

Letter from the European Ombudsman to the European Border and Coast Guard Agency (Frontex) on how it complies with its obligations and ensures accountability in relation to its new enhanced responsibilities under Regulation (EU) 2019/1896

Correspondence - 18/07/2022

Case OI/4/2021/MHZ - **Opened on** 04/03/2021 - **Decision on** 17/01/2022 - **Institution concerned** European Border and Coast Guard Agency (No further inquiries justified) |

Strasbourg, 04/03/2021

Subject: Strategic inquiry [1] X/2021/MHZ on how Frontex complies with its obligations and ensures accountability in relation to its new enhanced responsibilities under Regulation (EU) 2019/1896 [2]

Dear Mr Leggeri,

Regulation 2019/1896 requires Frontex to put in place administrative mechanisms and instruments to safeguard respect for fundamental rights in all its activities, as well as to ensure accountability for fundamental rights violations. Specifically, Recital 24 in the preamble to Regulation (EU) 2019/1896 states: “ *The extended tasks and competence of the Agency should be balanced with strengthened fundamental rights safeguards and increased accountability and liability, in particular in terms of the exercise of executive powers by the statutory staff.*”

It is important for the public to know what new or updated fundamental rights mechanisms have been put in place since Regulation 2019/1896 entered into force on 4 December 2019.

As you know, I have already launched, on 12 November 2020, an inquiry concerning one of these mechanisms, the Complaints Mechanism and the role of the Fundamental Rights Officer.

I now consider it useful to clarify, what steps Frontex has taken to put in place the remaining fundamental rights measures foreseen in Regulation 2019/1896, and what information is available to the public about this.



I am conscious that the European Parliament has setup a Frontex Scrutiny working group to examine alleged violations of fundamental rights in the context of Frontex activities and it is important not to duplicate that work [3] .

My inquiry will seek to clarify matters relating to the:

1. accountability in joint operations,
2. termination of operations under the new rules,
3. Frontex activities in relation to returns of migrants and to
4. migration support in screening at the external borders.

I would be grateful if Frontex could reply to the questions set out in the annex to this letter by 30 April 2021.

In the course of this inquiry, I would like to publish Frontex's reply on my website. I may also give interested stakeholders the opportunity to make observations.

Should you require any further information or clarifications concerning this inquiry, including how to arrange for the inspection of documents, please do not hesitate to contact Marta Hirsch-Ziembinska. Principal adviser on Charter compliance, who is responsible for the inquiry.

Yours sincerely,

Emily O'Reilly

European Ombudsman

1. Joint operations

(i) Regulation 2019/1896 states that 'operational plans' for joint operations should include *the description of responsibilities* , including with regard to the respect of fundamental rights [4] , and *instructions* on how to ensure the safeguarding of fundamental rights [5] . However, neither the plans nor the handbooks for joint operations (if they exist) are in the public domain. Given the clear public interest in these joint operations, it should be possible for the public to understand who is responsible for what aspects of these operations. Could Frontex publish this material?

2. Not launching/Termination of operations and pilot project

Regulation 2019/1896 [6] states that the Executive Director may decide not to launch any activity where there could already be serious concerns at the outset that the activity could lead to serious violations of fundamental rights or international protection obligations. These decisions may be taken after consultation with the Fundamental Rights Officer and should be based on duly justified grounds.



(i) What procedures and criteria does Frontex use to identify situations in which an activity could lead to serious violations of fundamental rights or of international protection obligations? The Ombudsman notes the recent decision in relation to Hungary, which followed the judgement of the EU Court of Justice [7] . Could a national court judgment or the views of an ombudsman/National Human Rights Institution about such violations also serve as a criterion?

(ii) Where the Executive Director decides to suspend or terminate an operation, what other steps could Frontex envisage to help remedy the detected violations of fundamental rights and/or international protection obligations? [8]

3. Returns

(i) Does Frontex have implementing rules for its new role [9] in assisting voluntary returnees in the post-arrival and post-return phases, taking into account the needs of vulnerable persons? Has Frontex considered working with the International Organisation for Migration (IOM) [10] in relation to voluntary returns?

(ii) How will Frontex ensure independent monitoring of Frontex return operations by its own staff, when taking into account that the escorts of returnees may be carried out by Frontex staff members as well?

(iii) Frontex is obliged to make forced-return monitors available upon request from its pool of forced-return monitors. In its 2018 report, the Frontex Consultative Forum stated the need to explore how the national return monitoring mechanisms interplay with the Frontex-governed pool of return monitors in order to bridge the gap between the number of monitored national returns (low) and Frontex's coordinated returns (high) [11] . What can Frontex do to encourage and assist Member States in creating more sustainable monitoring systems?

(iv) Article 50 (5) of Regulation 2019/1896 states that forced-return monitors shall submit a report on each forced return operation to the Executive Director, the Fundamental Rights Officer and the national authorities of all the Member States involved in the given operation. In the first semester of 2019, the Fundamental Rights Officer received monitoring reports from 57.5% of all forced-return operations organised by Frontex, and all reports received were from Frontex monitors. How does Frontex explain this relatively low percentage? What can Frontex do to change the situation?

(v) In her investigation OI/9/2014/MHZ, the European Ombudsman suggested that Frontex publish monitors' reports on its website. Frontex replied that it would consider this. Moreover, Frontex stated that it would continue to encourage transparency and consider all possibilities for increasing transparency. However, monitoring reports are still not published, nor are the Fundamental Rights Officer's observations summarising these reports.

Could Frontex publish monitors' reports on its website, taking into account data protection concerns?

4. Migration management support teams

(i) Frontex statutory staff may act as migration support teams, providing technical and



operational reinforcement to the Member States. This includes the screening of non-EU nationals arriving at external borders, including identifying, registering, debriefing, and fingerprinting these individuals, as well as providing information regarding the purpose of these procedures. [12] There is a risk of potential fundamental rights violations in relation to these procedures.

Does Frontex provide the migration support teams with specific guidance/instructions on how to ensure the protection of fundamental rights in the context of the above activities? If so, please share this material with the Ombudsman's Office. If not, please set out Frontex's plans in this regard.

[1] The Ombudsman undertakes strategic inquiries on her own initiative where she finds grounds to do so. As well as inquiring into any possible maladministration, these inquiries are intended to promote good administrative practice, in the interest of the institution concerned.

[2] 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: <https://eur-lex.europa.eu/eli/reg/2019/1896/oj> [Link].

[3]

<https://www.europarl.europa.eu/news/en/press-room/20210223IPR98504/respect-of-fundamental-rights-by-frontex->

[4] Article 38.3(d) of Regulation (EU) 2019/1896.

[5] Article 38.3(l) of Regulation (EU) 2019/1896

[6] Article 46 of Regulation (EU) 2019/1896.

[7] Such the 22 December 2020 judgement in case C-808/18 Commission v Hungary referring to the situation in the specific transit zones at the Hungarian-Serbian border (<http://curia.europa.eu/juris/document/document.jsf?jsessionid=875DA20DFAF154351FEE48F8173A9D3C?text=&docid=85484>).

[8] In the 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 Management Board recommended that Frontex *establish transparent rules on the Frontex-internal process to follow-up on serious incidents that have been established* , including on the application of Art. 46 of the EBCG Regulation. ” (emphasis added)

[9] Article 48.1(a)(iv) of Regulation (EU)2019/1896.

[10] IOM plays a major role in voluntary returns operations. Its Knowledge Management Hub is



funded by the EU (<https://www.iom.int/assisted-voluntary-return-and-reintegration>).

[11] During the first semester of 2017 , 86 forced-return operations were monitored out of 168, which amounts to **51%** (100% of CROs, 82% of JROs and 12% of NROs).

During the second semester of 2017 , 102 forced-return operations were monitored out of 173, which amounts to **59%** (details for the different types of operations are not provided).

During the first semester of 2018 , 113 forced-return operations were monitored out of 165 operations, which amounts to **68.5%** (100% of CROs, 99% of JROs and 16% of NROs).

During the second semester of 2018 , 119 forced-return operations were monitored out of 180 operations, which amounts to **66%** (100% of CROs, 93% of JROs and 27% of NROs).

During the first semester of 2019 , 137 forced-return operations were monitored out of 163 operations, which amounts to **84%** (100% of CROs, 100% of JROs and 55% of NROs).

[12] Article 40(4) of Regulation (EU) 2019/1896.