

European Parliament

2019-2024



LIBE Committee on Civil Liberties, Justice and Home Affairs

14.7.2021

WORKING DOCUMENT

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

LIBE 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

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.

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

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.

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 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-

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

¹⁷ Bellingcat 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.

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 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 of 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

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

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 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.

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

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.
- 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.

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.

- 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 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 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

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.

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.

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 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.

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 (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).

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 monitor's 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.
- 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.

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.

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

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.

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

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 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,

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.

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 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.

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.

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, 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.

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

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.

- 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 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

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).

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 mandate⁵¹
- 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 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

⁵⁰ Article 107(5).

⁵¹ Article 107(6).

⁵² Article 73(3) and 106(2).

⁵³ Article 6 Regulation 2019/1896.

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.
- 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.

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.