

Otsus juhtumi OI/4/2021/MHZ kohta, mis käsitleb seda, kuidas Euroopa Piiri- ja Rannikuvalve Amet (Frontex) täidab oma põhiõigustega seotud kohustusi ja tagab vastutuse seoses oma suurenenud kohustustega

Otsus

Juhtum OI/4/2021/MHZ - **Alguskuupäev:** {0} 04/03/2021 - **Otsuse kuupäev:** {0} 17/01/2022
- **Asjassepuutuvad institutsioonid** Euroopa Piiri- ja Rannikuvalve Amet (Edasine uurimine ei ole põhjendatud) |

Omaalgatusliku uurimise käigus hinnati, kuidas Euroopa Piiri- ja Rannikuvalve Amet (Frontex) täidab põhiõiguste ja läbipaistvusega seotud kohustusi, mis tulenevad määrusest 2019/1896 (Frontexi määrus), millega laiendati Frontexi volitusi.

Selle käigus uuriti, kuidas Frontex tagab oma operatsioonide parameetreid kirjeldavate operatsiooniplaanide läbipaistvuse ning mille põhjal ta otsustab tegevuse peatada, lõpetada või seda mitte alata, kui esineb põhiõigustega seotud probleeme. Uurimise käigus hinnati ka põhiõigustest kinnipidamise jälgimist sunniviilise tagasisaatmise puhul ning Frontexi suuniseid ebaseaduslikult ELi välispiiri ületavate või seda üritavate dokumentideta isikute taustakontrolli kohta.

Uurimise tulemuste põhjal tegi ombudsman Frontexile mitmeid ettepanekuid ameti vastutuse suurendamiseks. Ombudsman kutsub Frontexi üles ennetavalt tagama, et tema operatsiooniplaanid ja põhiõigusi käsitlevad analüüsid, mille põhjal tegevusdirektor teeb otsuseid operatsioonide algatamise, peatamise või lõpetamise kohta, oleksid läbipaistvad. Ta soovib Frontexil anda pagulastega vestlevatele taustakontrollirühmadele konkreetsed juhised. Samuti kutsub ombudsman Frontexi üles parandama järelevalvet sunniviilise tagasisaatmise üle, mille puhul saatjad on Frontexi töötajad, ning tagama paremat aruandlust järelevalveoperatsioonide kohta.

Background

1. Regulation 2019/1896 [1] ('the Frontex Regulation') expanded the mandate of the European Border and Coast Guard Agency (Frontex).

2. The Frontex Regulation includes a provision establishing a uniformed law enforcement



service under the responsibility of Frontex (the 'standing corps') [2] , which can be deployed to the EU's external borders. The standing corps carries out tasks related to border management, migration management, rapid border interventions and return operations, and has certain executive powers [3] to conduct this work.

3. Frontex also organises and coordinates operations at the EU's external borders in which Frontex and national authorities take part by deploying technical equipment, border guards or both ('joint operations').

4. The details of these operations are set out in advance in 'operational plans'. [4] These plans include the description of tasks and responsibilities of all the participants, including with regard to the respect for fundamental rights. They are accompanied by 'handbooks to the operational plans', which contain guidelines and further information about operational activities, services and products, reporting platforms and other matters. Frontex does not publish the operational plans or the handbooks.

5. The Frontex Regulation also confirms Frontex's role in coordinating all EU forced returns and empowers Frontex staff to act both as 'escort officers' and as 'fundamental rights monitors' during forced returns. Frontex also has responsibility for voluntary returns.

6. The Frontex Regulation balances this expanded role with **additional transparency obligations and fundamental rights safeguards** . For all its activities, Frontex must apply high transparency standards, allowing for public scrutiny, and ensure full respect for fundamental rights. [5]

7. The Frontex Regulation includes a number of fundamental rights safeguards: a Fundamental Rights Strategy and action plan [6] ; a Serious Incident Reporting procedure [7] ; a strengthened Complaints Mechanism [8] ; and a supervisory mechanism on the use of force [9] .

8. Frontex's Executive Director is obliged to suspend, terminate or withdraw the financing for any Frontex activity if they consider that there is a risk of violations of fundamental rights or international protection obligations that are of a serious nature or are likely to persist. [10] The Executive Director may also decide not to launch [11] an activity where they consider that there may be serious reasons to suspend or terminate the activity, after it has been launched, due to violations of fundamental rights or international protection obligations of a serious nature.

9. These decisions should be based on duly justified grounds [12] and may be taken only after consulting with Frontex's Fundamental Rights Officer (FRO). The Fundamental Rights Officer developed the 'Fundamental Rights Due Diligence Procedure'. Through this procedure, the FRO provides advice to the Executive Director before they take decisions on launching a new activity or decisions to suspend, withdraw or terminate an ongoing activity.

10. Each return operation organised or coordinated by Frontex should be monitored on the basis of objective and transparent criteria [13] .



11. Return operations include both escorts, who carry out the return, and monitors, who monitor fundamental rights compliance . *For returns organised by the Member States* , the escorts are members of the national body that carries out the return operation, whereas the monitors are members of another national body or other organisation. *Returns that Frontex organises and coordinates* are monitored by national monitoring bodies [14] , in accordance with the Returns Directive [15] . Frontex has also established a pool of forced return monitors [16] , who are drawn from national bodies but also include Frontex fundamental rights monitors (currently five) [17] . According to the Frontex Regulation, in returns coordinated/organised by Frontex, both the escorts and monitors may be members of Frontex staff. The Frontex Regulation states that all monitors, including Frontex's 'fundamental rights monitors', should report on such activities.

12. Where individuals cross or attempt to cross an external EU border irregularly, they may undergo 'screening' procedures, prior to any asylum application, notably where they are undocumented. Frontex staff may assist Member States in identification procedures through nationality screening, debriefing [18] , registration and fingerprinting. Frontex staff also provide expertise on the origin and veracity of documents submitted by migrants. Screening interviews may take place in the presence of an expert familiar with the cultural requirements of the interviewee (a 'cultural expert' [19]), but this is not always the case.

The inquiry

13. In the course of this inquiry, the Ombudsman assessed how Frontex complies with its transparency obligations and how it implements certain fundamental rights safeguards under the Frontex Regulation. [20]

14. In the context of this inquiry, the Ombudsman asked Frontex to reply to a set of questions concerning different aspects of its work, [21] including on:

- the transparency of operational plans and handbooks for joint operations,
- fundamental rights concerns and the role of the Executive Director,
- the monitoring of returns and the provisions for vulnerable persons, and
- the instructions to 'migration management support teams' to ensure fundamental rights protection, notably during the screening of migrants.

The Ombudsman forwarded Frontex's reply to civil society organisations active in the field of asylum and migration for their comments. Their replies were published on the Ombudsman's website. [22] The Ombudsman also inspected relevant documents held by Frontex. [23]

Annex 1 to this Decision contains a detailed account of the inquiry, including questions by the Ombudsman, Frontex's replies, the comments by civil society organisations and the Ombudsman's detailed assessment.

Overview of the Ombudsman's assessment

Publication of operational plans and handbooks for joint operations

15. The accountability mechanisms applicable to Frontex's joint operations can be effective only if Frontex provides sufficient transparency to enable independent scrutiny. The joint operations



involve multiple participants that have different obligations and may span different jurisdictions. Where violations occur, the nature of these operations makes it difficult to determine who was ultimately responsible.

16. On the basis of Frontex's reply [24] , the Ombudsman takes the view that publishing accurate, detailed, timely and comprehensive summaries of the operational plans of past and current operations could satisfy the transparency requirements, facilitate scrutiny and accountability and, ultimately, provide greater legitimacy for operations. Information that is relevant to the assessment of compliance with fundamental rights should be excluded from such summaries only if its publication would be detrimental to the tasks of Frontex, and in particular the objective of a given operation.

17. Similarly, Frontex could publish an overview of responsibilities for different categories of participants in the operations [25] , which are included in the handbooks to the operational plans [26] .

Identification of fundamental rights concerns and remedies for fundamental rights violations

18. The Ombudsman considers that the Fundamental Rights Due Diligence Procedure constitutes an appropriate preventive tool, notably if it is taken duly into consideration by the Executive Director in decisions on whether to suspend, terminate or withdraw the financing for Frontex activities for which there are fundamental rights concerns [27] . It sets out a timeline for the FRO's opinions and establishes clear criteria for the FRO to issue a negative opinion. [28] It provides operational guidelines on how to assess fundamental rights risks by using the checklists. Information taken into consideration by the FRO includes the reports of civil society organisations. The Fundamental Rights Due Diligence Procedure does not, however, state that the FRO's assessment should take into account the reports of national human rights bodies, such as ombudsmen [29] . This should be redressed.

Monitoring of returns and the provisions for vulnerable persons

19. The Ombudsman takes the view that monitors who monitor not only escorts from a specific Member State but also Frontex escorts should come from an independent body. Frontex could encourage the Member States via the Management Board to designate existing independent monitoring bodies as forced return monitors, and enlarge their monitoring powers as far as possible. [30]

20. In addition, to ensure the independence of Frontex fundamental rights monitors who monitor returns, Frontex should ensure that they are not given instructions by other Frontex staff. They should have the freedom to submit their observations unhindered at each stage of the return operation. This should be specified in the operational plans.



21. The Ombudsman points out that, when ombudsmen act as monitors, they include relevant findings in their annual reports, which are presented to national parliaments. They may also publish reports about a specific return, in an anonymised version. Frontex could consider adopting the same practice as regards the operations in which the monitors (national monitors from the pool and fundamental rights monitors acting as return monitors) submit their reports to it and to the FRO.

Instructions to ‘migration management support teams’ to ensure fundamental rights protection, notably during the screening of migrants

22. The screening process should be long enough to ensure important information can be identified, not only about the identity of individuals but also potential vulnerabilities. Given the sensitivity of such situations, migrants need to be given sufficient time and may require psychological help to be able to communicate properly during such procedures. [31] The guidelines on screening activities, which are included in the handbooks to the operational plans, could be more explicit in this respect. They could also be more detailed regarding the specific needs to be taken into account in registering minors. [32]

23. The guidelines state that, during screening, Frontex staff should provide migrants with basic information on international protection. To this end, the Ombudsman considers it would be useful to make available at screening venues, in as many languages as possible, leaflets, brochures and other information on the rights and obligations of asylum seekers. The guidelines could specify this and stipulate that Frontex staff should ask national authorities to ensure this. [33]

Conclusion

The inquiry identified areas where Frontex could make improvements.

Suggestions for improvement

I. Frontex should ensure a more proactive approach to transparency, including publishing documents that are needed to understand the respective roles and responsibilities of the actors involved in its operations. This includes summaries of operational plans and summaries of parts of the handbooks to the operational plans.

II. In carrying out the ‘Fundamental Rights Due Diligence Procedure’, the Fundamental Rights Officer (FRO) should take into account the relevant reports of national human rights bodies, such as ombudsmen. Frontex should publish on its website a summary of the Fundamental Rights Due Diligence Procedure and, once adopted, of its rules on how the Executive Director takes decisions to suspend, terminate or withdraw the financing for Frontex activities for which



there are fundamental rights concerns. Frontex should also publish the Executive Director's reply to each negative opinion of the Fundamental Rights Officer about a planned activity. The FRO's annual report should include information on the follow up to mitigating measures suggested by the FRO in relation to past operations.

III. Frontex should make clear, through training and by other available means, that forced return monitors from its pool should report any incident they observe, irrespective of whether it concerns the officers from the Member State they are tasked with monitoring, another Member State or Frontex. Frontex should seek the agreement of the Member States to implement this. Frontex 'fundamental rights monitors' who act as forced return monitors should be trained on how to apply the highest level of objectivity. They should not be made responsible for reporting on the conduct of Frontex escorts, where there may be a risk of a lack of objectivity. Frontex should publish on its website an anonymised version of the reports of forced return monitors after each return operation.

IV. The guidelines for 'screening officers' should indicate the timeline for the 'screening process' and provide more details on how to register minors and document the answers to questions asked during the screening process. Frontex officers should require the presence of a 'cultural expert' during the screening and that the host Member State makes available in as many languages as possible information about the applicable procedures.

Emily O'Reilly European Ombudsman

Strasbourg, 17/01/2022

ANNEXES :

Annex 1

This Annex contains an account of the Ombudsman's inquiry and findings. Each section is structured as follows:

- The Ombudsman's questions to Frontex
- Frontex's replies
- Comments by civil society organisations
- The Ombudsman's analysis (including suggestions for improvement)

Transparency of operational plans and handbooks for



joint operations

The Ombudsman's questions

1. The Ombudsman asked whether Frontex could publish operational plans and handbooks for joint operations to allow the public to understand who is responsible for which aspects of these operations.

Reply from Frontex

2. Frontex explained that each operational plan is composed of a general part and a 'specific activity plan'.

3. The general part, which is normally the same for all operations, describes responsibilities in respect of fundamental rights. It includes instructions on how to ensure that fundamental rights are safeguarded. The specific activity plans include provisions for each joint operation.

Frontex said that " *due to the nature of the activity, the full content of the operational plans for ongoing joint operations cannot be disclosed*". Frontex attached to its reply extracts of the general part, two codes of conduct that are included as annexes in the general part [34] , and an example of a 'handbook to the operational plan' (which is also included as an annex in the general part of the plan). Frontex specified that the handbook should be treated as confidential.

Comments from civil society organisations

4. The Meijers Committee indicated that operational plans are not even partially disclosed during ongoing joint operations. For completed operations, Frontex has never published these plans on its own initiative. It has, however, disclosed heavily redacted copies of operational plans upon request.

The Ombudsman's assessment

5. On the relevant sections of Frontex's website concerning its document register and key documents [35] , there is no reference to operational plans, evaluation reports for joint operations or the summaries of either. Frontex publishes only the codes of conduct [36] , which are annexed to operational plans.

6. Certain parts of the operational plans set out the precise role and tasks of all staff involved in Frontex joint operations. [37] These parts are crucial for establishing the extent to which staff members are responsible for possible fundamental rights violations.



7. The accountability mechanisms applicable to Frontex's joint operations can be effective only if Frontex provides sufficient transparency to enable independent scrutiny. The joint operations involve multiple participants that have different obligations and may span different jurisdictions. Where violations occur, the nature of these operations makes it difficult to determine who was ultimately responsible.

8. The Frontex Regulation [38] states that Frontex cannot disclose operational information that, if made public, could jeopardise attaining the objectives of operations. However, the Frontex Regulation [39] also states that Frontex should publish " *comprehensive information on past and current joint operations* " .

9. On the basis of Frontex's reply [40] , the Ombudsman takes the view that publishing accurate, detailed, timely and comprehensive *summaries* of the operational plans of past and current operations could satisfy the transparency requirements, facilitate scrutiny and accountability and, ultimately, provide greater legitimacy for operations. Information that is relevant to the assessment of compliance with fundamental rights should be excluded from such summaries only if its publication would be detrimental to the tasks of Frontex, and in particular the objective of a given operation.

10. Similarly, Frontex could publish an overview of responsibilities for different categories of participants in the operations [41] which are included in the handbooks to the operational plans [42] .

11. The Ombudsman suggests that **Frontex should ensure a more proactive approach to transparency, including publishing documents that are needed to understand the respective roles and responsibilities of the actors involved in its operations. This includes summaries of operational plans and summaries of parts of the handbooks to the operational plans.**

Identification of fundamental rights concerns and remedies for fundamental rights violations

The Ombudsman's questions

12. The Ombudsman asked Frontex (i) about the procedures and criteria that Frontex uses to identify situations in which an activity could lead to serious violations of fundamental rights or of international protection obligations, and (ii) whether national court judgements or the views of an ombudsman/national human rights institution also serve as a criterion for identifying violations. [43] The Ombudsman also asked what other steps Frontex envisages to help to remedy detected violations of fundamental rights and/or international protection obligations, where the Executive Director has decided to suspend or terminate an operation.



Reply from Frontex

13. Frontex said that, in 2020, the Fundamental Rights Officer developed the 'Fundamental Rights Due Diligence Procedure'. The Fundamental Rights Due Diligence Procedure is designed to allow Frontex's Fundamental Rights Officer (FRO) to provide advice to the Executive Director before they take decisions on launching a new activity or decisions to suspend, withdraw or terminate an ongoing activity. The FRO's assessment is based on information from international organisations, EU institutions [44] , judgements of national courts and decisions or information from national human rights institutions. The FRO also considers the substance of and follow-up to 'serious incident reports' [45] and complaints submitted in a given operational area. The FRO will recommend the termination, withdrawal or suspension of an activity if the alleged violations of fundamental rights are of a persistent or serious nature [46] , including acts in respect of which states are obliged (under the European Convention on Human Rights) to launch criminal prosecutions.

14. Frontex said that the FRO developed a 'Catalogue of measures' to mitigate the fundamental rights risks they identify as part of their assessment. These measures include tailored fundamental rights training and raising awareness about fundamental rights issues at Frontex. The Executive Director can apply measures that are not included in the Catalogue but must inform the Management Board of such measures and justify them.

15. The Frontex Regulation does not specify how the Executive Director can reactivate an operation that has been suspended or terminated. However, it states [47] that the Executive Director is entitled to assess, prior to any operational activity, whether there are violations of fundamental rights or international protection obligations that are of a serious nature or are likely to persist. The activity may be restored if the reasons that led to the suspension or termination of an activity cease to exist. Frontex must thus continuously monitor and assess the fundamental rights situation in the Member State or non-EU country where the activity takes place.

Comments from civil society organisations

16. Concerns were raised by the European Council on Refugees and Exiles (ECRE) about the effectiveness of the Fundamental Rights Due Diligence Procedure. In order to be effective in tackling fundamental rights violations, such a procedure must work swiftly and transparently, but it is not clear that this is the case. Information on what circumstances could trigger the Fundamental Rights Due Diligence Procedure should be made publicly available. The ECRE and the Meijers Committee took the view that information and evidence from civil society organisations should inform both whether the procedure is triggered and how it is implemented, since this information can often be more timely and reliable than other sources.

17. Where the Executive Director and the Management Board do not act, following the recommendation of the FRO [48] , the Executive Director should respond to the FRO within a specific timeline, explain the reasons for rejecting a recommendation and invite the FRO for an



exchange of views on the matter. The FRO could inform the European Parliament if they are not satisfied with the reasons.

18. The Fundamental Rights Due Diligence Procedure should apply to all types of activities carried out by Frontex, including aerial support and support activities in non-EU countries.

The Ombudsman's assessment

19. The Frontex Regulation [49] requires that the Executive Director consult the FRO before taking decisions to suspend, terminate or not launch activities. However, it does not specify what role the FRO fulfils in this regard. In addition, the reasons for and against such decisions and the evidence considered should be communicated to the public.

20. The Ombudsman acknowledges the importance of a written procedure whereby the FRO provides advice to the Executive Director on possible risks to fundamental rights in Frontex operations. [50]

21. The Ombudsman considers that the Fundamental Rights Due Diligence Procedure constitutes an appropriate preventive tool if taken duly into consideration in Frontex's rules on how the Executive Director takes decisions to suspend, terminate or withdraw the financing for Frontex activities for which there are fundamental rights concerns [51] . It sets out a timeline for the FRO's opinions and establishes clear criteria for the FRO to issue a negative opinion. [52] It provides operational guidelines on how to assess fundamental rights risks by using the checklists. Information taken into consideration by the FRO includes the reports of civil society organisations. However, the Fundamental Rights Due Diligence Procedure does not state that the FRO's assessment should take into account the reports of national human rights bodies such as ombudsmen [53] . This should be redressed.

22. Moreover, the Ombudsman considers that a description of the Fundamental Rights Due Diligence Procedure should be published on the FRO's section of Frontex's website. This description should include the criteria on which the FRO bases negative opinions, as described in the Fundamental Rights Due Diligence Procedure, as well as the steps of the procedure.

23. In addition, where the Executive Director decides to launch or not to suspend or terminate an operation despite an opinion from the FRO finding risks of fundamental rights violations of a serious nature, the Executive Director should provide and publish a reply explaining this decision. The Ombudsman notes that, in the 2020 Annual Report, the FRO refers to her opinion that the launch of the Rapid Border Interventions in Evros could lead to fundamental rights risks of a serious nature. [54] However, the ECRE pointed out that this operation is ongoing.

24. The Ombudsman suggests that, **in carrying out the 'Fundamental Rights Due Diligence Procedure', the Fundamental Rights Officer should take into account the relevant reports of national human rights bodies, such as ombudsmen. Frontex should publish on its website a summary of the Fundamental Rights Due Diligence Procedure and of its rules**



on how the Executive Director takes decisions to suspend, terminate or withdraw the financing for Frontex activities for which there are fundamental rights concerns. Frontex should also publish the Executive Director's reply to each negative opinion of the Fundamental Rights Officer about a planned activity.

25. The measures for mitigating the fundamental rights risks, identified as a result of the FRO's assessment, may vary. These measures are included in different opinions and observations issued by the FRO such as 'expressions of concern' [55], observations on the deployment of fundamental rights monitors, inputs to operational plans and the FRO's reports to the Management Board. The Ombudsman considers that the FRO's annual report should include information on the follow up to mitigating measures suggested by the FRO in relation to past operations. [56]

Monitoring of returns and the provisions for vulnerable persons

Protection of vulnerable persons in voluntary returns

The Ombudsman's questions

26. The Ombudsman asked whether for its new role in assisting voluntary returnees in the 'post-arrival'/'post-return' phases [57] Frontex has implementing rules, which take into account vulnerable persons.

Reply from Frontex

27. In reply, Frontex said that the national authorities in the Member States are solely responsible for indicating who is entitled to receive 'reintegration support' following their return, as well as what format that support should take. Frontex is working closely with the FRO to develop guidelines and tools specifically concerning the support offered by Frontex to the Member States in voluntary returns.

28. Frontex is discussing with the International Organization for Migration (IOM) how to explore possible areas of cooperation in the pre-return, returns, post-arrival and post-return stages of the return process. Frontex set up a dedicated working group on return, readmission and reintegration.

Independence of Frontex monitors in Frontex-led return operations

The Ombudsman's questions



29. Bearing in mind that Frontex staff members may act as ‘escort officers’ during forced returns, the Ombudsman asked how Frontex will ensure independent monitoring, where monitoring is carried out by its own staff.

Reply from Frontex

30. Frontex said that the return operations it organises and coordinates are monitored by national monitoring bodies, in accordance with the Returns Directive [58] . Frontex has also established a pool of forced return monitors from such bodies. Frontex itself will contribute to the pool with five fundamental rights monitors assigned to returns by the FRO. [59] When these fundamental rights monitors are deployed to a return operation organised following the request of a Member State/Schengen Associated State [60] , they will “ *still act as forced return monitors in accordance with Article 8(6) of Directive 2008/115/EC, thus within the applicable Member State’s monitoring system*” .

Comments from civil society organisations

31. The ECRE raised concerns about the independence of monitoring carried out by Frontex staff on return operations in which Frontex staff participate. It stated that other forced return monitors should be present in addition to Frontex’s fundamental rights monitors. Training could help but more monitors may be needed. These monitors should ideally come from an independent body, whose monitoring mandate is not limited to a specific Member State or Frontex.

32. The Meijers Committee said that, in order to ensure the independence of fundamental rights monitors, they should not be given instructions by other Frontex staff and should be given the freedom to submit their observations unhindered at each stage of the return operation. This should be specified in the operational plans. Sufficient funding should also be available to the fundamental rights monitors.

The monitoring of national returns and Frontex-coordinated returns

The Ombudsman’s questions

33. The Ombudsman asked what Frontex can do to improve the current situation, whereby there is considerably lower monitoring of national returns than of returns coordinated by Frontex. In relation to returns coordinated by Frontex, she also asked Frontex to explain the relatively low percentage of ‘monitoring reports’ received by the FRO in the first semester of 2019, and what Frontex can do to improve the situation.



Reply from Frontex

34. Frontex referred to two measures it encourages the Member States to implement. First, it encourages Member States to enhance communication channels between the authorities enforcing returns and the national monitoring bodies. Second, it encourages them to increase the human resources capacity of the national monitoring bodies to make possible their physical participation in a higher number of operations. Because Frontex's pool of monitors consists mainly of forced return monitors nominated to the pool from the national monitoring bodies of the Member States/Schengen Associated States, the limited number of national monitoring bodies has an impact on the composition of the pool. The capacity of the pool has been increased with the participation of the five fundamental rights monitors from Frontex.

35. Frontex said that 'implementation plans' for each return operation include an obligation on forced return monitors to submit a report to the Executive Director, the FRO and the national authorities of all the Member States involved in the given operation. [61] Frontex regularly reminds the national contact persons responsible for returns of this obligation during periodic meetings. Frontex has informed the Member States that the reports can be submitted to Frontex in their original language (and not necessarily in English).

36. Frontex said that the FRO regularly shares the observations on returns (the FRO's bi-annual reports) with the monitoring institutions of the organising and participating Member States. The FRO also encourages the Member States/Schengen Associated States to submit to Frontex their national reports. Frontex is in the process of developing a register of its documents to be published on its website. [62] Frontex released many monitors' reports in reply to individual applications for public access to documents.

Comments from civil society organisations

37. The ECRE suggested that Frontex could enter into agreements to receive reports or summaries from all bodies taking part in a monitoring exercise. Frontex should also ensure that training for monitors stress that Frontex should receive reports. The Meijers Committee suggested that Frontex should consider setting clear deadlines for submitting the reports and there should be consequences in case of non-compliance. Where necessary, Frontex should inform the Management Board and the Commission of a failure to submit a report.

The Ombudsman's assessment

38. The Ombudsman welcomes the FRO's involvement in drafting Frontex's guidelines for voluntary returns. Voluntary returns are often voluntary by designation only [63] , and the operations may be sensitive. Therefore, the experts' guidance on how to ensure human rights compliance and, in particular, respect for the dignity of returnees is essential.



39. In forced returns organised by the Member States , *escorts* are members of the national body who are mandated to perform the forced return operation. *Monitors* are members of another national body or other organisation who are mandated to observe and report on whether the return operation fully complies with the Charter of Fundamental Rights and other obligations specific to these operations [64] . Monitors supervise the conduct of escorts, such as the use of force and means of restraint. [65] It is thus of paramount importance that there is a sufficient degree of independence between the escorts and monitors. [66]

40. According to the Frontex Regulation, **in returns coordinated/organised by Frontex** , both the escorts [67] and monitors may be members of Frontex staff.

41. The Ombudsman notes that fundamental rights monitors who act as forced return monitors [68] should remain under the supervision of the FRO, and should - in principle - be independent in carrying out their duties [69] . Frontex's Management Board provided for safeguards of the FRO's independence. [70]

42. However, fundamental rights monitors are part of Frontex's *internal* fundamental rights oversight system. [71] In other Frontex operational activities, they cooperate and liaise with the Frontex coordinating officer of joint operations and provide advice and assistance to them. [72]

43. Therefore, it may be difficult to avoid the perception that monitoring of returns is not fully independent where Frontex fundamental rights monitors oversee the conduct of Frontex escorts. [73]

44. Frontex indicated in its reply [74] that the fundamental rights monitors who act as forced return monitors will monitor the compliance of national escorts. The Frontex Regulation does not state that, when these fundamental rights monitors are monitoring forced returns, they must supervise the conduct of Frontex escorts. However, there is a need to address the question of who will monitor Frontex escorts during forced return operations.

45. In relation to joint return operations by air, in which there are returnees originating in different Member States and corresponding escorts and monitors from different Member States, the Ombudsman has already drawn attention to the possibility that *monitors* should not only monitor conduct of the *escorts* from the country of the monitor but also from the countries that are part of the operation. [75] Frontex took this suggestion on board in its code of conduct for returns. [76]

46. The Ombudsman takes the view that monitors who monitor not only escorts from a specific Member State but also Frontex escorts should come from an independent body. Frontex could encourage the Member States via the Management Board to designate existing independent monitoring bodies as forced return monitors, and enlarge their monitoring powers as far as possible. [77]

47. In addition, to ensure the independence of Frontex fundamental rights monitors, Frontex should ensure that they are not given instructions by other Frontex staff. They should have the



freedom to submit their observations unhindered at each stage of the return operation. This should be specified in the operational plans.

48. The Ombudsman points out that, when ombudsmen act as monitors, they include relevant findings in their annual reports, which are presented to national parliaments. They may also publish reports about a specific return, in an anonymised version. Frontex could consider adopting the same practice as regards the operations in which the monitors (national monitors from the pool and fundamental rights monitors acting as return monitors) submit their reports to it and to the FRO.

49. The Ombudsman suggests that **Frontex should make clear, through training and by other available means, that forced return monitors from its pool should report any incident they observe, irrespective of whether it concerns the officers from the Member State they are tasked with monitoring, another Member State or Frontex. Frontex should seek the agreement of the Member States to implement this. The Frontex fundamental rights monitors who act as forced return monitors should be trained on how to apply the highest level of objectivity. They should not be made responsible for reporting on the conduct of Frontex escorts, where there may be questions of lack of objectivity. Frontex should publish on its website an anonymised version of the reports of forced return monitors after each return operation.**

Instructions to migration management support teams to ensure fundamental rights protection, notably during the screening of migrants

The Ombudsman's questions

50. The Ombudsman asked whether Frontex provides its migration support teams with specific instructions on how to ensure the protection of fundamental rights in the context of their 'screening activities' at the borders.

Reply from Frontex

51. Frontex referred to training carried out by the FRO at hotspots in Greece and Italy, both for maritime border surveillance officers (in sea borders operations) and for members of the Frontex standing corps.

52. The operational plans include general instructions on how to safeguard fundamental rights in operational activities, while the Action Plan for the Frontex Fundamental Rights Strategy includes practical fundamental rights safeguards. These apply to all members of the teams (national staff and Frontex staff).



53. Frontex issues specific guidelines for the screening activities in the handbooks to the operational plans. [78] As mentioned above, Frontex shared with the Ombudsman a version of the handbook but classified it as confidential.

54. If an individual who crosses or attempts to cross an external EU border irregularly is undocumented, the screening interview aims to establish their nationality. The screening should also register details on the arrival of the person and their return to their country of origin, where applicable. The screening interview by deployed members of the Frontex Standing Corps (debriefing officers and border guards) takes place following a request of the Member State hosting the operation. There are two levels of screening: basic (to establish the nationality of the persons subject to the interview, conducted by the deployed borders guards); and advanced (to identify the nationality, as well as collect information on migration patterns and migration profiles, in compliance with fundamental rights). Advanced interviews are conducted by debriefing officers.

55. When appointing debriefing officers or border guard officers as interviewers, Frontex takes into account the age and sex of the interviewed person. They act in close cooperation with the officers from the Member State hosting the operation. The interview may take place in the presence of an expert familiar with the cultural requirements of the interviewee (a 'cultural expert' [79]), but this is not always the case. Where the interviewee can understand the language of the interviewers, an interpreter does not need to be present during the screening.

56. The screening encompasses the application of techniques and methods aimed at uncovering accurate information about the individuals. This involves the preparation of questions, as well as knowledge on how to address the individuals, how to conclude interviews and how to assess the answers to be able to identify discrepancies.

Comments from civil society organisations

57. Médecins sans Frontières raised concerns about the conditions of screening activities, the lack of information given to asylum seekers on their rights and the lack of attention given to ensuring vulnerable people are referred to appropriate services and organisations.

The Ombudsman's assessment

58. At the EU's external borders, Frontex staff may assist Member States in identification procedures through nationality screening, debriefing [80] , registration and fingerprinting. This precedes asylum applications. Frontex staff also provide expertise on the origin and veracity of documents submitted by migrants. The handbooks to the operational plans include guidelines for all these activities.

59. While the guidelines indicate how long debriefing activities should take, this is not the case for screening activities. The screening process should be long enough to ensure important



information can be identified, not only about the identity of individuals but also potential vulnerabilities. Given the sensitivity of such situations, migrants need to be given sufficient time and may require psychological help to be able to communicate properly during such procedures. [81] The guidelines could be more explicit in this respect. They could also be more detailed regarding the specific needs to be taken into account in registering minors. [82]

60. The guidelines state that, during screening, Frontex staff should provide migrants with basic information on international protection. To this end, the Ombudsman considers it would be useful to make available at screening venues, in as many languages as possible, leaflets, brochures and other information on the rights and obligations of asylum seekers. The guidelines could specify this and stipulate that Frontex staff should ask national authorities to ensure this. [83]

61. There is no requirement that the screening should include an expert familiar with the cultural requirements of the interviewee. However, given the difficult conditions often experienced by individuals subject to screening, [84] the Ombudsman considers that ideally a 'cultural expert' could be present during the screening, among other things to ensure the individuals fully understand the procedure and its significance.

62. An exhaustive description on how to document responses to questions during the screening process is essential to ensure the accuracy of any subsequent redress process, such as a complaint to the FRO. The Ombudsman understands that the debriefing screening officers (in charge of the advanced screening) and border guards (in charge of the basic screening) use 'screening booklets' and complete 'screening forms' to document the presumed nationality of individuals subject to screening. These booklets and forms are available on Frontex's One Stop Shop platform (FOSS). However, the guidelines do not set out general principles on how to report on screening procedures, whereas they do for the reporting on debriefing and fingerprinting.

63. The Ombudsman suggests that **the guidelines for screening officers should indicate the timeline for the screening process, and provide more details on how to register minors and document the answers to questions asked during the screening process. Frontex officers should require the presence of a 'cultural expert' during the screening and that the host Member State makes available in as many languages as possible information about the applicable procedures.**

ANNEX 2

Summary of the guidelines for conducting screening interviews provided by Frontex in its written reply

1. Before the interview, the debriefing officer must know where the interview will take place (the



choice of location must allow for privacy). There should be water and dry food available for the interviewed person.

2. The debriefing officer should carry out their activity according to a pre-defined method or model that encompasses: thorough preparation of the interview; verification and documentation of the interviewed migrant's belongings and of preliminary information available; the conduct of the interview; and the reporting requirements.

3. The debriefing officer cannot check the belongings of migrants themselves but can provide advice to the officer responsible from the host Member State on where the documents may be hidden, how to find evidence of trafficking and how to ensure the privacy and dignity of the interviewee.

4. The debriefing officer has at their disposal the screening booklet on how to complete the screening form and establish the nationality of the individual.

5. At the beginning of the interview, the debriefing officer should introduce themselves and all present to the interviewee. They should explain the procedure, the reasons for the interview and the role of the interpreter, if present. The provision of information must be done in a manner adequate for the age and gender of the interviewee.

6. The debriefing officer should inform potential asylum seekers about the asylum procedure. They should refer to the respective national authority all screened persons who express in any way a fear of suffering harm if they are returned to their country of origin or former habitual residence or if they ask or claim for asylum or any other form of international protection procedure or if they are stateless. Those who would like to complain about violations of their fundamental rights must be informed of Frontex's complaints mechanism.

7. If the information that an interviewee is vulnerable comes to light during the interview, the debriefing officer should inform the authority from the host Member State during the interview or immediately after. Officers have access to a list of 'vulnerabilities', which might be revealed during the screening process.

8. Families with small children and unaccompanied children are prioritised in the border procedures, including screening.

9. The screening of minors must be adapted to their level of maturity. This may involve adjusting the height of the interviewer (such as by kneeling to address them at eye level), inviting the interpreter to assist or using visual forms of communication to make sure that children understand the questions.

10. Where an interviewer suspects that a person claiming to be an adult is a minor, this must be immediately reported to the national authority so that the adequate procedure can be initiated. In the meantime, the individual should be treated as a minor.



11. The Handbook on Risk Profiles on Trafficking in Human Beings describes objective criteria and indicators for identifying victims of trafficking and how to refer them to the national authority for their protection.

[1] 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> [Linki]

[2] The standing corps includes Frontex staff as well as staff from national bodies of EU Member States and Schengen Associated States (Iceland, Norway, Switzerland and Liechtenstein).

[3] These include verifying the identity and nationality of individuals, authorising or refusing entry, stamping travel documents, issuing or refusing visas at the border, border surveillance including patrolling between border crossing points to prevent unauthorised border crossings, and registering fingerprints of persons apprehended in connection with the irregular crossing of borders; see Article 55(7) of Regulation 2019/1896.

[4] Operational plans should include the description of participants' responsibilities, including with regard to the respect of fundamental rights, as well as instructions on how to ensure the safeguarding of fundamental rights.

[5] Article 10(2) and article 80(1) of Regulation 2019/1896.

[6] Article 80 of Regulation 2019/1896.

[7] Article 38(3)h of Regulation 2019/1896.

[8] Article 111 of Regulation 2019/1896

[9] Article 55.5.a and Annex V of Regulation 2019/1896.

[10] Article 46 of Regulation 2019/1896

[11] Article 46 of Regulation 2019/1896

[12] There is no information in the public domain on how these grounds are determined.

[13] Article 50(5) of Regulation 2019/1896.

[14] According to article 50.3 of Regulation 2019/1896, in 'collecting return operations' organised by Frontex escorts are provided by the country of return.



[15] Article 8(6) of Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals

[16] In accordance with article 51 of Regulation 2019/1896.

[17] In accordance with article 110 of Regulation 2019/1896.

[18] This entails carrying out “ *debriefing interviews with migrants in order to collect information for risk analysis on irregular migration and other cross-border crime including trafficking in human beings and terrorism(...) to profile irregular migrants and to identify new modus operandi and migration trends used by irregular migrants and facilitators/criminal networks (...) to identify possible suspects involved in people smuggling or other cross-border crime including terrorism (...).*”

https://frontex.europa.eu/assets/Key_Documents/MB_Decision/2020/MB_Decision_1_2020_adopting_the_profiles_
[Linki]

[19] Cultural experts may also provide interpretation. They are sensitive to the linguistic and cultural factors which may impact the direction of questioning.

[20] In an own-initiative inquiry completed in 2021, the Ombudsman already looked into how Frontex is applying its obligations arising from Regulation 2019/1896 relating to the Complaints Mechanism and the role of the FRO. See OI/5/2020/MHZ on the functioning of Frontex’s complaints mechanism for alleged breaches of fundamental rights and the role of the Fundamental Rights Officer: <https://www.ombudsman.europa.eu/en/case/en/57955> [Linki].

[21] The Ombudsman’s letter to Frontex is available at: .
<https://www.ombudsman.europa.eu/en/doc/correspondence/en/138914> [Linki].

[22] The European Council on Refugees and Exiles (ECRE), Meijers Committee, Médecins Sans Frontières (MSF), Platform for International Cooperation on Undocumented Migrants (PICUM), Sea-Watch and SOS Mediterranée replied. The replies are available at:
<https://www.ombudsman.europa.eu/en/case/en/58639> [Linki]

[23] The report on the inspection is available at:
<https://www.ombudsman.europa.eu/en/doc/inspection-report/en/151002> [Linki]

[24] Frontex attached to its reply to the Ombudsman excerpts from an operational plan in which responsibilities and tasks with respect to fundamental rights are listed. However, these responsibilities concern all members of the standing corps taking part in the operations (without distinguishing between border management teams, migration management support teams and return teams). There are also specific instructions for all participants concerning the Complaints Mechanism and reporting ‘serious incidents’, as well as instructions applicable with regard to persons in need of international protection and other vulnerable persons. Certain fundamental rights safeguards of third country observers are also mentioned in the general part of the operational plans. In accordance with Article 78(2) of Regulation 2019/1896, Frontex can invite



border guards/coast guards/police officers from non-EU countries to be deployed *as third country observers* in joint operations after the prior consultation and agreement of Member States authorities. Their specific tasks are described in the specific activity plans. Frontex attached to its reply an extract from the specific activity plan for Joint operation FOA Land 2021, which details what the non-EU country observers can and cannot do.

[25] Amongst other things, this includes the tasks of: the officers in charge of screening, fingerprinting and registration; the fundamental rights monitors; and the press officers in the context of joint operations.

[26] Frontex attached to its reply to the Ombudsman an example of a 'handbook to the operational plan' (from January 2021). This handbook contains guidelines and complementary information with regard to " *Frontex operational activities, services and products, reporting platforms and other operations' related matters* ". Frontex specified that the handbook should be treated as confidential.

[27] See paragraph 8, above.

[28] In its report on the fact-finding investigation of Frontex concerning alleged fundamental rights violations (of 14 July 2021), the Frontex Scrutiny Working Group of the European Parliament stated that " *clearer criteria and procedures need to be established for the adequate application of Article 46*" and that it: " *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 justification for the decision to suspend, terminate or withdraw funding, and transparency .*" (https://www.europarl.europa.eu/cmsdata/238156/14072021%20Final%20Report%20FSWG_en.pdf [Linki])

[29] The Frontex Scrutiny Working Group of the European Parliament said in its report (page 15) that, in follow up to a serious incident report, the FRO or Executive Director should also rely on the information provided by competent national human rights bodies and/or authorities such as national ombudsmen.

[30] European Parliament Resolution on the implementation of the Return Directive, of 17 December 2020, called on the Commission and Member States to make use of the existing independent monitoring bodies such as national human rights institutions by cooperating with them or designating them as forced return monitoring systems (paragraph 35): https://www.europarl.europa.eu/doceo/document/TA-9-2020-0362_EN.html [Linki].

[31] According to the European Court of Human Rights, asylum seekers are "*member[s] of a particularly underprivileged and vulnerable population group in need of special protection*" regarding which there is a "*broad consensus at the international and European level*". (M.S.S.v. Belgium and Greece, para. 251; Tarakhelv. Switzerland, para. 118; A.S. v. Switzerland, para.



29; N.H. and Others v. France, para. 162)

[32] In the context of a case before the European Committee of Social Rights, the UN High Commissioner for Refugees referred to gaps by Frontex and the Greek authorities in registering unaccompanied children upon their arrival in Greece - International Commission of Jurists (ICJ) and European Council for Refugees and Exiles (ECRE) v. Greece (Complaint No. 173/2018)

[33] The Court of Justice of the EU, in its judgement in case C-36/20 PPU, said that *"in order to facilitate access to the examination procedure at border crossing points and in detention facilities, information should be made available on the possibility of applying for international protection"* . (paragraph 76)

<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=ecli:ECLI%3AEU%3AC%3A2020%3A495>
[Linki]

[34] The 'Code of conduct applicable to all persons participating in Frontex Operational Activities', and the 'Code of Conduct for return operations and return interventions coordinated and organised by Frontex'.

[35] In case 2273/2019/MIG, the Ombudsman proposed as a solution that Frontex establish a dedicated website for its documents register. Frontex agreed to this proposal.
<https://www.ombudsman.europa.eu/en/case/en/56157> [Linki]

[36] Article 114(2) of Regulation 2019/1896 explicitly provides for the publication of the Codes.
https://frontex.europa.eu/assets/Key_Documents/Code_of_Conduct/Code_of_conduct_applicable_to_all_persons_p
[Linki]

https://frontex.europa.eu/assets/Key_Documents/Code_of_Conduct/Code__of_Conduct_for_Return_Operations_a
[Linki]

[37] In accordance with Article 38.3 (d) of Regulation 2019/1896

[38] Article 114(2) of Regulation 2019/1896

[39] Article 114(2) of Regulation 2019/1896

[40] Frontex attached to its reply to the Ombudsman excerpts from an operational plan in which responsibilities and tasks with respect to fundamental rights are listed. However, these responsibilities concern all members of the standing corps taking part in the operations (without distinguishing between border management teams, migration management support teams and return teams). There are also specific instructions for all participants concerning the Complaints Mechanism and reporting 'serious incidents', as well as instructions applicable with regard to persons in need of international protection and other vulnerable persons. Certain fundamental



rights safeguards of third country observers are mentioned in the general part of the operational plan. In accordance with article 78(2) of Regulation 2019/1896, Frontex can invite border guards/coast guards/police officers from non-EU countries to be deployed *as third country observers* in joint operations after the prior consultation and agreement of Member States authorities. Their specific tasks are described in the specific activity plans. Frontex attached to its reply an extract from the specific activity plan for Joint operation FOA Land 2021, which details what the non-EU country observers can and cannot do.

[41] Amongst other things, this includes the tasks of: the officers in charge of screening, fingerprinting and registration; the fundamental rights monitors; and the press officers in the context of joint operations.

[42] Frontex attached to its reply to the Ombudsman an example of a 'handbook to the operational plan' (from January 2021). This handbook contains guidelines and complementary information with regard to " *Frontex operational activities, services and products, reporting platforms and other operations' related matters* ". Frontex specified that the handbook should be treated as confidential.

[43] The Ombudsman noted that the decision of Frontex to stop its activities in Hungary was made following a ruling of the Court of Justice of the EU - C-808/18 Commission v Hungary:

[https://curia.europa.eu/juris/document/document.jsf?jsessionid=BF896CAB8F05CAFF145629DB5EE1EF0E?text=&](https://curia.europa.eu/juris/document/document.jsf?jsessionid=BF896CAB8F05CAFF145629DB5EE1EF0E?text=&docid=85487&doclang=en&part=fulltext&page=1&numdoc=85487)
[Linki].

[44] For example, the Annual Report on Human Rights and Democracy in the World (from the European External Action Service) and country reports from the European Asylum Support Office.

[45] Frontex's Fundamental Rights Strategy, adopted by its Management Board on 14 February 2021, describes serious incident reporting as follows: "*Any participant in the Agency's operational activities who has reason to believe that a violation of Fundamental Rights has occurred is required to report it to the Agency via the established reporting channels, such as the Frontex serious incident report system. The Code of Conduct and the Standard Operating Procedure of the Serious Incident Report oblige all participants in the Agency's operational activities to report any potential violation of Fundamental Rights through a Serious Incident Report (SIR).*"

https://frontex.europa.eu/assets/Key_Documents/Fundamental_Rights_Strategy/Fundamental_Rights_Strategy.pdf
[Linki]

Article 1 of the Decision of Frontex's Executive Director 'Standard Operating Procedure (SOP)-Serious Incident Reporting' of 19 April 2021 states that: "*A Serious Incident (SI) is an event, caused by an action or failure to act by a person, or by force of nature, which directly or indirectly involves Frontex participants or assets and which: entails a potential violation of EU or international law, in particular related to Fundamental Rights and international protection obligations, and/or involves a potential violation of the Frontex Codes of Conduct, and/or has as serious actual or potential negative implications on Frontex's tasks or activities and/or has a*



serious potential life-changing impact on a participant's health."

https://frontex.europa.eu/assets/Key_Documents/SIR_SOP.pdf [Linki]

[46] The European Court of Human Rights has defined what persistent and serious nature means: ECHR, Ireland v UK 5310/71, judgement of 19 January 1978, paragraph 159:

https://www.cvce.eu/en/obj/judgement_of_the_european_court_of_human_rights_ireland_v_the_united_kingdom_1 [Linki].

[47] Article 106(4)m of Regulation 2019/1896

[48] Under article 46 of Regulation 2019/1896.

[49] Article 46(4) and (5) of Regulation 2019/1896

[50] The Working Group established by Frontex Management Board on fundamental rights and legal operational aspects of operations in the Aegean Sea (report issued on 5 March 2021) stated: *"The existing legal framework only offers Frontex limited options for action in the event of reported and established violations. The most important measure is Article 46, which is a measure of last resort. In the sense of proportionality, it is necessary to discuss measures and proceedings below the threshold of Article 46."*

[51] The Ombudsman inspected the document 'Frontex Fundamental Rights Due Diligence Procedure', drafted on 4 January 2021. Frontex classified this document as confidential.

[52] In its report on the fact-finding investigation of Frontex concerning alleged fundamental rights violations (of 14 July 2021), the Frontex Scrutiny Working Group of the European Parliament stated that *"clearer criteria and procedures need to be established for the adequate application of Article 46"* and that it: *"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 justification for the decision to suspend, terminate or withdraw funding, and transparency."* (https://www.europarl.europa.eu/cmsdata/238156/14072021%20Final%20Report%20FSWG_en.pdf [Linki])

[53] The Frontex Scrutiny Working Group of the European Parliament said in its report (page 15) that, in follow up to a serious incident report, the FRO or Executive Director should also rely on the information provided by competent national human rights bodies and/or authorities such as national ombudsmen.

[54] Page 11 of

<https://frontex.europa.eu/media-centre/news/news-release/first-frontex-fundamental-rights-office-report-SswYWN> [Linki]



[55] The Ombudsman inspected a recent expression of concern, issued by the FRO. Frontex classified this as confidential.

[56] See suggestion number 8 in the Ombudsman's decision in OI/5/2020/MHZ:
<https://www.ombudsman.europa.eu/en/decision/en/143108> [Linki].

[57] The term 'post-return phase' relates to the period following the forced return. The term 'post-arrival phase' relates to the period following the voluntary return. In practice, both terms are used interchangeably.

[58] Article 8(6) of Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals

[59] In accordance with article 110(4) of Regulation 2019/1896.

[60] The Schengen Associated States are Iceland, Norway, Switzerland and Liechtenstein.

[61] As required under Regulation 2019/1896.

[62] Following the Ombudsman's inquiry in case 2273/2019/MIG:
<https://www.ombudsman.europa.eu/en/case/en/56157> [Linki].

[63] According to a 'scoping paper' from the European Network of Human Rights Institutions, *"[t]he role of NHRIs in upholding the human rights of migrants and asylum seekers in the light of recent EU developments"* (published in July 2021).

[64] Directive 2008/115/EC 'Common Guidelines on security provisions for joint removals by air' - Annex to Council Decision 2004/573/EC; the European Commission's Return Handbook (annex to the EU Commission Recommendation C(2017)6505:
<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32017H2338> [Linki]; Twenty Guidelines on Forced Returns of the Committee of Ministers of the Council of Europe
https://www.coe.int/t/dg3/migration/archives/Source/MalagaRegConf/20_Guidelines_Forced_Return_en.pdf [Linki]

[65] The Twenty Guidelines on Forced Returns of the Committee of Ministers of the Council of Europe states that forced returns should be fully documented in particular with respect to any means of restraint used in the course of the operation (page 58).
https://www.coe.int/t/dg3/migration/archives/Source/MalagaRegConf/20_Guidelines_Forced_Return_en.pdf [Linki]

[66] The Commission stated in its 2017 Return Handbook that monitoring systems should include organisations/bodies independent from the authorities enforcing return; public bodies, such as a national ombudsman or an independent general inspection body, may act as monitors. However, it seems problematic to assign a monitoring role to a subsection of the same administration, which also carries out return/removals.



[67] According to article 50.3 of Regulation 2019/1896, in ‘collecting return operations’ escorts are provided by the country of return.

[68] Article 54.3 Regulation 2019/1896

[69] Article 110(5) of Regulation 2019/1896.

[70] The Management Board’s decision 6/2021 of 20 January 2021 adopting special rules to guarantee the independence of the Fundamental Rights Officer and their team:

https://frontex.europa.eu/assets/Key_Documents/MB_Decision/2021/MB_Decision_6_2021_adopting_special_rules [Linki]

[71] Article 8(1) of the Management Board’s decision 6/2021 of 20 January 2021 adopting special rules to guarantee the independence of the Fundamental Rights Officer and his or her team: “ *A Fundamental Rights Officer is part of the administrative and management structure of the Agency .*”

[72] Article 110(2)(a)(c) of Regulation 2019/1896

[73] Concerns in relation to the independence of Frontex monitoring of forced returns are expressed in the Report about monitoring of forced operations, drafted by the Greek Ombudsman as part of a project run by the International Ombudsman Institute. As regards the Frontex pool of monitors (article 51 Regulation 2019/1896), the report says that the requirement from article 110 Regulation 2019/1896 to place all monitors of the pool under the FRO’s hierarchical supervision and the recruitment of Fundamental rights monitors internalises the monitoring system at Frontex: .

<https://www.synigoros.gr/resources/300521-ioi-monitoring-forced-returns-neo--2.pdf> [Linki]

[74] See Frontex’s statement paragraph 30 of Annex I.

[75] See the Ombudsman’s decision in her own-initiative inquiry OI/9/2014/MHZ (paragraph 41): <https://www.ombudsman.europa.eu/en/decision/en/59740> [Linki].

[76] Article 16.4 of Frontex’s Code of Conduct for Return Operations and Return Interventions reads: “ *When feasible and subject to prior agreement between Member States concerned, forced-return monitors may also monitor on behalf of other Member State taking part in an return operation .*” (

https://frontex.europa.eu/assets/Key_Documents/Code_of_Conduct/Code__of_Conduct_for_Return_Operations_and_Return_Interventions [Linki]

[77] European Parliament Resolution on the implementation of the Return Directive, of 17 December 2020, called on the Commission and Member States to make use of the existing independent monitoring bodies such as national human rights institutions by cooperating with them or designating them as forced return monitoring systems (paragraph 35):



https://www.europarl.europa.eu/doceo/document/TA-9-2020-0362_EN.html [Linki].

[78] In its reply, Frontex summarised these guidelines. Annex 2 to this Decision contains this summary.

[79] Cultural experts may also provide interpretation. They are sensitive to the linguistic and cultural factors which may impact on the direction of questioning.

[80] This entails carrying out “ *debriefing interviews with migrants in order to collect information for risk analysis on irregular migration and other cross-border crime including trafficking in human beings and terrorism(...) to profile irregular migrants and to identify new modus operandi and migration trends used by irregular migrants and facilitators/criminal networks (...) to identify possible suspects involved in people smuggling or other cross-border crime including terrorism(...).*”

https://frontex.europa.eu/assets/Key_Documents/MB_Decision/2020/MB_Decision_1_2020_adopting_the_profiles [Linki]

[81] According to the European Court of Human Rights, asylum seekers are “*member[s] of a particularly underprivileged and vulnerable population group in need of special protection*” regarding which there is a “*broad consensus at the international and European level*”. (M.S.S.v. Belgium and Greece, para. 251; Tarakhelv. Switzerland, para. 118; A.S. v. Switzerland, para. 29; N.H. and Others v. France, para. 162)

[82] In the context of a case before the European Committee of Social Rights, the UN High Commissioner for Refugees referred to gaps by Frontex and the Greek authorities in registering unaccompanied children upon their arrival in Greece - International Commission of Jurists (ICJ) and European Council for Refugees and Exiles (ECRE) v. Greece (Complaint No. 173/2018)

[83] The Court of Justice of the EU, in its judgement in case C-36/20 PPU, said that “*in order to facilitate access to the examination procedure at border crossing points and in detention facilities, information should be made available on the possibility of applying for international protection*”. (paragraph 76)

<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=ecli:ECLI%3AEU%3AC%3A2020%3A495> [Linki]

[84] *Border Procedures Reception and Application for international protection*, study drafted in 2020 by the Greek Ombudsman for the IOI (page 11: “ *Administrative detention is the rule for border procedures in Greece, France, Spain, Slovenia and Netherlands* ”).