

*Our internal ref. ICO/200-S1/2021  
Your ref. OI/4/2021/MHZ*

**Ms Emily O'Reilly**  
European Ombudsman

Dear Ms O'Reilly,

With reference to your Decision in strategic inquiry OI/4/2021/MHZ on how the European Border and Coast Guard Agency (Frontex) complies with its fundamental rights obligations and ensures accountability in relation to its enhanced responsibilities, hereby I present to you Frontex's action plan for the implementation of the four recommendations issued on 17 January 2022.

The action plan in annex provides a detailed overview of activities which the Agency has taken or intends to take in this regard. It further outlines the necessary steps and their foreseen timeframe to fully implement the abovementioned recommendations. Allow me to underline that the document was prepared in collaboration with and was endorsed by the Fundamental Rights Officer (FRO) prior to its submission.

Taking this opportunity, I reiterate the Agency's commitment to ensure accountability and compliance with its fundamental rights obligations, and I thank you and your staff for your support and guidance in this important task.

Yours sincerely,

*Electronically signed*

**Aija Kalnaja**  
*Deputy Executive Director for Standing Corps Management  
deputising for the Executive Director*

Annex: Frontex's action plan in relation to the European Ombudsman's recommendations - Decision in OI/4/2021/MHZ

## FRONTEX'S ACTION PLAN IN RELATION TO THE EUROPEAN OMBUDSMAN'S RECOMMENDATIONS - Decision in OI/4/2021/MHZ

### on how the European Border and Coast Guard Agency (Frontex) complies with its fundamental rights obligations and ensures accountability in relation to its enhanced responsibilities

#### *Publication of operational plans and handbooks for joint operations*

**RECOMMENDATION 1 - 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.**

#### **Points 15-17 of the detailed assessment**

**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<sup>1</sup>, 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 give operation.

<sup>1</sup> 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.

17. Similarly, Frontex could publish an overview of responsibilities for different categories of participants in the operations<sup>2</sup>, which are included in the handbooks to the operational plans<sup>3</sup>.

### FRONTEX'S ACTIONS:

In order to satisfy transparency requirements and inform the public about its operations, as per Article 114(2) of the European Border and Coast Guard Regulation 2019/1896<sup>4</sup> (hereinafter: EBCG Regulation), and in response to this Recommendation, Frontex is working on the periodical product (operational brief) that would inform the public about its operational activities, without revealing operational information which, if made public, would jeopardize attainment of the operational objectives. The intended product (operational brief) will be published in the Frontex Public Register of Documents, on an annual basis. The Ombudsman recommendation to publish the summaries of the operational plans and of the handbook cannot be fulfilled, as releasing such summaries would benefit criminal networks with intelligence, enabling them to change their modus operandi and consequently result in hampering the course of ongoing and future similar operations, which would put the life of migrants in danger. This would ultimately obstruct the purpose of such operations: to counter and prevent cross-border crime and unauthorized border crossings. As Frontex ongoing operations tend to cover similar operational areas as the operations conducted in preceding years, disclosing details of the operational plans from the past would be tantamount to disclosing the current state of play. Consequently, the course of ongoing and future operations of similar nature would be hampered by depriving the operations of any strategy and element of surprise, ultimately defeating their purposes.

### *Identification of fundamental rights concerns and remedies for fundamental rights violations*

**RECOMMENDATION 2 - 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.**

<sup>2</sup> 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.

<sup>3</sup> 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.

<sup>4</sup> Regulation (EU) 2019/1896 of 13 November 2019 on the European Border and Coast Guard (OJ L 295, 14.11.2019, p. 1).

## Point 18 of the detailed assessment

**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<sup>5</sup>. It sets out a timeline for the FRO's opinions and establishes clear criteria for the FRO to issue a negative opinion<sup>6</sup>. 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<sup>7</sup>. This should be redressed.

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### FRONTEX'S ACTIONS:

The internal Fundamental Rights Officer's due diligence procedure is consistently used for FRO assessments of the fundamental rights situation prior to the launch and in the course of operational activities. Findings of assessments are also used to formulate recommendations, including on Article 46 of the EBCG Regulation (on suspension of operations) to advise on the application of the "Standard Operating Procedure – mechanism to withdraw the financing of, or suspend or terminate, or not launch Frontex activities", adopted by the Executive Director on 25 January 2022<sup>8</sup>. The Fundamental Rights Office is revising its due diligence procedure to include reports of national human rights bodies, such as ombuds institutions, but also a range of other updates. When the procedure is finalised, it will be made public through the annual report (at least). In February 2022, the Office outlined an overarching Playbook - for all activities, which currently is being developed. Where needed, more specific Standard Operating Procedures could be developed under this overarching framework but even the Playbook itself contains details on how the work should be conducted. Furthermore, the Fundamental Rights Office adopted on 5 May 2022, reporting guidelines for the Fundamental Rights Monitors, which explicitly requires taking findings from ombuds institutions and similar entities into consideration.

As regards Frontex's obligation to publish the Executive Director's reply to each negative opinion of the FRO about a planned activity, the Management Board will adopt by end of Q3 2022 rules for the Executive Director to ensure that action is taken with regard to recommendations of the Fundamental Rights Officer. In line with these rules being considered by the Management Board,

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<sup>5</sup> See paragraph 8 of the detailed assessment.

<sup>6</sup> 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](https://www.europarl.europa.eu/cmsdata/238156/14072021%20Final%20Report%20FSWG_en.pdf))

<sup>7</sup> 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.

<sup>8</sup> Decision of the Executive Director No R-ED-2022-12 Standard Operating Procedure - mechanism to withdraw the financing of, or suspend or terminate, or not launch Frontex activities

FRO would report on the extent to which his or her recommendations were followed up and on the concrete actions taken respectively by the Executive Director and the Management Board in this regard. This information would be included in the annual report of the FRO which is publicly available (at a minimum).

In addition, pursuant to Article 114(2) of the EBCG Regulation which requires the Agency to communicate to the public on matters falling within the scope of its tasks and on its own initiative, Frontex will publish ED's replies to each negative opinion of the FRO about a planned activity. However, such publication should follow the rules established by Regulation 1049/2001 regarding public access to documents and be without prejudice to the security rules of the Agency on protecting EU classified information and sensitive non-classified information. Consequently, the ED's reply to each negative opinion of the FRO about a planned activity shall be published unless their publication results in the disclosure of operational information which, if made public, would jeopardise the attainment of the objectives of operations. Therefore, before publication, the ED's replies will be subject to a scrutiny procedure similar to the documents requested on the basis of Regulation 1049/2001. Case by case assessments will balance the need to ensure safe and effective implementation of operational activities with the duty to inform and to be transparent set by the EBCG Regulation.

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## Monitoring of returns and the provisions for vulnerable persons

***RECOMMENDATION 3 - 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.***

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## Points 19-21 of the detailed assessment

**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<sup>9</sup>

**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

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<sup>9</sup> 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](https://www.europarl.europa.eu/doceo/document/TA-9-2020-0362_EN.html) .

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.

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#### **FRONTEX'S ACTIONS:**

Pursuant to Art. 50(5) of the EBCG Regulation:

*“Every return operation organised or coordinated by the Agency shall be monitored in accordance with Article 8(6) of Directive 2008/115/EC. (...)”*

With regard to the Return Directive (Art. 8(6)), the Member States (MS) are obliged to provide effective monitoring. Therefore, the legal framework assigns the obligation to monitor return operations to the MS. This obligation is also applied when a monitor from the pool is deployed (in line with Art. 51 of the Regulation) who is a person from a national body of a MS competent for forced-return monitoring in accordance with Article 8(6) of Directive 2008/115/EC, or a fundamental rights monitor employed as statutory staff of the Agency, nominated by the Fundamental Rights Officer on the basis of Article 109(3)(c) of the Regulation being independent in the performance of their tasks.

All monitors carry out independent monitoring of return operations as well as return interventions throughout their duration.

In principle, the MS decides to deploy its own monitor or request a monitor from the Frontex pool if the monitoring national institution does not deploy a monitor to be present in a given return operation. Those monitors have the national mandate to monitor the contingent of their own MS or of the MS requesting a monitor from the pool.

The Agency promotes and constantly supports the already existing practice under which monitors, report on the entire return operation and all its aspects, without being limited to the contingent to which they were assigned. The submission of any concerns regarding fundamental rights is therefore ensured at any stage of the operation. Additionally, this common practice is further promoted through the Agency's training and documents used in operations, such as the Code of Conduct for Return Operations and Return Interventions relating to all persons participating in Frontex operational activities, which reads:

*The monitoring of forced RO or RI shall be carried out on the basis of objective and transparent criteria and cover the compliance with the fundamental rights during the whole forced return operation or return intervention, from the pre-departure phase until the hand-over of the returnees in the third country of return or back to the country of departure.*

and

*Any participant in the return operation or return intervention who has reasons to believe that a violation of this Code or of the Code for all border control operations and all persons participating and of Fundamental Rights has occurred, has the duty to report it to Frontex or the Fundamental Rights Officer via the established reporting channels, especially via the Serious Incident Reporting (SIR) procedure<sup>[1]</sup>, the*

*supervisory mechanism for the use of force<sup>[2]</sup>, or if a forced-return monitor, via the reporting procedure for the forced-return monitor.*

**[1]** Decision of the Executive Director NrR – ED – 2021 -51 of 19/04/2021 related to the standard operating procedures (SOP) – Serious Incident Report

**[2]** Management Board Decision 7/2021 of 20 January 2021 establishing a supervisory mechanism to monitor the application of the provisions on the use of force by statutory staff of the European Border and Coast Guard Standing Corps

As outlined above, monitors have the national mandate to monitor the contingent of the respective Member State or of the Member State requesting a monitor from the pool. All monitors carry out independent monitoring of return operations as well as return interventions throughout their duration as to ensure the highest level of objectivity when performing their tasks.

Monitors nominated to the Frontex pool of forced-return monitors in line with Art. 51 of the Regulation are persons from a national body of a Member State competent for forced-return monitoring in accordance with Article 8(6) of Directive 2008/115/EC, or fundamental rights monitors employed as statutory staff of the Agency, nominated by the Fundamental Rights Officer on the basis of Article 109(3)(c) of the Regulation being independent in the performance of their tasks.

Efforts were undertaken also by the Agency to encourage Member States to designate independent monitoring bodies for return monitoring, however not all Member States have decided to implement such measures. The Fundamental Rights Officer will continue recommending and promoting that Member States have in place monitoring bodies that are supported by a proper mandate, capacity and competence and with a high level of independence.

Any concerns regarding fundamental rights during the monitoring of a return operation are submitted in an independent manner and reported directly to the Fundamental Rights Office for assessment. Moreover, operational plans do include sections on fundamental right safeguarding and all available mechanisms as well as describe the role and responsibilities of the monitors.

The reports by monitors are filled in a defined reporting template and received by the Fundamental Rights Office. The information provided sometimes requires follow up or clarifications. A new reporting framework for the pool of Forced Return Monitors via an IT system is being developed by which outputs of the monitoring reports will contain data and statistics which can be shared regularly on a web supported Platform for Communication, Coordination and Info Sharing for monitors. Relevant information and findings on the return monitoring activities are also included in the Fundamental Rights Officer Annual Report which is available for public access. Parts of the Fundamental Rights Officer Return Observations might be shared on Frontex/Fundamental Rights Officer related website with a view to ensuring enhanced transparency and visibility.

Adequate training for the forced return monitors, including the participation of Fundamental Rights Office staff as trainers, is ensured prior to taking up their activities within Frontex pool in which also monitors' reporting modalities and obligations for monitors as well as Serious Incident Reporting Mechanism are explained; forced return monitors participate in the briefings/debriefings held in the course of return operations and the Fundamental Rights Officer stresses in relevant fora and discussions with Pool Monitors the importance of reporting any related incidents when observed during return monitoring. Forced return monitors receive targeted training and material relevant for their monitoring work, jointly developed within the EU funded ICM DP FReM projects and adjusted regularly by Frontex/Fundamental Rights Office.



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

**RECOMMENDATION 4** - *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.*

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**Points 22-23 of the detailed assessment**

**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<sup>10</sup>. 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<sup>11</sup>.

**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<sup>12</sup>

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**FRONTEX’S ACTION:**

The Handbook to the Operational Plans has been duly updated in order to reflect the recommendation. The content of the update was prepared in coordination with FRO.

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<sup>10</sup> 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)

<sup>11</sup> 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)

<sup>12</sup> 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>