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

Decision
Case OI/5/2020/MHZ - **Opened on** 10/11/2020 - **Decision on** 15/06/2021 - **Institutions concerned** European Border and Coast Guard Agency (No maladministration found) | European Border and Coast Guard Agency (No further inquiries justified) |

The Ombudsman opened an inquiry on her own initiative to look into how the European Border and Coast Guard Agency (Frontex) deals with alleged breaches of fundamental rights through its 'complaints mechanism', and to address the role and independence of Frontex's Fundamental Rights Officer in this regard.

In the context of a previous inquiry, the Ombudsman recommended the creation of an independent mechanism for handling complaints about Frontex operations. The complaints mechanism was approved by the EU legislators, and became operational in 2016.

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.

This inquiry aimed to assess how Frontex has implemented new rules concerning the complaints mechanism and the Fundamental Rights Officer, which came into force in November 2019. 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.

Since its creation, the complaints mechanism has dealt with a very low number of complaints, with no complaints as yet concerning the actions of Frontex staff members. Between 2016 and January 2021, the Fundamental Rights Officer had received 69 complaints of which 22 were admissible. With operations made up of staff members from different bodies, who are responsible to different authorities, it may be difficult for potential complainants to identify the alleged perpetrators and to understand how and to whom they can report alleged violations, and

seek redress through the appropriate channels.

In this inquiry, the Ombudsman also reviewed complaints dealt with by the complaints mechanism and identified various potential shortcomings that may make it more difficult for individuals to report alleged fundamental rights violations and seek redress. The Ombudsman's inquiry also identified delays by Frontex in implementing its new obligations concerning the complaints mechanism and the Fundamental Rights Officer.

Based on the inquiry, the Ombudsman sets out a series of suggestions for improvement to Frontex, with a view to improving the accessibility of the complaints mechanism for potential victims of fundamental rights violations and strengthening the accountability of Frontex operations and all those involved therein. These include suggestions on how to make it easier for potential victims of fundamental rights violations to be aware of redress possibilities and to report incidents, as well as suggestions to improve how complaints are handled and followed up on.

Background to the inquiry

1. The European Border and Coast Guard Agency (Frontex) has to comply with the Charter of Fundamental Rights in all its activities. To help ensure compliance with its fundamental rights obligations, Frontex has a Fundamental Rights Officer (FRO), and, in 2016, put in place a 'complaints mechanism'.

2. Frontex's Executive Director draws up the mechanism's implementing rules, in consultation with the FRO, Frontex's Consultative Forum [1] and other internal operating entities. The current implementing rules are in the process of being revised, with a view to reflecting the changes to Frontex's mandate under Regulation 2019/1896 [2] .

3. To date, the FRO has been responsible for reviewing the admissibility of complaints and registering admissible complaints, as well as forwarding **all** registered complaints to the Executive Director of Frontex. The FRO should forward admissible complaints concerning staff of national authorities participating in Frontex operations to the authority of the Member State concerned and inform the relevant fundamental rights body. For admissible complaints against staff members of Frontex, the Executive Director should follow up on these in consultation with the FRO, including taking disciplinary measures if necessary.

4. In the period covered by this inquiry, all complaints concerned the staff of national authorities participating in Frontex operations; there were no complaints concerning the actions of Frontex staff . [3]

5. The FRO is also responsible for dealing with Serious Incident Reports (SIR) [4] concerning fundamental rights. These reports contain information on 'serious incidents' [5] that occur in the context of Frontex operations.

6. In November 2019, new rules came into force concerning the complaints mechanism [6] and the FRO [7] . In addition to dealing with complaints submitted through the mechanism and with SIRs, the FRO was given responsibility for dealing with complaints alleging violations of the rules on the use of arms. [8] According to the rules, the FRO should have adequate human and financial resources to fulfil their tasks.

7. The new rules also established the function of fundamental rights monitors [9] . At least 40 fundamental rights monitors were supposed to have been recruited by 5 December 2020. The FRO is responsible for managing these monitors, and may nominate them as monitors of forced returns. The post of deputy FRO was established, to assist the FRO. Henceforth, the FRO should report directly to Frontex's Management Board and should cooperate with the Consultative Forum.

8. Frontex published rules [10] on the functioning of the FRO, including its independence, in January 2021. At the time of this decision, not all of the 40 fundamental rights monitors have been recruited, and the procedure for recruiting the deputy FRO has not yet been finalised.

9. In the meantime, various public concerns have been raised about Frontex's compliance with fundamental rights.

The inquiry

10. The Ombudsman opened an inquiry on her own initiative on the independence, effectiveness and transparency of the complaints mechanism, and the role of the FRO.

11. In the context of the inquiry, the Ombudsman asked Frontex to reply to a set of questions. [11] Frontex sent two replies: one signed by the Executive Director and one signed by the interim FRO. [12] The Ombudsman's inquiry team met with the interim FRO and inspected Frontex's documents related to the mechanism. The report on the meeting and inspection was sent to Frontex and published on the Ombudsman's website. [13]

12. The Ombudsman also consulted national ombudsmen, through the European Network of Ombudsmen , asking them if they have: (i) been informed about or forwarded complaints by the FRO; (ii) investigated the response of national authorities to such complaints; and/or (iii) received complaints directly about alleged violations of fundamental rights in Frontex operations in which their national authorities took part.

13. Of the twelve ombudsmen that replied [14] , ten replied in the negative to all the questions asked. The Bulgarian and Greek ombudsmen replied that they have dealt with complaints related to Frontex operations. The Bulgarian Ombudsman was forwarded one complaint by the FRO in 2020, and received no complaints directly from persons affected by the Frontex operations. Since 2017, the Greek Ombudsman has received seven complaints through Frontex's complaints mechanism, all of which had previously been submitted directly to the

Ombudsman himself. The Greek Ombudsman indicated that it can be difficult to get national authorities to reply in a comprehensive, transparent and timely manner.

The outcome of the inquiry

14. In a previous own initiative inquiry into Frontex's work, the Ombudsman recommended the creation of a complaints mechanism. With the support of the European Parliament, this was subsequently established in Regulation 2016/1624 on the European Border and Coast Guard [15] .

Examples of complaints dealt with by the mechanism

Among **admissible complaints**, there was one, submitted in 2017, concerning an operation to return migrants by boat from Greece to Turkey. This operation was financed by Frontex and scheduled for 27 April 2017. The complainant, an Iranian national, applied for asylum in Greece and his application was pending before the national court at the time of his scheduled removal. He alleged violations of article 18 of the Charter of Fundamental Rights (right to asylum) and article 19 (protection in the event of removal, expulsion or extradition). The FRO forwarded the complaint to the competent Greek authority. The Greek authority cancelled the operation to return the complainant to Turkey.

Another admissible complaint concerned a joint return operation from Hungary to Afghanistan, dated 20 November 2017. The complainant, an Afghan citizen, alleged that he was returned from Hungary while his appeal was pending before the court. He argued that article 19 of the Charter (protection in the event of removal, expulsion or extradition) and article 47 (right to effective remedy and fair trial) were violated. The FRO forwarded the complaint to the Hungarian authority. The case was not resolved in 2017.

Among **inadmissible complaints**, in 2017, two complaints were submitted concerning border checks on the Polish-Belarus border. The FRO forwarded these complaints to the Polish Ombudsman and the Polish Border Guards. There was also a complaint concerning the checks at the Lithuanian-Russian border. Officers deployed by Frontex were not involved in these complaints.

15. The Ombudsman has monitored its implementation since its creation. In her view, the nature of Frontex's operations requires such a mechanism. These operations involve multiple participants, often from different jurisdictions, who have different obligations but who all wear 'Frontex' insignia and operate under the EU flag. As such, Frontex should have flexible procedures through which individuals can (i) receive assistance in identifying those responsible for perceived wrongdoings in Frontex operations, and (ii) claim redress for violations of their fundamental rights under EU law.

16. The complaints mechanism can be an effective [16] accountability mechanism only if it is

accessible and has the means to conduct independent investigations, which are prompt, thorough and transparent. This inquiry has sought to examine whether the complaints mechanism has fulfilled these conditions so far, and how it can be improved.

17. Among the Ombudsman's main findings are the following:
- since its creation, the complaints mechanism has dealt with a **very low number of complaints** , with no complaints as yet concerning the actions of Frontex staff members. Between 2016 and January 2021, the FRO had received 69 complaints of which 22 were admissible. This may be explained by a number of factors including: (i) lack of awareness and understanding among potential complainants about the mechanism; (ii) fear of negative repercussions, coupled with the fact that it is not possible to submit anonymous complaints, (iii) stressful situations in which potential complainants find themselves; (iv) lack of engagement on the ground by Frontex deployed officers who could play a more active role in receiving and transmitting complaints to the FRO.
- there has been **inadequate transparency** in relation to the mechanism's activities although progress is now being made.
- while at the beginning of the existence of the complaints mechanism, the Executive Director 's co-operation with the FRO was not entirely satisfactory, this co-operation has improved over time. The Executive Director is obliged to co-operate with the FRO. Where possible, he should seek to act on the FRO's recommendations. The decision of the Executive Director on a complaint forwarded to him by the FRO may be challenged before the European Ombudsman.
- there has been delay by Frontex in implementing the important changes introduced by Regulation 2019/1896. It took Frontex about 13 months to take the necessary steps so that the Management Board could adopt the rules on the FRO's independence and further 3 months to complete the procedure for appointing a new FRO. The appointment of the deputy FRO has consequently been delayed, as the FRO must participate in that procedure. **The 40 fundamental rights monitors have not yet been appointed** , even though this process should have been completed by 5 December 2020.
- **the first FRO and the subsequent interim FRO used the complaints mechanism provisions at their disposal and proactively developed the mechanism to guarantee complainants' fundamental rights** . In closing decisions, the FRO has set out well-reasoned and convincing views on alleged violations of fundamental rights and made recommendations to the Member States for systemic improvements, as well as recommendations to Frontex on what it could do to ensure that Member States avoid such issues in the future.
- ensuring timely and adequate follow up to complaints is essential. If a Member State does not follow up in a timely and appropriate manner, Frontex cannot comply with its duty to request the Member State concerned to remove its staff from the Frontex activity immediately, where they are found to have violated fundamental rights or international protection obligations. There have been **problems with the co-operation between the FRO and national authorities** , in particular delays in replying by national authorities . So far their replies have not included evidence on the substance of the case, even in cases where the FRO explicitly asked for evidence.
- while the FRO does not explicitly have the power to conduct own-initiative investigations, the FRO uses two procedures that essentially serve this purpose: 'expression of concern' and 'imminent risk'. Both procedures can serve to uncover systemic problems. **The FRO uses these**

instruments appropriately and effectively , in particular when using the 'imminent risk' procedure to deal with complaints about fundamental rights violations in the context of return operations.
- while **the FRO has considerable independence vis-a-vis the functioning of the complaints mechanism** (including dealing with complaints about the use of force), the same cannot be said about its role vis-a-vis the SIRs in the context of fundamental rights issues. The SIR is an elaborate system, involving many participants, with the role of the FRO beginning only later in the process. This may diminish the influence of the FRO.

18. Annex I contains the Ombudsman's detailed assessment of the work carried out by the complaints mechanism to date, as well as the FRO's role. Annex II contains an overview of complaints dealt with to date, while Annex III details Frontex's efforts to improve awareness of the right to complain.

Conclusions

Based on all of the material examined in the course of this inquiry, the Ombudsman is drawing the conclusions set out below, along with nine suggestions for improvement.

The Ombudsman considers it regrettable that there has been delay by Frontex in implementing the important changes introduced by Regulation 2019/1896. However, since the situation is in the process of being resolved, the Ombudsman does not find it justified to pursue this matter further.

The inquiry identified many areas for improvement that are addressed via suggestions below.

Frontex and the Fundamental Rights Officer will be informed of this decision **.**

To understand better why so few complaints have been submitted to date, the Ombudsman will also share this decision with the European Union Agency for Fundamental Rights, the European Network of Ombudsmen and civil society organisations to hear their views.

Suggestions for improvement

Operational plans

1. 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. (Points 11-12 of the detailed assessment)

Memoranda of understanding with non-EU countries

2. 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. (Point 47 of the detailed assessment).

Public information material on the complaints mechanism

3. 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 are not supposed to be penalised for submitting complaints and that submitting complaints should not prejudice other procedures, such as asylum applications. (Point 14 of the detailed assessment).

4. The FRO should seek to develop permanent channels of co-operation 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. (Points 16-17 of the detailed assessment).

Revised implementing rules for complaints mechanism

5. 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. (Points 18-20 of the detailed assessment).

6. 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. (Points 21-22 of the detailed assessment).

7. The revised rules should:
- clarify what is meant by a failure to act, including by giving examples, and clarify how individuals may complain about such a failure. (Points 22 of the detailed assessment.)
- specify what information should be contained in the reports sent by the national authorities to the FRO, after it has forwarded a complaint to them. For example, a template for such reports could be included as an annex to the rules. (Point 31 of the detailed assessment).
- stress that Member States are obliged to co-operate with the FRO, and specify the potential sanctions for violations. (Point 34 of the detailed assessment.)
- define a deadline for the FRO to determine the admissibility of a complaint. (Point 23 of the detailed assessment).

- provide for a procedure for appealing decisions of the FRO, in line with Article 111(5) of Regulation 2019/1896, which states that the FRO *"shall reassess the complaint if the complainant submits new evidence in situations where the complaint has been inadmissible of unfounded"* . (Point 25 of the detailed assessment).
- stipulate that the FRO reports directly to the Management Board, and reports to the Executive Director only concerning possible violations of fundamental rights reported to the FRO by the fundamental rights monitors as the FRO " *deems necessary"* . (Point 44 of the detailed assessment).

Reporting and publications

8. 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. (Points 39 and 53 of the detailed assessment).

9. The FRO's rules on dealing with serious incident reports should be made public together with the implementing rules on the complaints mechanism. (Point 56 of the detailed assessment).

Emily O'Reilly European Ombudsman

Strasbourg, 15/06/2021

Annexes

Annex I: The Ombudsman's detailed assessment

Functioning of the complaints mechanism

Reply from Frontex and the FRO

[17]

1. Between 2016 and January 2021 (the date of Frontex's reply to the Ombudsman), the FRO

had received 69 complaints of which 22 were admissible. Frontex expects the deployment of fundamental rights monitors, to whom complaints may be directly submitted, to lead to an increase in complaints.

2. Under the current implementing rules, a complainant has to provide their contact details. Anonymous complaints are not admissible. Complainants may be represented by any party, whether a natural or legal person.

3. To date, no complaint has been submitted against a Frontex staff member. As such, the Executive Director has not yet been required to deal with such a complaint. The FRO was in contact with the Executive Director about certain complaints concerning staff of national authorities.

4. The FRO closes a case after having received a reply from the relevant national authority, informing the FRO that its investigation has been closed after appropriate follow up. The current implementing rules give the national authority six months from when the FRO forwards the complaint to reach its findings.

An appropriate reply is essential for the mechanism's effectiveness. The new implementing rules will include guidelines in this respect for the national authorities.

If a national authority sends no reply to the FRO or if it sends only an 'inconclusive response', the FRO informs the Executive Director and the Management Board. Frontex then follows up on the matter. This has happened in only a limited number of cases so far. The FRO closes a case where an inconclusive reply has been received from the relevant national authority but, based on the reply, no further information can be expected.

5. The FRO does not always receive a reply or an acknowledgment of receipt from the national human rights institutions to which it forwards complaints. [18]

6. The FRO issues a final report on the complaint which is addressed to Frontex's Executive Director and the Management Board chair. Where relevant, the report includes recommendations on the complaint that should be addressed by the Executive Director or the relevant national authorities. The case is then closed by means of a letter signed by the FRO and addressed to the national authority and the complainant, explaining the facts and the findings made. The FRO attaches the final report to the letter.

7. For Frontex operations in non-EU countries, the FRO may assess the fundamental rights situation by liaising with the national human rights bodies (such as the national ombudsman institutions) [19] , NGOs and other actors in the field.

8. Frontex publishes information on the complaints mechanism in its annual reports. The FRO submits to the Management Board periodic reports on its activities and an annual report on the mechanism, including specific references to Frontex's and Member States' findings and follow up to complaints. Under Regulation 1896/2019 [20] , the FRO is obliged to publish an annual

report on its activities and on Frontex's compliance with fundamental rights in its operations. The report will include information on the mechanism and on Frontex's progress in implementing its fundamental rights strategy.

9. The FRO's staff grew from one post in 2012 to 10 posts in 2019. Two of the current posts are dedicated to handling complaints. In 2020, Frontex allocated to the Fundamental Rights Office the new deputy FRO position, 40 fundamental rights monitors positions and two posts for civil servants from national administrations on secondment. These new allocated posts should be filled in 2021. Moreover, the FRO became a managerial post, with responsibility for a budget of EUR 1 million in 2020 and EUR 1.3 million in 2021 (excluding staff costs). The Executive Director was not involved in the selection and appointment of the new FRO, who is responsible to the Management Board.

The Ombudsman's assessment

Accessibility of the complaints mechanism

10. The Ombudsman acknowledges the work of the FRO to raise awareness about the complaints mechanism, both among staff and stakeholders, and on the ground. [21] Nevertheless, the Ombudsman notes that, so far, very few complaints have been received through the mechanism.

11. Regulation 2019/1896 [22] states that the 'operational plans', which apply to all participants in Frontex operations, should include provisions for " *a mechanism to receive and transmit to the Agency complaints (..) alleging breaches of fundamental rights* ". In the Ombudsman's view, this obligation should be clearly listed in the operational plans, among the tasks and responsibilities for ensuring the respect for fundamental rights, and alongside the obligation to provide information about the complaints mechanism. It would also be beneficial if the Code of Conduct applying to all persons participating in Frontex's operations were to mention the obligation to receive complaints and transmit them to Frontex, and not only the obligation to provide information about the mechanism. [23]

12. The fact that this is not currently the case could help explain why no complaints have yet been transmitted to the mechanism through participants in Frontex operations. Moreover, the FRO stated that the subjects of forced returns are not always provided with complaint forms, even though a member of Frontex's staff is present on every forced return coordinated by Frontex. [24] While the Ombudsman hopes that the presence of fundamental rights monitors on the ground will improve the situation, she is making a suggestion for improvement to address this.

13. In any event, the Ombudsman considers that the low number of complaints is likely not only due to the lack of engagement by Frontex staff members on the ground or because potential complainants are not aware that the complaints mechanism exists, but that there may be other reasons.

14. Migrants and refugees from different backgrounds [25] may not be aware that redress mechanisms are standard and/or are free of charge in EU countries [26] , or may fear that submitting a complaint may prejudice other procedures, such as potential asylum applications. The public information material about the complaints mechanism could be adapted to draw greater attention to this.

15. Individuals whose fundamental rights may be potentially affected in Frontex's operations are often already in extremely difficult situations. [27] They may not have the time or wherewithal to fight for their fundamental rights. The Ombudsman also notes that complaints submitted directly by individuals to national ombudsmen about violations of fundamental rights in Frontex operations are rare. [28] Instead, where complaints are received, they are submitted by civil society organisations, on behalf of individuals, or lawyers working on a pro bono/legal aid basis. [29]

16. It is therefore crucial that civil society organisations specialised in human rights are able to help individuals by not only submitting complaints on their behalf to the complaints mechanism, but also actively following how complaints are handled.

17. The Ombudsman is convinced that cooperation with civil society is essential for the complaints mechanism to function well. It would be useful for the FRO to develop formal channels of cooperation with civil society organisations present on the ground where Frontex operates, and Frontex's Consultative Forum which includes representatives of civil society could play an important role to this end. The FRO should also make clear to civil society organisations how it considers the complaints mechanism applies to border guards of a host Member State who are present in the area of Frontex operations but are not directly part of the operation.

18. Already in 2016, the Consultative Forum recommended that anonymous complaints be accepted as this could encourage individuals to use the complaints mechanism. The first step to this end would be to ensure the new complaints mechanism implementing rules [30] include a provision allowing complainants to remain anonymous, even if there is a requirement for such complainants to have non-anonymous representatives.

19. Certain national authorities and/or human rights bodies may be procedurally precluded from dealing with anonymous complaints. However, this does not mean that there is no purpose served by the FRO forwarding such complaints to them. After having received such a complaint, these bodies are informed about the issues and may tackle them on their own initiative or otherwise. They may also make contact with potential representatives of anonymous complainants, if they believe there are additional steps the complainant should take.

20. In the same vein, the complaint form contains information [31] on confidentiality, which may lead to confusion.

21. Apart from complaints about alleged violations of fundamental rights (both actions and failure to act), the mechanism will now also deal with complaints about violations of the rules on

the use of force. [32] Complainants alleging violations of the rules on the use of force do not need to be affected by the violations about which they complain. [33]

22. However, it is important to specify, in the new complaints mechanism implementing rules, what rules on the use of force are concerned and, in a separate section, which specific procedural steps are foreseen in the mechanism regarding such complaints. [34] It would also be important to specify what a failure to act could be; this could include situations such as the failure to refer migrants who asked for international protection to the relevant authorities. [35] The complaints mechanism implementing rules ('The Agency's rules on the complaints mechanism') are published on Frontex's webpage dedicated to fundamental rights. The new complaints mechanism implementing rules should avoid ambiguity and be so explicit that there is no need for guidelines on their application.

Procedures under the complaints mechanism

23. Based on the information inspected in this inquiry, it seems clear that the first FRO and the subsequent interim FRO sought to use the complaints mechanism provisions at their disposal to guarantee the fundamental rights of complainants. Reviews of the admissibility of complaints were thorough, and carried out within a reasonable timeframe, considering that Frontex often had to carry out exchanges with national authorities, and sometimes with complainants, to clarify the details of allegations. However, the Ombudsman considers that having a formal deadline for reviewing the admissibility of complaints would be desirable. This could be addressed in context of the revision of the complaints mechanism implementing rules.

24. The material reviewed by the Ombudsman indicates that the FRO provided thorough and timely explanations to complainants about how their complaint would be handled, including contact details of the national authority and human rights body to which their complaints were forwarded. Where complaints were inadmissible complaints, the FRO explained the reasons why and provided advice on where the complainant could turn to for help.

25. The FRO has also offered complainants the possibility to appeal its decision on their complaint in certain cases. [36] However, the Ombudsman considers that the possibility to appeal decisions should be made more formalised, and that this would enhance the credibility of the mechanism.

26. The material reviewed suggests that the FRO acts in a timely and thorough manner in forwarding admissible complaints to national authorities and human rights bodies, and following up on the complaints. [37] Closing decisions are generally well-reasoned and convincingly argued in terms of alleged violations of fundamental rights. [38]

27. The FRO has made recommendations to the Member States for systemic improvements. Even if Member States have exclusive competence to conduct investigations concerning the violations of fundamental rights in Frontex operations by staff from their national authorities, the FRO is empowered to conduct investigations into any Frontex activities [39] . In doing so, the FRO has a duty to draw attention to wrongdoings by national authorities in joint

operations/operations coordinated by Frontex. To this end, the Ombudsman welcomes that the FRO's closing decisions also include recommendations to Frontex on what it could do to ensure that Member States avoid such issues in the future.

28. While the FRO's recommendations are not binding, the Ombudsman welcomes that Frontex followed up on the recommendations concerning systemic issues.

29. The Executive Director of Frontex is obliged to cooperate with the FRO. [40] To that end, the Ombudsman considers that, where possible, the Executive Director should seek to act on the FRO's recommendations. In any event, the decision of the Executive Director on a complaint forwarded to him by the FRO may be challenged before the European Ombudsman. [41]

30. The Ombudsman notes that, while at the beginning of the existence of the complaints mechanism, the FRO's cooperation with the Executive Director and Frontex was not entirely satisfactory, this cooperation has improved over time. One of the inspected files demonstrated that the Executive Director contacted a national authority and the Management Board, with a view to ensuring the Member State in question followed up on a complaint forwarded to it by the FRO. [42] The Ombudsman trusts that this approach will continue.

31. The Ombudsman's inspection demonstrated that there have been problems with the cooperation between the FRO and national authorities. [43] There have been delays in replying by national authorities, and so far their replies have not included evidence on the substance of the case, even in cases where the FRO explicitly asked for evidence. [44] Frontex should consider including clearer provisions in the new complaints mechanism implementing rules concerning the follow up of complaints at national level [45] , notably by providing a template for replies to the FRO.

32. Regulation 2019/1896 obliges national authorities not only to ensure appropriate follow up to complaints forwarded by the FRO, but also to report back to the FRO within a defined time period on their findings and follow up to complaints. The new complaints mechanism implementing rules should keep the current compulsory deadline for the Member States to report to the FRO within six months from the date they receive the complaint by the FRO. For each case in which a Member State does not comply with the obligation to report to the FRO, the FRO should be able to refer the matter to the Management Board. Since the European Commission, which monitors national compliance with EU law, sits on the Management Board, this could be an additional means for ensuring compliance.

33. Ensuring timely and adequate follow up to complaints is essential. If a Member State does not follow up in a timely and appropriate manner, Frontex cannot comply with its duty under Regulation 2019/1896 to request the Member State concerned to remove its staff from the Frontex activity immediately, where they are found to have violated fundamental rights or international protection obligations. [46]

34. The complaints mechanism implementing rules could give examples of possible sanctions

for Member States if they do not cooperate with the FRO, on the basis of Article 111.7 of Regulation 2019/1896. To be fully comprehensive, these rules could thus refer to the possibility for the Executive Director to suspend or not launch Frontex activities, where there are violations of fundamental rights, in accordance with Article 46 of Regulation 2019/1896.

35. While the FRO does not explicitly have the power to conduct own-initiative investigations, the FRO uses two procedures that essentially serve this purpose: 'expression of concern' and 'imminent risk'. The 'imminent risk' procedure allows the FRO to help complainants whose complaints do not comply with the procedural requirements for admissibility, but where the information provided in the complaint constitutes an imminent risk of serious and irreparable harm to their fundamental rights due to Frontex's activities. The 'expression of concern' procedure applies if information received by the FRO or an inadmissible complaint raises issues that could have more general fundamental rights implications for a Frontex activity. [47] Both procedures can serve to uncover systemic problems. The FRO seems to use these instruments appropriately and effectively, in particular the 'imminent risk' procedure to deal with complaints about fundamental rights violations in the context of return operations.

Transparency of the complaints mechanism

36. It took Frontex two years after the setup of the complaints mechanism in 2016 to provide details on complaints in its annual reports, but the information remains generic.

37. The FRO has submitted periodic activity reports to the Management Board, but these have not been made public. The FRO also compiles detailed annual reports ('Individual complaints mechanism annual reports') on the mechanism, but these are also not published [48] .

38. While this lack of transparency is regrettable, under Regulation 2019/1896 [49] , the FRO now has a legal obligation to publish its own annual activity reports, including information on the extent to which the activities of Frontex respect fundamental rights. These reports should include information on the complaints mechanism and the implementation of the fundamental rights strategy.

39. However, simply publishing these reports will not be sufficient to ensure Frontex can be held accountable for the actions of the mechanism. To this end, the Ombudsman suggests that Frontex publish on its website the FRO's closing decisions on complaints (so called 'final reports'), if necessary after having anonymised their content. [50]

Independence of the complaints mechanism

40. The Ombudsman takes the view that the complaints mechanism can only be as independent as the FRO is.

41. During the first years of the complaints mechanism's existence, the FRO was appointed by the Executive Director and also reported to him [51] . The FRO had no managerial duties, such as recruitment or budgetary. In these circumstances, the FRO had to rely on the support of the

Consultative Forum to guarantee the independence of the complaints mechanism.

42. The Ombudsman considers that the FRO's cooperation with the Consultative Forum [52] is important in ensuring the independence of the mechanism, and that the two entities should seek to strengthen their collaboration. Formal processes to facilitate this cooperation would therefore be desirable.

43. The decision to replace the first FRO, during her prolonged absence, by a member of the Executive Director's private office (cabinet) clearly risked creating the perception that the FRO's independence may be compromised. However, by following the procedures, the interim FRO has helped to ensure the independence of the FRO's activities.

44. Regulation 2019/1896 reinforced both the role and the independence of the FRO. The FRO is to be assisted by the deputy FRO and at least 40 fundamental rights monitors, who will act on the ground under the supervision of the FRO. The fundamental rights monitors may also be assigned complaints mechanism tasks. The FRO's independence was confirmed by the rules issued by the Management Board in January 2021. In particular, according to Regulation 2019/1896, the FRO should report directly to the Management Board, and to the Executive Director only on possible violations of fundamental rights reported to the FRO by the fundamental rights monitors as the FRO " *deems necessary*" . The new implementing rules for the mechanism should take into account this difference.

45. It is regrettable that there has been delay by Frontex in implementing the important changes introduced by Regulation 2019/1896. It took Frontex about 13 months to take the necessary steps so that the Management Board could adopt the rules on the FRO's independence and further 3 months to complete the procedure for appointing a new FRO. The appointment of the deputy FRO has consequently been delayed, as the FRO must participate in that procedure. [53] The 40 fundamental rights monitors have not yet been appointed, even though this process should have been completed by 5 December 2020.

How the complaints mechanism applies in non-EU countries

46. The Ombudsman considers that, where non-EU countries have poor human rights records, Frontex should take this into account before seeking to cooperate and negotiate memoranda of understanding with bodies in those countries that are nominally responsible for human rights.

47. To make it easier for potential victims of fundamental rights violations to report incidents in non-EU countries where Frontex operations are ongoing, Frontex should be responsible for receiving complaints in the first instance, and deciding whether they need to transfer the complaint to the relevant national body. In its memoranda of understanding with the national human rights bodies of non-EU countries, Frontex should consider including provisions to this end.

The role of the Fundamental Rights Officer

Reply from Frontex and the FRO

48. Frontex has three mechanisms by which individuals can report violations of fundamental rights: the Complaints mechanism, the Serious Incident Report (SIR) mechanism and the 'supervisory mechanism on the use of force by statutory staff'.

49. The FRO deals with complaints alleging violations of fundamental rights due to actions or the failure to act by staff involved in the activities of Frontex, as well as with complaints alleging violations of the rules on the use of force. The FRO is supposed to ensure that incidents involving the use of force are thoroughly investigated and the results of those investigations are transmitted to the Consultative Forum. [54] The supervisory mechanism on the use of force functions in parallel with the complaints mechanism, for which the FRO is responsible. Reports of incidents involving the use of force are thus transmitted to the FRO.

50. In addition, the FRO acts as a coordinator whenever there is an SIR related to potential violations of fundamental rights.

The Ombudsman's assessment

51. The Ombudsman notes the large number of tasks for which the FRO is now responsible under Regulation 2019/1896. In addition to managerial and training tasks, and dealing with serious incidents reports and the complaints mechanism (including complaints on the use of force), the FRO also has a series of advisory tasks. These advisory tasks can be based on a specific request or on the FRO's own initiative, and include providing opinions on various Frontex activities (pilot projects, technical assistance projects and draft working arrangements with non-EU countries, among many others). The FRO also follows up on the monitoring reports of the joint return operations, both to the Member States and Frontex. The FRO also reviews Frontex's Fundamental Rights Strategy.

52. The most recent periodical reports on the FRO's activities [55] , which were submitted to the Management Board, show that the FRO's advisory tasks include providing observations and recommendations on Frontex operational plans and evaluation reports of joint operations (including return operations). [56] These observations and recommendations play an important role in ensuring the protection of fundamental rights in the context of Frontex operations.

53. However, it is essential that the FRO's advice is acted on to the greatest extent possible, and that the FRO monitors this. To this end, the FRO's annual reports could include a section on the concrete actions taken by the Frontex and the Member States following the FRO's observations and recommendations.

54. In addition, while the FRO has considerable independence over the functioning of the complaints mechanism (including dealing with complaints about the use of force), the same

cannot be said as regards its role vis-a-vis the SIRs in the context of fundamental rights issues. The Ombudsman's inspection showed that the SIR is an elaborate system, involving many participants, with the role of the FRO beginning only later in the process. This may diminish the influence of the FRO.

55. One way to mitigate this could be to ensure that SIRs on fundamental rights are directly reported to the FRO, who could carry out the initial assessment and categorise them. The Ombudsman is therefore pleased that Frontex followed on the recommendation of the Working Group on Fundamental Rights and Legal and Operational Aspects of Operations in the Aegean Sea, set up by its Management Board [57] , and will change the SIR distribution list in a way that FRO receives all SIRs on fundamental rights. [58]

56. It would be in compliance with the principles of good administration that once the FRO receives SIRs, the FRO could use a similar procedure to that employed by the complaints mechanism. To this end, the FRO's procedural rules on dealing with SIRs concerning suspected violations of fundamental rights should be made public, together with the mechanism's implementing rules.

Annex II: Complaints dealt with by the Fundamental Rights Officer 2016-2019

[59]

In the period covered by this inquiry, all complaints concerned the staff of national authorities participating in Frontex operations; there were no complaints concerning the actions of Frontex staff.

1. Complaints in 2016/17

In the FRO's report covering the entire year 2017 and the period between 6 October 2016 (when the complaints mechanism was set up) and 31 December 2017 (*Complaints Mechanism Fundamental Rights Officer Report to Executive Director and Management Board*), the FRO provided an overview of all complaints received during the reporting period. They were five admissible complaints and twelve inadmissible complaints.

Admissible complaints

A. The complaint concerned an operation to return migrants by plane ('air readmission operation') from Greece to Turkey, which was financed by Frontex and took place on 20 October 2016. The complainants, who were represented by a civil society representative, were a family of six Syrian nationals (including four children), who had formally requested asylum from the Greek authorities. They alleged violations of article 18 of the Charter of Fundamental Rights (right to asylum), article 24 (rights of the child), and article 19 (protection in the event of removal, expulsion or extradition). On 15 February 2017, the FRO forwarded the complaint to Greek authority, which by the end of the reporting period (30 December 2017) had not replied.

B. The complaint concerned an operation to return migrants by boat (readmission operation [60]) from Greece to Turkey, which was financed by Frontex and scheduled for 27 April 2017. The complainant, an Iranian national, applied for asylum in Greece and his application was pending before the national court at the time of his scheduled removal. He alleged violations of article 18 of the Charter of Fundamental Rights (right to asylum) and article 19 (protection in the event of removal, expulsion or extradition). The FRO forwarded the complaint to the Greek authority. The Greek authority cancelled the operation to return the complainant to Turkey.

C. The complaint concerned a readmission operation from Greece to Turkey, which was scheduled for 25 May 2017 and financed by Frontex. The complainant, a national of Pakistan, applied for asylum in Greece. His appeal against the negative decision on his asylum application was pending before the national court on the date of the scheduled operation. He alleged violations of article 18 of the Charter (right to asylum) and article 19 (protection in the event of removal, expulsion or extradition). The FRO forwarded the complaint to the Greek authority. The Greek authority cancelled the complainant's readmission.

D. The complaint concerned the border checks at the rail border crossing point in Terespol (Poland). The complainant, a Russian national, alleged that he attempted on several occasions to file an application for international protection at the border but they were all rejected, and he was sent back to Belarus. He alleged violations of article 18 of the Charter (right to asylum) and article 41 (right to good administration). The Polish authority informed the FRO that the complainant had no valid visa and did not file an application for international protection, but had invoked economic reasons to enter Poland. The case was pending by the end of the reporting period. The FRO asked for additional information.

E. The complaint concerned a joint return operation from Hungary to Afghanistan, dated 20 November 2017. The complainant, an Afghan citizen, alleged that he was returned from Hungary while his appeal was pending before the court. He argued that article 19 of the Charter of Fundamental Rights (protection in the event of removal, expulsion or extradition) and article 47 (right to effective remedy and fair trial) were violated. The FRO forwarded the complaint to the Hungarian authority. The case was pending by the end of the reporting period.

Inadmissible complaints

Seven complaints were inadmissible either because they did not relate to a Frontex activity or there was no involvement/presence of officers deployed by Frontex.

Three complaints concerned the Bulgarian authorities (one complaint submitted by 22 Sri Lanka citizens and one complaint from a citizen of Ghana were about extended detention without a reason; the third complaint was from another group of Sri Lankan citizens concerning their deportation). The FRO forwarded the three complaints to the Bulgarian ombudsman and UNHCR.

There was one complaint from a Syrian refugee detained in Moria (Greece) pending his return to and readmission by Turkey. He appealed the return decision before the national court.

Frontex was not involved. The FRO forwarded the complaint to the Greek Ombudsman.

Two complaints concerned border checks on the Polish-Belarus border. The FRO forwarded these complaints to the Polish Ombudsman and the Polish Border Guards. There was also a complaint concerning the checks at the Lithuanian-Russian border. Officers deployed by Frontex were not involved in these complaints.

Two complaints were anonymous and considered inadmissible because they did not relate to persons directly affected by a Frontex activity. One of those, concerning the conditions faced by migrants arriving on Chios Island (Greece), was dealt with by the FRO as 'an expression of concern'. The FRO informed Frontex's executive director about the issues, and he contacted the Greek authorities.

Two inadmissible complaints did not concern fundamental rights violations: a complaint from a journalist about the refusal to record a readmission operation in Lesbos; and a complaint from an EU citizen about the long waiting time to cross the Hungarian-Serbian border.

2. Complaints in 2018

In the FRO's report for 2018 (*Individual Complaints Mechanism Annual Report*), the FRO provided an overview of complaints received during that year. Three complaints were declared admissible, with national procedures ongoing at the time of the report. Seven complaints were declared inadmissible.

Admissible complaints

A. The complaint was carried over from 2017, since the case had not been closed. The complaint concerned a Frontex-coordinated operation to return migrants by plane (air readmission operation) from Greece to Turkey, which took place on 20 October 2016. The complainants were a family of six persons (including four children) who had formally informed the Greek authorities that they were seeking asylum in Greece. They alleged violations of article 18 of the Charter of Fundamental Rights (right to asylum), article 24 (rights of the child) and article 19 (protection in the event of removal, expulsion or extradition). The FRO forwarded the complaint to the Greek authority, which did not reply within the applicable timeframe.

B. The delay in the response of the Greek authority to dealing with complaint A triggered a second complaint from the same complainants about the delay.

C. The complaint concerned a joint return operation from Spain to Colombia, which took place on 26 September 2018. The complainant alleged violations of article 1 of the Charter of Fundamental Rights (human dignity) and article 4 (prohibition of torture and inhuman or degrading treatment or punishment) in the context of his return. The FRO forwarded the complaint to the Spanish police. Following the first reply by the Spanish police, the FRO asked additional questions.

D. The complaint concerned incidents with a joint operation on border checks at the Polish-Belarussian border that took place on 3 September 2018. The complainant is a person with disabilities and reduced mobility, who alleged that he was a victim of a violation of article 26 of the Charter of Fundamental Rights (integration of persons with disabilities). The FRO forwarded the complaint to the Polish authority (National Focal Point). The case is pending.

Inadmissible complaints

Seven complaints were inadmissible because they did not concern Frontex's activities.

The FRO forwarded two inadmissible complaints to the Polish Ombudsman and to the Polish Board Guard: one concerning the detention without a reason of a non-EU citizen travelling from Germany to Poland by train, and the second about the 10-hour delay in checking a family at the Polish-Ukrainian border.

Two complaints concerned difficulties experienced by individuals entering Italy. Another complaint was submitted by an EU citizen who was stopped frequently at the Spanish-Moroccan border. Another complaint concerned checks at the Croatian border with Bosnia and Herzegovina.

The FRO received one anonymous complaint, which did not relate to a Frontex activity.

3. Complaints in 2019

In the FRO's report for 2019 (*Individual Complaints Mechanism Annual Report*), the FRO provided an overview of complaints received during that year. Seven complaints were declared admissible. The complaints mechanism procedure was finalised in relation to three of these complaints, and the procedure concerning the remaining four is ongoing. Eleven complaints were declared inadmissible.

Admissible complaints

A. The complaint concerned a joint return operation (by air) from Budapest, scheduled on 7 May 2019. Three families (sixteen persons, including children and women in vulnerable situations) were to be returned from Hungary. However, they had applied for asylum in Hungary and their appeal was pending. They alleged that their return would violate EU asylum law, as their asylum applications had not been examined on their merits but merely dismissed as inadmissible, based on a specific provision introduced by Hungary that, they said, is contrary to EU asylum law. The FRO asked the Hungarian authority for a reply. The Hungarian authority: denied that there had been fundamental rights violations; maintained that the complainants' legal rights were upheld by the Asylum Office and the national court; stated that the conditions in which the families had been held in transit zone had been adequate; stated that the complainants had voluntarily left Hungary for Serbia before the decision to return them was actually applied.

B. The complaint concerned a joint operation 'Focal Points 2019 Land' at the crossing point

Roszke (Hungary), with two persons alleging mistreatment by a Hungarian border guard. The Hungarian authority informed the FRO that the complainants' statements were in contradiction with a statement made by the representatives of the Department of Justice and Supervision, which is responsible for the border guard; and that the circumstances could not be ascertained.

C. The complaint concerned the joint operation 'Coordination Points 2019 Air' in Kutaisi airport (Georgia). The complainants (two families) alleged verbal mistreatment and violation of their right to good administration by national officers deployed by Frontex to that operation. The FRO forwarded the complaint to the French and Italian National Focal Points.

D. The complaint concerned the joint operation 'Focal Points 2019 Land' at the border crossing point in Terespol (Poland). The complainant alleged verbal mistreatment by a Polish border guard. The Polish Border Guards informed the FRO that they conducted an investigation and found that there was no violation of the complainant's rights, and that any perception of such may have been due to linguistic barriers.

E. The complaint concerned a joint return operation financed by Frontex (by air) from Sweden, scheduled for 12 November 2019. The complainant alleged that the flight would seriously undermine his health. The complainant submitted medical certificates in support of his claim. The Swedish authority replied to the FRO that the complainant had appealed against his return on numerous occasions and that the outcomes had always been negative, as medical assessments did not corroborate his claims. Ultimately, the complainant was not returned.

F. The complaint concerned the return of an individual from Lesbos (Greece) to Turkey under a Frontex-financed operation that was scheduled for 15 November 2019. The complainant alleged violations of article 18 of the Charter of Fundamental Rights (the right to asylum), article 47 (right to effective remedy and fair trial) and article 19 (protection in the event of removal, expulsion and extradition). The case is pending before the Greek authorities.

G. The complaint concerned a joint return operation by air, from Sweden, financed by Frontex and scheduled for 9 December 2019. The complainant alleged that he was going to be returned to a country where he had never been, in violation of article 19 of the Charter of Fundamental Rights (protection in the event of removal, expulsion and extradition). The Swedish authority informed the FRO that the Swedish Migration Agency had reviewed the complainant's asylum application and issued a negative decision, and that his appeal before the court was rejected. At the moment when the Swedish authority replied, the complainant was still in Sweden.

Inadmissible complaints

Seven complaints were not admissible because they were not related to any activity of Frontex, and two were inadmissible because they did not concern violations of fundamental rights. Three of the complaints were about the checks at borders (at the land borders between Morocco-Spain and Poland-Ukraine); at airports in Italy and Denmark; and at the sea border in Tarifa (Spain). There were two complaints submitted by families: one complaint concerned a family that alleged that they had no tent in the camp for refugees in Moria (Greece); another

complaint concerned the waiting time at the Greek border. One complaint was submitted by two members of Frontex team in Almeria (Spain) against another team member, for alleged insults. One complaint was about mistreatment of residents by two staff members at the camp for refugees in Drama (Greece).

Annex III: Awareness-raising activities carried out by Frontex

1. Based on data on the nationalities of persons arriving at the EU's borders and the countries to which the forced returns supported by Frontex are made, Frontex compiled a list of the most common languages of potential complainants to the complaints-mechanism. The complaint form is now available on Frontex's website in the thirteen most common languages [61] . The FRO can also deal with complaints received in other languages, using different translation services available to the EU administration. To this end, Frontex intends to update the complaint form on its website to state that a person can submit a complaint in any language. Leaflets it makes available to persons arriving at the EU's borders already specify that they can submit a complaint in any language.

2. While Frontex encourages complainants to use the online form, it also accepts written complaints submitted by post or email. Participants in Frontex operations should help those seeking to submit complaints and transmit complaints to the FRO, even if the complaint relates to the participants themselves. Such complaints are currently not registered on the ground, but Frontex plans to set up a mechanism for doing so.

3. A tool for submitting complaints directly by smartphones is currently being developed, with the first prototype in English planned to be available in the first quarter of 2021.

4. In 2017-20, the FRO worked on raising awareness about the mechanism by producing public information material (a booklet and poster about the mechanism) and organising training and workshops for all Frontex staff, as well as for staff of national authorities and other stakeholders. The booklet is available in 14 languages on Frontex's website and is printed in 12 languages. In the context of joint return operations, Frontex distributed 12 500 copies of the booklet and 100 posters. The FRO is considering creating tailored material for children about the mechanism, as well as a video for the general public.

5. FRO staff have carried out field visits, with a view to raising awareness about the mechanism, but it can be difficult to reach potential complainants, not least due to language difficulties and the situation on the ground. Where possible, the FRO uses the European Asylum Support Office's (EASO) facilities in order to make booklets and other information available, as well as national authorities or civil society organisations where possible.

[1] Created in 2012, the Forum brings together key EU institutions, international and civil

society organisations to advise Frontex in fundamental rights matters. https://frontex.europa.eu/accountability/fundamental-rights/consultative-forum/general/ [Link]

[2] Regulation 2019/1896 on the European Border and Coast Guard: https://eur-lex.europa.eu/eli/reg/2019/1896/oj [Link].

[3] Further details on the number and nature of complaints can be found in annex II.

[4] Serious Incident Reports (SIR) aim to inform Frontex, Member States and other stakeholders as soon as possible about 'serious incidents', as described in the 'Frontex Serious Incident Catalogue'.

[5] Serious incidents are defined as an event or occurrence that may affect or be relevant to the Frontex mission, Frontex's image and/or the safety and security of participants on operations, including violations of fundamental rights or EU or international law.

[6] Article 111 of Regulation 2019/1896.

[7] Article 109 of Regulation 2019/1896.

[8] Annex V of Regulation 2019/1896.

[9] Article 110 of Regulation 2019/1896.

[10] The rules were adopted by the Management Board of Frontex ('Management Board Decision 6/2021 of 20 January 2021 adopting special rules to guarantee the independence of the Fundamental Rights Officer and his or hr staff').

[11] The Ombudsman's letter to Frontex is available at: https://www.ombudsman.europa.eu/en/correspondence/en/134842.

[12] available at: https://www.ombudsman.europa.eu/en/correspondence/en/137728

[13] available at: https://www.ombudsman.europa.eu/en/report/en/139670

[14] Ombudsmen of Belgium, Bulgaria, Croatia, Cyprus, Czechia, Denmark, Estonia, Finland, Greece, Norway, Slovakia, and Slovenia.

[15] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016R1624 [Link]

[16] Recital 104 of Regulation 2019/1896: "(...) the mechanism should be effective, ensuring that complaints are properly followed-up.(...)"

[17] The arguments were submitted in the letters of the Frontex Executive Director and of the interim FRO, as well as by the interim FRO during the inspection meeting with the

Ombudsman's inquiry team.

[18] In the context of the inquiry, the FRO argued that the Officer needs tools to ensure that national authorities or Frontex reply in a timely, comprehensive and transparent manner, and that Frontex follows up where no reply has been received.

[19] To this end, Frontex is currently in the process of concluding Memoranda of Understanding concerning the mechanism with the relevant bodies in Albania and Montenegro.

[20] Art. 109.4 of Regulation 2019/1869.

[21] As described in the Annex I to the Decision.

[22] Article 38(3)n of Regulation 2019/1896.

[23] CODE OF CONDUCT - applicable to all persons participating in Frontex operational activities (europa.eu) [Link]

[24] Individual complaints mechanism Annual Report 2018. Not yet published.

[25] See the ECA's 53rd observation concerning a cultural mediator in its audit report dated 8 June 2021, concerning Frontex: https://op.europa.eu/webpub/eca/special-reports/frontex-8-2021/en/#chapter3

[26] With the exception of the poster on the complaints mechanism, the existing awareness-raising material does not emphasise these elements adequately: https://frontex.europa.eu/accountability/complaints-mechanism/ [Link]

[27] Annex II to this decision details some of the challenging situations faced by individuals.

[28] Ten of the twelve ombudsmen who replied to the European Ombudsman stated that they have not received complaints directly from persons affected by Frontex operations, in which their national authorities took part, about alleged violations of fundamental rights.

[29] The Greek ombudsman who receives the highest number of complaints from migrants and refugees about the infringements of their rights at the EU borders, compared to other ombudsmen, stated in its interim report 'Alleged pushbacks to Turkey of foreign nationals who arrived in Greece seeking international protection' that among 15 individual complaints about the pushbacks he investigated, 12 were submitted by NGOs and one by a lawyer acting on behalf of individuals (https://www.synigoros.gr/?i=human-rights.en.recentinterventions.791674 [Link]).

[30] The Ombudsman's team inspected the draft CM implementing rules, which Frontex classified as confidential.

[31] On the one hand, the complaint form quotes from Regulation 2019/1896: " *complaints are dealt with confidentially by Frontex and the FRO ... complainants must confirm that they are explicitly authorising the FRO to disclose [their] identity and personal data (…) with the relevant national authorities and fundamental rights institutions* ." On the other hand, it states: " *If you decide not to share your personal data, the complaint may be rejected by the competent national authorities and human rights institution* '."

[32] Annex V, Regulation 2019/1896

[33] Point 4, under 'Complaints mechanism', Annex V of Regulation 2019/1896: *"Any person may submit a complaint to report suspected breaches by statutory staff deployed as members of the teams of the rules on the use of force applicable under this Annex through the complaints mechanism provided for in Article 111* ."

[34] During the meeting with the Ombudsman's team, the interim FRO referred to Article 111.8 of Regulation 2019/1896 and stated that, where a staff member of a national authority has failed to comply with the rules on the use of force, Frontex should request the Member State to remove that staff member from Frontex operations. See the report of the inspection meeting at: https://www.ombudsman.europa.eu/en/report/en/139670.

[35] Between the entry into force of the regulation on 4 December 2020 introducing a possibility to complain about a failure to act, and February 2021 when the reply to the Ombudsman was provided, the FRO has received no complaint concerning a failure to act. See the report on the inspection meeting with the FRO: https://www.ombudsman.europa.eu/en/report/en/139670

[36] In accordance with Article 111(5) of Regulation 2019/1896. See the report on the inspection meeting with the interim FRO: https://www.ombudsman.europa.eu/en/report/en/139670

[37] The Ombudsman's inquiry team inspected the exchanges between the FRO, national human rights bodies and national authorities. Frontex considered these documents confidential.

[38] The Ombudsman's inquiry team inspected the FRO's closing decisions and final reports on cases. Frontex considered these documents confidential.

[39] Article 109.2.b of Regulation 2019/1896.

[40] Article 111.6 of Regulation 2019/1896: "In case of a registered complaint concerning a staff member of the Agency, the fundamental rights officer shall recommend appropriate follow-up, including disciplinary measures to the executive director, and where appropriate, referral for the initiation of civil or criminal justice proceedings in accordance with this Regulation and national law. The executive director shall ensure the appropriate follow-up and shall report back to the fundamental rights officer within a determined timeframe and, if necessary, at regular intervals thereafter, as to the findings, the implementation of disciplinary measures, and follow-up by the Agency in response to a complaint."

[41] Article 228 TFEU provides that the European Ombudsman can deal with complaints about instances of maladministration in the activities of the union institutions, bodies and agencies, with the exception of the Court of Justice of the European Union acting in its judicial role.

[42] Article 111.7: "(...) The Agency shall follow up on the matter if no report is received from the relevant Member State. Where the relevant Member State, within the determined time period, does not report back or provides only an inconclusive response, the fundamental rights officer shall inform the executive director and the management board."

[43] One case concerning the Greek authorities is mentioned in Frontex annual general report for 2018. The FRO did not receive feedback from the Greek authorities within the deadline set out in the complaint mechanism rules in force (six months after forwarding complaint). The FRO concluded that this situation endangers the effectiveness of the mechanism. Another complaint concerning Greece is pending before the Hellenic authorities since November 2019. This case will be recorded as closed in the FRO Annual Report for 2020, according to the FRO's ad interim statement during the meeting with the Ombudsman's team (see report at: https://www.ombudsman.europa.eu/en/report/en/139670).

[44] See the report of the Ombudsman's inspection meeting at: https://www.ombudsman.europa.eu/en/report/en/139670

[45] The Consultative Forum made a recommendation to this end, in its 2016 annual report.

[46] Art. 111.8 of Regulation 2019/1896.

[47] See Annex II to the decision. The FRO has dealt for instance with one inadmissible complaint concerning the conditions faced by migrants arriving on Chios Island (Greece), as 'an expression of concern'. The FRO informed Frontex's executive director about the issues, and he contacted the Greek authorities.

[48] Frontex considered the reports for 2018, 2019 and 2020 to be non-confidential during the Ombudsman's inspection.

[49] Article 109.4 of Regulation 2019/1896.

[50] The Consultative Forum also suggested this in its 2018 annual report.

[51] The FRO also reported to the Management Board.

[52] In 2018, Frontex's Consultative Forum raised concerns about the arrangement found to temporarily replace the FRO during a period of extended sick leave, notably concerning the impact on the independence of the FRO and potential conflicts of interest. The management board, based on a proposal by the executive director, appointed an advisor in the private office ('cabinet') of the Executive Director as an interim FRO.

[53] Article 109.6 of Regulation 2019/1896.

[54] As set out in Annex V to Regulation 2019/1896.

[55] Reviewed in the context of the Ombudsman's inspection. Frontex declared the reports 'confidential'.

[56] For instance, in one period of six months, the FRO issued five observations reports on operational plans and ten on Frontex's evaluations reports concerning joint operations.

[57] Fundamental Rights and Legal Operational Aspects of Operations in the Aegean Sea, Final Report of the Frontex Management Board Working Group, 1 March 2021.

[58] https://frontex.europa.eu/assets/Key_Documents/MB_Documents/Frontex_Roadmap_WG_FRALO_Recommendati

[59] The Annex includes the information on complaints provided by the FRO in the FRO's annual reports for 2017, 2018 and 2019. The Ombudsman's investigative team inspected these reports. Frontex declared that these three reports are not confidential. All the remaining documents concerning complaints, which the Ombudsman's inquiry team inspected, were declared confidential.

[60] Frontex uses the term 'readmission operation' to describe operations to return migrants to the non-EU country of their departure with which the EU has an agreement to 'readmit' migrants.

[61] Arabic, English, French, Urdu, Tigrinya, Pashtu, Farsi, Spanish, German, Russian, Kurdish, Serbian and Albanian.