rights have been commented on widely. Marco Stefan and Roberto Cortinovis of the Centre for European Policy Studies [warned](#) that the mechanism would leave out a whole range of border surveillance operations and activities performed by Member States and Frontex. They also pointed out that Member State authorities have too much discretion in their monitoring activities and that independent human rights monitors should investigate alleged pushbacks and thus oversee the work of national authorities responsible for checking, carrying out surveillance and patrolling the EU's external borders.

A [joint statement](#) signed by more than 80 civil society organisations argued that to ensure accountability for rights violations at borders, including the persistent use of removals and pushbacks across a large number of Member States, the monitoring mechanism must be expanded beyond the screening procedure, be independent of national authorities, and involve independent organisations, such as non-governmental organisations. However, as pointed out by other [commentators](#), rules are not enough to ensure compliance. The Commission, as guardian of the Treaties, should enforce Member States' compliance with EU obligations, especially regarding

fundamental rights. This should be done by focusing not only on incorrect transposition of EU law but also on violations occurring during the implementation of the legislation on the ground. To ensure the independence of the monitoring mechanisms, Sergio Carrera of the Centre for European Policy Studies [recommended](#) creating a role for the European Ombudsman and the network of national ombudsmen, as well as for national data protection authorities.

Meanwhile, a [lack of solidarity](#) in the distribution of asylum-seekers and refugees means that responsibility falls mainly to the countries at the EU's external borders. This may remain so despite the Commission's [proposal on asylum and migration management](#), which was presented as part of the pact and whose solidarity mechanism may [not be enough to support](#) fair sharing of responsibility for asylum-seekers between Member States. The longer the pressure remains on border countries, the greater the risk of human rights violations at the borders. It is therefore of paramount importance to strike the right balance between the effective protection of fundamental rights with procedural guarantees, solidarity in EU asylum policy and efficient border control.

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ENDNOTES

- ¹ The [final report](#) of the Frontex Scrutiny Working Group on the fact-finding investigation on Frontex concerning alleged fundamental rights violations states that 'the decision to suspend the activities in Hungary did not reveal that the "operation on Return" (i.e. the return activities) would continue. This decision goes against the conclusion of the CJEU that the return decisions issued by the Hungarian authorities are incompatible with the Return Directive and the Charter.'
- ² At the October 2019 [LIBE hearing](#) on EU obligations in SAR operations in the Mediterranean, then Frontex Director Fabrice Leggeri claimed it was not Frontex's responsibility to decide if Libya was a safe destination for disembarkation. According to Leggeri, Frontex has no legal mandate to coordinate operations that consist exclusively of SAR and is able to intervene when border surveillance is involved, acting under the coordination of national authorities.

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