

Reply of the European Commission on the findings of an inquiry from the European Ombudsman
- ref. OI/3/2023/MHZ

I. SUMMARY OF THE FACTS

On 10 June 2023, the fishing vessel *Adriana* departed from the port of Tobruk, Libya, carrying approximately 750 people. On 14 June 2023, the *Adriana* sank off the coast of Pylos, Greece, leading to the drowning of an estimated 600 people. The vessel was first sighted by the Italian Maritime Rescue Coordination Centre (MRCC), which shared the sighting with the Greek Joint Rescue Coordination Centre (JRCC) and Frontex. Frontex directed one of its aerial surveillance assets to the position of the boat, sharing footage and relevant information with the Italian and Greek RCCs, also mentioning that the boat was evidently overcrowded, and no life jackets were visible, but without issuing a Mayday relay, as the vessel did not appear to be in immediate danger. The aircraft then returned to base due to the limits of its fuel. The boat was located in the Greek Search and Rescue Region (SRR), putting the Greek JRCC in charge of coordination of Search and Rescue (SAR) activities. On four separate occasions, Frontex would subsequently seek updates from and make offers of assistance to the Greek JRCC, receiving no reply from the Greek authorities. Instead, a different Frontex asset (drone) scheduled to fly over the location of the *Adriana* was redirected by the Greek authorities towards another migrant boat that was subsequently subject to a SAR operation. By the time another Frontex asset was able to fly over the location of the *Adriana*, as part of its scheduled path, the boat had capsized. The Greek RCC rejected Frontex's offer to return with another aircraft to aid SAR operations.

Given Frontex's involvement, Frontex's Fundamental Rights Office (FRO) on 26 June 2023 opened and began investigating a Serious Incident report. The investigation's final report was issued on 1 December 2023. FRO found that Frontex abided fully by its obligations and made "extraordinary" efforts to follow up on the vessel sighting and to offer on multiple times additional support to the Greek authorities (which was ignored). The FRO also concluded that in future, Frontex should assess more thoroughly whether to issue a Mayday relay, particularly in cases where the responsible national authorities do not provide information about their own assessment or responses. While FRO is not in a position to assess the causes of the shipwreck, the report finds that "*it appears that the Greek authorities failed to timely declare a search and rescue (operation) and deploy a sufficient number of appropriate assets in time to rescue the migrants*". The Greek authorities also failed to provide the information necessary for FRO to complete its investigation.

The Hellenic Coast Guard opted not to launch an own internal disciplinary investigation, while investigations by the Greek Naval Court and Greek Ombudsman are ongoing. The European Ombudsman launched her inquiry on 23 June 2023 and completed the investigation on 26 February 2024. A Decision, accompanied by Conclusions, was transmitted to the Executive Director of Frontex as well as to the Presidents of the Commission, Parliament, and Council.

II. EUROPEAN OMBUDSMAN'S INQUIRY

Following the tragic incident of the shipwreck of vessel "Adriana", off the coast of Pylos, Greece, the European Ombudsman opened inquiry OI/3/2023/MHZ. The inquiry focused

centrally on “how the European Border and Coast Guard Agency (Frontex) complies with its fundamental rights obligations with regard to search and rescue in the context of its maritime surveillance activities, in particularly the Adriana shipwreck”. The **Decision** noted that Frontex cannot be said to have violated any of its rules or procedures. However, given especially the outcome of the Pylos shipwreck, the European Ombudsman put forward a number of suggestions for improvements for the Agency. The Agency is expected to address these specific suggestions in their own reply, which is due by June 2024. These may be summarised as follows:

- I. Frontex should regard “persistent violations of fundamental rights [...] in responding to maritime emergencies” as grounds to terminate activities in a Member State in line with Article 46 EBCG Regulation. In the case of Pylos, Frontex should review whether the threshold is reached to trigger Article 46 and explain why or why not.
- II. Frontex should conduct a serious organisation-wide reflection, led by the Executive Director and involving the Management Board, on its ability to uphold its fundamental rights obligations in its response to maritime emergencies and SAR operations.
- III. Frontex should adopt and publish guidelines on how it reacts to maritime emergencies, including regarding issuing Mayday Relays. These guidelines should cover all factors and scenarios, including an unresponsive RCC and concerns about the record of national authorities. Frontex should also review how it responds to unofficial reports, such as from NGOs, concerning potential situations of distress at sea.
- IV. The Operational Plans for maritime Joint Operations (JO) should include relevant provisions such as actions to take in maritime emergencies while awaiting coordination from an RCC, provisions on the division of responsibilities in SAR or maritime emergencies are distributed between Frontex and the host Member State, the obligations of each actor intervening in SAR operations in a JO, the conditions for the use of equipment (such as cameras) and sanctions for improper use of equipment, the role of coordinating officer in SAR operations for each JO.
- V. Frontex should only accept requests from Member States for EUROSUR Fusion Services where the requests provide for full respect of fundamental rights during SAR and do not include pre-emptive or territorial limitations to the surveillance activities. Frontex should make the provision of aerial surveillance services conditional on the Member State agreeing to update Frontex in a timely manner on responses to maritime emergencies where Frontex is involved, and to allow Frontex assets to be present and assist SAR operations, where possible, with the national authorities agreeing to respond to Frontex’s offers of assistance and justifying any declined offers.
- VI. Frontex’s Fundamental Rights Office should ensure that a Fundamental Rights Monitor is always present in the surveillance room when maritime incidents are detected or, if this is not feasible, the assigned Monitor should be available and able to provide advice on fundamental rights compliance in real time.

To contextualise the findings, the Ombudsman also issued **Conclusions** on “EU search and rescue” which feature a few additional, overarching considerations and priorities that require the urgent attention of the Union Institutions and the Member States. With these, the Ombudsman appears to have intended to kickstart a process of reflection on the tragically high number of deaths at sea in the Mediterranean, particularly as the Ombudsman effectively

identifies a large-scale failure to adequately guarantee the respect for the fundamental rights of the persons aboard “migrant boats”. While the EU has no competence to coordinate search and rescue operations, Frontex is found to face constraints in its capacity to save lives at sea, dictated by its role of providing support to the Member States and lack of ability to take a more active role or independent action in SAR. For this reason, the European Ombudsman suggests that Frontex should consider whether the threshold has been reached to allow it to terminate, withdraw or suspend its activities in Greece, and publicly clarify its reasons for concluding that the threshold has or has not been reached.

More broadly, the Conclusions note that the EU as a whole faces the challenge of “how to ensure that people on board “migrant boats” are afforded the same protections and guaranteed the same right to life as others.” Accordingly, the European Ombudsman calls for immediate and urgent attention to the following:

1. In order to provide answers to the broader systemic issues that go beyond the mandate of this inquiry, the Ombudsman calls upon the European Parliament, the Council of the EU and the European Commission to **establish an independent commission of inquiry to assess the reasons for the large numbers of deaths in the Mediterranean**, to learn the lessons from incidents such as the Adriana shipwreck, and to make recommendations on how to protect fundamental rights and the right to life in the response to maritime emergencies.
2. Ensure **EU-level consequences for any findings that a Member State authority has failed to comply** with its fundamental rights and/or search and rescue obligations in regard to this incident and more generally.
3. Reflect on **changes to the legislation setting out Frontex’s mandate**, which would enable it to play a more comprehensive and proactive search and rescue function.

III. THE REPLY OF THE EUROPEAN COMMISSION

The Commission thanks the European Ombudsman for the letter of 26 February 2024, transmitting the findings of the inquiry into how the European Border and Coast Guard Agency (Frontex) complies with its fundamental rights obligations with regard to search and rescue (SAR) in the context of its maritime surveillance activities (OI/3/2023/MHZ). The shipwreck of the Adriana vessel, off the coast of Pylos in Greece, represents a great tragedy and a senseless loss of human life, as well as a heartbreaking reminder of the dangerous nature of the journeys that so many undertake to reach the European Union.

Therefore, the Commission expresses its gratitude to the European Ombudsman first and foremost for conducting this inquiry. Indeed, while nothing can undo the tragedy of the Adriana shipwreck, everyone involved in overseeing SAR in the EU must seize this opportunity to reflect and assess whether any actions could have been handled differently, or if policy changes are necessary in the future. The Ombudsman’s inquiry provides an important support in that direction, starting with the Decision on the role of Frontex in SAR in the EU. While it was reassuring to read the conclusion that Frontex did not breach any of the relevant rules and procedures, the Commission takes very seriously the assessment that Frontex could do more to respond more proactively to the cases of distress at sea identified by its surveillance services, in close cooperation with Member States. The Commission trusts that the Agency will review the Ombudsman’s suggestions for improvement with the

seriousness that the situation demands. The Commission, also in its role as a member of the Frontex Management Board, is committed to doing what it can to promote this review taking place, with the involvement of the Board.

The European Ombudsman also identified several needs to improve the broader framework of SAR in the EU and to prevent a similar tragedy from occurring again. The Commission has been calling for closer cooperation on SAR within the context of the European Contact Group on Search and Rescue, established in 2020. During the last meeting of the Contact Group on 23 April, the Commission, in its capacity as Chair of the Group, invited the European Ombudsman to present the findings of the inquiry. The following sections will briefly address the Ombudsman's suggestions.

Firstly, on the suggestion regarding the need to establish an independent commission of inquiry to assess the reasons behind the large number of deaths in the Mediterranean. While the EU has certain competences on maritime transport accident investigations, these are carried out in view of preventing the reoccurrence of accidents and not to determine liability. In the context of Joint Operations, and where there is Frontex involvement at any point during a SAR operation with a Member State as set out in Regulation (EU) 656/2014¹, Frontex could compile, collect, and analyse information on the different circumstances leading to shipwrecks as well as the loss of life in the context of SAR operations and provide post-factum analytical reporting.

As the Commission has repeatedly said, Member States must ensure the full respect of the relevant international maritime law, as well as of the EU acquis in compliance with the Charter of Fundamental Rights, including in the management of external borders of the Union. Based on a more thorough analysis into loss of life during SAR operations involving Frontex, the Frontex Fundamental Rights Office could indeed offer recommendations on how to better protect fundamental rights and the right to life when responding to maritime emergencies.

With regard to the second suggestion, namely that there should be EU-level consequences in case it is determined that a Member State has failed to comply with its search and rescue obligations, both in regard to this incident and more generally, the competence to determine whether the authorities fulfil their duties in the context of a SAR operation lies primarily with Member States. Actors involved in SAR operations must act in a lawful, swift and coordinated way to make sure that those in distress at sea are brought to safety as rapidly as possible, independently of the circumstances that led them to be in distress.

Acknowledging that compliance with fundamental rights is of the utmost importance while performing maritime border surveillance, the European Commission is in constant and close dialogue with Member States. In the context of the Pylos shipwreck, the Commission's position has been firm in all regular communication with Greek authorities. This tragedy must be investigated thoroughly, swiftly and transparently. All facts must be established and, should any wrongdoing be identified, there must be adequate consequences and follow-ups to not only prosecute it, but also prevent any such incident from occurring in future. The Commission is aware that such an investigation is currently ongoing, by Greece's Naval Court, and the Greek Ombudsman is also conducting an own-initiative investigation,

¹ REGULATION (EU) No 656/2014 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 15 May 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.

following the Hellenic Coast Guard's decision not to launch an own internal investigation. The Commission does not interfere with these investigations and judicial proceedings, but it is essential to reiterate that each Member State is responsible for ensuring that Union law is implemented fully and correctly, including the measures forming part of the Schengen *acquis* particularly as regards the management of the external borders, and that established wrongdoings are appropriately prosecuted.

With regard to the existence of EU-level consequences for failures to comply with fundamental rights, the Commission retains the prerogative to use all tools at its disposal to ensure the correct application of provisions of EU law, including as interpreted in the light of the Charter of Fundamental Rights. Whilst search and rescue activities by Member States are not subject to detailed Union rules, the Commission can make use of infringement procedures and other measure at its disposal in complementary areas subject to EU law to ensure compliance, including for example under Article 7(3) of the EBCG Regulation on the need to implement European integrated border management as a shared responsibility of the Agency and the responsible national authorities,⁽²⁾ particularly if this results in violations of the Charter of Fundamental Rights. Moreover, in line with the Common Provisions Regulation⁽³⁾ (CPR), Member States need to put in place effective mechanisms to ensure the effective application and implementation of the Charter of Fundamental Rights and fulfil the enabling conditions in line with Article 15 of the CPR, in order to obtain reimbursement of expenditure under the MFF programming period 2021-2027. During the implementation of Member States' Home Affairs Funds programmes, the Commission will continue monitoring the fulfilment of the relevant enabling conditions, with the aim to ensure the full respect of EU *acquis* and fundamental rights in compliance with the Charter of Fundamental Rights⁽⁴⁾, including in the management of external Union borders. The Commission wishes to stress that it is prepared to use all instruments at its disposal to take appropriate measures in case of substantiated evidence that EU funds disbursed in a Member State have not been used in accordance with applicable Union rules, including respect for fundamental rights, and may proceed with the recovery of unduly spent amounts in case of detected and verified breach of the provisions of the Regulations.

With regard to the third suggestion, namely that there should be a reflection on possible changes to the legislation setting out Frontex's mandate, it is important to reiterate that, when it comes to SAR and as the Ombudsman also notes in the Decision, according to international law the national authorities of the countries in whose territorial waters or SAR regions an incident occurs retain responsibility over all the primary functions of SAR. Relevant EU legislation, such as the EBCG Regulation and Regulation (EU) 656/2014, do not affect this division of competences, although the support Frontex is able to provide to the Member States in performing SAR sooner, better, and more effectively, has significantly grown over the past years. For example, Frontex strengthened its cooperation with the European Maritime Safety Agency (EMSA) and the European Fisheries Control Agency (EFCA) on coast guard functions, one of those being search and rescue, especially in the context of multipurpose maritime operations. Although this cannot remedy the tragedy of the *Adriana* shipwreck, the

⁽²⁾ REGULATION (EU) 2019/1896 on the European Border and Coast Guard, Article 7(3).

⁽³⁾ Regulation (EU) 2021/1060 of the European Parliament and of the Council of 24 June 2021 laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and financial rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy, OJ L 231 du 30.6.2021, p. 159.

⁽⁴⁾ 2012/C 326/02

Commission notes that in 2023 alone, 43 000 people were rescued at sea with support from Frontex.

Finally, given the continuous challenges with SAR operations in the Mediterranean, the Commission will be reflecting on what possible additional support for better coordination and cooperation on SAR, in full respect of national competences and international law, can be offered, including through Frontex. In this context, the Commission intends to bring the findings of the European Ombudsman’s inquiry to the attention of the Member States at an upcoming Management Board meeting of Frontex, with the objective to discuss what could be improved with respect to SAR, from trainings to strengthening national capacities and capabilities, to further improving situational awareness and information sharing, including also in the context of the European Contact Group on Search and Rescue.

IV. CONCLUSION

The European Ombudsman has not requested any specific replies or clarifications from the European Commission. However, broader questions for the EU were raised in the context of the inquiry, and which the Ombudsman calls on the European Parliament, the Council and the Commission to address. The Commission believes this inquiry represents an important step towards the joint effort to make sure that a tragedy such as the Pylos shipwreck will not be forgotten or ignored. The Commission intends to act on the priorities outlined above, including in its role as a Member of the Frontex Management Board and in the context of the European Contact Group on Search and Rescue.

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