

Your ref. OI/3/2023/MHZ

Ms Emily O'Reilly
European Ombudsman

Subject: Frontex's reply in relation to the European Ombudsman's own initiative inquiry OI/3/2023/MHZ - The role of the European Border and Coast Guard Agency (Frontex) in the context of search and rescue (SAR) operations

Dear Ms O'Reilly,

With reference to your letter of 24 July 2023 in relation to your own initiative inquiry OI/3/2023/MHZ, please find the answers below each of your questions:

Point A)

- 1. Could Frontex make the necessary arrangements for my inquiry team to inspect Frontex's serious incident report concerning the Adriana shipwreck of 14 June 2023?**

[REDACTED]

- 2. Could Frontex make it possible for my inquiry team to inspect its serious incident reports for other recent incidents involving considerable loss of life of migrants due to shipwrecks or situations of distress at sea (including in the central Mediterranean, for example, the incident on 26 February 2023 off the coast of southern Italy and the incident on 7 January 2023 involving the sinking of a boat near Louata, in the Sfax region)?**

[REDACTED]

Point B)

- 1. How does Frontex ensure that, during joint maritime operations, it complies with its fundamental rights obligations under EU and international law, including the duty to rescue those in distress at sea?**

The EBCG Regulation¹, as part of the European Integrated Border Management concept, takes into account the requirements of EU Regulation No 656/2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union. Article 4 of EU Regulation No 656/2014 provides for the protection of fundamental rights and the principle of non-refoulement. Frontex ensures that it fulfils its tasks in full compliance with relevant European Union law, including the Charter of Fundamental Rights of the European Union.

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

The Operational Plan includes a dedicated part with “*General instructions on how to ensure the safeguarding of fundamental rights during the operational activity including the complaints mechanism*”. It includes information on:

- The European Border and Coast Guard obligations in safeguarding fundamental rights,
- Tasks and responsibilities regarding respect for fundamental rights,
- Sharing expertise and best practices related to the protection and compliance with fundamental rights,
- Frontex complaints mechanism and the right to submit a complaint,
- how to submit a serious incident report in case of alleged violations of fundamental rights,
- The Role of Fundamental Rights Monitors,
- Specific fundamental rights safeguards on Third Country observers.

All participants to Frontex maritime Joint Operations (JO) receive an operational briefing at the beginning of their deployment in which the operational team responsible for the implementation of the JO and representatives and FROM stress the importance of the fundamental rights obligations under EU and international law, and the duty to rescue those in distress at sea.

During sea patrolling mission, Frontex complies with international law and fundamental rights obligations by alerting the relevant national authorities upon a detection and accession of an event as a possible SAR, while awaiting orders from the relevant Member State authorities (MRCC) to be engaged or to provide any kind of support if requested.

2. *Does Frontex proactively engage in SAR activities, searching for persons in distress, retrieving survivors, and delivering them to a ‘place of safety’?*

In all SAR cases, Frontex assets always operate under the coordination of the competent Rescue centres of the national authorities, receiving instruction after the detection of a possible SAR case or being tasked to take part in a SAR activity. In this regard, crews are proactively supporting the operations in accordance with the incoming information and instructions.

The respective SAR coordinating authority decides, which aircraft/vessel is best suited to conduct a SAR operation. Frontex deployed assets are at the disposal of the competent MRCC and in case of need can be engaged in SAR operations.

Member State authorities assume responsibility and coordination of SAR operations of migrant boats in distress sighted by the Agency’s assets inside their Search and Rescue Region and ensure the identification of a safe port of disembarkation.

When engaged in SAR activities, Frontex assets contribute e.g. by searching for persons in distress, retrieving survivors and delivering them to a ‘place of safety’ assigned by the MRCC.

Point C)

1. *According to Regulation 2014/656, for each sea operation, an international coordination centre is used as a channel for communication between national and Frontex staff, including the coordinating officer appointed by Frontex’s Executive Director. What is the exact role of Frontex and its coordinating officer in SAR operations, given that it is the national rescue centre that decides on such operations?*

The role of Frontex and its coordinating officer related to SAR is to ensure the readiness of the participating assets deployed by Frontex to properly respond to SAR and to support the Member States in any way requested and or deemed relevant according to the international standards and regulations.

When a SAR operation is launched, the competent MRCC coordinates the assets involved, the communication, and all other activities to ensure the rescue of the persons in distress and their transfer to a safe place. Together with the respective International Coordination Centre (of the Frontex Joint Operation), the coordinating officer receives updates on the rescued persons, possible casualties, and other relevant information which might be used for the further analysis of a SAR event.

2. *Is Frontex contacted proactively by the national authorities as soon as SAR operations are being prepared and launched?*

Frontex is regularly asked by national authorities to assist in search and rescue operations. In accordance with international law, search and rescue operations are always coordinated by the national rescue centres. The competent authority decides which assets shall be dispatched to the rescue operation. This might include Frontex aircraft or vessels, but also commercial and NGO assets.

National authorities are aware of Frontex activities within the area of a SAR event and might engage an asset anytime it is considered necessary. Frontex makes sure that national authorities are aware of the availability, location, size and technical specifications of each deployed asset to enable the coordination centres to the make best use of them.

3. *Does Frontex have substantial input into the design or organisational implementation of these operations?*

Frontex does not have a substantial input into the design or organisational implementation of SAR operations. They are coordinated by the MRCC and Frontex assets might be requested to take part in the implementation of the SAR activities.

Within the mandate on the European cooperation on coast guard functions, described in Article 69 of the EBCG Regulation, Frontex supports national authorities carrying out coast guard functions by promoting and organising SAR workshops and events in order to exchange best practises, knowledge, and experience from the field.

Point D)

1. *More specifically, on the role of the coordinating officers, how do fundamental rights monitors assist and advise coordinating officers?*

Fundamental rights monitors regularly exchange with Frontex coordinating officers and provide advice (pro-actively or upon request) on fundamental rights questions pertaining to activities in JO. Frontex would like to stress that fundamental rights monitors are assigned to each operational activity.

Articles 110(2)(d) and 44(3) of the EBCG Regulation lay down the principle for the collaboration between the fundamental rights monitors and the coordinating officers, which are transposed into the Standard Operating Procedures of the fundamental rights monitors. The Frontex coordinating officer is the key counterpart for the monitors on the operational side. The monitors are to cooperate and liaise with the coordinating officer and inform them about any concerns related to fundamental rights as well as provide advice and support in relation to fundamental rights challenges within the Agency's operational activities. After their visit to the operational areas, fundamental rights monitors share their findings and recommendations with the relevant coordinating officer. In turn, the coordinating officers ensure that the monitors are invited to participate in the operational briefing to provide a presentation on fundamental rights and to obtain access to all areas, documents, and information relevant for the fulfilment of their tasks and support the implementation of the recommendations proposed by the monitors.

During SAR operations, which take place within the context of a JO, monitors analyse Frontex involvement in SAR operations and monitor sea patrols on both, Frontex assets and co-financed assets, to assess the compliance with fundamental rights in SAR operations. This may cover all phases of the operations from detection, interception, apprehension, and disembarkation.

In this capacity, fundamental rights monitors provide advice and monitor compliance with fundamental rights mainly related to the protection of the right to life, the prohibition of *non-refoulement*/collective expulsions and access to asylum. Further, in cases where allegations of fundamental rights violations arise, the fundamental right monitors advice on the participants' duty to report and, alongside the FCOs to closely cooperate with the FRO Serious Incident Reporting Team responsible for further investigating such cases.

In addition, in the context of Frontex Multipurpose Aerial Surveillance services, fundamental rights monitors (FROM) are assigned in a shift model to the European Surveillance Room in Frontex HQ, where Frontex Surveillance Aircraft (FSA) patrolling is live streamed. FROMs are available in person or over phone to support Team Leaders coordinating this service.

2. ***Have there been reports by the coordinating officer to the Executive Director, detailing instances where instructions issued to staff involved in SAR operations by the host Member States are not in compliance with fundamental rights, with suggestions to suspend, terminate or not launch the activities in question?***

Frontex is not aware of any such case.

3. ***If so, please provide us with such reports, under the conditions described in point A above?***
N/A

Point E)

In accordance with Regulations 2019/1896 and 2014/656, Frontex is obliged to provide technical and operational assistance to Member States and non-EU countries in support of SAR operations, in compliance with the Charter of Fundamental Rights. In its operational plans for joint operations signed with the Member States, there should always be a SAR component. Is such a component consistently included, and could Frontex provide examples detailing what this component is comprised of?

There is a standard sub-chapter (Technical and operational assistance to SAR operations) in all Operational Plans of the Sea JOs (Specific activity plan), which stipulates that “MS shall observe their obligation to render assistance to any vessel or person in distress at sea and they shall ensure that their participating units comply with that obligation, in accordance with international law and respect for fundamental rights under the coordination of the responsible Rescue Coordination Centre (RCC)”.

Moreover, all Operational Plans of the Sea Joint Operations in the Chapter “COORDINATION STRUCTURE” provide that in case border control turns to SAR, the activities are executed under the coordination of the competent SAR national authorities according to internationally agreed SAR procedures.

Point F)

Does Frontex specify in writing how cameras on boats taking part in Frontex joint operations - and/or part of the Frontex technical equipment pool- should be used to monitor compliance with fundamental rights obligations?

The Specific activity plan of the JO Poseidon includes such provisions, which are:

“In compliance with the national legislation of the host MS, including the applicable national provisions on data protection, the assets must properly document [REDACTED] of all actions (detection, tracking and interception).”

Point G)

1. ***Does Frontex have/prepare reports or other assessment documents concerning fundamental rights compliance during SAR activities in the context of joint maritime operations, in particular concerning:***
 - (i) delayed or lack of response to individuals or boats in distress at sea in a search and rescue region covered by a joint operation;*
 - (ii) delayed or refused disembarkation at EU ports of people rescued by the vessels of non-governmental organisations (NGOs);*
 - (iii) situations where captains of NGO vessels are required to hand over rescued individuals to the coast guards of non-EU countries?*

No, there is no dedicated report concerning fundamental rights compliance during SAR activities in the context of joint maritime operations. [REDACTED]

However, every year, Frontex publishes an annual report on the implementation of Regulation (EU) No 656/2014, which also focuses extensively on fundamental rights in SAR operations. The Fundamental Rights Office also provides regularly and timely observations to this annual report.

2. If so, how is the Fundamental Rights Officer involved in preparing such reports?

In the context of Multipurpose Aerial Surveillance services operating in the pre-frontier areas, the Fundamental Rights Office provides a fundamental rights assessment of the requested service where relevant concerns/risks related *inter alia* to the engagement with non-EU countries' authorities, delay/lack of response to distress cases, disembarkation in unsafe ports, communication during SAR, and mitigating measures are highlighted.

The Fundamental Rights Office further provides ad hoc opinions on specific issues. [REDACTED]

3. Please provide us with examples of such reports under (i), (ii) and (iii), under the conditions described in point A above?

Please find the respective opinions herewith attached for your kind reference (Annexes 3 and 4 - "Confidential").

Point H)

Does Frontex have a protocol on its communication with non-governmental organisations that operate in support of SAR operations, with a view to ensuring coordination and swift reaction to situations of distress at sea?

Frontex assets act under the international law (i.e. IAMSAR manuals) in term of communications. In emergency situations, where a vessel or persons are in imminent danger, the crew of all Frontex aircraft is instructed to broadcast a Mayday Relay on VHF channel 16. The call is addressed to all vessels. Although cooperation with NGOs is not specifically foreseen by the EBCG Regulation, if NGOs are in the area, of course they also receive the emergency call.

Is worth to mention that coordination of SAR activities is an exclusive duty of the "competent" Rescue Coordination Centre identified for a certain geographical area, FX assets are resources that can be used to operate in support of SAR operations only if required.

Point I)

Frontex's multiannual programming 2023-2025 states that "protecting and saving lives at external borders is a key priority; the capacity and operational readiness to support MS/SACs in conducting search and rescue operations [should] be a vital part of all the surveillance operations at the external sea borders." Could Frontex clarify the targets for its SAR activities, as indicated in multiannual programming in relation to the key activity 2.3.2 and 2.3.3 (Page 49)?

All SAR actions are an integral component of the operational activities conducted in the maritime domain. The Operational plans contain SAR requirements stemming from the body of "law of the sea". Frontex's contribution in this domain is two-fold: (i) through operational engagement in Multipurpose Maritime Operations (MMO) maritime component in 2.3.2. and (ii) capacity building actions comprised within both 2.3.3 and specific actions within projects 'E' and 'G' as contained in the tripartite working arrangement 2023, Annex XVII to the Single Programming Document 2023-2025.

Project: E	Cross-sector training and capacity building
Objective and tasks:	<ol style="list-style-type: none"> 1. Offer joint cross-sectoral training to Member State national authorities by developing or implementing as adequate joint cross-sector training events or awareness sessions for items such as: <ol style="list-style-type: none"> 1. Search and Rescue; 2. Fishing vessels safety/fisheries inspection rules; 3. Maritime Surveillance; 4. EU cooperation on coast guard functions. 2. Offer joint cross-sectoral training to at least one third country by developing or implementing as adequate joint cross-sector training events or awareness sessions.
Timeline:	2023 (multiannual, follow up work from 2022)
Contribution from Member States authorities:	<ol style="list-style-type: none"> 1. Member States will benefit from the cross-sector trainings to be organised. 2. Where relevant, Member States to participate with their input.

Project: G	Multipurpose Maritime Operations
Objective and tasks:	<ol style="list-style-type: none"> 1. To further develop the concept for implementation of MMO(s). <ol style="list-style-type: none"> 1. Identify potential areas and periods of interest for the implementation of MMOs in 2024, taking into consideration the availability of multipurpose capacities of the three Agencies, in those areas in such periods as well as operational activities already in place; 2. Keep updated the generic modalities. 1. To implement the MMO(s) agreed by TWA Steering Committee in the European sea basin, upon MS's or Agencies request and in line with the generic modalities for MMO. <ol style="list-style-type: none"> 1. Implement a MMO in the Black Sea. Prepare specific modalities in accordance with the generic modalities for MMO and relevant decision of the Steering Committee; 2. Implement a MMO in Baltic Sea (Possible alternative TBC: North Spain/Portugal). Prepare specific modalities in accordance with the generic modalities for MMO and relevant decision of the Steering Committee; 3. Implement a MMO in an additional European sea basin (TBD). Prepare specific modalities in accordance with the generic modalities for MMO and relevant decision of the Steering Committee.
Timeline:	<ol style="list-style-type: none"> 1) Possible areas/period of interest to be identified by September 2023 for the endorsement of the Steering committee for ASP 2024. 2) During year 2023
Contribution from Member States authorities:	MSS' feedback on MMO received through the evaluation report. Generic modalities: Through AECGE, feedback from MSs involved in previous MMOs.

I remain at your disposal for any further information.

Yours sincerely,

Electronically signed

Hans Leijten
Executive Director

² Frontex kindly requests to treat the documents shared as 'Confidential' and not to disclose them to any persons.