

February 2023

Dear Ms O'Reilly,

Thank you for the opportunity to provide additional comments to our complaint (1452/2022/MHZ).

First of all, we would like to acknowledge the efforts undertaken by the Fundamental Rights Office considering the limitations they face as it is evidenced in FRONTEX's reply. We are also pleased to learn that the FRO/FROMs are conducting an "assessment on debriefing activities" that will hopefully support this EO's inquiry.

The main aim of our complaint was, first and foremost, to trigger oversight over a central Frontex activity (debriefing) that, so far, has received little scrutiny while, at the same time, has evolved in practice. For that purpose, we urge the EO to focus on how debriefing interviews are conducted in *practice*.

1. Frontex obligation to respect national law

The issue raised in this complaint is that FRONTEX in the performance of its task *must also* respect national law that provides certain legal guarantees that at times might go beyond what is established in EU law.

In its reply, FRONTEX ignores this obligation which it seems to leave to the national authorities and Team Leaders to fulfil. However, situations such as the one presented in the complaint show that FRONTEX's way of dividing responsibility is out of sync with its legal obligations. The Spanish Ombudsperson has made several recommendations to the Spanish national authorities to take additional steps to ensure that FRONTEX operations respect the rights that national law confers to people subject to a debriefing interview.

FRONTEX's response clearly shows that the agency does not consider that it is obliged to respect the legal guarantees recognized by national law, to which it does not even refer, nor that it must take any action in this regard. The European Ombudsperson could clarify the steps that can be expected from Frontex or due diligence necessary to ensure compliance with national legislation (something that its regulation explicitly includes).

2. Debriefing interviews are not voluntary and they have a legal impact on the interviewees

While operational documents might conceive of debriefing as entirely "voluntary, anonymous and confidential", such understanding is out of sync with the practices performed by participants to FRONTEX joint operations. We regret that, in its reply, FRONTEX did not engage in this level of analysis and chose, instead, to merely elaborate on the provisions

governing debriefing, disregarding the significant gaps between the law and everyday practices that we have evidenced. In this regard, we would like to refer the EO to the Spanish Ombudsperson's recent observations and recommendations where he provides a more detailed account of Frontex debriefing activities, identifying a series of serious violations of procedural safeguards and the rights of people subject to debriefing. Given the observations made by the Spanish Ombudsperson, we would like to request for the EO to extend the scope of this inquiry beyond JO Indalo to include all debriefing activities in Spain.

In reply to the specific points, we would like to add the following:

1. Fails to ensure access to legal aid for migrants in the context of debriefing interviews

In its reply, FRONTEX does not take due account of the breadth of the legal framework in which the agency carries out its activities nor recognises detainees as right bearers. Crucially, and contrary to FRONTEX's claims, debriefing activities are conducted in a ***context that is directly associated with criminal proceedings***. A central purpose of debriefing migrants is precisely to identify suspects of cross-border crime, to extract information related to such crimes, including personal data of suspects, and to exchange such information with national authorities and, through the PeDRA programme, with Europol.

In Spain, debriefing interviews are conducted either directly at the ports of disembarkation¹ or at the CATEs (*Centros de Atención Temporal de Extranjeros*) during the hours immediately after disembarkation of new arrivals. In this regard, FRONTEX ***cannot ignore that its actions are carried out against people who are formally detained*** in the CATEs as a result of their irregular entry into Spanish territory, to whom not only the Organic Law on Immigration 4/2000 is applicable, but also the Royal Decree of September 14, 1882 approving the Criminal Procedure Law, as well as the Spanish Constitution of 1978. Specifically, article 61 (1) lit. d of the Law 4/2000 allows the detention of the newly arrived migrants for a maximum period of 72 hours, as a precautionary measure. Participants to FRONTEX operations in Spain, in particular Team Leaders, are fully aware that, during this period of time, the national authority expressly recognizes the detention situation of the people who are being interviewed by FRONTEX deployed officers and Team Leaders. By recognising the condition of detention, participants to FRONTEX joint operations should also guarantee all the rights provided by article 520 of the Criminal Procedure Law.

Hence, ***the condition of being a detainee is key here***. When conducting police-like interrogations (so-called debriefing) with people who are detained, the Agency must guarantee the fundamental right to legal assistance prior and during the interview. This obligation is enshrined in article 17. 3 of the Spanish Constitution (*"Every detained person must be informed immediately, and in a way that is understandable, of their rights and the reasons for their detention, and cannot be forced to make a statement. The assistance of a lawyer to the detainee*

¹ <https://www.defensordelpueblo.es/resoluciones/planes-operativos-de-las-actuaciones-de-frontex-en-espana/>

is guaranteed in police and judicial proceedings, in the terms established by law”) as well as in article 22 of Law 4/2000.

We do not share FRONTEX's statement that it is not necessary to guarantee legal assistance to detainees who are not being investigated for a criminal act, including cases when interviewees are then identified as protected witnesses because of collaboration with police authorities. This is mainly because the guarantees offered by this fundamental right does not depend on the existence of an investigation that affects them personally, but on their own condition as detainees. Furthermore, as stated above, debriefing activities are directly associated with criminal proceedings.

In this sense, and especially considering the agency's unequivocal obligation to guarantee the protection of fundamental rights (Article 80(1) Regulation 2019/1896), it is very significant that FRONTEX perceives the guarantee of a fundamental right as a threat to the effective performance of its tasks since it is not taking into account that legal assistance can serve a protective purpose, ensuring that situations of coercion do not occur and that the identification of vulnerabilities take place duly taking into account all the personal and family circumstances of the interviewees.

2. Does not keep a record of migrants' consent for debriefings.

The Spanish Ombudsperson as well as our findings are unequivocal: debriefing interviews are not voluntary interviews and people subject to them do not receive enough information about the object of the interview and their rights. In such context, as the Spanish Ombudsperson has concluded, debriefing must stop.

The justification given by FRONTEX regarding the lack of written consent for confidentiality reasons is not acceptable. There are other mechanisms to guarantee confidentiality that FRONTEX could deploy to its actions, just as national authorities do with protected witnesses for example. While we agree that anonymity is paramount, the agency shall ensure that people subject to debriefing are informed in advance about the voluntary nature of the interviews, as well as the potential consequences/effects of accepting or refusing to be interviewed. Ensuring anonymity does not absolve the agency from obtaining informed consent regardless of whether there is a criminal charge against the interviewee.

3. Fails to ensure external oversight of debriefings

In its reply, FRONTEX vaguely refers to a number of EU agencies and International Organisations as well as to its own advisory body (the Consultative Forum). Debriefing interviews are, however, conducted without the presence of any of the actors mentioned in the letter. In other words, none of them conduct oversight over FRONTEX debriefing activities. As explained in our initial complaint, when one of us requested to be present during a debriefing interview as a legal representative of one of the interviewees, access was refused. Furthermore, as the letter states, FROMs “were refused access by Frontex to monitor debriefing activities and to be present in debriefing interviews”. The letter, therefore, further evidences

the absence of any external or internal oversight of debriefings.

4. In selecting migrants and conducting debriefing interviews, does not take into account the potential vulnerabilities of migrants or the difficult situations of their detention in the Centros de Atención Temporal de Extranjeros.

FRONTEX's reply opens up a number of questions: How exactly does the agency ensure that "the interviewee is both fit and able to undertake an interview"? Such a statement appears out of sync with the reality at the ports that we have observed. Debriefing takes place immediately after disembarkation, following often physically and psychologically exhausting journeys. In fact, the agency encourages interviews to take place as soon as possible after arrival because of the risk of "false accounts" and the presumed reluctance to cooperate if migrants mix with others. Interviews therefore are not only conducted in the CATEs but also directly at the port as evidenced by the Spanish Ombudsperson. In a recent Op-ed, the European Data Protection Supervisor consider debriefing as a "pervasive" activity that extracts data "from people facing immense vulnerabilities".²

In this regard, it is relevant to mention the case experienced by the client of one of us. Immediately upon arrival at the port of Almeria, she was subject to an interview conducted by Frontex deployed officers where she was asked about the driver of the boat and where no lawyer was present. Her testimony later became a witness statement in a smuggling case. The Frontex officers who extracted information from her were absolutely indifferent to her situation of extreme vulnerability. She had just lost her child during the boat crossing. This posed, however, no obstacle to interviewing her immediately after a helicopter had taken the body of her dead child. What this case shows is that Frontex officers are more concerned with extracting information to support criminal proceedings than with detecting vulnerabilities.

How does the agency ensure that a proactive identification of vulnerabilities takes place? Our research shows that while debriefing interviews may present an opportunity to identify protected witnesses or vulnerable persons and despite it being an obligation under the operational plan, this aspect did not feature in how Frontex debriefers presented their work during the conversations we had. Debriefing interviews are vested with a high degree of doubt and distrust, which becomes evident in the constant search for "truthful" accounts and people with "suspicious behaviour". Interviews are conducted mostly by police officers following a particular policing mindset which does not encompass the detection of vulnerabilities. Furthermore, at the moment, there are no apparent procedural arrangements to conduct such referrals nor an objective way to measure the performance of this task. For instance, the agency does not collect information on the number of referrals "to the host MS team leader for further handling or through the established procedures to the competent national authority if the MS team leader is not available".

² <https://www.euractiv.com/section/data-privacy/opinion/it-is-time-to-tear-down-this-wall/>

With regards to the agency's point on reporting, it is our understanding that when an interviewee shares information regarding a breach of fundamental rights, debriefers are encouraged to inform the interviewee about the Frontex complaints mechanism (so he/she can submit a complaint) rather than the officer initiating a SiR. Our understanding is that such "compromise" prioritizes the relationship with the host authority to avoid situations as the one documented in the OLAF report:

The Frontex-deployed expert wanted to inform RAU [Risk Analysis Unit] about the awkward behaviour of the local authorities, but at the same time explicitly asked not to uncover their name and treat this information as unofficial, because the expert wanted to avoid any immediate confrontation with the local authorities and due to the sensitive nature of the issue. It happened in the past that because of the initiation of a SIR the debriefing expert had serious conflict with the Greek Authorities and could that made their stay unbearable. The expert providing this information had to stay as a guest officer for months in the area and keep a good working relation with the hosting authorities. For this reason, the expert communicated the information via alternative channels.

Thus, we would like to caution over relying on the alleged effectiveness of FRONTEX reporting mechanisms (as the letter does) given that such mechanisms have been widely criticized for their shortcomings.

To conclude, the agency's reply seems to suggest that full credibility and reliability should be given to its debriefing work, expecting EU citizens to believe that its intervention in the debriefing interviews does not cause any harm and that the agency alone can guarantee respect for the fundamental rights of detainees who are subject to de facto covert interrogations.

When taking a decision, we would like to request the EO to also consider:

- the Spanish Ombudsperson resolution on debriefing available at: <https://www.defensordelpueblo.es/resoluciones/planes-operativos-de-las-actuaciones-de-frontex-en-espana/>;
- the FROMs "assessment on debriefing activities" and any other relevant information provided by the FRO;
- EDPS recent audit on Frontex's processing of personal data about migrants since a key source of the data that is being are debriefing interviews.

Yours sincerely,

