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WORKING DOCUMENT

on Report on the fact-finding investigation on Frontex concerning alleged fundamental rights violations

Committee on Civil Liberties, Justice and Home Affairs

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1. Constitution of the FSWG and reason for inquiry

The Frontex Scrutiny Working Group (FSWG) of the European Parliament's LIBE Committee was constituted following a decision of the LIBE Coordinators of 23 February 2021, endorsed by the LIBE Committee on 1 March 2021. The FSWG's mandate is to permanently 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.

Within the first four months of its existence, the FSWG was requested to 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.

Meanwhile, other investigations are pending or have recently been finished. The European Court of Auditors released its report on the effectiveness of Frontex's support to external border management on 7 June 2021.¹ In November 2020, the European Ombudsman started an own-initiative inquiry on the functioning of the complaint mechanism, which was released on 15 June 2021.² In December 2020, OLAF opened an investigation concerning the Agency.³ On Wednesday 28 April 2021, the Parliament decided to postpone the discharge to the 2019 budget of Frontex, as long as the OLAF investigation and the parliamentary inquiry are still ongoing.⁴

The FSWG was requested to present its findings on the fact-finding investigation in a written report with conclusions and concrete recommendations. For that purpose, the FSWG has held eight public meetings dedicated to the fact-finding investigation with several sources and stakeholders.⁵ In addition to these public meetings, the FSWG has held five internal meetings to discuss its findings and recommendations.

In addition to these exchanges of views, the FSWG requested numerous documents from Frontex and the European Commission, in order to analyse the responses of the Agency to possible fundamental rights violations. The FSWG also opened a mailbox for external actors to submit evidence and it has formally requested reports on pushbacks from the UNHCR. On 14-15 June, the members of the FSWG conducted a virtual mission to the Agency's headquarters in Warsaw.⁶

2. Allegations of fundamental rights violations in which Frontex was reportedly

¹ European Court of Auditors, Special Report 08/2021, "Frontex's support to external border management: not sufficiently effective to date".

² European Ombudsman, Case OI/5/2020/MHZ.

³ According to media reports, this investigation concerns allegations of harassment, misconduct and migrant pushbacks.

⁴ European Parliament decision and resolution of 28 April 2021 on discharge in respect of the implementation of the budget of the European Border and Coast Guard Agency for the financial year 2019 (2020/2167(DEC)).

⁵ An overview of these exchanges of views can be found in the Annex to this report.

⁶ A summary of this virtual mission can be found in the Annex to this report.

involved, aware of and/or did not act upon

A. Allegations of fundamental rights violations

During recent years, NGOs and international organisations have presented a series of cases of alleged fundamental rights violations, pushbacks and collective expulsions at EU external borders. Reports by actors like UNHCR, the Greek Ombudsman, Amnesty International⁷, Human Rights Watch⁸, Border Violence Monitoring Network⁹ or Refugee Support Aegean¹⁰ indicate a pattern of behaviour by border- and coastguards that puts lives at risk at sea, jeopardises access to asylum and uses violence to deter people.

Intergovernmental organisations like the Office of the High Commissioner for Human Rights of the United Nations,¹¹ the Special Rapporteur on the rights of migrants of the UN,¹² the Commissioner for Human Rights,¹³ the European Committee for the Prevention of Torture,¹⁴ and the Parliamentary Assembly of the Council of Europe¹⁵ explicitly state that EU Member States are violating their international and regional human rights and maritime law obligations when carrying out pushbacks and unlawful collective expulsions against asylum seekers, refugees and migrants arriving to their borders.

Since March 2020, attention has particularly been focused on the modus operandi of the Greek authorities. According to reports related to Greece, pushbacks, sometimes undertaken by unidentified forces wearing uniforms and masks and carrying weapons, have expanded to migrants after arrival on the islands or the mainland. It is unclear whether there was any direct participation by Frontex in these alleged actions.

The Greek Ombudsman, who has been investigating alleged cases of pushbacks for years, released an interim report in April 2021 on pushbacks at the Greek-Turkish land border, in which he noticed the lack of investigations and proper responses by Greek authorities and urged for investigations, as the claims of violations are persistently accompanied by denial from the country's authorities.¹⁶

A joint investigation by Bellingcat, Lighthouse Reports, Der Spiegel, ARD and TV Asahi (after: the Bellingcat report) stated that Frontex planes were in the vicinity of the maritime

⁷ Amnesty International, Europe: pushback practices and their impact on the human rights of migrants and refugees, February 2021.

⁸ See latest Human Rights Watch report on pushbacks: <https://www.hrw.org/news/2021/06/23/frontex-failing-protect-people-eu-borders>.

⁹ Border Violence Monitoring Network, Annual Torture Report 2020.

¹⁰ Refugee Support Aegean, Push backs and violations of human rights at sea: a timeline, December 2020.

¹¹ OHCHR, "Lethal Disregard" Search and rescue and the protection of migrants in the central Mediterranean Sea, May 2020.

¹² Special Rapporteur on the rights of migrants, UN HRC, Report on means to address the human rights impact of pushbacks of migrants on land and at sea, 12 May 2021.

¹³ Commissioner for Human Rights, Council of Europe, A distress call for human rights: the widening gap in migrant protection in the Mediterranean, March 2021.

¹⁴ CPT, Report to the Greek Government on the visit to Greece carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 13 to 17 March 2020, Strasbourg, 19 November 2020, CPT/Inf (2020) 35; See also CPT's report on its mission to Hungary in 2017, where it also touched upon the role of Frontex, <https://rm.coe.int/16808d6f12>, as well as its follow up report.

¹⁵ PACE, 'Pushback policies and practices in Council of Europe Member States', resolution no. 2099 and recommendation. no. 2161, adopted 28 June 2019.

¹⁶ The Greek Ombudsman, Alleged pushbacks to Turkey of foreign nationals who had arrived in Greece seeking international protection, Interim Report, April 2021.

Greek-Turkish border where alleged pushback operations were ongoing.¹⁷ The reporters claimed to have found evidence that Frontex had knowledge of the pushbacks, did nothing to ensure compliance with legal obligations, and in some cases even cooperated with the authorities carrying out the illegal pushbacks and collective expulsions.

In its report of December 2020, the EU Fundamental Rights Agency gives an overview of reports by institutions of the Member States, Council of Europe and the UN, on violations of fundamental rights at EU external borders, pointing out that at some of the involved border sections, Frontex was carrying out joint border surveillance operations at the time.¹⁸ When examining the operations of the European Border and Coast Guard Agency, the European Court of Auditors detailed the inadequate functioning of the Agency as a result of its failure to implement in full its 2016 mandate, and concluded that there is a significant risk that Frontex will struggle to implement its mandate from 2019.¹⁹

B. Response by Frontex to these allegations

In November 2020, the Management Board established a Working Group Fundamental Rights and Legal Operational Aspects of Operations (WG FRaLO) to investigate the specific allegations raised by the investigation of the journalists regarding alleged involvement of Frontex with pushbacks in the Eastern Mediterranean.²⁰ In its final report of 1 March 2021, based on the preliminary report of 21 January 2021, the Management Board concluded that out of the 13 incidents put forward by the Bellingcat report, eight cases had not caused a violation of the Frontex Regulation, and five examined incidents were not yet, or could not yet be clarified.²¹

At its extraordinary meeting in May 2021, the Management Board concluded that 4 out of the 5 outstanding cases have been closed, although in two out of the five cases, the Management Board concluded with “the strong belief that the presented facts support an allegation of possible violation of fundamental rights or international protection obligations such as the principle of non-refoulement, and that it cannot be excluded that the incident has characteristics of a case of unprocessed return and violation of the principle of non-refoulement”²².

The Management Board adopted a range of recommendations specifically aiming at improving the reporting mechanisms, the possibility to monitor follow up actions by national border guards, the implementation of Article 46 and the human rights sensitivity of the Agency. On the 15th of January, six and a half years after the entry into force of Regulation (EU) No 656/2014, the Management Board requested a legal opinion 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. The Commission delivered its opinion on 3 March 2021.²³

¹⁷ Bellincat et al., ‘Frontex at Fault: European Border Force Complicit in ‘Illegal’ Pushbacks’, 23 October 2020.

¹⁸ FRA, Migration: Fundamental Rights issues at land borders”, December 2020, para. 4.2.

¹⁹ ECA Special Report 08/2021, Frontex’s support to external border management: not sufficiently effective to date.

²⁰ Decision of the Management Board, no. 39/2020, 10 November 2020.

²¹ Final Report of the Frontex Management Board Working Group on “Fundamental Rights and Legal Operational Aspects of Operations in the Aegean Sea”, 1 March 2021.

²² Explanatory note on the state of play of the five incidents reviewed in the final report of the management board working group on fundamental rights and legal and operational aspects of operations, 23 April 2021.

²³ European Commission, Legal Opinion on “The nature and extent of Frontex’s obligations in the context of its

Frontex implemented the recommendation of the WG FRaLO regarding the reporting mechanism as part of a SOP adopted in April 2021.

C. General conclusions

The FSWG concludes that several reliable actors, such as national- and international human rights bodies and organisations, consistently reported about fundamental rights violations at the border in a number of Member States, but that Frontex generally disregarded these reports. The Agency also failed to adequately respond to internal observations about certain cases of probable fundamental rights violations in Member States which were raised by the FRO, the CF or through incident report.

The FSWG did not find conclusive evidence on the direct performance of pushbacks and/or collective expulsions by Frontex in the serious incident cases that could be examined by the FSWG. However, the FSWG concludes that the Agency found evidence in support of allegations of fundamental rights violations in Member States with which it had a joint operation, but failed to address and follow-up on these violations promptly, vigilantly and effectively. As a result, Frontex did not prevent these violations, nor reduced the risk of future fundamental rights violations.

The FSWG found deficiencies in Frontex's mechanisms to monitor, report and assess fundamental rights situations and developments, and makes concrete recommendations for improvement. But it has also identified gaps in the framework of cooperation with Member States, which may hamper the fulfilment of Frontex's fundamental rights obligations.

The FSWG is concerned about the lack of cooperation of the Executive Director to ensure compliance with some of the provisions of the EBCG Regulation, notably on fundamental rights, which led to significant delays in the implementation of the Regulation. In this context, the FSWG regrets his recurrent refusal to implement the recommendations of the Commission to ensure compliance with the newly adopted Regulation. The FSWG strongly disapproves the delay in the recruitment of the fundamental rights monitors, which sharply contrasts with the proposal of the Executive Director to expand the Cabinet of the Executive Management of Frontex to 63 staff members.

Moreover, the FSWG takes the position that the Management Board should have played a much more proactive role in acknowledging the serious risk of fundamental rights violations and in taking action to ensure that Frontex fulfils its negative and positive fundamental rights obligations as enshrined in the Regulation. During the last months, Frontex has developed internal procedures and rules necessary to comply with the Regulation. The FSWG welcomes this, but urges both actors to further increase the fundamental rights compliance of the Agency by reconsidering its internal structures and communication, as well as the cooperation with the host Member States.

Finally, the FSWG highlights the responsibility of the Member States and the Commission, outside their role in the Management Board as well. They should step up their involvement and actions to ensure that Frontex's support of border surveillance goes hand in hand with adequately preventing and combating fundamental rights violations.

3. Fundamental Rights compliance of Frontex

Conclusions and recommendations on the implementation of the Regulation.

A. Division of responsibilities between the Agency and Member States in relation to

implementation of joint maritime operations at the Union's external sea borders", 3 March 2021.

fundamental rights

The FSWG learned that the principle of working under instructions of the host Member States can hinder the capacity of Frontex to fulfil its fundamental rights obligations. This was the case when Frontex was ordered to leave or not to enter a place in the operational area where a risk of fundamental rights violations could be expected, or when they were refused access to fundamental rights related information. The limits which are experienced by Frontex in practice to only investigate fundamental rights compliance in relation to assets financed or co-financed by Frontex enables host Member States to use nationally funded assets in joint operational areas for operations with a higher risk of fundamental rights violations. A letter from Frontex to the host Member States requesting to have these assets covered by the mandate of Frontex has been left unanswered.

With the monitoring by the Fundamental Rights Monitors (FRMs), the need for unrestricted and unannounced access to relevant spots, assets and information becomes even more crucial. Apart from the operational teams, the FRO also faces difficulties while evaluating Joint Operations or investigating the fundamental rights situation in a host Member State. According to the European Ombudsman, replies by national authorities to the FRO are often delayed and do not include evidence on the substance of the case. The European Court of Auditors report confirms that the refusal to share national information with Frontex team members is a real problem that severely impedes effective functioning of the Agency²⁴.

Although the risk assessment, vulnerability assessment and situational picture are the main basis for the decision to launch a Joint Operation or Rapid Border Intervention, they do not include a fundamental rights analysis. Furthermore, the European Court of Auditors found deficiencies in the risk assessment, vulnerability assessments and the situational picture available to the Agency. These gaps hamper the possibility for adequate criteria and conditions in the operational plan (OPLAN).

Recommendations

- The FSWG calls on the Executive Director to ensure that the Fundamental Rights Officer (FRO) is consulted prior to the decision to launch a Joint Operation.
- The FSWG underlines the importance of further developing a structure and culture of cooperation between Frontex and the host Member State, which enables both effective border management and monitoring of fundamental rights compliance in full respect of national, EU- and international law.
- The FSWG endorses the recommendation of the FRaLO WG that every OPLAN should include a transparent reporting mechanism, in which the host Member States involve all assets used in the operational area, with the objective that every incident in the operational area is reported and properly followed up.²⁵ This should apply regardless of the way these assets are being financed, in order to ensure that Frontex, and in particular the FRO, can monitor the whole operational area and investigate all SIRs or other indications of non-compliance. In addition, the FSWG recommends that the operational plan includes the condition that Frontex teams have access to all assets, relevant information and all parts of the operational area.

²⁴ European Court of Auditors, Special Report 08/2021, “Frontex’s support to external border management: not sufficiently effective to date”.

²⁵ Conclusions of the Management Board’s meeting on 20-21 January 2021 on the preliminary report of its Working Group on Fundamental Rights and Legal Operational Aspects of Operations in the Aegean Sea.

- The FSWG urges for clear conditions in the OPLAN to ensure full cooperation by the host Member State with the FRO and FRMs, in particular access to all operational areas and needed information, and to give substantive and evidence-based responses to complaints or other requests from the FRO.
- The FSWG welcomes the European Court of Auditors (ECA) recommendation that the relevant assessment units should ensure the necessary expertise and human resources for adequate analyses, and emphasises that, for a responsible decision making on joint operations, these units should include fundamental rights expertise as well. The FSWG insists on the proper implementation of the current Regulation where the FRO and his staff are able to issue opinions on all OPLANs, including the risk and vulnerability assessment parts.
- The FSWG recommends that, in order to ensure effective border management and proper monitoring of the fundamental rights situation, further improvement in information sharing is necessary.
- The FSWG recalls that for maritime operations, every operational plan should include an agreement on Search and Rescue obligations, as well as on the port of disembarkation, which has to be a place of safety as it is laid down in international maritime law.
- In order to develop a more proactive and predictable approach to search and rescue operations, the FSWG recommends that the Agency, the Commission and the Member States develop protocols to respond to search and rescue needs and save lives at sea, and to ensure sufficient capacity to coordinate search and rescue operations.
- According to the FSWG, non-compliance with the operational plan related to the fundamental rights safeguards should have serious consequences: the ED should immediately address obstacles faced by the FRO with the host Member State and use incentives to enforce compliance, i.a. through suspending the funding of certain projects, national assets or personnel of the host Member State.²⁶

B. Role of border- and coastguards in relation to fundamental rights violations

Since the Agency should function as the eyes and ears on the ground, the FSWG finds that in order to ensure respect for fundamental rights, it is of utmost importance that border- and coastguards face no hurdle or repercussion whatsoever for signalling wrongful or potentially unlawful acts or situations. The FSWG underlines that the whistleblower guidelines should offer clear and high standard of protection and notes that seconded national experts and other non-staff members currently do not receive the same level of protection as members of staff.

The FSWG notes that Frontex has documented several aggressive actions by officials of the Turkish Coastguard, which underlines the operational complexities European border guards are confronted with. Frontex operates and is going to operate in areas where geopolitical complexities are unforeseen.

The FSWG has found that some deployed border guards, who needed to submit a SIR through the chain of command, were discouraged from submitting a SIR.²⁷ In one case examined by the FSWG, a deployed officer who submitted a SIR was ordered by the host Member State to

²⁶ See Chapter 3(D) for the application of art. 46.

²⁷ See SIR no. 12604/2020, 30 October 2020. In the explanatory note on the state of play of the five outstanding incidents of the FRaLO report, 23 April 2021, reg.no. 4472, the FRO emphasizes the repetitive nature of such allegations, and the importance of an impartial, objective and confidential investigative procedure.

operate in another part of the operational area.²⁸

The FSWG also found that the implementing rules on the supervisory mechanism to monitor the application of the provisions on the use of force fail to guarantee that sufficient fundamental rights expertise is involved in the decision making.

Recommendations

- The FSWG recommends that border guards should be offered clearer guidance and more effective training on fundamental rights and procedural safeguards while exercising border surveillance tasks.²⁹ The FSWG insists that further development of common core curricula for the training of border guards and training at European level for instructors of the border guards of Member States, including with regard to fundamental rights, access to international protection and relevant maritime law is necessary;
- The FSWG recommends that the whistleblower guidelines should apply to anyone participating in Frontex operational activities, including seconded national experts and other non-staff members, similar to the Agency's Codes of Conduct.
- The exceptional reporting mechanism, where incidents can immediately be reported to the FRO should be available for all participants and all relevant categories of staff. The FSWG underlines that orders to avoid parts of the operational area where pushbacks are potentially happening, should be reported by team members.
- The FSWG welcomes the FRaLO WG recommendation to clarify the relation between its system of protecting whistleblowers and the exceptional reporting under the Serious Incident Reports mechanism to ensure that confidential reports from Frontex employees and team members are handled in an appropriate way, given prompt follow-up to, and that the protection of the identity is guaranteed.³⁰
- In order to safeguard the independence of the Advisory Committee on the Use of Force (ACUF), the FSWG calls on the Management Board to modify the implementing rules to ensure that members of the ACUF are not appointed by the Executive Director, but by the Management Board, and that members with fundamental rights expertise are included in the Committee.
- The FSWG calls upon the Management Board to modify the implementing rules to ensure that the FRO and his/her office are consulted *prior* to the decision to initiate administrative inquiries, pre-disciplinary proceedings or disciplinary proceedings, and remains involved throughout inquiries and proceedings where fundamental rights issues are at stake.

C. Role of the Fundamental Rights Officer and the Consultative Forum

The FSWG has found that the Fundamental Rights Officer (FRO) and the Consultative Forum (CF)³¹ were frequently not involved from the start in the development of rules, procedures

²⁸ See the minutes of a hearing with a NO on 8 December 2020, on SIR no. 12604/2020.

²⁹ See also FRA: 'Migration: Fundamental Rights, Issues at land borders', December 2020, p. 35.

³⁰ Preliminary Report of the Frontex Management Board Working Group, 19 January 2021, para. 5.3.

³¹ The Forum currently consists of thirteen organisations, namely: the European Asylum Support Office (EASO), European Union Agency for Fundamental Rights (FRA), United Nations High Commissioner for Refugees (UNHCR), The Council of Europe (CoE), International Organization for Migration (IOM), Organization for Security and Co-operation in Europe - Office for Democratic Institutions and Human Rights

and strategies on matters concerning fundamental rights. This increases the risk that Frontex's policy lacks sufficient safeguards to ensure compliance with fundamental rights provisions of its own regulation. Although the capacity of the office of the FRO has increased, it is still very limited compared to its increased number of tasks. Especially for analysing tasks and for the support of the FRO, the office may suffer from shortages in the near future.

The FSWG has found that the recommendations and opinions of the CF are not sufficiently taken into account by the Management Board and the Executive Director.³² The FSWG has found that the internally established confidentiality rules affect the effectiveness of the CF, as it hinders the Forum from sharing its recommendations and opinions with external actors.

The FSWG has found that the ED has caused a significant and unnecessary delay in the recruitment of at least 40 FRMs, which seriously hampered the Agency's capability to monitor fundamental rights compliance during joint operations. This violates the obligation in the Regulation to ensure that at least 40 fundamental rights monitors were recruited by 5 December 2020.³³³⁴ At the time of preparation of this report, this obligation remains unfulfilled and no clear timeline exists for its fulfilment.

The Fundamental Rights Officer has recruited 20 FRMs by now, of which 15 have been appointed at AST level. This lower ranking may affect the monitors' authority and autonomy, access to classified and sensitive information, and therefore their effectiveness. As the AST-level monitors can only be deployed to operations coupled with AD-level monitors, de facto only five areas of operations, including returns, can be monitored at the same time.³⁵

Recommendations

- The FSWG urges the Management Board and the Executive Director to ensure that the FRO and CF are included actively from the very start of relevant processes, actively involve the recommendations and opinions from the FRO and CF in their decision-making and justify their follow-up to the respective actors.
- The FSWG also calls on the Management Board to ensure sufficient resources for the FRO and sufficient funding for the secretariat of the CF.
- The FSWG calls on the Management Board to enable the FRO and CF to share their recommendations and opinions with the Parliament, and to further disseminate them where possible.
- The FSWG calls for the immediate provision of a clear and short timeline for the employment and deployment of the remaining fundamental rights monitors at AD-level, complemented with supporting personnel at AST-level.

(OSCE ODIHR), Office for the High Commissioner for Human Rights (UN Human Rights), Amnesty International European Institutions Office (EIO), Churches' Commission for Migrants in Europe (CCME), International Commission of Jurists (ICJ), Jesuit Refugee Service Europe (JRS), Red Cross EU Office (RCEU) and Save the Children (SC).

³² This has led one of its members to leave the CF, see: <https://picum.org/picum-is-no-longer-part-of-the-frontex-consultative-forum/>.

³³ Art. 110, Regulation 2019/1896.

³⁴ The division of posts between AST4 and AD7 for future FRMs for 2020 was agreed between the FRO a.i. and the Executive Director having regards to the limits of Frontex Establishment plan 2020 and 2021 and communicated to the Management Board.

³⁵ See explanatory note for the Management Board of 16/17 June 2021, with the state of play of the recruitment of the Fundamental Rights Monitors, 26 May 2021.

- The FSWG requests from the FRO and the CF to report back on their activities to the European Parliament. This should be organized periodically and whenever deemed necessary. The FSWG urges the FRO and the CF to alert the Management Board and, if necessary, the LIBE Committee of the Parliament, the FSWG and the Commission when they are restricted in their independence while exercising their mandate.

D. Role of the Executive Director

The FSWG finds that the Executive Director has often not involved the FRO and the CF in fundamental rights related discussions or decisions on strategies and rules, or has only involved them at a late stage of a decision making process. From the documents provided to the FSWG, it has become clear that the Executive Director repeatedly did not respond to recommendations, opinions, advises, evaluations or requests for information from both the FRO and the CF.³⁶ The Executive Director challenged critical questions about this, by stating that the FRO should have insisted on a formal reply.³⁷ He has confirmed to the FSWG that there are currently no internal procedures in place regarding responses and follow-up actions to advice and opinions of the FRO. This systematic absence of responses has significantly hampered the effectiveness of the role of the FRO and the CF.

The FSWG notes with concern that the Executive Director has delayed the recruitment of the three Deputy Executive Directors, and has refrained from delegating independent powers to them. In combination with the proposal of the Executive Director to expand the Cabinet of the Executive Management of Frontex to 63 staff members, the FSWG is strongly concerned about insufficient checks and balances within the Agency.

The FSWG regrets that the large number of reports of alleged fundamental rights violations at borders where Frontex is operational have not triggered a comprehensive assessment by the Agency on the measures to be taken to prevent those violations or on whether the Agency should apply Article 46. On the contrary, the Executive Director continues to maintain that he is not aware of any information that fundamental rights have been or are being violated, and even denies that he had received reports from actors that have confirmed they shared their findings with the Agency.³⁸

The obligation to suspend an operation has so far only been used once in the case of Hungary. This was done five years after the first recommendation of the FRO, although many reports from several sources described serious and persistent fundamental rights violations at the Hungarian border. The decision by the ED to suspend came six weeks after the judgement of the CJEU on infringement procedures against Hungary. The decision to suspend the activities

³⁶According to the information provided by the Agency to the FSWG, since 2017, the FRO has filed 7 expressions of concern about fundamental rights related situations to which no response followed by the ED; submitted "Annual General Reports on Serious Incident Reports" to which no response followed by the ED; submitted at least 40 observations to OPLANs or FERs, to which no response followed by the ED; submitted 3 "Complaints Mechanisms Annual Reports" since 2017, to which no response followed by the ED; submitted 11 "Fundamental Rights Officer Reports to the MB", to which no response followed by the ED; on 8 occasions provided other types of formal opinions or observations, following MB decisions, procedures in Regulation 2020/1986 or the initiative of FRO, to only 2 of which a response followed by the ED;

³⁷ Replies to follow-up questions from FSWG, reply to question VIII, 1) from the Greens/EFA group.

³⁸ For instance, Frontex has denied two times to have received information from UNHCR, while UNHCR sent the FSWG a declaration on its communication with Frontex.

in Hungary did not reveal that the operation on Return would continue.³⁹ 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.

Recommendations

- The FSWG deeply regrets the failure of the Executive Director to respond or follow up to the many expressions of concerns, recommendations, opinions or observations submitted by the FRO over the course of four years. The FSWG calls upon the Executive Director to apply professional courtesy when determining whether he needs to respond to multiple requests from a key member of his staff. In addition, the FSWG calls on the Management Board to establish rules with fixed time limits for responses, including the requirement for duly justified reasons and information on how to follow up a recommendation of the FRO and of the CF, as well as to monitor compliance with these rules.
- The FSWG calls on the Executive Director to ensure that the Agency complies with all fundamental rights obligations enshrined in the Regulation in its implementation of integrated border management, both in terms of policy and operational activities. This requires a change of culture, but also measures to ensure that fundamental rights expertise and awareness are guaranteed at all levels and units of the Agency, and during all stages of the decision making processes.
- The FSWG concludes that clearer criteria and procedures need to be established for the adequate application of Article 46 and supports that the Agency has set up an ongoing structured debate in cooperation with the FRO in order to develop a due diligence procedure and intermediate steps in this regard. These criteria should, as a minimum, include a strong role of the FRO, the need to take account of information received from external actors, risk indicators and objective early warning criteria, as well as a justification for the decision to suspend, terminate or withdraw funding, and transparency.
- The FSWG calls upon the Executive Director to apply this due diligence procedure in the case of its activities in Greece, in a fully transparent, comprehensive and timely manner, and to share his conclusions with the European Parliament.
- The FSWG emphasises that Article 46 and the due diligence procedures and all reporting mechanisms must apply to all types of activities carried out by Frontex, including aerial support and support in third countries.
- The FSWG calls on the Executive Director to immediately suspend its operations, supporting return-related operations, from Hungary.

E. The Management Board response to the allegations of fundamental rights violations

The FSWG welcomes the Management Board's (MB) inquiry on the reporting mechanisms and the related recommendations. However, on the conclusion of the MB that the inquiry of the FRaLO WG could be considered closed, several concerns remain for the FSWG, for the following reasons.

- Firstly, three incidents, where the FRaLO WG concluded that the Greek authorities had wrongfully categorised incidents as prevention of departure as the vessels were

³⁹ The Commission called for heightened vigilance when assessing the possibility of supporting Hungary in return-related activities (HOME.C.1.003/MH).

located in the Greek waters, which should have led to further examination⁴⁰, and four other incidents, which raised serious questions about fundamental rights violations, were at the time of the final report still under examination. The mandate should have enabled the Working Group to complete the examination of those outstanding cases, instead of leaving this to the Executive Director.

- Secondly, more relevant information related to alleged fundamental rights violations by the Greek authorities was submitted to the Agency before, during and after the FRaLO WG's inquiry, through SIRs as well as from international and non-governmental organisations.
- Thirdly, the formal observations of the FRO to the draft operational plans for the RBI interventions EVROS and Aegean, and her expressions of concern in March 2020, were not taken into account.
- Lastly, the absence of a due diligence procedure during the FRaLO WG inquiry limited the possibility to take gradual measures in the application of Article 46, which had a significant impact on the outcome of the investigation.

The FSWG regrets that the FRaLO WG limited its inquiry to information retrieved from within the Agency itself and from the Member States. An exchange with the investigative journalists whose work constituted the reason for the inquiry, and with institutions like the Greek Ombudsman and UNHCR would have been appropriate. In addition, the FSWG would have preferred for the FRO and the CF to participate in the FRaLO WG, given their fundamental rights expertise, knowledge of the procedures and independence.

From the documents received by the FSWG, it became clear that the MB has taken note of many SIRs, but does not seem to have discussed or drawn any conclusions on the overall picture that arises from the total number of reports and the seriousness of the allegations.⁴¹ The MB should have been more proactive in raising these issues, it has also not firmly requested thorough and transparent national investigations and subsequently taken further steps in order to prevent potential violations of fundamental rights by host Member States.

In view of the overall responsibilities of the MB, the FSWG regrets that the Board was not more proactive in ensuring that the Agency updated and adapted its internal rules in time as a consequence of the new mandate granted to the Agency under the 2019 Regulation, namely the fundamental rights strategy and accompanying action plan, the rules on the independence of the FRO, the supervisory mechanism on the use of force, the rules for the executive director on the authorization on the carry/use of weapons and on the storage and transportation of weapons, but also the appointment of the three Deputy Executive Directors, the FRO and of the 40 FRMs.

Recommendations

- The FSWG urges the MB to step up its engagement in ensuring that the Agency is properly managed and run, with sufficient checks and balances, and to ensure compliance with its fundamental rights obligations.
- The FSWG regrets the decision of the MB not to prolong its FRaLO WG, and

⁴⁰ SIR nos. 11860/2020, 11934/2020, 12604/2020.

⁴¹ For instance, during the MB meeting of 16-17 June 2021, it simply took note of the presentation by the FRO of 10 new SIRs on allegations of fundamental rights violations by the Greek border- and coastguard, reported in 2020 and between January and May 2021.

- recommends to the Executive Board to launch a plan for structural improvements on fundamental rights compliance by the Agency and for monitoring its implementation.
- The FSWG calls upon the MB to ensure the Agency's adequate follow up to replies (or the lack thereof) from national governments, and to ensure diversification of sources and better communication on the way Frontex has handled allegations of human rights violations by Member States.

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

A. Complaints, Reporting and Transparency

The FSWG welcomes the European Ombudsman's inquiry into the Frontex complaints mechanism for breaches of fundamental rights and the role of the Fundamental Rights Officer and stresses that timely and adequate follow up by Member States to complaints is essential. The inquiry concludes that there has been delay by Frontex in implementing the important changes introduced by Regulation 2019/1896 and identified many areas for improvement. Since the situation is in the process of being resolved, the Ombudsman decided not pursue this matter further⁴².

The FSWG shares the conclusion of the Ombudsman that the complaints mechanism currently does not meet the criteria of effectiveness concerning accessibility, institutional independence, and transparency. The FSWG stresses that timely and adequate follow up by Member States to complaints is essential.

The FSWG has found that, since 2017, the FRO was not sufficiently involved in the handling of SIRs. As the FRO was not informed about all SIRs, she could not correct a potential wrongful categorisation. In at least one case, the Executive Director recategorised a SIR situation related to a suspected violation of fundamental rights (category 4) and requested the FRO to remove all information gathered.⁴³ The FRO should be protected against such interventions in cases where he/she is obviously competent. The FSWG underlines the FRaLO WG's conclusion that any incident implying a possible violation of fundamental rights should have been categorized in a Serious Incident Report category 4 and immediately allocated to the coordination of the FRO.

Frontex claims that access to the document is only allowed to the person that requested it, and who is not able to share it further. However, the Agency as an EU institution does not fall under the law on intellectual property. As the FRaLO WG has noted, a too restricted classification regime reduces transparency.⁴⁴

Recommendations

- The FSWG endorses the recommendations made by the EU Ombudsman on the effectiveness and accessibility of the complaints mechanism, which can be found in the Annex. The FSWG welcomes the fact that some of these recommendations are already addressed in the Fundamental Rights Action Plan which is almost finalized,

⁴² Decision in OI/5/2020/MHZ on the functioning of the European Border and Coast Guard Agency's (Frontex) complaints mechanism for alleged breaches of fundamental rights and the role of the Fundamental Rights Officer, 15 June 2021.

⁴³ SIR 11095/2020.

⁴⁴ FRaLO WG preliminary report January 2021, p. 36.

- e.g. by enhanced visibility and accessibility of the complaints mechanism.
- The FSWG underlines the importance of publishing the findings and, if applicable, the recommendations of the FRO in individual complaints, once the individual procedures end.
 - The FSWG urges the FRO and/or the Executive Director to ensure that complaints are not closed until Member States provide the Agency with an adequate response. This can either be done by addressing the complaint in the Management Board and/or by involving the relevant national Ombudsman's office. The FSWG calls for more capacity to ensure adequate follow up on complaints.
 - The FSWG emphasises the importance of an effective and independent investigation of SIRs or other reported incidents. This implies that in its follow up to a SIR, the FRO or Executive Director should not only rely on responses by government authorities,⁴⁵ but ensure a diversification of sources, and corroborate the information provided by national authorities with competent national human rights bodies and/or authorities such as national Ombudsmen and relevant international organisations.
 - The FSWG welcomes the provisions in the Agency, its new Standing Operational Procedure for SIRs,⁴⁶ which ensures that SIRs concerning fundamental rights should be filed with the FRO directly. However, the FSWG recommends that regarding other categories, the FRO's office is involved in the initial assessment and competent to decide whether a SIR relates to fundamental rights issues.
 - The FSWG emphasises that the monitoring and reporting obligations of the Agency not only concern Frontex participants or assets, but all aspects of its operational activities, including (deployed) personnel and assets from participating and host member states.
 - Out of the 10 new SIRs filed, 8 concerned Greece. The FSWG stresses that, although not all reported incidents necessarily equal violations, reports of similar incidents should be carefully considered, seeing that they could indicate violations of fundamental rights that are of a serious nature. This should be reflected in the manner in which SIRs are handled, particularly regarding communication and information exchange with the host Member State, and also in the decisions of Art. 46. The FSWG stresses that such recurring incidents - which should be reported regularly to the Management Board by the FRO - should also be followed up on by the Management Board.
 - The FSWG urges the Agency to further increase its transparency by acting in accordance with the practice of the AsktheEU portal and not resort to any copyright clause. The FSWG emphasises that SIRs, reports on the use of force and individual complaints should only be classified as restricted documents when necessary and on a case-by-case basis.
 - The FSWG recalls the resolution of the European Parliament, in which it called on the Agency to refrain from seeking to recover the (excessively high) costs of external

⁴⁵ Three weeks after the SIR of the incident of 18-19 April 2020 was filed, the ED addressed a letter to the Greek authorities, requesting to launch an internal investigation and to coordinate the possible follow-up measures stemming from the mentioned incident only relied on information provided by the operational command itself. Yet, after the Greek authorities denied the allegations and ignored the call for an internal investigation, the executive director did not provide for any follow up measures. An assessment of all SIR reports available reveal that this is in line with a pattern that a case is closed after the host Member State has denied the reported incident.

⁴⁶ Decision of the Executive Director No R-ED-2021-51, Standard Operating Procedure (SOP) – Serious Incident Reporting of 19/04/2021.

lawyers from applicants in court cases based on access to information requests.⁴⁷

B. Governance and accountability

European Parliament

The FSWG observes that until recently, the Parliament was not informed adequately about activities and evaluations by Frontex, going beyond receiving publicly available reports. Concerning other types of information, the level of confidentiality hampered the democratic control to be exercised by the Parliament. The FSWG observes that the ED has made oral or written statements to the Parliament that did not reflect the knowledge he had at the time of its statements.⁴⁸

Recommendations

- The FSWG notes that the current inquiry has improved the information exchange, and urges the Agency to further progress along these lines.
- The FSWG recalls the Parliament's advisory role in the appointment of the ED,⁴⁹ and invites the MB to actively engage with the Parliament in advance of the publication of a vacancy for a new Executive Director.
- In line with the Parliaments' prerogatives concerning the appointment of the ED, the FSWG exhorts the Commission to promptly consult the Parliament in view of carrying out its assessment which takes into account an evaluation of the ED's performance and the Agency's future tasks and challenges⁵⁰, and recommends the MB to take such opinion into consideration when deciding on the possible extension of the ED's mandate.⁵¹
- The FSWG emphasises the importance of the Parliament making full use of its prerogatives to evaluate the Agency's performance in implementing its fundamental rights obligations,⁵² and taking adequate steps in case of shortcomings.

Council

The accountability of the Executive Director to the Council, implies an overall responsibility of the Council for a proper functioning of the Agency.⁵³ The Court of Auditors, when examining the operations of the European Border and Coast Guard Agency, details the

⁴⁷ EP resolution of 28 April 2021 on discharge in respect of the implementation of the budget of the European Border and Coast Guard Agency for the financial year 2019, 2020/2167 (DEC).

⁴⁸ In the hearing on 6 July 2020 before the LIBE Committee, the ED stated referring to the 2 March incident, "this was the only case", while he knew of at least one other incident as he had signed a letter on 8th of May to the Greek Minister about the 18-19 April incident; in the same hearing of 6 July, the ED misrepresented the material facts of the 2 of March as he stated that the Danish vessels was "instructed by the HCG not to take on board the migrants intercepted at sea but to return them to Turkey", while they were already on board of the vessels; in the written replies provided by the Agency to the FSWG, FRONTEX stated that "Frontex is not aware of the exact information observed by UNHCR and referred by it for investigation of the Greek authorities" and that "Frontex has never received any information from UNHCR, therefore no investigation has been launched related to this material." This was repeated by the ED when he came to the FSWG. This is inaccurate, as, in a letter dated 25 of May, UNHCR confirmed to the FSWG that exchanges on pushback incidents have indeed taken place with Frontex; Commissioner Ylva Johansson stated after the hearing of 1 December that "some of the things being said by the Executive Director in Parliament [are] not true"

⁴⁹ Article 107(2).

⁵⁰ Article 107(5).

⁵¹ Article 107(6).

⁵² Article 73(3) and 106(2).

⁵³ Article 6 Regulation 2019/1896.

insufficient functioning of the Agency due to its failure to implement in full its 2016 mandate, noting that “the Agency responded to its new responsibilities in an ad hoc fashion and only began to address its needs in a systematic way in 2019”. In addition, the Court of Auditors concluded that there is a significant risk that Frontex will struggle to implement its mandate from 2019, partly due to a not yet sufficiently developed information exchange framework with the Member States.

Recommendations

- The FSWG urges the Council to take a more proactive role in ensuring that Frontex meets its negative and positive fundamental rights obligations. The FSWG recommends that in their appointment of representatives, the Member States have to ensure sufficient involvement of the relevant ministries and sufficient expertise of all aspects of the Agency’s functioning including fundamental rights. In addition, in order to ensure political accountability, the JHA Council should regularly discuss the overall functioning of Frontex and its compliance with fundamental rights obligations.
- The FSWG calls on the Member States to support the Agency in implementing the mandate, particularly in securing the needed support by means of staff and material.
- As the Executive Director is accountable to both the Parliament and Council, the FSWG invites the Council to exchange views on the findings of its inquiry, and the role of both institutions to ensure a correct implementation of the recommendations.

European Commission

In line with its oversight functions, the Commission has engaged in an intensive and long lasting communication with the Executive Director in order to achieve a correct and timely implementation of the obligations of the 2019 Regulation.⁵⁴ Despite these efforts, it took Frontex about 13 months to prepare the adoption of the rules on the FRO’s independence and another 3 months to complete the procedure for appointing a new FRO.⁵⁵ The efforts by the Commission could also not prevent the long delays in the recruitment of the FRMs and the deputy directors.

Recommendations

- The FSWG urges the Commission to raise cases of problematic cooperation with the Agency in the meetings of the Management Board, and in case of non-compliance with the Regulation, to consider further steps towards the Agency in its role as Guardian of the Treaty.
- Urges the Commission to closely monitor and investigate Member States’ compliance with fundamental rights, and in case of violations, to take timely and adequate steps to enforce compliance.
- The FSWG requests the Commission to keep the European Parliament regularly informed of any activities/initiatives that might have an impact on fundamental rights as a way to strengthen and guarantee the democratic oversight over the Agency.
- The FSWG underlines that effective fundamental rights impact assessments should be carried out by the Agency before engaging with third countries, and asks the Commission to monitor that those are actually performed before giving its prior approval to working arrangements.

⁵⁴ See the letter of Director-General Pariat to the Chair of the FSWG, “Explanatory timelines for the development of the implementing framework for European Border and Coast Guard Regulation”, 25 May 2021.

⁵⁵ See also European Ombudsman, Decision in OI/5/2020/MHZ, 15 June 2021, para. 18.

- The FSWG specifically urges the Commission to actively engage in the development of the intermediate steps of Article 46 and of the due diligence procedure for the application thereof, to closely monitor a correct application, and to keep the Parliament informed.
- The FSWG calls upon the Commission to ensure that EU funding for border management in case of a joint operation between Frontex and a specific Member State is made conditional upon compliance with fundamental rights and effective cooperation with the Agency as agreed in the OPLAN, which should at least include access to information and access to operational areas for fundamental rights monitoring and reporting by the Agency.
- Should the Commission decide to initiate infringement proceedings against a Member State which has a joint operation with the Agency, the FSWG calls on the Commission to inform the MB, ED, FRO and CF and request that an assessment is done by the Agency according to Article 46 and the due diligence procedure.

ANNEX

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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:
 - o the compliance of the Agency with fundamental rights;
 - o the Agency's internal management, including procedures for reporting and handling of complaints;
 - o 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 views⁵⁶ 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 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

⁵⁶ First exchange of views, https://multimedia.europarl.europa.eu/en/committee-on-civil-liberties-justice-and-home-affairs_20210304-1215-COMMITTEE-LIBE_vd.

subsequently issued.⁵⁷

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,⁵⁸ 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 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 third⁵⁹ and fourth⁶⁰ exchanges of views on 23 and 29 April the FSWG exchanged views

⁵⁷ Ref. Ares(2021)1635567 - 04 March 2021.

⁵⁸ Second exchange of views, https://multimedia.europarl.europa.eu/en/libe-working-group-on-frontex-scrutiny_20210315-1345-COMMITTEE-LIBE_vd.

⁵⁹ Third exchange of views, <https://webstreaming.europarl.europa.eu/ep/embed/embed.html?event=20210423-0900-COMMITTEE-LIBE&language=or&autoplay=false&logo=true>

⁶⁰ Fourth exchange of views, https://multimedia.europarl.europa.eu/en/libe-working-group-on-frontex-scrutiny_20210429-1500-

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 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,⁶¹ 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

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⁶¹ Fifth exchange of views, https://multimedia.europarl.europa.eu/en/committee-on-civil-liberties-justice-and-home-affairs_20210510-1735-COMMITTEE-LIBE_vd.

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,⁶² 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 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,⁶³ 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

⁶² Sixth exchange of views, https://multimedia.europarl.europa.eu/en/libe-frontex-scrutiny-working-group-meeting_20210521-1100-COMMITTEE-LIBE_vd.

⁶³ Seventh exchange of views, https://multimedia.europarl.europa.eu/en/libe-working-group-on-frontex-scrutiny_20210603-1400-COMMITTEE-LIBE_vd.

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 June⁶⁴, 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 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

⁶⁴ Eighth exchange of views, https://multimedia.europarl.europa.eu/en/libe-working-group-on-frontex-scrutiny_20210623-1530-COMMITTEE-LIBE_vd.

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 Lesvos 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 08/2021⁶⁵

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.⁶⁶

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.

⁶⁵ ECA Special Report 08/2021: Frontex's support to external border management: not sufficiently effective to date, 7 June 2021.

⁶⁶ For the overall findings see, Executive Summary at pp. 4, 5.

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.⁶⁷

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.⁶⁸ 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.

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.⁶⁹ 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

⁶⁷ See, for instance, Art 10 (1) (e), (h), (i), (s), (t), (w) and (ad). of Regulation 2019/1896.

⁶⁸ The Management Board has adopted the FR Strategy on 15 February 2021, the action plan has not yet been adopted.

⁶⁹ Pre 12, Art 7 (1) Regulation 2019/1896.

border management and return activities of the Agency.⁷⁰

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.⁷¹ Joint operations and rapid border interventions (RBI) shall be preceded by a thorough reliable and up-to-date risk analysis.⁷² Before launching a RBI, the ED also needs to take account of the situational picture and vulnerability assessment.⁷³

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.⁷⁴

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.⁷⁵ 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

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.⁷⁶ 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).⁷⁷

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

⁷⁰ Pre 42, Regulation 2019/1896.

⁷¹ Art 36(2) Regulation 2019/1896.

⁷² Art 37 (3) Regulation 2019/1896.

⁷³ Art 39 (3) Regulation 2019/1896.

⁷⁴ Art 46(5) Regulation 2019/1896.

⁷⁵ Art 38 Regulation 2019/1896.

⁷⁶ Article 82 (2) and (4)

⁷⁷ Article 82(3)

Frontex Standing Corps

Since 2019, Frontex deploys officers belonging to the standing corps of 10.000, which should become fully operational in 2027.⁷⁸ 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,⁷⁹ including access to asylum and human dignity, and shall pay particular attention to vulnerable persons.⁸⁰ 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.⁸¹

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 consideration of action under Article 46.⁸²

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).⁸³ 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.⁸⁴ 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

⁷⁸ 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.

⁷⁹ Art. 82(3)

⁸⁰ Art. 40(4)(5), Art. 43(4).

⁸¹ Art. 55(4))

⁸² Art. 44(3)(b) and (d)

⁸³ Article 19 of the Code of Conduct applicable to all persons participating in Frontex Operational Activities, ED Decision No R-ED-2017-32.

⁸⁴ Rules on whistleblowing had already been included in the Staff Regulations (Articles 22a and 22b) since 2004.

procedure to follow in case of use of force.⁸⁵ 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.⁸⁶ 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.⁸⁷

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.⁸⁸ 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 monitoring and analysing the implementation of the Fundamental Rights Strategy.⁸⁹ The FRO is appointed by the MB, after consultation with the CF.⁹⁰ 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.⁹¹ 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 2020.⁹² According to the Legal and Financial Statement accompanying the

⁸⁵ 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.

⁸⁶ Art. 5, Management Board Decision 7/2021

⁸⁷ Art. 8, Management Board Decision 7/2021

⁸⁸ Art. 99

⁸⁹ Art. 109

⁹⁰

⁹¹ Art. 80(4)

⁹² Art. 110

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.⁹³ 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.⁹⁴ 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.⁹⁵

Chapter 3(D) - Role of the Executive Director

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.⁹⁶ 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.⁹⁷

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.⁹⁸ 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.⁹⁹

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.¹⁰⁰

Operational plan

The Executive Director draws up the draft operational plan and submit it to the Members

⁹³ Art.108(1)

⁹⁴ Art. 80(4)

⁹⁵ Art. 108

⁹⁶ Art. 106 (1), Art 6.

⁹⁷ Art 109(3).

⁹⁸ Art. 46(4)

⁹⁹ Art. 46(5)

¹⁰⁰ Art. 46(6)

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.¹⁰¹¹⁰² 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.¹⁰³ 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.¹⁰⁴

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.¹⁰⁵ The executive director is accountable for his activities to the management board.¹⁰⁶ 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.¹⁰⁷

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,¹⁰⁸ 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.

¹⁰¹ Art. 38(3)(d) and (l)

¹⁰² 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.

¹⁰³ Art. 38(3)(i), Art. 38(3)(n)

¹⁰⁴ Art 47

¹⁰⁵ See Art 100 Regulation 2019/1896 for the tasks of the Management Board.

¹⁰⁶ Art 106(5) Regulation 2019/1896.

¹⁰⁷ Art. 109 (4) Regulation 2019/1896.

¹⁰⁸ 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'.

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.¹⁰⁹ 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.¹¹⁰

Serious Incident Reporting

The members of Frontex teams are under the obligation to report suspected violations of 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.¹¹¹ 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.¹¹² This is why the agency is obliged to report on its activities to the Parliament to the fullest extent.¹¹³

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.

¹⁰⁹ Art. 10(1)(ad).

¹¹⁰ Article 15(1) TFEU; 11(2) TEU and Article 298(1) TFEU, Art.114 Regulation 2019/1896.

¹¹¹ Management Board Decision 12/2021 of 14 February 2021 adopting the Fundamental Rights Strategy.

¹¹² Art. 6.

¹¹³ Recital 116.

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
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