

ECRE comments on Frontex’s reply to the questions asked by the European Ombudsman in the context of the Strategic inquiry OI/4/2021/MHZ concerning the compliance of the European Border and Coast Guard Agency (Frontex) with its fundamental rights obligations in the course of its activities

1) Fundamental Rights Due Diligence Procedure:

Article 46(4) and (5) of the 2019 European Border and Coast Guard Regulation strengthened Frontex’s due diligence responsibilities with a reinforced obligation for the Agency to suspend, terminate or not launch activities that could lead to violations of fundamental rights or international protection obligations. This was welcome and long overdue. Several stakeholders had expressed serious concerns about the situation in Hungary since 2016, including the Frontex Fundamental Rights Officer (FRO)¹ and the Frontex Consultative Forum who had called for a halt for Frontex’s operational support to Hungary, including for returns and a suspension of any Frontex return-related activities from the country several times.² The Regulation provided some guidance on elements to be taken into account by the Executive Director (ED) when making this decision including: the number and substance of registered complaints that have not been resolved by a national competent authority, reports of serious incidents, reports from coordinating officers, relevant international organisations and Union institutions, bodies, offices and agencies in relevant areas (Article 46(6)). However, the guidance lacked detail and the lack of transparency of the complaints and serious incident mechanisms and ongoing support to Hungary hindered any serious understanding of how or if this due diligence was taking place or if it was being applied to all of Frontex’s activities. It was not until after a December 2020 decision of the Court of Justice of the European Union (CJEU) against Hungary (Case C-808/18) that Frontex finally decided to ‘pull out’, although some Frontex support for Return operations continue.³

In 2020 in part due to this situation, the Frontex FRO developed a Fundamental Rights Due Diligence Procedure to assess fundamental rights risks to preclude Frontex’ potential involvement in fundamental rights violations by its partners. There were also a set of measures to mitigate fundamental rights risks identified as a result of the due diligence assessment. In its letter to the European Ombudsman, Frontex explains that the FRO advises the ED based on information from a range of sources including international organisations, EU institutions, National Human Rights Institutions, where available, the Serious Incident Reports and Complaints. For the FRO to recommend action under Article 46 (4) and (5) the alleged offences must be of a persistent or serious nature as defined in the case law of the European Convention on Human Rights (ECHR).⁴

¹ LIBE Committee on Civil Liberties, Justice and Home Affairs, Working Document: Report on the fact-finding investigation on Frontex concerning alleged fundamental rights violations, 14 July 2021, page 11-12.

² See, for example, Frontex Consultative Forum annual report 2019, page 27, available at: https://frontex.europa.eu/assets/Partners/Consultative_Forum_files/Frontex_Consultative_Forum_annual_report_2019.pdf.

³ LIBE Committee on Civil Liberties, Justice and Home Affairs, Working Document: Report on the fact-finding investigation on Frontex concerning alleged fundamental rights violations, 14 July 2021, page 11-12.

⁴ Frontex response to European Ombudsman strategic inquiry – OI/4/2021/MHZ.

At the same time, extremely serious concerns have been raised about persistent push-backs by Greek authorities for several years, with well-evidenced reports from NGOs,⁵ the Greek Ombudsman⁶ and concerns detailed in a recent report by the UN Special Rapporteur on Human Rights.⁷ On 15 February 2020 Front-LEX and the Legal Centre Lesbos sent a Communication to the Executive Director of Frontex, requesting that the agency immediately suspends or terminates operations in the Aegean in view of serious and persistent human rights violations, pursuant to Article 265 of the Treaty on the Functioning of the European Union (TFEU). In their communication they detail how against the backdrop of years of evidence on pushbacks by Greece and Greece suspending asylum applications for one month in March 2020, Frontex launched a Rapid Border Intervention with little time to conduct any due diligence assessment, no evidence of consultation with the FRO and no distinct operational plan.⁸ Support to Greece by Frontex is ongoing.

In light of the above, it is not evident that the introduction of the procedure has had an impact on the way in which Frontex operates. It is difficult to assess from the outside what due diligence Frontex undertakes, when, and how it arrives at decisions to suspend, terminate or not launch activities. The nature of the fundamental rights at stake includes *non-refoulement*, the right to life and the prohibition of torture and inhumane and degrading treatment and means the utmost speed, transparency and accountability is essential. If the due diligence procedure means several years of evidenced, credible reports are ignored and a court case has to be concluded at the CJEU, it is not fit for purpose.

ECRE holds that information on the threshold that triggers the due diligence procedure should be made publicly available and that information and evidence from civil society organisations should inform both whether the procedure is triggered and any ongoing due diligence process. In addition, Frontex should be more accountable to the European Parliament (EP) in situations at the border and of potential violations of fundamental rights. The due diligence procedure should be more transparent with a public request from the EP for Frontex to explain its due diligence procedure and provide regular updates on situations that are assessed, at the very least to the Frontex Scrutiny Working Group.

The relation between the due diligence procedures and decisions under Article 46 on whether to continue, halt, suspend or not launch operations should be clarified.⁹ The due diligence procedure, alongside Serious Incidents Reports and findings from the Complaints Mechanism

⁵ See: Amnesty International, Greece: Violence, lies and push-backs, 23 June 2021, available at: <https://www.amnesty.org/en/latest/news/2021/06/greece-pushbacks-and-violence-against-refugees-and-migrants-are-de-facto-border-policy/>; GCR and Oxfam, Lesbos Bulletin Update on the EU response in Lesbos, by the Greek Council for Refugees & Oxfam, 17 June 2021.

⁶ Greek Ombudsman, Alleged pushbacks to Turkey of foreign nationals who had arrived in Greece seeking international protection: interim report (updated up to 31 December 2020), 28 April 2021, available at: <https://bit.ly/344xO6F>.

⁷ Report on means to address the human rights impact of pushbacks of migrants on land and at sea - Report of the Special Rapporteur on the human rights of migrants, Felipe González Morales (A/HRC/47/30) [EN/AR/RU/ZH]

⁸ See Front-Lex Legal Department, Taking the EU to Court, full communication available at: <https://www.front-lex.eu/app/download/16133482624/Non-Confidentiel+Version+of+the+Application.pdf?t=1621958131>. On 21 May 2021, an action initiating proceedings against Frontex (T-282/21) was lodged to the General Court of the European Union in this case. Information available at: <https://curia.europa.eu/juris/document/document.jsf?text=&docid=244444&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=2296832>

⁹ For more detail on this, please see ECRE Policy Paper, July 2021, Holding Frontex to Account. Available at: <https://ecre.org/wp-content/uploads/2021/05/Policy-Papers-07.pdf>

are supposed to inform FRO's recommendations to the ED to act under Article 46. However, under the current rules regarding Article 46, the ED and the Managing Board (MB) do not need to act on this recommendation. ECRE recommends that where the ED and the MB do not take appropriate action as recommended by the FRO, they should respond within a specific timeline, explain the reasons for rejecting a recommendation and invite the FRO for an exchange of views on this matter. If the FRO's advice is not followed and no satisfactory reason is provided, it should be possible (or mandatory) for the FRO to make such a situation public, at least to the EP.

Finally, due diligence procedures and all reporting mechanisms must apply to all types of activities carried out by Frontex, including aerial support and support in third countries. All operations should be halted, suspended or not launched in cases where there are found to be serious risks of violations of fundamental rights.

2) Relatively low number of reports on forced return operations sent by national monitors to the FRO:

Although joint return flights coordinated by Frontex are monitored more than national return operations, Article 8(6) of the Return Directive requires an 'effective return monitoring system' that does not obligate Member States (MS) to have return monitoring on all flights, and this can restrict the monitoring undertaken.

National monitors on forced return operations can be from a variety of different institutions depending on domestic legislation and practice, for example, State agencies (sometimes within the same administrative structure of the agency which is monitored), non-governmental organisations, qualified individuals, or Independent authorities such as the Ombudsman/National preventive mechanism (NPM).¹⁰ There is not always a requirement in national legislation to write a report after each return monitoring operation¹¹ and the procedure and status of any reports depends on the institution the monitor is working for. In countries where the police are monitoring forced returns, e.g. Belgium¹², the procedure for releasing a report could potentially be more complex. For national ombudsmen the reports are often internal but the head of the institution may use the monitor's findings in their annual report or in observations and proposals to the competent public body. The monitors report to their own institutions, not Frontex. In these circumstances, the most reports received would naturally come from those reporting directly to Frontex. Frontex should clarify that it has agreements to receive monitoring forms or summaries from all institutions taking part in the monitoring process, or that it records information from MS where they receive recommendations directly from national preventative mechanisms. Frontex should also ensure that training for monitors stresses the importance of reporting forms and Frontex receiving them. ECRE supports Frontex's initiative to receive monitoring reports in languages other than English to encourage reporting.

¹⁰ Greek Ombudsman, Monitoring Forced Return, page 7, available at: <https://www.synigoros.gr/resources/300521-ioi-monitoring-forced-returns-neo--2.pdf>.

¹¹ Ibid, page 16.

¹² See FRA, Forced Return Monitoring Systems, 2020 Update, available at: <https://fra.europa.eu/en/publication/2020/forced-return-monitoring-systems-2020-update#TabPubOverview0>.

3) Independent monitoring of return operations in which Frontex staff members are directly involved:

Fundamental Rights Monitors are selected and managed by the FRO (Art. 109(2)-(3)) and are Frontex staff members. If deployed to a return operation in which escorts are also Frontex staff members, the monitoring cannot be considered independent. According to the Return Handbook published by the European Commission, monitoring systems should involve organisations and bodies different and independent from the authorities enforcing return and it seems problematic to assign a monitoring role to a subsection of the same administration which also carries out return.¹³ Given the seriousness of potential fundamental rights violations, the potentially difficult nature of return operations and specific standards and general human rights standards applicable to forced returns, it is important that an independent monitoring system is in place to ensure compliance with these standards. Fundamental Rights Monitors should be seen as an internal check for Frontex to help them ensure that fundamental rights are complied with, not as independent monitoring. Forced return monitors should always be present in addition.

At the same time during forced return operations, forced return monitors are provided by Member States and are responsible for monitoring returnees from one particular MS. As such, individual monitors are only monitoring one MS on any joint operation, the MS that has issued the call for monitors. The monitoring report, therefore, is only about the MS being monitored. If there is only one monitor on a plane with different groups of returnees from different MS as well as Frontex staff, it is not the primary role of the monitor to monitor Frontex staff or incidents with returnees in other parts of the plane, and indeed it would be difficult to be physically present and to continue to monitor the part of the plane they are responsible for. The monitor may mention that something occurred or they were told something, but it is not their primary role. This could be concerning for monitors personally if they hear a serious incident and know there is no one monitoring it, but also brings up questions about the coverage of monitoring on joint flights. It should be made clear in training that during the debriefing and in reports, monitors should report any incident they observe irrespective of if it concerns the MS they are tasked to monitor or another MS or Frontex. It also highlights gaps in monitoring as there are no monitors currently sent to specifically monitor Frontex staff. This could be overcome if there were additional independent fundamental rights monitors, who were responsible to monitor incidents as they occurred rather than one particular Member State.

ECRE recommends independent fundamental rights monitors from an independent body such as ombudsmen or national preventative mechanisms or civil society whose monitoring mandate is not limited to a specific MS or Frontex.

¹³ European Commission, Return Handbook, 27 September 2017, https://ec.europa.eu/home-affairs/sites/default/files/what-we-do/policies/european-agenda-migration/20170927_recommendation_on_establishing_a_common_return_handbook_annex_en.pdf, p. 42-43.