

ANNEX

FRONTEX'S ACTION PLAN AS REGARDS THE EUROPEAN OMBUDSMAN'S RECOMMENDATIONS in Decision in OI/3/2023/MHZ

on how Frontex complies with its fundamental rights obligations with regard to search and rescue in the context of its maritime surveillance activities, in particular the Adriana shipwreck

RECOMMENDATION A)

If the FRO identifies persistent violations of fundamental rights by a Member State in responding to maritime emergencies or, should Frontex become aware of such serious violations following formal inquiries or court judgements, Frontex should consider terminating, withdrawing or suspending Frontex's activities with the Member State in question, in line with Article 46 of Regulation 2019/1896.

1. This should also be considered in the context of the Pylos shipwreck, for which there are ongoing national investigations. Frontex should consider whether the threshold has been reached to allow it to terminate, withdraw or suspend its activities with the Member State in question.

2. It should publicly clarify its reasons for concluding that the threshold has or has not been reached.

FRONTEX'S ACTIONS

Point A/1 - Status: In progress (foreseen timeline: end of 2024)

On 25 January 2022, the Executive Director Decision No R-ED-2022-12¹ on the Standard Operating Procedure (SOP) - mechanism to withdraw the financing of, or suspend or terminate, or not launch Frontex activities was adopted.

¹ Decision of the Executive Director No R-ED-2022-12 of 25/01/2022- Standard Operating Procedure - mechanism to withdraw the financing of, or suspend or terminate, or not launch Frontex activities

On 1 September 2022, based on the Opinion of the FRO on Greece of 1 September 2022 in which the FRO proposed the activation of Article 46 of the European Border and Coast Guard Regulation 2019/1896² (Regulation), the Agency launched a procedure in accordance with this Article and the SOP. A Working Group (WG) was established to conduct a detailed assessment of the situation, and issue recommendations.

On 22 September 2022, the Greek authorities submitted to the Agency the Greek Implementation Plan (GIP) to address the recommendations and the concerns expressed in the above FRO Opinion as well as the FRO Opinions sent earlier in relation to Greece.

On 20 February 2023, the WG advised the Executive Director not to withdraw financing, suspend or terminate the Frontex coordinated Joint Operations (JOs) implemented in Greece, i.e. JO Poseidon and JO Terra and put forward recommendations to implement further measures to strengthen the compliance with fundamental rights.

Following the Pylos shipwreck, in July 2023, the FRO issued another Opinion on Greece. FRO advised again to trigger the mechanism under Article 46 of the Regulation. As the concerns were similar, the WG continued working on the recommendations and the GIP. To further operationalise the GIP, a refined Action Plan was put in place and its implementation has been followed by the WG. The final evaluation of the GIP will be provided to the Frontex Management Board by the end of 2024.

The Agency is currently developing a new concept of the permanent platform, the Fundamental Rights Compliance Panel (Panel), to regularly monitor concerns regarding the compliance with fundamental rights related to operational activities, with the possibility to involve other relevant entities on a need basis and in close cooperation with the FRO and the Consultative Forum (CF) members.

The Panel is foreseen to assess on a case-by-case basis whether the threshold to trigger Article 46 of the Regulation is reached. The Panel will be mandated to propose corrective measures, including the full or partial suspension or termination of activities.

FRONTEX'S ACTIONS

Point A/2 - Status: Implemented

Frontex is committed to ensuring that all its operational activities in Greece are carried out in full compliance with the law and respect the dignity of all persons. The option of withdrawing the Agency's support is a last resort measure that must not be taken lightly. Such a step would impact not just the joint efforts to secure the EU's borders but also the ability to save lives at sea.

² Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulation (EU) 1052/2013 and Regulation (EU) 2016/1624 (OJ L 295, 14.11.2019, p. 1).

Frontex has provided the reasons for concluding that the threshold has not been reached in various public fora. This includes detailed explanations given during hearings of the European Parliament and through various European media outlets. The Agency remains committed to transparency and will continue to engage openly with stakeholders to ensure clarity on operational decisions.

RECOMMENDATION B)

Frontex should conduct a sustained and serious organisation-wide reflection, led by its Executive Director and with the involvement of members of its Management Board, on how it upholds its fundamental rights obligations in its response to maritime emergencies and search and rescue operations.

FRONTEX'S ACTIONS

Point B - Status: Implemented

The Frontex Management Board considers fundamental rights aspects of maritime emergency and search and rescue (SAR) operations in the context of Frontex operational activities. The establishment of the Frontex Management Board Working Group on Fundamental Rights and Legal Operational Aspects of Operations in Aegean Sea³ (FRaLO) served the purpose to monitor the operational activities' compliance with fundamental rights.

Internal discussions and reflections led to the overall transformation of the organisation of the Agency at the beginning of 2024 to improve the comprehensive planning, implementation and evaluation of operational activities in a transparent manner. This also aims at contributing to streamlining fundamental rights obligations in all Frontex activities, including in its response to maritime emergency and SAR operations, while being mindful that Frontex is not a 'SAR authority'.

Simultaneously, since 2021, the FRO and the Fundamental Rights Monitors (FROMs) have 24/7 access and a constant seat in the European Surveillance Room, which conducts real-time aerial surveillance activities. The Frontex Chain of Command - introduced by Executive Director Decision No R-ED-2023-51 as part of an operational pilot project⁴ - embeds the FRO or FROMs in the management structure of the contingent to directly support the Frontex Contingent Commander (FCC) while maintaining FRO's and his staff's independence in performing their duties. The roll-out of the Frontex Chain of Command

³ Management Board Decision 39/2020 of 26 November 2020 on the establishment of the Management Board Working Group on Fundamental Rights and Legal and Operational Aspects of Operations

⁴ Decision of the Executive Director No R-ED-2023-51 of 14 June 2023 on establishing temporary functions, processes, and organisational structures to pilot, develop and evaluate the Frontex Chain of Command - Operational Pilot Project and Frontex Operational Concept.

including the active role of FRO/FROMs has been approved by the Frontex Management Board and commenced in 2023. The structure including the role of the FRO/FROMs in the direct support to the FCC will be further operationalised in a Decision of the Executive Director on the new Frontex Chain of Command that is being drafted in consultation with the FRO.

RECOMMENDATION C)

1. Frontex should adopt and publish internal guidelines on how to react to maritime emergencies detected by Frontex's aerial surveillance, including regarding the issuance of Mayday relays and possibly also other emergency signals.

This should cover all relevant factors, including taking into account whether the relevant RCC has clearly communicated its actions and confirmed that it is coordinating a SAR operation, as well as potential concerns about the record of national authorities.

2. Frontex should also reflect on how better to respond to unofficial reports, such as those from NGOs, which may have vital information to impart, and how to include them its assessments. Reported dangers to children should be given the highest priority.

FRONTEX'S ACTIONS

Point C/1 - Status: Implemented

Frontex has established internal guidelines for Frontex Surveillance Aircraft to issue a Mayday Relay call [REDACTED]. The procedure outlines in detail the steps to be followed and include which immediate action to take upon sighting, how to conduct a risk and safety evaluation, on the communication with a vessel in a state of emergency, on the transmission of the Mayday Relay signal on behalf of the vessel, on the appropriate radio frequency, on the coordination with Rescue Coordination Centre (RCC), and how the incident is to be documented. The guidelines have been consulted with the FRO to ensure the fundamental rights compliance.

FRONTEX'S ACTIONS

Point C/2 - Status: Implemented

As regards the Agency's response to unofficial reports, it shall be highlighted that Frontex treats all reports of threats to the physical integrity of persons very seriously and responds to all reports it

receives, including those from NGOs, in particular those which may contain vital information to be transmitted.

When information is received from NGOs concerning emergencies/distress cases and/or requests for international protection, Frontex strives to assess each report and disseminates the information received and the relevant updates to the competent national and local authorities, and to Frontex surveillance aircrafts if they are deployed in the area as well as to operational teams operating in the area.

In cases where the physical integrity of persons may be at risk, the information is treated with priority, beyond gender and age differences, and transmitted to the competent national authorities and Frontex operational teams as soon as possible and in any case within approximately one hour as of receipt. Information related to less urgent cases, e.g. asylum seekers requesting international protection, are processed as soon as possible as these not fall under Frontex's direct mandate - however, also here if the life and integrity of human beings is at stake, these cases are dealt expeditiously.

The Agency is committed to gathering further information from operational teams to establish whether Frontex's assets or actors are involved in the incident or operating in or near the area. In addition, it offers Frontex assets to respond to requests for assistance from the national authorities.

In the Frontex 24/7 Operations Centre (OPC), each case is carefully evaluated to determine the most appropriate course of action - this includes the determination of follow-ups and further steps.

The rapid, consistent and continuous flow of information between the operational area, the national authorities and the OPC ensures a prompt response which allows for a rapid assessment and the determination of appropriate measures to ensure the protection of human life.

RECOMMENDATION D)

As regards joint maritime operations coordinated by Frontex, the operational plans should also include provisions on how to respond to maritime emergencies, while awaiting instructions from the relevant rescue coordination centre, including regarding the issuance of Mayday relays.

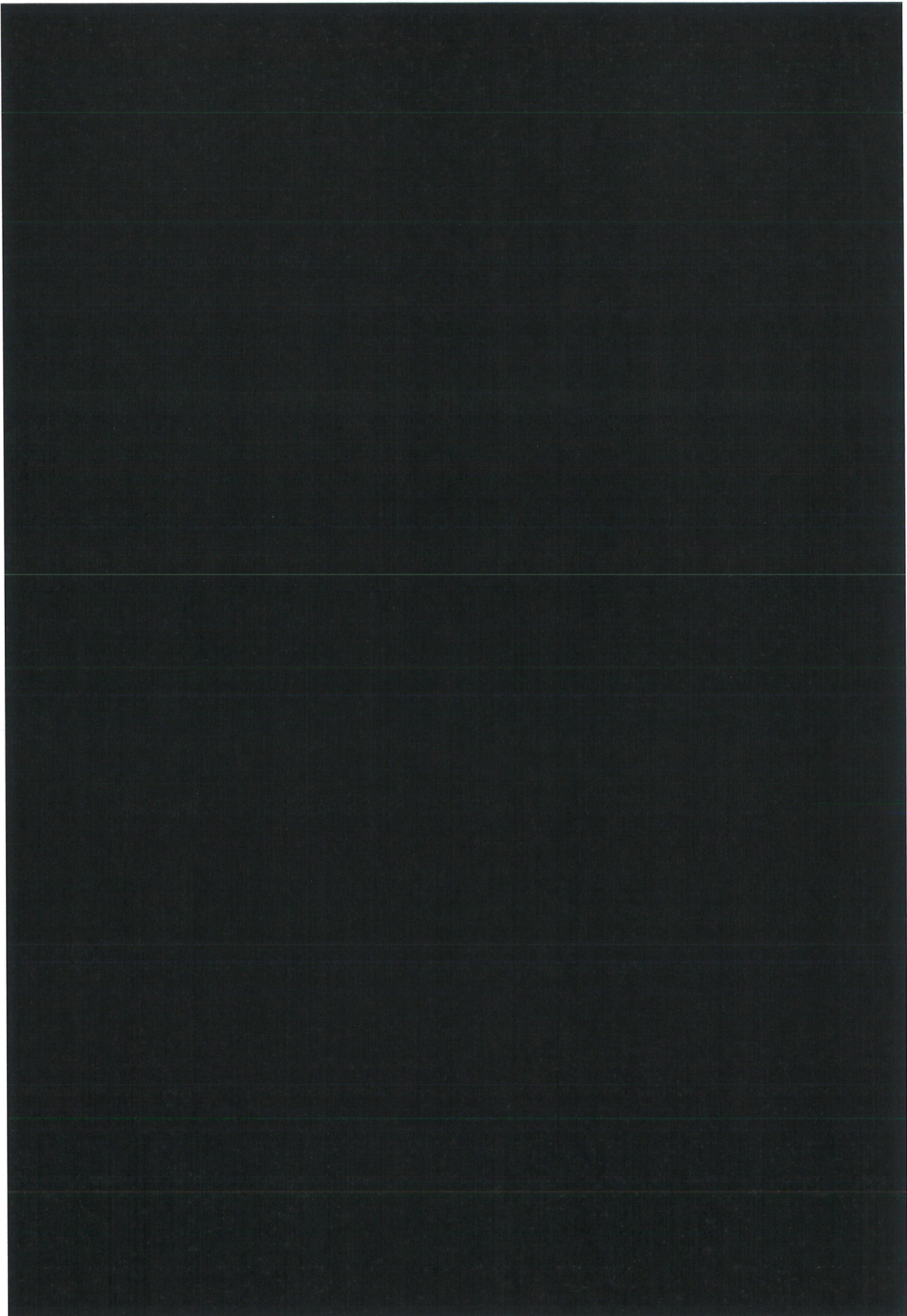
The operational plans should also:

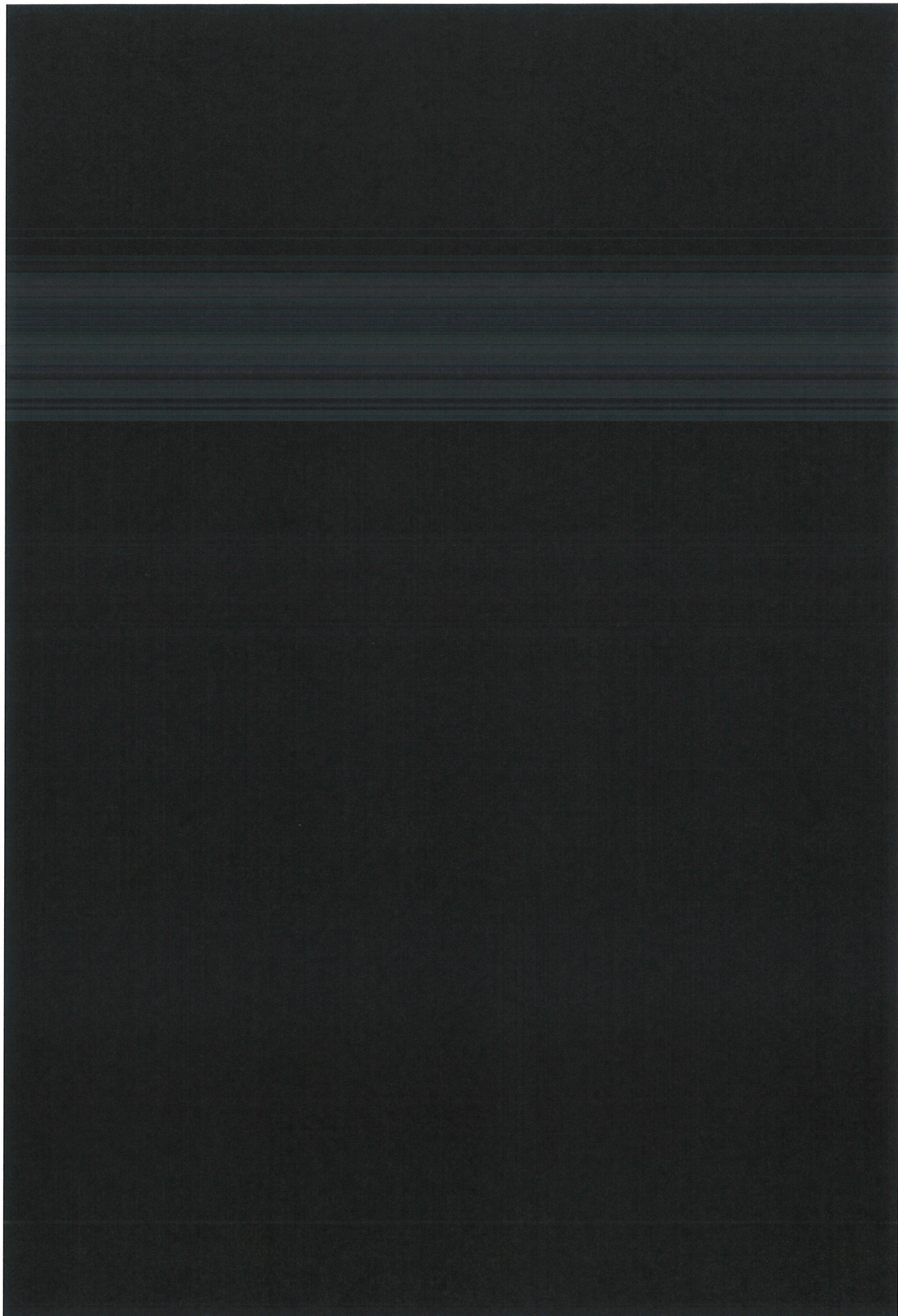
(i) include provisions on how the responsibilities in maritime emergency situations/potential SAR incidents are distributed between the host country, Frontex and participating Member States;

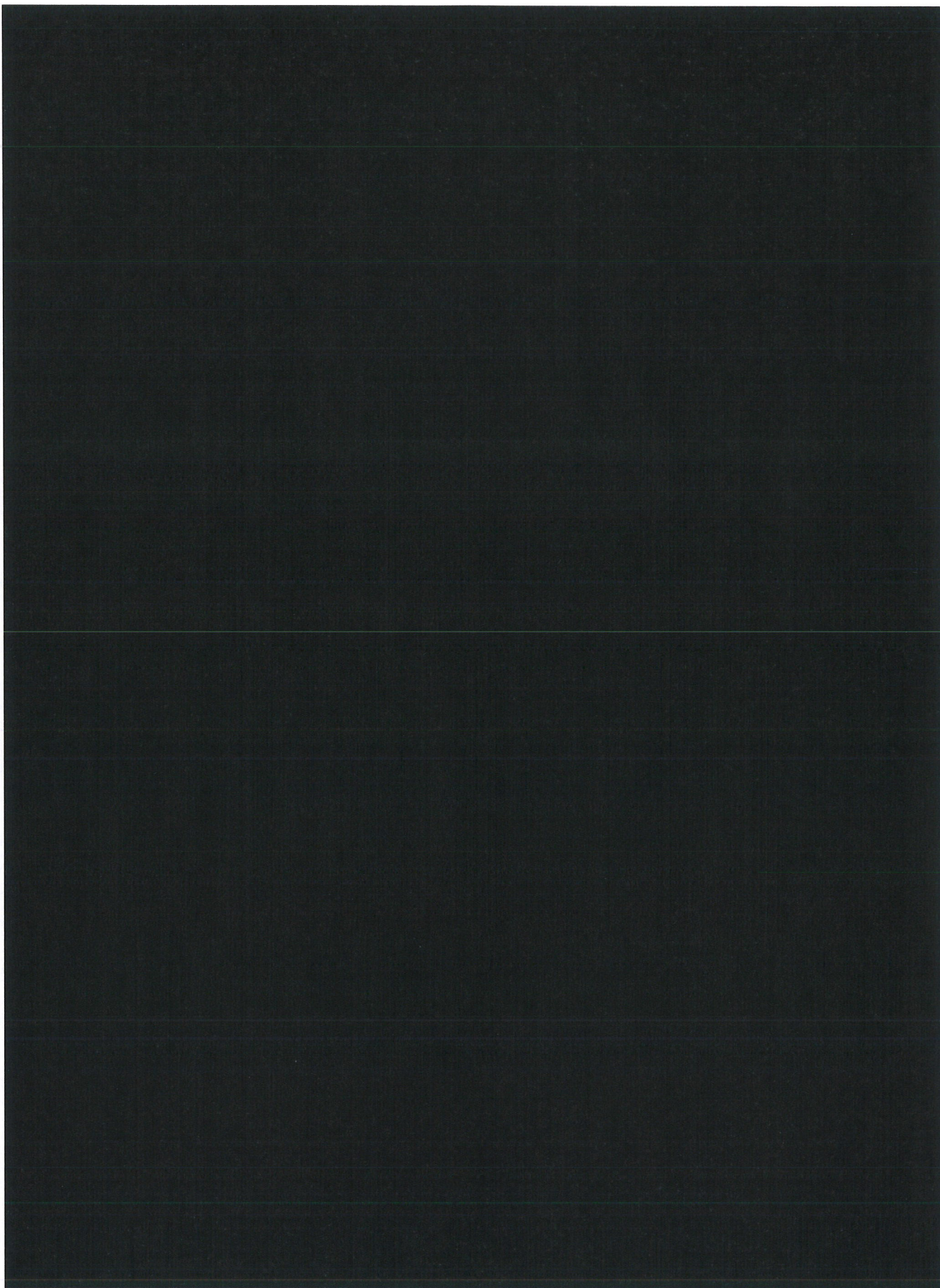
(ii) specify the obligations of each actor intervening in joint operations in relation to SAR, and specify the steps that Frontex and staff in national coordination centres should take upon the detection of a maritime emergency situation;

(iii) specify the conditions for the use of equipment (such as cameras) and include possible sanctions if this not done; and

(iv) specify the role of coordinating officer in SAR operations for each maritime joint operation.







FRONTEX'S ACTIONS

Point D(iii) - Status: Closed

Justification: recommendation is regulated in the applicable legal framework.

Regarding the use of equipment, Chapter 4.3.1.3. of the General Part of the operational plan states:

In compliance with the national legislation of the host MS⁶, including the applicable national provisions and EU legislation on data protection, assets participating in the JO properly document (by taking photos and/or videos and/or providing livestreaming video) all actions (detection, tracking and interception).

The assets deployed by the MS shall submit all available materials to the ICC as soon as possible. The ICC is responsible to deal with the information received from the assets. The ICC shall channel the information received from the assets deployed by the MS to Frontex and the respective host MS national and/or international stakeholders. In each case, Frontex should be informed by the ICC about the outcome of the actions, after the information has been submitted by the asset deployed by the MS in the JO.

In case of Frontex Surveillance Aircraft (FSA), deployed by Frontex to patrol in the operational area of the JO, the European Surveillance Team (EST) will provide to the ICC all the relevant information collected during the operational actions. Upon request, the EST will also make available additional video or imagery related with the JO. While patrolling within the operational area, during the whole duration of the operational flights of the FSA real time video streaming will be made available to the EST, the ICC and other national authorities of the host MS, if requested by the host MS.

Frontex is to be granted access to video data recorded by the assets participating in the JO upon request and in accordance with the host MS legislation during the storage period.

Additionally, the Technical Equipment Mission Report (TEMR) shall be provided within four hours after patrolling activity was completed and include the following information:

- *A clear map showing patrolling tracks in accordance with on-board Global Positioning System (GPS) data.*
- *The boundaries of the operational area of the operational activity, the host MS/TC Flight Information Region, territorial sea and Search and Rescue (SAR) Regions, if possible and relevant, extracted from the official charts.*
- *Objects identified during the patrolling activity with coordinates, speed, course and time.*
- *Mission Event log reporting in chronological sequence the main events occurred during the patrolling activity, including incidents, objects of interest detection and behaviour, fishing vessel sightings, pollution detections and any other information, including relevant pictures.*
- *Brief description of the main events.*
- *Incidents where a migrant vessel has changed its course away from the operational area by its own means, if relevant.*
- *In case of interception/rescue: if any asylum request was expressed to the crew of the asset.*
- *Description of the actions performed by the reporting unit, other state authorities or other MS/TC' asset about events that occurred outside and in the vicinity of the operational areas.*

⁶ The national legislation of the host MS is defined in in the document "Description of the tasks and specific instructions to the members of the teams including rules on use of force" available on FOSS.

The General Part also includes references to Frontex Management Board Decision 51/2021 adopting Technical Standards for the equipment to be deployed in Frontex activities⁷ where the technical standards based on parameters for the equipment to be deployed in operational activities of the Agency are laid down. These parameters are qualified as mandatory, recommended, or optional and recommends that “*Crew members should wear cameras to record specific missions (for example the recovery of people from water/ dinghies).*”

When it comes to the sanctions to be imposed if the conditions for the use of equipment were not met, the following frameworks ensure that any misconduct is handled properly:

1. Frontex Codes of Conduct⁸. The Codes’ revision is ongoing and is already in the final stage.
2. Serious Incident Reporting (SIR)⁹. The Standard Operating Procedure on SIR is under revision.
3. Complaint Mechanism.

Furthermore, the internal disciplinary framework of the Agency has to be highlighted: Frontex Management Board Decision 24/2022¹⁰, which applies by analogy to national experts and persons employed under private law contracts working on Frontex premises. Nevertheless, based on Article 43(5) of the Regulation, members of the teams who are not statutory staff remain subject to the disciplinary measures of their home Member State in accordance with the national law sanctioning violations of fundamental rights or international protection obligations conducted as part of an operational activity.

FRONTEX’S ACTIONS

Point D(iv) - Status: Closed

Justification: recommendation is regulated in the applicable legal framework.

Finally, the managerial responsibilities of the Frontex Contingent Commander (in his/her capacity of Frontex Coordinating Officer) are defined in the General Part in Chapter 8.4.2. which covers generically all his/her responsibilities in the framework of the JO set out in accordance with the Regulation.

RECOMMENDATION E)

- 1. In the context of service requests for aerial surveillance under EUROSUR, Frontex should accept only those requests that provide for full respect of fundamental rights during SAR**

⁷ Management Board Decision 51/2021 of 21 September 2021 adopting Technical Standards for the equipment to be deployed in Frontex activities.

⁸ Decision of the Executive Director 2012/120 on the adoption of Frontex Staff Code of Conduct; Decision of the Executive Director 2017/32 adopting the Code of Conduct applicable to all persons participating in Frontex operational activities.

⁹ Decision of the Executive Director No R-ED-2021-51 of 19/04/2021 Standard Operating Procedure (SOP) - Serious Incident Reporting

¹⁰ Management Board Decision 24/2022 of 25 March 2022 laying down general implementing provisions on the conduct of administrative inquiries and disciplinary proceedings.

operations and do not include any pre-emptive or territorial limitations to its surveillance activities.

2. Furthermore, Frontex should make its aerial surveillance service conditional on the agreement of the relevant Member State that:

(i) the relevant authorities will keep Frontex updated in a timely manner on the response to ongoing maritime emergencies in which Frontex assets are or have been involved, provided this does not compromise the operation; and

(ii) Frontex's aerial surveillance assets can be present at and assist SAR operations, where possible, unless this could be detrimental to the success of the SAR operation itself, and that national authorities respond to Frontex's offers of assistance and provide explanations where they decline such offers.

FRONTEX'S ACTIONS

Point E/1 - Status: Implemented

The EUROSUR integrated framework as defined in Article 18 of the Regulation foresees:

*(...) contributing to ensuring the protection and saving the lives of migrants...". This provision reflects the principle of *shared responsibility* and foresees the Member States obligation to "ensure the management of their external borders ..., in close cooperation with the Agency, in their own interests and in the common interest of all Member States in full compliance with Union law, including respect for fundamental rights (...)" pursuant to Article 7(3) of the Regulation.*

To that end and following the FRO recommendation at the beginning of 2022, the following disclaimer has been introduced in the EUROSUR Fusion Services (EFS)' service request form to remind the requesting National Coordination Centre about their obligations derived from the applicable legal framework:

All actions, activities and/or operations facilitated by the exchange of information within this service request must be carried out in adherence to EU and international human rights and refugee law provisions. By submitting this request, the requesting national authority commits to respecting and safeguarding fundamental rights, notably the right to life, including protection of persons at sea, the prohibition of torture, the right to asylum, and the principle of non-refoulement. The acceptance and activation of this service are contingent upon the acknowledgment and adherence to these provisions.

In addition, the FRO is requested by the responsible EFS Service Manager to prepare a fundamental rights assessment indicating the associated risks and proposing mitigating measures for each aerial surveillance EFS service request received. These assessments are used to decide whether such request can be fulfilled by Frontex.

Concerning the exclusion of any pre-emptive or territorial limitations to Frontex surveillance activities, it must be noted that the Agency "...shall provide a National Coordination Centre, at its request, with information on the external borders of the Member State to which it belongs and on the pre-frontier area" pursuant to Article 28(2) of the Regulation. This cooperation is governed by the *duty to cooperate*

in good faith according to Article 11 of the Regulation as well as the principle of *shared responsibility* in line with Article 7 of the Regulation.

There might also be operational or technical reasons for limiting the area for which a request was received. As emphasized in Article 28(2)(f) of the Regulation, also the aerial surveillance EFS is based on risk analyses or could be used to mitigate a vulnerability identified. The surveillance areas are allocated accordingly by the requesting Member State. Technical limitations include the range of the aircraft available and the receipt of aeronautical permissions.

FRONTEX'S ACTIONS

Point E/2 (i) - Status: Closed

Justification: recommendation is regulated in the applicable legal framework.

Regarding the recommendation for Frontex to make its aerial surveillance service conditional on the agreement of the relevant Member State it should be noted that:

Pursuant to Article 20(4) of Commission Implementing Regulation (EU) 2021/581¹¹ on the situational pictures of the European Border Surveillance System (EUROSUR) (Commission Implementing Regulation), the Member States are in any case obliged to report events related to SAR at sea regardless of whether any aerial surveillance EFS is involved. Compliance with this legal obligation is regularly assessed by Frontex and outlined in the bi-annual report on the function of EUROSUR according to Article 121(5) of the Regulation. Frontex will also include a disclaimer in the EFS service request form to remind MS to adhere to Article 20(4) of the Commission Implementing Regulation.

FRONTEX'S ACTIONS

Point E/2 (ii) - Status: Closed

Justification: recommendation is regulated in the applicable legal framework.

The tasks and responsibilities of the National Coordination Centre, the single point of contact for Frontex in the context of the EUROSUR integrated framework, are defined in Article 21(3) of the Regulation.

¹¹ Commission Implementing Regulation (EU) 2021/581 of 9 April 2021 on the situational pictures of the European Border Surveillance System (EUROSUR) (OJ L 124, 12.4.2021, p. 3).

The responsibility of the National Coordination_Centre is according to this article limited to facilitate the “*timely exchange of information with SAR... authorities and manage the dissemination of relevant information at national level*”. Furthermore, Article 3(7) of the Commission Implementing Regulation establishes that a national Maritime RCC is the “*unit responsible for promoting efficient organisation of search and rescue services and for coordinating the conduct of search and rescue operations within a search and rescue region as referred to in the International Convention on Maritime Search and Rescue*”. Thus, it is the National Coordination Centre with a limited role in SAR operations requesting the EFS service but the responsibility of the Maritime RCC to conduct SAR operations. Therefore, it is the opinion of the Agency that such an obligation vis-à-vis the National Coordination Centre cannot be imposed by Frontex as the National Coordination Centre is not necessarily the national competent authority for SAR operations.

RECOMMENDATION F)

The FRO should introduce practical arrangements to ensure that, where serious maritime incidents are detected in the context of Frontex’s surveillance activities, a FROM is present in European Surveillance Room. If the physical presence of the FROM is not possible, the assigned FROM should be available and able to provide advice on fundamental rights compliance to such incidents in real time.

FRONTEX’S ACTIONS

Point F - Status: In progress (foreseen timeline: end of 2024)

The FRO has recommended further strengthening of the fundamental rights safeguards to be fully included in the planning and processing of operational documents of Multipurpose Aerial Surveillance (MAS) services. Such safeguards would enhance the monitoring of MAS services and to protect lives at sea.

The FRO’s team assigned to monitor Aerial Surveillance has increased its capacity. A roster of FROMs for monitoring is in place since September 2021. Currently, the work of the FROMs includes:

- 1. Monitoring in the European Surveillance Room:** The FROMs are assigned to the European Surveillance Room on weekly shifts. Every week, one FROM is available to provide support, including when not physically present in the European Surveillance Room, being reachable by phone or email between 8:30 - 17:30 from Monday to Friday. Outside working hours, the assigned FROM can be reached in specific situations (see point 7 below).
- 2. Near-real-time desk monitoring:** the FROMs have access to the European Surveillance Room, the sighting and mission reports accessible from their own laptops.

3. **Ensuring compliance with fundamental rights:** In the European Surveillance Room, the FROMs gather information in near-real-time from both the sightings and from the team leaders to ensure that procedures to protect lives at sea are adhered to. For this, they can advise on fundamental rights-related matters in Frontex Aerial Surveillance services without delaying those activities and respecting the international, maritime and aviation law.
In cases of potential Serious Incidents, the FRO may further investigate such cases under the SIR Mechanism, including through **own initiative investigations**.
4. **Reporting and analysis:** Based on the monitoring methodology, every week, the assigned FROM assesses Events of Interests, following procedural guidelines containing a set of indicators. These internal guidelines inform the daily work of the FROMs. The information collected and analysed during the monitoring, including possible trends and practices observed in the context of aerial surveillance and SAR activities, are developed into the fundamental rights assessments of Aerial Surveillance services.

To further enhance cooperation and coordination between the Team Leaders and the FROMs, the FRO suggested the following actions:

5. A service phone to the FRO's team working on Aerial Surveillance, to ensure smooth communication between the FROMs and Team Leaders at any time, including outside working hours.
6. Establish a Stand-by Duty system for specific time periods (e.g., summer), specifically when there is an increase in migratory flow in operational areas.
7. Adoption of internal guidelines to standardise the modalities in which the Team Leaders may trigger the support of the FROMs when not physically present in the European Surveillance Room.