

ANNEX

Table of contents

- 1. Mandate adopted by the LIBE coordinators on the 23rd of February 2021**
- 2. Overview of exchanges of views**
- 3. Summary of the exchanges of view**
- 4. Summary of the virtual mission to Frontex Headquarters**
- 5. List of relevant reports and documents submitted to or examined by the FSWG**
- 6. Summary of the Management Board conclusions on the FRaLO WG inquiry**
- 7. Report by the European Ombudsman - list of suggestions for improvements endorsed by the FSWG**
- 8. Summary of the Court of Auditors Special Report 08/2021**
- 9. Overview of relevant legal provisions used in the report**

1. Mandate adopted by the LIBE coordinators on the 23rd of February 2021

Mandate

- Monitor all aspects of the functioning of Frontex, including its reinforced role and resources for integrated border management, the correct application of the EU acquis, and its execution of Regulations (EU) 2019/1896 and 656/2014, in particular on:
 - the compliance of the Agency with fundamental rights;
 - the Agency's internal management, including procedures for reporting and handling of complaints;
 - transparency and accountability of the Agency towards the European Parliament;
- Put forward recommendations in these areas.

Working methods and composition

- The FSWG may gather information, including by making requests to Frontex, and by inviting and requesting stakeholders. Meetings may be held to this effect, these should be public to the extent possible.
- A dedicated LIBE Secretariat staff person should be allocated solely to support the work of the FSWG. It should also be granted the necessary meeting facilities and interpretation.
- The Chair of the FSWG is nominated and elected at the constitutive meeting of the working group. The Chair of the FSWG will report back to LIBE at least every 4 months.
- The FSWG is constituted of two standing Members per political group.
- The FSWG shall be complementary to the work of the Schengen Scrutiny Working Group. The chair of the SSWG will be invited to the meetings of the FSWG.
- The discussions in the FSWG will not undermine or replace the right and the obligation of the LIBE Committee as a whole to discuss and treat these issues.

Fact-finding investigation into alleged fundamental rights violations

- Within the first four months of its existence, the FSWG should carry out a fact-finding investigation, gathering all relevant information and evidence regarding alleged violations of fundamental rights in which the Agency was involved, was aware of and/or did not act, internal management, procedures for reporting, and the handling of complaints. Bi-weekly meetings of the FSWG should be planned to that effect.
- Information from EU institutions, bodies and agencies, such as the Frontex Management Board, the European Ombudsman, the European Court of Auditors and OLAF, should be taken into account. In addition, the fact-finding investigation can draw on the work of and exchange with various sources and stakeholders, such as experts, journalists, Frontex staff, Member States authorities, civil society and researchers.
- The FSWG shall present its findings in a written report with conclusions and concrete recommendations. Any findings of breaches of fundamental rights will be elaborated

in a resolution.

2. Overview of exchanges of views

04/03/2021	Commissioner Johansson and Executive Director Fabrice Leggeri
15/03/2021	Frontex Management Board and Head of Operational Response Division Frontex
23/04/2021	Legal experts and NGO panel, including Hungarian Helsinki Committee, Refugee Support Aegean
29/04/2021	Legal experts and representative of the Armed Forces of Malta
10/05/2021	Investigative journalists from der Spiegel and Lighthouse Reports
21/05/2021	European Ombudsman and Fundamental Rights Agency (FRA)
03/06/2021	Representative of the Italian Coast Guard, Frontex Fundamental Rights Officer, Frontex Consultative Forum.
23/06/2021	Commissioner Johansson, Portuguese Presidency, Executive Director Fabrice Leggeri

3. Summary of the exchanges of view

The FSWG held eight exchanges of views with the Executive Director and the EU Commission, the Frontex Management Board, investigative journalists, Italian and Maltese coast guards, NGOs and legal experts, the EU Ombudsman, the Fundamental Rights Officer, the Frontex Consultative Forum, the EU Fundamental Rights Agency and the Council, which were livestreamed and recorded.

The first exchange of views¹ with Agency's Executive Director, Fabrice Leggeri, and Commissioner Ylva Johansson took place on 4 March. The ED committed to cooperating fully with the FSWG in its investigation and to establish a more long-standing and structured cooperation. He declared his openness to implement the WG's recommendations. In his opening remarks, he stated that the FRaLO Working Group has not found evidence of

¹ First exchange of views, https://multimedia.europarl.europa.eu/en/committee-on-civil-liberties-justice-and-home-affairs_20210304-1215-COMMITTEE-LIBE_vd.

violations, but has highlighted complexities in the operational situation in the region. The ED further updated the WG on the recruitment of the 40 FRMs, and highlighted that it is important that they are recruited at the highest possible grade. The ED stated that the Agency operates in difficult and sometimes hazardous geopolitical circumstances and called on the Commission for guidance on issues regarding the interception of vessels, which was subsequently issued.²

The Commissioner highlighted the priorities of sound border protection to protect the EU citizens' rights and safety, combat crime, and for a fully functioning Area of Freedom, Security and Justice and Schengen area. She noted that Frontex is the most important Agency in the EU and has an extremely important role to play in this regard, while this has to be combined with protecting the EU values, urgently addressing shortcomings and developing a new culture within the Agency. She stressed that its expanded mandate and powers should be complemented with adequate scrutiny and safeguards, and that the possibility to apply for asylum and non-refoulement should always be guaranteed, even in cases of irregular entry. Finally, she stressed limitations of the Commission's role in guiding and controlling the Agency.

MEPs questioned Mr Leggeri on Frontex's involvement in pushbacks and other fundamental rights violations, the implementation of Art. 46 in Hungary and delays in the hiring of FRMs. They reminded Mr. Leggeri that Frontex is accountable to the EP. MEPs also criticised the Commission for lack of proactive engagement and stressed that it bears the political responsibility for the functioning of the Agency.

In its second exchange of views on 15 March,³ the FSWG had an exchange with the Frontex Management Board and the Head of the Frontex Operational Response Division. The members of the MB discussed the FRaLO WG's report and reaffirmed the respect of fundamental rights as a cornerstone in border management operations. They particularly emphasised the need for proper functioning of the reporting mechanism and the enhanced capacity of the MB to further supervise and provide strategic advice to Frontex. Furthermore, the structure of the Operational Response Division, the role of coordinating officers, the operation capacity of the Agency in maritime operations, and the nature of the operational plans were explained. The representatives of the MB and the Operational Response Division noted once more the complexity of operations in the Aegean sea.

MEPs focused on the use of different sources in the inquiry of the FRaLO and asked questions about allegations regarding Swedish staff facing resistance in lodging SIRs, the use of body-cams, and the chain of command on the ground. MEPs also asked for clarifications regarding the application of Art. 46, search and rescue, the relationship with the FRO, as well as the cases that were still pending clearance at the time of the presentation of the final report

² Ref. Ares(2021)1635567 - 04 March 2021.

³ Second exchange of views, https://multimedia.europarl.europa.eu/en/libe-working-group-on-frontex-scrutiny_20210315-1345-COMMITTEE-LIBE_vd.

of the MB working group. The Swedish representative in the MB attributed the Swedish staff incident to a misunderstanding, while the Chair of the MB appealed for more transparency for material regarding the incidents studied by FRaLO, and repeated that FRaLO was not an investigation working group.

In its third⁴ and fourth⁵ exchanges of views on 23 and 29 April the FSWG exchanged views with four legal experts on the legal framework on the principle of non-refoulement and the right to asylum. Particular angles on fundamental rights challenges, the application of these rights in international waters, its different applications in the context of crossings of maritime and land borders, discussing in particular the *N.D. v. Spain* judgment of the ECtHR, the EU-Turkey Statement, and the application of Article 6 of Regulation 656/2014 on interceptions in territorial waters and of Article 46 of Regulation 2019/1896. The Asylum Procedures Directive, the Schengen Borders Code and the Maritime Operations Regulation, EU Charter, the ECHR and the Refugee Convention were analysed. The experts highlighted issues regarding sharing of information versus a need for confidentiality, the procedural guarantees triggered by the prohibition of refoulement, and the shared responsibility of both the host Member State and Frontex. The complaints mechanisms and the monitoring responsibilities of the Agency were discussed in particular, spanning three stages, *i.e.* fact-finding, verification and deciding on follow-ups. It was suggested that the Agency also relies on information produced by other actors for its fact-finding exercise and that it is important to improve the reporting, monitoring, and complaints mechanisms, and enhance transparency into its work.

The NGOs Refugee Support Aegean and Hungarian Helsinki Committee (HHC) were also heard during the third exchange of views. They focused their interventions on their respective countries, Greece and Hungary. Specifically, the activities of Frontex at Greek hotspots related to the registration and identification procedures were discussed, including the problem of cases of false registration of nationality and age by Frontex, which generate risks for the right to good administration (article 41 of the Charter), the right to an effective remedy and fair trial (article 47 of the Charter), the rights of the child (article 24 of the Charter), and the respect for private and family life (article 7 of the Charter). The HHC criticised the lack of prompt suspension of operations in Hungary, notwithstanding the regularisation of pushbacks in national law and the concerns of the FRO and the CF. Both NGOs pointed at the lack of transparency of Frontex's operations and stressed the need for the accountability of Frontex.

The FSWG also invited a former representative of the Armed Forces of Malta, to give a presentation of their activities and expertise in relation to Frontex's operations. The Maltese representative described the difficulties the coast guard faces in practice in maritime operations, where decisions need to be taken in a fluid and stressful environment. Such

⁴ Third exchange of views, <https://webstreaming.europarl.europa.eu/ep/embed/embed.html?event=20210423-0900-COMMITTEE-LIBE&language=or&autoplay=false&logo=true>

⁵ Fourth exchange of views, https://multimedia.europarl.europa.eu/en/libe-working-group-on-frontex-scrutiny_20210429-1500-COMMITTEE-LIBE-1_vd.

decisions may include balancing the safety of the crew and the possibility of finding and rescuing persons at sea. Guidelines can be useful in this respect, but they cannot cover all the different factors that can affect decision-making at sea. He further explained the responsibilities of the Rescue Coordination Centre, and clarified that he cannot speak about any current Frontex operation and that he retired from the Maltese Armed Forces in 2015.

In its fifth exchange of views, which took place during the LIBE meeting of 10 May,⁶ the FSWG heard from journalists of the Lighthouse Reports and Der Spiegel, responsible for the publications that sparked the investigation of the Scrutiny Group. The MEPs discussed with them the evidence they presented and the overall migration situation in the Mediterranean. The reporters explained the methods (e.g. publicly available and open-source data, information from NGOs and footage produced by asylum seekers) and contents of their investigations, focusing on the role played by Frontex in the reported pushbacks conducted in the Aegean Sea. They stated that Frontex was either close to the scene of or directly involved in at least 7 reported pushbacks.

The incident of 18-19 April 2020 in the Aegean Sea, which had yet not been resolved by FRaLO, was discussed in more detail. Particular attention was paid to the fact that the incident was re-categorised by the ED as not-concerning fundamental rights, and, thus, not assessed by the FRO. They further pointed out that in Central Mediterranean Frontex does not inform commercial and NGO vessels in the vicinity and only shares the distress signal with the Libyan Coast Guard, which has reportedly proceeded to pull back vessels back to its territory. The journalists also noted that according to their reporting the Greek coast guard had started at the end of February 2020 to push back certain vessels entering Greek waters, alleging that this was known to Frontex. They expressed concerns that fundamental rights are not a priority for Frontex.

During its sixth exchange of views on 21 May,⁷ the FSWG heard from the EU Ombudsman and the FRA. The Ombudsman gave some insights into her two then still ongoing own-initiative investigations on the compliance of the Agency with fundamental rights, motivated by complaints, concerns raised by national Ombudsman bodies and civil society, as well as the EU Ombudsman's past enquiries. Her investigations concern the proper functioning of the Frontex complaints mechanism and the effectiveness of the FRO, as well as transparency and accountability gaps, and aim at determining the sort of guidance on fundamental rights that is given by the Agency to its deployed border guards. The Ombudsman was questioned on the reasons that motivated the enquiries, their scope, timetable, and methods.

The FRA representative explained that they had been cooperating with Frontex since 2010 in different ways, including co-chairing the CF, providing Frontex with the results of its relevant research, sharing expertise and training. He stressed the need to promptly complete the recruitment of the 40 FRMs, which will also enhance transparency into Frontex

⁶ Fifth exchange of views, https://multimedia.europarl.europa.eu/en/committee-on-civil-liberties-justice-and-home-affairs_20210510-1735-COMMITTEE-LIBE_vd.

⁷ Sixth exchange of views, https://multimedia.europarl.europa.eu/en/libe-frontex-scrutiny-working-group-meeting_20210521-1100-COMMITTEE-LIBE_vd.

operations, establish a due diligence procedure for triggering Article 46 EBCG Regulation, including an ex ante assessment of fundamental rights-related risks by FRMs for each operation, and improving the system of following up with the recommendations of the CF and the FRO.

During its seventh exchange of views, on 3 June,⁸ the FSWG invited the new Frontex FRO, recruited during the course of the FSWG investigation a representative of the Italian Coast Guard, and the two co-chairs of the CF, from FRA and UNHCR. The exchange focused on the responsibilities for rescuing boats in distress and the practice of SAR operations, as well as the Agency's safeguards for fundamental rights protection. The FRO prioritised the recruitment of the 40 FRMs, improving the complaints and reporting mechanisms, and developing clear procedures for triggering Article 46 EBCG Regulation. The representative of the Italian Coast Guard discussed the coordination of SAR operations by the Italian MRCC, and underlined that it cooperates with the coordination centres of these neighbouring countries.

The CF pointed out that the suspension of operations in Hungary had been advised twice to the ED prior to Art. 46 being triggered, and that the CF understood only at a later stage that Frontex still supports return operations, which were exempt from that decision. They underlined that compliance with the principle of non-refoulement and the right to asylum requires individualised procedures for persons under the jurisdiction of a Member State that present clear indications that they may want to seek international protection. According to the CF, persons at sea in rubber boats present such clear indications. Its representatives finally called for additional resources to support the work of the CF.

During its eighth and final public exchange of views on 23 June⁹, the FSWG had a debrief meeting with Commissioner Johansson, ED Fabrice Leggeri, and the Portuguese Minister of the Interior Eduardo Cabrita. The Commissioner repeated her criticism for the incomplete deployment of the 40 FRMs for reasons that she could not accept and advised the Agency to discontinue the support to return operations from Hungary.

The ED insisted that there is no proof of active involvement of the Agency in pushbacks and talked of hybrid threats by Turkish vessels in the Aegean sea. He further stressed the progress that the Agency has made regarding the new SOP for SIRs. He finally attributed several of the recent debates in the weak communication of the Agency, which is now being addressed as the Agency has hired a communication expert and developed a communication strategy. The ED reiterated his commitment to the democratic control of the EP and offered to provide statistics showing an increase in access to docs in the last five years.

4. Summary of the virtual mission to Frontex Headquarters (Rapporteur addition)

On 14 and 15 June 2021, the FSWG carried out a virtual, remote mission to Frontex

⁸ Seventh exchange of views, https://multimedia.europarl.europa.eu/en/libe-working-group-on-frontex-scrutiny_20210603-1400-COMMITTEE-LIBE_vd.

⁹ Eighth exchange of views, https://multimedia.europarl.europa.eu/en/libe-working-group-on-frontex-scrutiny_20210623-1530-COMMITTEE-LIBE_vd.

Headquarters and heard from Frontex ED and Directors of Divisions, representatives from the Frontex Situation Centre and the Frontex Operational Response Division, the ex-ad interim FRO and the current FRO, and representatives from the CF.

During the initial panel, the FSWG Members asked questions to the ED regarding the management of SIRs, the recruitment of the FRMs and future cooperation with the FRO, on the report from the ECA as well as on the material sent via USB stick by the Turkish authorities.

During the second panel, FSWG Members received a presentation of the tasks of the different divisions of Frontex and engaged in an exchange of views with the Director of Situational Awareness and Monitoring Division, the Director of Operational Response Division, the Director of European Centre for Returns Division ad interim, the Director of Capacity Building Division, the Director of Deployment Management Division ad interim, and the Director of International and European Cooperation Division.

The third panel featured contributions by the Head of Frontex Situation Centre and the Head of Sector Command and Control Centre. During this exchange of view, excerpts of footage relating to the incidents that occurred on 18-19 April 2020 and 4-5 August 2020 in the Aegean Sea, recorded by a Frontex surveillance aircraft, were shown and commented on.

During the fourth panel, an exchange of views with the Head and a member of the Field Deployment Unit took place. The discussion focused on how coordination of operational activities on the field through the network of Frontex Coordinating Officers takes place, and FSWG Members asked questions on the availability and deployment of Frontex air surveillance assets as well as on the rules of engagement and SOPs for Frontex co-financed assets in joint operations.

On the second day of the remote mission, the FSWG had an exchange of views with the ex-ad interim FRO and the newly-recruited FRO. The former commented on her involvement in meetings on allegations of pushbacks in the Eastern Mediterranean Sea and on the setting up of the FRaLO WG as well as on the recruitment of the FRMs and on the development of the action plan on fundamental rights management. The current FRO commented on the transition and handover with the former FRO and on the steps that his office will take next. The exchange of views with the FSWG Members focused on the degree of involvement of the FRO in strategic issues and discussions, on proposals on the implementation of article 46 of the EBCG Regulation and on the recruitment and future role of the FRMs.

During the following panel, an exchange of view with representatives of the CF took place, where FSWG asked questions on how the CF is involved in fundamental rights-related processes within Frontex and on the extent to which their recommendations are reacted upon. Questions were also asked on the implementation of the recommendations from the FRaLO WG, on the implementation of article 46 of the EBCG Regulation and on the ED decision to withdraw from operations in Hungary.

During the last panel of the virtual mission, FSWG Members had a final exchange of views with Frontex ED and Directors of Divisions. The questions posed by FSWG Members concerned SIRs management, the implementation of article 46 of the EBCG Regulation, the involvement of the CF in the work of the Agency and the consideration for their recommendations, and SOPs for surveillance and patrolling assets.

5. List of relevant reports and documents submitted to- or examined by the FSWG

The FSWG requested the Commission and Frontex to provide large number of documents related to the fact-finding investigation

The Commission provided in its answer documents on cooperation with third countries, on fundamental rights, on staffing and standing corps and others. The Commission's documents and correspondence with Mr Leggeri from 2019, 2020 and 2021 provide guidance on cooperation with third countries. More than 20 letters were received on fundamental rights compliance mechanisms where the Commission services provided the Management Board and the Agency assistance with the necessary modifications to the Agency's decision on the delegation of the appointing authority powers as well as to the selection procedure(s) of the fundamental rights officer and monitors. In a number of letters on staffing and standing corps, the Commission provided guidance on various draft Management Boards decisions on the fundamental rights officer's independence, on middle management, on the design and specifications of uniforms, on the delegation of AIPN power, on the supervisory mechanism and others. A reply to the questions raised by the Management Board WG FRaLO on the nature and extent of Frontex's obligations in the context of its implementation of joint maritime operations at the Union's external sea borders was also made available to the FSWG. Other letters were provided related to various topics like Frontex's effective use of 2020 appropriations, the Management Board decision to reject the proposal to reduce unit costs used for reimbursing the participation of Member States' officers in Frontex's operational activities, the Single Programming Document 2021-2023, the permanent premises and others.

The requested documents received by Frontex were provided in three USB sticks via diplomatic pouches due to the sensitive nature of the documents, information and materials provided. The Agency provided MB minutes since 2019 and information related to the work of the Management Board Working Group FRaLO including the MB statement of its establishment, its timeline, draft agendas of the meetings, briefing notes, questions and answers, draft findings, outcomes of the meetings, its final report with an annex as well as letters from the ED to Portuguese, Romanian and Swedish border authorities and their replies. Frontex provided materials related to 13 cases that were reviewed by the WG FRaLO including the correspondence between Frontex and national authorities, videos and others. The Agency submitted its standard operational procedures for SIR, all category 4 SIRs from 2015 that occurred at Greek-Turkish border as well as all SIRs for 2020 and 2021. Frontex provided mission reports, shifts reports and technical equipment reports related to the incidents. The Agency submitted an OPLAN Poseidon 2020, a Handbook to OPLAN, a

JORA incident template guidelines for joint maritime operations and its communications with the Greek authorities and MRCC on alleged pushbacks. Frontex provided information and correspondence on EUNAVFOR MED IRINI as well as on Joint Frontex-Italy-EUBAM Pilot Training Action in support of the Libyan General Administration for Coastal Security. While the amount of information made available to the FSWG was significant, comments were made on the delay in providing them, chaotic structure of the documents provided by the Agency and the lack of some of the requested maps and documents.

The FSWG had access to documents prepared for the Management Board meetings in 2021 as well as to the correspondence between LIBE and Frontex and the Commission before the establishment of the Working Group.

In addition to the requested documents provided by the Commission and Frontex, the FSWG received a number of materials on its functional email set up for this purpose. The Frontex Consultative Forum submitted their recommendations on operations in Hungary, the SIR mechanism and training as well as all other recommendations from 2014 to 2018. They provided their response to a request for information received from the WG FRaLO as well as their Annual work programme for 2021. An USB stick was received along with a letter from the Ambassador of Turkey with video clips and other information regarding alleged pushbacks from Greece. A note detailing UNHCR's interventions with authorities in the context of reported pushback incidents at the external land and sea borders of Greece has been provided. The Office of High Commissioner on Human Rights (OHCHR) submitted a Report on means to address the human rights impact of pushbacks of migrants on land and at sea. The European Council on Refugees and Exiles (ECRE) submitted proposals for strengthening non-judicial mechanisms for scrutiny of Frontex. The European Court of Auditors (ECA) provided its special report on Frontex's support to external border management. The Greek Helsinki Monitor submitted its criminal complaint to the Supreme Court Prosecutor calling for the investigation of 147 cases of illegal, violent, racist pushback or deportation of 7000+ foreigners in March-December 2020. The EU funded project RESPOND provided their knowledge on the activities of Frontex at the Greek-Turkish border and issues relating to the lack of accountability of the Agency. Statewatch submitted a note "Evidence of Frontex knowledge of and complicity in human rights violations". The former FRO of the Agency provided a list of the mentions to fundamental rights and to the mandate of the FRO. The EU Ombudsman findings - from the inquiry into Frontex were also received. The Border Violence Monitoring Network (BVMN), Legal Centre Lesbos AMKE, Seawatch e.v., Amnesty, the Meijers Committee, ECRE and other civil society representatives provided additional documents, information and materials. A letter from a possible whistle-blower was also received, for which the authentication process is still ongoing.

The joint investigation by Bellingcat, Lighthouse Reports, Der Spiegel, ARD and TV Asahi on pushbacks at the maritime Greek-Turkish border was examined and presented to the FSWG in May 2021.

Apart from the submitted reports mentioned above, the FSWG took into account the reports of the Council of Europe Commissioner for Human Rights, the Greek Ombudsperson, Seawatch, the UN Special Rapporteur for the Human Rights of Migrants, Human Rights Watch, Refugee Rights Europe, the Committee for the Prevention of Torture, Parliamentary Assembly of the Council of Europe, Amnesty International and Refugee Support Aegean.

6. Summary of the Management Board conclusions on the FRaLO WG inquiry

In its meeting of the 10th of November 2020, the Management Board decided to establish a Working Group Fundamental Rights and Legal Operational Aspects of Operations dedicated to “supporting the Management Board in its conduction of inquiries in relation to the allegations of so-called alleged pushbacks in the Eastern Mediterranean in 2020 but also contribute to the interpretation of some provisions of Union regulations related to operational activities at sea”. The Working Group was requested to report to the Management Board at the 83rd meeting of the Management Board on 20-21 January 2021.

The Consultative Forum received a request on 9 February 2021, from the Secretariat of the Frontex Management Board Working Group on Fundamental Rights and Legal Operational Aspects of Operations in the Aegean Sea (FRaLO). In the request, FRaLO invited the Consultative Forum to provide relevant reference or information that would bring additional light to six incidents and help the Working Group to draw further conclusions. In its response, the Forum stated that the prohibitions of refoulement and of collective expulsion as well as the right to an effective remedy apply irrespective of persons having expressed a wish to seek asylum. The Forum furthermore recalled that, in the Aegean context, where a person expresses a wish to receive asylum, s/he must be disembarked on land and have his or her application examined in accordance with the Asylum Procedures Directive.

The European Commission was requested by the Working Group to elaborate on a number of legal questions of certain legal provisions and application of jurisprudence of the European Court of Human Rights to the sea borders and the impact of that jurisprudence on the interpretation of provisions of Regulation (EU) 656/20141. The Commission concluded that it is essential that each case be judged on its own merits, taking into account all circumstances governing the concrete situation at sea. It also stated that the judgment in N.D and N.T cannot be directly applied to all situations, because it related to a specific situation at a land border and not at sea borders, it only assessed the situation from the point of view of obligations under Article 4 of Protocol No 4 of the ECHR and could not consider the specific obligations applicable in the Union legal order and in this specific judgment the principle of non-refoulement was not at stake.

In its preliminary conclusions, the WG FRaLO stated that it is the common legal understanding of the Working Group that not every detected boat with persons on board automatically qualifies as a distress case, and that not every detected attempt of irregular border crossing can automatically be considered as an asylum case. It noted that therefore, a precise analysis of the specific circumstances of each individual case is of utmost importance,

and that individual access to the asylum system has to be guaranteed. Moreover, it concluded that Coast Guard Officers operating in the Aegean Sea face difficult and special circumstances.

On the basis of the Working Group's preliminary report, the Management Board welcomed the explanations provided by the European Commission as concerns the legal framework governing Frontex's maritime operations and noted that according to the Management Board, the recommendations and final conclusions of the Report of the Working Group with regard to Frontex's maritime operations in the Aegean Sea are coherent with these explanations. The Management Board furthermore requested the Agency to revise its reporting system in order to make it more efficient and to submit a proposal for establishing a transparent process to follow-up on Serious Incident Reports on potential violations of fundamental rights.

7. Report by the European Ombudsman - list of suggestions for improvements endorsed by the FSWG

Operational plans

Frontex should clearly stipulate, in all operational plans, that participants in Frontex operations should accept complaints from individuals who believe they have been victims of fundamental rights violations, or their representatives, and transmit them to Frontex via the complaints mechanism.

Memoranda of understanding with non-EU countries

In its memoranda of understanding or other relevant documents concluded with non-EU country bodies, Frontex should stipulate that Frontex (via the FRO) is responsible for receiving all complaints on non-compliance with fundamental rights. After classifying them, the FRO would then transfer complaints to the relevant national body, where necessary.

Public information material on the complaints mechanism

In its public information material, Frontex should make clearer to potential complainants the benefits of the complaints mechanism, notably that it is free of charge. Frontex should also draw attention to the fact that complainants should not be penalised for submitting complaints and that submitting complaints should not prejudice other procedures, such as asylum applications.

The FRO should seek to develop permanent channels of cooperation with civil society organisations present on the ground where Frontex operates and provide them with information material on the complaints mechanism, which explains the procedures for those representing individuals that wish to submit complaints.

Revised implementing rules for complaints mechanism

Frontex should consider allowing anonymous complaints and rewording its complaint form in relation to anonymised complaints being rejected by the certain national authorities. When

forwarding complaints submitted by representatives of individuals who wish to stay anonymous, the FRO should encourage the national human rights body and the national authority dealing with the complaint to use all means at their disposal to resolve the alleged issues, in cooperation with the representatives.

For complaints alleging violations of the rules on the use of force, the revised implementing rules should make it clear which rules on the use of force are concerned (notably by referring to Annex V of Regulation 2019/1896). The implementing rules should also set out which specific procedural steps, if any, are foreseen within the complaints mechanism to deal with such complaints.

Reporting and publications

Frontex should publish on its website the FRO's annual reports for 2017, 2018, 2019 and 2020, and consider publishing the FRO's closing decisions on complaints (so-called 'final reports'), if necessary after having anonymised their content. Annual reports of the FRO could include a section on the concrete actions undertaken by Frontex and the Member States on the basis of the FRO's observations and recommendations, one year on.

The FRO's rules on dealing with serious incident reports should be made public together with the implementing rules on the complaints mechanism.

8. Summary of the Court of Auditors Special Report 08/2021¹⁰

The audit of the European Court of Auditors covered four out of the six primary activities of the Agency: situation monitoring, risks analysis, vulnerability assessments, joint operations and rapid border interventions (RABIT). It examined whether the Agency carried out these activities effectively to contribute to implementing the EU IBM, covering the 'fight against illegal immigration' as well as the 'fight against cross-border crime'. It also examined the preparedness of Frontex to fulfil its expanded mandate under the 2019 Regulation. Frontex's activities regarding the respect for and the protection of fundamental rights are not included in the scope of this audit although some of the ECA's findings can be relevant for fundamental rights protection.

The last external evaluation of the agency was published in July 2015, while Regulation (EU) 2019/1896 was approved without an impact assessment.

What follows is a summary of the findings of the ECA that are relevant to assess the performance of the Agency in the context of its fundamental rights obligations.¹¹

¹⁰ ECA Special Report 08/2021: Frontex's support to external border management: not sufficiently effective to date, 7 June 2021.

¹¹ For the overall findings see, Executive Summary at pp. 4, 5.

The ECA concludes that the Agency has not yet adapted its organisation to the requirements of its 2016 mandate and is not ready to implement its 2019 mandate effectively. Significantly, the ECA has partly attributed this to shortcomings in how Member States input information in EUROSUR – the information exchange framework that should allow Frontex to have accurate and updated situational awareness of the external borders. Outdated information uploaded in different formats and with varying levels of detail hinder the Agency’s situational awareness and holistic planning, which includes mitigating risks to fundamental rights in its operations.

9. Overview of relevant legal provisions used in the report

Chapter 2(A) - Fundamental Rights obligations of Frontex

The 2019/1896 Regulation established the European Border and Coast Guard to ensure European integrated border management at the external borders, with a view to managing those borders efficiently and in full compliance with fundamental rights. The Regulation established a standing corps with a capacity of up to 10.000 operational staff, which are to be deployed in the framework of border management teams, migration management support and return teams during joint operations, as well as in rapid border interventions, return operations and return intervention.

As an EU agency, Frontex is bound by international human rights standards, as well as protection obligations towards asylum seekers, which are defined in EU primary and secondary legislation, as well as international maritime law, including search and rescue obligations. The Agency is under the obligation to respect, protect and fulfil, in particular, the rights that are most sensitive in the context of its operations.¹²

According to the legal framework, the Agency has not only the negative obligation to respect fundamental rights by not actively violating them, but also positive obligations to protect fundamental rights.

Frontex Fundamental Rights Strategy

Art. 80 (1) mandates the Agency to draw up, implement and further develop a Fundamental Rights Strategy (FRS), accompanied by an Action Plan.¹³ The FRS focuses on the operationalisation and mainstreaming of fundamental rights into the Agency's work, and in it, Frontex expresses its commitment to respecting and promoting fundamental rights, considering these elements as unconditional and integral components of effective European integrated border management.

¹² See, for instance, Art 10 (1) (e), (h), (i), (s), (t), (w) and (ad). of Regulation 2019/1896.

¹³ The Management Board has adopted the FR Strategy on 15 February 2021, the action plan has not yet been adopted.

Chapter 3(A) - Division of responsibilities between Member States and Frontex

Shared responsibility of border management and fundamental rights

European integrated border management should be implemented as a shared responsibility of the Agency and the national authorities responsible for border management. While Member States have the primary responsibility for the management of their external borders, the Agency should support the application of Union measures relating to the management of the external borders by reinforcing, assessing and coordinating the actions of the Member States which implement those measures.¹⁴ These duties should always be carried out by the member states in full compliance with their obligations under the Charter and the asylum *acquis*, as well as their obligations under international human rights law and the 1951 Refugee Convention. In a spirit of shared responsibility, the role of the Agency is to regularly monitor the management of the external borders, including the respect for fundamental rights in the border management and return activities of the Agency.¹⁵

Joint Operations (JOs)

The Agency shall organise assistance for the host Member State, in accordance with Union and international law, including the non-refoulement principle.¹⁶ Joint operations and rapid border interventions (RBI) shall be preceded by a thorough reliable and up-to-date risk analysis.¹⁷ Before launching a RBI, the ED also needs to take account of the situational picture and vulnerability assessment.¹⁸

Decision to launch or not launch a Joint Operation

The Executive Director shall, after consulting the fundamental rights officer, decide not to launch any activity by the Agency where he or she considers that there would already be serious reasons at the beginning of the activity to suspend or terminate it because it could lead to violations of fundamental rights or international protection obligations of a serious nature that are likely to persist.¹⁹

Operational Plan (OPLAN)

In respect of its management obligations, the host state signs the operational plan that is drafted by the Agency and is binding upon all participants in the operation.²⁰ This operational plan covers all necessary aspects for a joint operation, including the division of powers and competences, reporting of serious incidents and other safeguards, instructions, and mechanisms for the protection of fundamental rights.

Tasks and powers of members of the teams

¹⁴ Pre 12, Art 7 (1) Regulation 2019/1896.

¹⁵ Pre 42, Regulation 2019/1896.

¹⁶ Art 36(2) Regulation 2019/1896.

¹⁷ Art 37 (3) Regulation 2019/1896.

¹⁸ Art 39 (3) Regulation 2019/1896.

¹⁹ Art 46(5) Regulation 2019/1896.

²⁰ Art 38 Regulation 2019/1896.

Members of the teams shall be subject to authorisation of host MS and only perform tasks and exercise powers under instructions from border guards or staff of the host MS.²¹ While performing their tasks and exercising their powers, members of the teams shall fully ensure respect for fundamental rights and comply with Union and international law (and national law).²²

Risk- and vulnerability assessments

The Agency should carry out risk- and vulnerability assessments based on objective criteria to assess the capacity and readiness of the Member States to face challenges at their external borders and to contribute to the standing corps and technical equipment pool. Member States should, in their own interest and in the interest of the other Member States, contribute relevant data necessary for the activities carried out by the Agency, including for the purposes of situational awareness, risk analysis, vulnerability assessments and integrated planning

Chapter 3(B) - Border- and Coastguards

Frontex Standing Corps

Since 2019, Frontex deploys officers belonging to the standing corps of 10.000, which should become fully operational in 2027.²³ All team members, regardless of their state of employment, shall, in the performance of their tasks, fully ensure respect for fundamental rights and comply with EU and international law,²⁴ including access to asylum and human dignity, and shall pay particular attention to vulnerable persons.²⁵ In particular, the agency shall ensure that its statutory staff carry out their duties in accordance with the highest standards and in full compliance with fundamental rights.²⁶

Coordinating Officer

The coordinating officer, a Frontex officer on the ground, ensures the operational implementation of all the organisational aspects of joint operations, monitors the correct implementation of the operational plan, including as regards the protection of fundamental rights and reports on this to the executive director. In particular, the coordinating officer shall report to the executive director any occasion where the instructions issued to the teams by the host Member State were not in compliance with the operational plan. This especially concerns compliance with fundamental rights. Where appropriate he/she shall suggest

²¹ Article 82 (2) and (4)

²² Article 82(3)

²³ The standing corps is composed of four categories of operational staff: 1) statutory staff 2) staff seconded by Member States for long-term deployment, or 3) made available for short-term deployment, and 4) Member States' staff forming part of the reserve for rapid reaction to be deployed in Rapid Border Interventions. The first category is staff employed by the agency, while the remaining three categories refer to personnel that belongs to participating member states.

²⁴ Art. 82(3)

²⁵ Art. 40(4)(5), Art. 43(4).

²⁶ Art. 55(4)

consideration of action under Article 46.²⁷

Reporting of incidents

Every officer who has reason to believe that the code of conduct or fundamental rights were violated, is obliged to report this immediately to Frontex in the form of a Serious Incident Report (SIR).²⁸ Border- and coastguards have to follow different steps, which are defined in a Standard Operating Procedure (SOP). All Agency members must refuse to execute instructions that directly violate fundamental rights, and file a SIR.

Protection of whistleblowers

With its Decision 17/2019 of 18 July 2019 the Management Board adopted the Frontex Guidelines on Whistleblowing.²⁹ These Guidelines have been issued in agreement with OLAF. They aim to provide assurance to staff that report in good faith serious wrongdoings or concerns that their position is protected, and that they need not fear negative repercussions on their reputation or career.

Supervisory mechanism to monitor the application of the provisions on the use of force

The supervisory mechanism to monitor the use of force by staff of Frontex regulates the procedure to follow in case of use of force.³⁰ According to the implementing rules, the executive director is responsible for the initiation of inquiries and disciplinary proceedings, as well as the application of precautionary and suspension measures. The executive director only has to inform the Fundamental Rights Officer and the Consultative Forum of the final decisions resulting from the investigations.³¹ The members of the Advisory Committee on the Use of Force (ACUF), who are to be appointed by the Executive Director, should issue recommendations to the Executive Director regarding the supervisory mechanism.³²

Chapter 3(C) - Role of the Fundamental Rights Officer and the Consultative Forum

Fundamental Rights Officer

The Agency's Fundamental Rights Officer (FRO) is part of the administrative and management structure of the Agency.³³ The FRO is responsible for promoting the Agency's full respect- and monitor compliance with fundamental rights and is specifically tasked with making observations about the operations of the agency, identifying possible preventive and corrective measures, keeping a record of possible fundamental rights incidents, as well as

²⁷ Art. 44(3)(b) and (d)

²⁸ Article 19 of the Code of Conduct applicable to all persons participating in Frontex Operational Activities, ED Decision No R-ED-2017-32.

²⁹ Rules on whistleblowing had already been included in the Staff Regulations (Articles 22a and 22b) since 2004.

³⁰ 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.

³¹ Art. 5, Management Board Decision 7/2021

³² Art. 8, Management Board Decision 7/2021

³³ Art. 99

monitoring and analysing the implementation of the Fundamental Rights Strategy.³⁴ The FRO is appointed by the MB, after consultation with the CF.³⁵ Any vacancy notice for the position of the FRO can be published only upon the prior consent of the MB. To ensure the full independence of the FRO, the ED should not have any separate role in the appointment process.

The FRO should enjoy full independence in the performance of his/her duties and the Agency should take his/her reports into account.³⁶ As part of her tasks, the FRO shall handle fundamental rights-related serious incidents reports and the admissibility of complaints under the Frontex complaints mechanism. The FRO also has an important role under the procedures concerning Art. 46. The rules to safeguard the independence of the Fundamental Rights Officer in practice have been established by the Management Board in implementing rules.

Fundamental Rights Monitors

One of the most important elements of these obligations is, since the 2019 amendment of the EBCG Regulation, the deployment of fundamental rights monitors in all operational activities, which are the eyes and ears of the Fundamental Rights Officer on the ground. Fundamental rights monitors shall be employed as members of the Agency's own statutory staff, to constantly assess the fundamental rights compliance of operational activities, provide related advice and assistance and contribute to the promotion of fundamental rights. The agency was under the obligation to recruit at least 40 fundamental rights monitors 5 December 2020.³⁷ According to the Legal and Financial Statement accompanying the implementation of the EBCG Regulation and the opinion of the Commission, the fundamental rights monitors should be recruited on AD posts.

The Consultative Forum

Established in 2011, the Consultative Forum (CF) is an advisory body assisting Frontex, tasked with providing independent advice in fundamental rights matters.³⁸ The CF provides guidance and independent advice on fundamental rights and produces publicly available annual reports presenting the observations and recommendations on the agency's activities regarding fundamental rights. To effectively perform its role, the CF should be provided with effective and timely access to all information concerning the respect for fundamental rights and the agency shall take into account its reports.³⁹ The composition of the CF is decided by the MB on the basis of the proposal of the FRO, which is produced in consultation with the ED.⁴⁰

Chapter 3(D) - Role of the Executive Director

³⁴ Art. 109

³⁵

³⁶ Art. 80(4)

³⁷ Art. 110

³⁸ Art.108(1)

³⁹ Art. 80(4)

⁴⁰ Art. 108

The Agency is managed by the Executive Director, who has to perform his/her duties independently from any government or other body, without prejudice to the respective competences of EU institutions and the management board. He or she is accountable to the European Parliament and to the Council.⁴¹ Regarding fundamental rights, it is his responsibility to assess the fundamental rights and international protection situation prior to any operational activity. The executive director is obliged to reply to the FRO as to how concerns regarding possible violations of fundamental rights regarding operational activities or technical assistance projects have been addressed.⁴²

Obligation to suspend, terminate or not launch an operation

One of the most important powers of the executive director to protect fundamental rights is his duty to withdraw financing from, suspend, or terminate activities in whole or in part in case of violations that are serious in nature or likely to persist.⁴³ With respect to the initiation of an activity, such an activity may not be launched where the executive director considers that this could lead to violations of a serious nature that are likely to persist.⁴⁴

These decisions by the executive director should be based on duly justified grounds. They shall be made taking into account all relevant information, including but not limited to the number and substance of registered complaints, serious incidents reports, reports from coordinating officers, as well as reports of relevant international organisations and EU institutions, bodies, offices and agencies in the areas covered by this Regulation.⁴⁵

Operational plan

The Executive Director draws up the draft operational plan and submit it to the Member States concerned, which should provide for a description of tasks and special instructions to the border and coast guard teams with regard to fundamental rights and data protection requirements as well as general instructions on how to ensure the safeguarding of such rights.^{46,47} More specifically, it should provide for a reporting and evaluation scheme, including with regard to the protection of fundamental rights, and set out procedures for receiving and transmitting fundamental rights-related complaints.⁴⁸ The executive director shall transmit detailed evaluation reports to the management board within 60 days following the end of those activities, together with the observations of the fundamental rights officer.⁴⁹

⁴¹ Art. 106 (1), Art 6.

⁴² Art 109(3).

⁴³ Art. 46(4)

⁴⁴ Art. 46(5)

⁴⁵ Art. 46(6)

⁴⁶ Art. 38(3)(d) and (l)

⁴⁷ In accordance with the Frontex Sea Operations Regulation, guarantees such as the availability of shore-based medical staff, interpreters, legal advisers and other relevant experts need be included in the operational plan. Failure of the operational plan to make such provisions can give rise to a predictable and reliable threat of violations of the right to access asylum or the prohibition of refoulement.

⁴⁸ Art. 38(3)(i), Art. 38(3)(n)

⁴⁹ Art 47

Chapter 3(E) - Management Board

The Management Board (MB) is responsible for taking the strategic decisions of the Agency, which includes the adoption of the rules of procedures.⁵⁰ The executive director is accountable for his activities to the management board.⁵¹ In order to safeguard the independent functioning of the FRO, also in relation to the ED, it is the responsibility of the MB to appoint the FRO and deputy FRO, and to establish special rules to guarantee the independence of the FRO. The FRO has to report directly to the MB, which has to ensure that action is taken with regard to his/her recommendations.⁵²

Chapter 4 - Governance, oversight, procedures for reporting, and the handling of complaints

Complaints mechanism

Through the complaints mechanism, Frontex deals with complaints from individuals who believe their fundamental rights have been violated in the context of Frontex operations. The Fundamental Rights Officer's role is to deal directly with complaints about the actions of Frontex staff members, as well as to ensure that complaints about the staff of national authorities involved in Frontex operations are dealt with properly by the relevant authorities.

The complaints mechanism was introduced with the 2016 EBCG Regulation and extended with the 2019 Regulation to also cover failures to act, operational activities in third countries, and complaints regarding the use of force. In November 2020, the European Ombudsman opened an inquiry into the effectiveness and transparency of the complaints mechanism of the agency,⁵³ with the aim to assess how Frontex has implemented the new rules concerning the complaints mechanism and the Fundamental Rights Officer. It also sought to assess the overall effectiveness of the complaints mechanism, against a background of public concerns about fundamental rights violations in the context of Frontex operations.

Information and transparency

Among the Agency's explicit tasks is also to follow high standards for border management allowing for transparency and public scrutiny of its operations ensuring respect for, the protection and the promotion of fundamental rights.⁵⁴ Frontex, as an EU agency, is under the obligation to conduct its work as openly as possible and provide access to documents to EU nationals and residents.⁵⁵

Serious Incident Reporting

The members of Frontex teams are under the obligation to report suspected violations of

⁵⁰ See Art 100 Regulation 2019/1896 for the tasks of the Management Board.

⁵¹ Art 106(5) Regulation 2019/1896.

⁵² Art. 109 (4) Regulation 2019/1896.

⁵³ European Ombudsman, Case OI/5/2020/MHZ, Investigation how the European Border and Coast Guard Agency (Frontex) deals with complaints about alleged fundamental rights breaches through its 'Complaints Mechanism'.

⁵⁴ Art. 10(1)(ad).

⁵⁵ Article 15(1) TFEU; 11(2) TEU and Article 298(1) TFEU, Art.114 Regulation 2019/1896.

fundamental rights. The Fundamental Rights Strategy, the Codes of Conduct, and the SOP for Serious Incident Reporting oblige all participants in the activities of the agency to report any potential violation via the SIR mechanism.⁵⁶ However, over the years, a low number of Serious Incident Reports has been filed by members of the border guard teams. The investigations into them have attributed no wrongdoing, and serious concerns have been expressed as to the effectiveness of the mechanism, including by the EU Ombudsman.

In an effort to address these concerns the Executive Director of Frontex issued in April 2021 an amended Standard Operating Procedure (SOP) for Serious Incident Reporting (Art. 106(4) EBCG Regulation). The SOP defines the process of reporting, including the steps to be followed and the roles and responsibilities of individual actors involved in the reporting, assessment and follow up.

Parliamentary Scrutiny

The Regulation provides that the Agency shall be accountable to the European Parliament and the Council, making the Parliament the most important actor in terms of democratic oversight of the Agency.⁵⁷ This is why the agency is obliged to report on its activities to the Parliament to the fullest extent.⁵⁸

Since the European Border and Coast Guard is composed of both the Agency and national authorities, with due scrutiny functions assigned to the European Parliament and the national parliaments respectively, the Regulation provides for cooperation between the Parliament and national parliaments in exercising due oversight over the Agency.

The FSWG considers that its observations and conclusions can be helpful within the context of increased geopolitical tensions and migratory movements on the EU's external border between Lithuania and Belarus, where Frontex is providing assistance to Lithuania.

10. List of abbreviations and acronyms

ACUF: Frontex Advisory Committee on the Use of Force

AD: Administrator level European Union official

Agency: European Border and Coast Guard Agency

AST: Assistant level European Union official

CCME: Churches' Commission for Migrants in Europe

CF: Frontex Consultative Forum

⁵⁶ Management Board Decision 12/2021 of 14 February 2021 adopting the Fundamental Rights Strategy.

⁵⁷ Art. 6.

⁵⁸ Recital 116.

Charter: Charter of Fundamental Rights of the European Union
CJEU: Court of Justice of the European Union
CoE: Council of Europe
CPT: European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
DED: Frontex Deputy Executive Director
EASO: European Asylum Support Office
EBCG Regulation or Frontex Regulation or 2019 Regulation or Regulation: 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 Regulations (EU) No 1052/2013 and (EU) 2016/1624
EBCG: European Border and Coast Guard Agency
ECA: European Court of Auditors
ECHR: European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR: European Court of Human Rights
ED: Frontex Executive Director
EIO: Amnesty International European Institutions Office
EP: European Parliament
EUROSUR: European Border Surveillance System
FER: Frontex' Evaluation Report
FRA: European Union Agency for Fundamental Rights
FRaLO WG: Working Group on Fundamental Rights and Legal Operational Aspects of Operations
FRM: Frontex Fundamental Rights Monitor
FRO: Frontex Fundamental Rights Officer
Frontex: European Border and Coast Guard Agency
FSWG: Frontex Scrutiny Working Group
HRW: Human Rights Watch
IBM: Integrated Border Management
ICJ: International Commission of Jurists
IOM: International Organisation for Migration
JHA: Justice and Home Affairs
JO: Joint Operation
JRS: Jesuit Refugee Service Europe
LIBE: European Parliament's Committee on Civil Liberties, Justice and Home Affairs
MB: Frontex Management Board
MRCC: Maritime Rescue Coordination Centre
NGO: Non-Governmental Organisation
OLAF: European Anti-Fraud Office
OPLAN: Operational Plan
OSCE ODIR: Organisation for Security and Co-operation in Europe - Office for Democratic Institutions and Human Rights
RABIT: Rapid Border Intervention Team
RBI: Rapid Border Intervention

RCEU: Red Cross EU Office

Return Directive: Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals

SAR: Search and Rescue

SC: Save the Children

SIR: Serious Incident Report

SOP: Standard Operating Procedure

UN: United Nations Organisation

UN Human Rights: Office of the United Nations High Commissioner for Human Rights

UNHCR: Office of the United Nations High Commissioner for Refugees