

Meijers Committee

To Rosita Hickey
Director of Inquiries, European Ombudsman
By email

Date 15 September 2021

Meijers Committee
Standing committee of experts on international immigration, refugee and criminal law

Subject 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

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Dear Ms Hickey,

Thank you for your letter of 9 July 2021 in which you asked the Meijers Committee for its views on several concrete issues relating to the European Ombudsman inquiry into Frontex. You requested our input on three points in particular. We focus on these below.

In addition, we note that Frontex' response to Question 1 (publication of Operational Plans) is factually incorrect. Frontex states that '[d]ue to the nature of the activity, the full content of the operational plans for ongoing joint operations cannot be disclosed'. In reality, during joint operations, operational plans are not even partially disclosed. As for completed operations, Frontex has never published (parts of) these plans on its own initiative. While it sometimes discloses heavily redacted operational plans upon request, practice in this respect is inconsistent and different persons making the same request will not necessarily receive the same response. We recommend that Frontex (partially) publishes operational plans on its own initiative, but in any case, upon request. For your information, we will publish in the near future a comment on Frontex' practice with respect to public access to documents in which we will discuss these matters in more detail.

1. Sources relevant for the Fundamental Rights Due Diligence Procedure

According to Frontex, a decision to withdraw or not to launch an operation if there are fundamental rights concerns (Art. 46(4) and (5) of Reg. 2019/1896) is based on "a range of sources, including from relevant international organisations, European institutions ... as well as ... national entities, including national court decisions or ... National Human Rights Institutions". Although this enumeration of sources is in line with those mentioned in Art. 46(6) of the Frontex Regulation, information from non-governmental organisations is not mentioned by Frontex. It should be pointed out that NGOs often provide more timely (and sometimes even more accurate) and therefore "real-time" information about a particular human rights situation. In contrast, information from governmental sources, especially of courts, tends to be of more reactive character.

It should also be pointed out that non-governmental information can be just as authoritative as governmental information. In its case-law on non-refoulement and the treatment of asylum-seekers, for example, the European Court of Human Rights often takes into account non-governmental information. That Court's standard formula even is that "as regards the general situation in a particular country, the Court has often attached importance to the information contained in recent reports from independent international human rights protection associations such as Amnesty International, or governmental sources ...".¹ Reports, of whatever source, have evidentiary value once "their conclusions are consistent with each other and if other sources corroborate them".²

Therefore, we recommend that Frontex clarifies in its internal procedures that information from civil society about the human rights situation in a Member State is seriously taken into account in the Due Diligence Procedure.

2. The relatively low number of reports on forced return operations sent by national monitors to the Fundamental Rights Officer

Given the clear obligation imposed upon return monitors to submit a report on each forced return operation, the mere sending of reminders and recommendations seems insufficient to ensure compliance. The Agency should therefore set clear deadlines for submitting these reports and, in their absence, attach consequences to the non-fulfilment of such obligation. Given that forced return monitors are recruited from Member State competent authorities, Member States remain responsible for correctly fulfilling their obligations. Where necessary, the Agency should inform the Management Board and Commission of a failure to submit reports.

As we discussed in our last paper about Frontex and its obligations and accountability for push-backs, the obligation to report human rights-related incidents is often neglected, or when incidents do get reported, they are insufficiently followed up.³ Therefore, we emphasise the need to ensure all officers are not merely obliged to report any incidents that come to their knowledge but that they are also given the practical opportunity to do so. Robust procedures must be put in place to ensure officers can file reports anonymously and without repercussions. The Fundamental Rights Officer should have a central role in deciding on an appropriate follow-up to reported human rights incidents.

¹ ECtHR 23 Feb. 2012, *Hirsi v Italy*, no. 27765/09, par. 118; ECtHR 28 Feb. 2008, *Saadi v Italy*, no. 37201/06, par. 131.

² *Saadi v Italy*, par. 143.

³ Meijers Committee, Frontex and pushbacks: obligations and accountability, April 2021, available at https://www.commissie-meijers.nl/sites/all/files/cm2105_frontex_and_pushbacks.pdf

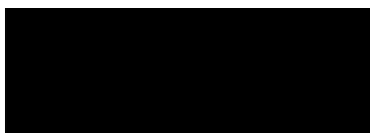
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3. Frontex' response to the Ombudsman's question about how Frontex will ensure independent monitoring of return operations

The possibility for fundamental rights monitors to act as forced return monitors is explicitly foreseen in Article 110 EBCG Regulation, which also states that they shall be under the Fundamental Rights Officer's hierarchical supervision and shall be independent in the performance of their duties. Therefore, the question of these monitors independence is a broader one and has also been raised concerning the independence of the FRO themselves in light of their position as an official of the Agency and appointed by the Management Board. Frontex' reply does not specify in what ways the independence of the monitors is secured. Sufficient funding should be made available for the monitors. They cannot be given instructions by other Frontex staff and should be given the freedom to exercise their observations unhindered at each stage of the return operation. Specific provisions regarding the position of the fundamental rights monitors acting as return monitors could be included in the standard operational plan for return operations.

We hope you find these comments helpful. As always, we are available for your questions and remarks.

Yours faithfully,



Prof. dr. A.B. Terlouw
Chairwoman